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STATE OF NEBRASKA, APPELLEE, V. LAVONNE F. BODTKE, APPELLANT.

363 N.W.2d 917

Filed March 8, 1985. No. 84-447.

1. **Miranda Rights.** The requirements and corresponding proscriptions of *Miranda* relate to governmental activity such as interrogation by law enforcement personnel. *Miranda* does not dictate rules governing the manner or efforts of private citizens enforcing their private property rights by private investigation or interrogation.
2. **Confessions: Evidence.** Voluntariness is the ultimate test to use an accused's statement as evidence in a criminal prosecution.
3. _____: _____. On questioned voluntariness, an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury.
4. **Confessions: Words and Phrases.** Generally, before one is a person in authority perhaps affecting voluntariness of an accused's statement or confession, the accused must reasonably believe that the person making a promise or inducement related to a statement or confession is one who has the capacity, directly or indirectly, to produce a represented material result in the prosecution or disposition of a matter in the criminal justice system.
5. **Jury Instructions: Appeal and Error.** An appellant cannot claim prejudice regarding an instruction favorable or beneficial to the appellant's theory on which a case is tried.

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

David E. Cording, for appellant.

Paul L. Douglas, Attorney General, and Jill Gradwohl, for appellee.

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

SHANAHAN, J.

This is an appeal from the district court for Thayer County where LaVonne F. "Bill" Bodtke was convicted in a jury trial on two counts of forgery, Neb. Rev. Stat. §§ 28-602(1) and 28-603(1) (Reissue 1979), Class III felonies. The district court sentenced Bodtke to a term of 1 year in the Nebraska Penal and Correctional Complex on each count, with sentences to run consecutively. We affirm the judgment of the district court.

Bodtke owned the Bodtke Insurance Agency in Hebron, Nebraska, and was an agent for Farmers Mutual Insurance Company of Nebraska (Farmers Mutual). Farmers Mutual insured farm property and livestock against loss caused by various casualties, for example, wind damage to buildings and livestock death from vandalism or lightning. Generally, when an insured sustained a loss, the local agent, such as Bodtke, would verify the loss and process the claim. The process included a written proof of loss—a "Property Loss Notice" and "Statement of Loss" signed by the insured—mailed by the agent to Farmers Mutual, which issued a settlement draft. Farmers Mutual would mail the settlement draft to the agent who had forwarded the claim, and the agent would deliver the draft to the insured-claimant.

During 1982, Bodtke, without knowledge of certain policyholders of Farmers Mutual, signed proofs of loss in the names of persons insured by Farmers Mutual, claims for losses which never occurred. Upon receipt of the settlement draft issued for the false claim, Bodtke forged the signature of the insured, cashed the check, and kept the proceeds.

Farmers Mutual became suspicious of approximately 60 claims submitted through Bodtke's agency for claimed losses in the latter part of 1981 and 1982. Of the suspect claims, 4 related to livestock loss through gunshot wounds, 34 for livestock killed by lightning, and 17 for property damage caused by wind.

Two representatives of Farmers Mutual met with Bodtke at his office in Hebron on January 25, 1983, to "confront him with the fraudulent claims." In that 1-hour meeting, Bodtke admitted submitting false claims. The Farmers Mutual representatives suggested that Bodtke come to the insurance company's home office in Lincoln, but Bodtke was unable to go to Lincoln on January 25. After unsuccessful attempts at scheduling, a meeting was held on February 4 in the library of Farmers Mutual's headquarters in Lincoln. Attending the meeting were Bodtke and three officials of Farmers Mutual—its president, a vice president, and the corporate general counsel. No law enforcement personnel attended or knew about the meeting. Although Bodtke's attorney was aware of the meeting at Farmers Mutual's office, Bodtke

appeared without counsel and acknowledged that his attorney did not object to any meeting to discuss and resolve the fraudulent claims. No one from Farmers Mutual called Bodtke's attorney, and the meeting proceeded.

None of the Farmers Mutual representatives informed Bodtke that he had a right to the presence of an attorney during the meeting or that he was not at liberty to leave the meeting at any time. In fact, Bodtke, for some undisclosed reason, left the meeting but returned and resumed discussing the claims questioned by Farmers Mutual.

In the course of the meeting, the general counsel for Farmers Mutual told Bodtke that the insurance company wanted "to resolve the matter of [Bodtke's] debt to the company," that Farmers Mutual was obligated "to report these matters [false claims] to the Department of Insurance," and that any possibility of criminal prosecution "would be up to the State." After Bodtke and the officers of Farmers Mutual sorted through a list of sundry suspect claims submitted through Bodtke's agency and paid by the insurance company, Bodtke identified the false claims which he had submitted. Bodtke and Farmers Mutual expressed a mutual desire to minimize notoriety which might ensue from civil litigation regarding the false claims. Farmers Mutual had prepared an "agreement" for Bodtke's signature. The agreement recited Bodtke's submitting "false claims" and Farmers Mutual's issuing checks for payment of $30,676.63 on the false claims, as well as contained a recital that Bodtke "forged the endorsement of the payees" on the checks and kept the proceeds "from the claim payments." Further, the agreement required Bodtke to "transfer ownership of the Farmers Mutual portion of [Bodtke's agency] to the company, to be sold," and also contained:

> Agent understands this agreement settles only his financial obligation to the company, and that the company is required by law to report the matter to the state. Agent further understands that the state alone will decide whether to file criminal charges against agent and take administrative action against his remaining agent's licenses.

Bodtke signed the agreement on February 4 in the office of

Farmers Mutual. Later, in Thayer County, Bodtke was charged with two counts of forgery, namely, falsely making a claim against Farmers Mutual in violation of § 28-602(1) and falsely endorsing or uttering a check issued by Farmers Mutual to an insured. See § 28-603(1). Pursuant to Neb. Rev. Stat. § 29-115 (Cum. Supp. 1984), Bodtke moved for pretrial suppression of his February 4 agreement with Farmers Mutual, claiming that the agreement was an involuntary confession and was obtained in violation of safeguards for custodial interrogation of a suspect as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The district court overruled Bodtke's motion. In his jury trial Bodtke did not testify and offered no evidence but, as apparent trial strategy, proceeded on the expectation that the jury would reject the February 4 "agreement" as involuntary and acquit Bodtke.

At conclusion of the evidence and during the conference on instructions, the court indicated its intention to give an instruction patterned on NJI 14.52, regarding voluntariness and the use of Bodtke's written "agreement" as evidence of guilt. Part of the court's proposed instruction contained:

> The state has introduced in evidence certain admissions or confessions claimed to have been made by the defendant.
>
> Before such admissions or confessions may be considered by you as evidence of defendant's guilt, you must find beyond a reasonable doubt that they were freely, voluntarily, and intelligently made by the defendant.
>
> . . . .
>
> To be voluntary an admission or confession does not have to proceed wholly or spontaneously at the suggestion of the defendant. The fact that it may have been elicited by questions propounded by persons who were interrogating the defendant will not, of itself, render it inadmissible.

The remainder of the court's proposed instruction was taken from NJI 14.52. Bodtke objected to the court's proposed instruction and requested that the omitted phrase, "in authority," as found in NJI 14.52, be added to the court's proposed instruction, namely, "questions propounded by persons *in authority* who were interrogating the defendant . . . ."

(Emphasis supplied.) Also, Bodtke requested a definitional instruction regarding "persons in authority." The court denied both requests by Bodtke and gave its instruction as indicated. The jury found Bodtke guilty on both counts of forgery, and the court sentenced Bodtke after a presentence report.

Bodtke claims two errors in the proceedings against him, namely: (1) Because representatives of Farmers Mutual did not give the warnings required by *Miranda*, the district court should have suppressed Bodtke's statement, the February 4 "agreement" given to insurance company representatives; and (2) In accordance with NJI 14.52, any instruction regarding voluntariness of Bodtke's statement should have included (a) the modifying phrase "persons in authority" in reference to Bodtke's interrogators and (b) a definition of the phrase "persons in authority."

Factfinding by a trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. McCarthy*, 218 Neb. 246, 353 N.W.2d 14 (1984).

Although not critical for disposition of the issues presented in this appeal, there is a distinction between an admission and a confession. Bodtke uses the word *confession* to characterize his statement sought to be suppressed. In a confession an accused admits guilt of every material element of the crime charged against him, whereas in an admission an accused acknowledges some fact or circumstance in itself insufficient to constitute an acknowledgment of guilt but tending to prove the ultimate fact of guilt. See, *The People v. Georgev*, 38 Ill. 2d 165, 230 N.E.2d 851 (1967); 23 C.J.S. *Criminal Law* § 816 (1961). Bodtke's statement did not refer to any specific proof of loss or to any criminal intent "to deceive or harm" anyone by the transactions. Those omissions technically rendered Bodtke's statement an admission rather than a confession.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), formulated prerequisites for admissibility of a suspect's in-custody statement(s) obtained "in a police-dominated atmosphere, resulting in self-incriminating statements," *id.* at 445, and sought to minimize the psychological advantage frequently inherent in an exercise of governmental authority as a tool for coercion, that is, the

"potentiality for compulsion." *Id.* at 457. "Custodial interrogation" has been characterized by the U.S. Supreme Court in *Miranda* as "questioning instigated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

In *Miranda* the U.S. Supreme Court also stated:

> The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way,

id. at 477, and "In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear," *id.* at 481.

In Bodtke's case there are dual reasons that the *Miranda* requirements do not apply to the statement obtained. First, there is no indication or intimation that any law enforcement agency was involved, directly or indirectly, in effecting meetings between Bodtke and Farmers Mutual or in producing Bodtke's statement. Clearly, the requirements and corresponding proscriptions of *Miranda* relate to governmental activity such as interrogation by law enforcement personnel. *Miranda* does not dictate rules governing the manner or efforts of private citizens enforcing their private property rights by private investigation or interrogation. See *Carnes v. State*, 115 Ga. App. 387, 154 S.E.2d 781 (1967). Representatives of Farmers Mutual were private citizens, not law enforcement personnel. Second, Bodtke was not in custody, that is, "deprived of his freedom of action in any significant way," when he made the statement sought to be suppressed. At the office of Farmers Mutual, Bodtke was at liberty to leave the meeting at any time and, unrestrained and unaccompanied, Bodtke actually left the meeting only to return and take up negotiations to determine and resolve his liability to Farmers Mutual. See *United States ex rel. Sanney v. Montanye*, 500 F.2d 411 (2d Cir. 1974). The district court correctly overruled Bodtke's motion to suppress on claims of involuntariness and failure to comply with

Miranda regarding custodial interrogation.

We next address the complaint about the instruction given on the question of voluntariness concerning Bodtke's statement. However, before examining the instruction tendered by Bodtke and that given by the court, a review of voluntariness and its relation to evidence in a criminal prosecution is beneficial.

Miranda has not relegated to oblivion all other case law on voluntariness. "Apparent compliance with the *Miranda* procedures does not automatically assure the voluntariness of a statement, any more than failure to adhere to *Miranda* automatically renders an admission involuntary." *United States v. Bernett*, 495 F.2d 943, 949 (D.C. Cir. 1974) (Robinson, Circuit Judge, dissenting).

As expressed by Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

See, also, *United States v. Bernett, supra.*

If an accused lacks sufficient powers of reason and volition, the most meticulous explanation of constitutional rights will not make a statement voluntary. Is the act of admission or confession that of the maker or another? Use of an accused's involuntary statement, whether admission or confession, offends due process and fundamental fairness in a criminal prosecution, because one acting with coercion, duress, or improper inducement transports his volition to another who acts in response to external compulsion, not internal choice. With voluntariness as the ultimate test regarding an accused's statement, the focal point of inquiry into voluntariness is whether the statement is "the product of a rational intellect and a free will." *State v. Prim*, 201 Neb. 279, 281, 267 N.W.2d 193,

195 (1978); *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975). Accord, *Blackburn v. Alabama*, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960); *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

To afford due process on the question of voluntariness, Nebraska has adopted a procedure whereby voluntariness is first determined by the trial court as a matter of law and out of the presence of the jury. See Rule 104(c), Nebraska Evidence Rules (Neb. Rev. Stat. § 27-104(3) (Reissue 1979)): "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require . . . ." Cf. *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (judicial determination of voluntariness before submission to jury on that question).

If the court finds the statement is voluntary and, therefore, admissible, the question of voluntariness is submitted to the jury, which, by appropriate evidence, must be satisfied that the statement is voluntary. The very statutory vehicle for initial determination of voluntariness as a matter of law for a court also recognizes and preserves the question of voluntariness for ultimate disposition by the fact finder, that is, "None [of the statutory provisions for a motion to suppress a defendant's statement] shall affect the right of the defendant to present the question of . . . voluntariness . . . for the consideration of the fact finder at trial." § 29-115. See, NJI 14.52; *State v. Longmore*, 178 Neb. 509, 134 N.W.2d 66 (1965) (voluntary character of a statement or confession is a question of fact for the jury, notwithstanding a court's determination as a matter of law that the statement or confession is voluntary); *United States v. Smith*, 638 F.2d 131 (9th Cir. 1981) (once a defendant's statement or confession is received in evidence, the jury must hear all relevant evidence on the issue of voluntariness and shall be instructed to accord the statement or confession the appropriate weight warranted by the circumstances). See, also, *Commonwealth v. White*, 353 Mass. 409, 232 N.E.2d 335 (1967).

With background for the importance of voluntariness

regarding an accused's statement, the next question is whether an accused's statement to private citizens must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury. This is the first that we have been asked to answer such question.

In our research it appears that every jurisdiction which has faced this question has logically concluded that, before a statement is admissible, an accused's statement must be voluntary, whether made to law enforcement personnel or private citizens. There are several illustrative cases.

Schaumberg v. State, 83 Nev. 372, 432 P.2d 500 (1967), involved a gambling casino employee's admission to his employer that the employee had "rigged" a slot machine so that the employee's brother-in-law hit the jackpot. The Supreme Court of Nevada stated:

> [W]e must nevertheless be concerned that the statements made by the defendant were voluntary and not the product of coercion. To be admissible as evidence, a confession (or admission) must be made freely, voluntarily and without compulsion or inducement, whether made to police officers or to private persons.

Id. at 374, 432 P.2d at 501-02.

A somewhat extreme situation was presented in *People v. Berve*, 51 Cal. 2d 286, 332 P.2d 97 (1958), concerning a statement actually and literally beaten out of a defendant. The defendant had performed an illegal abortion on a woman, who later died. To obtain a "confession" that the defendant had performed the criminal abortion, the victim's husband and other relatives of the victim kidnaped the defendant. While so confined, the defendant was "kicked and slugged with shoes," struck in the groin, and pushed through a window. The victim's husband pointed a loaded rifle at the defendant's head and suggested that the defendant "confess or die." The California Supreme Court held that the defendant's "confession" could not be admitted as evidence against the defendant, and stated: "No valid grounds for distinction are to be found in the fact that the coercion in this case was inflicted by civilians, and not the police. . . . The absence of volition condemns an enforced confession." *Id.* at 293, 332 P.2d at 101.

Although an employee admitted to his employer that the employee had stolen many of the employer's cattle, the Supreme Court of Mississippi held in *McElroy v. State*, 204 So. 2d 463, 465 (Miss. 1967): "[I]t is necessary to establish, in order that a confession . . . may become competent against the accused, that it was freely and voluntarily made and was not the result of coercion or induced by promises." See, also, *Berry v. State*, 153 Ind. App. 387, 393, 287 N.E.2d 557, 561 (1972) (a defendant's admissions to private citizens are admissible "so long as they are voluntarily made"); *In re Simmons*, 24 N.C. App. 28, 210 S.E.2d 84 (1974) (the voluntariness requirement applies to statements made to private individuals as well as to those made to law enforcement personnel); cf. *United States v. Rojas*, 458 F.2d 1355 (9th Cir. 1972) (in a bench trial a bank employee's damaging admission to a bank official regarding misapplication of bank funds was admissible, after the court determined that the statement was voluntary).

There is no alchemy to transform an accused's involuntary statement made to private citizens into valid evidence of guilt in a criminal prosecution. We hold as a general proposition: On questioned voluntariness, an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury. Such expression of law regarding voluntariness is based on our existing and oft-stated rule: To be admissible, a statement or confession must have been freely and voluntarily made. *State v. Crisp, ante* p. 265, 361 N.W.2d 544 (1985). See, also, *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984); *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983); *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983); *State v. Hunsberger*, 211 Neb. 667, 319 N.W.2d 757 (1982).

Consequently, voluntariness in Bodtke's statement to the insurance company representatives was a proper preliminary question for the court as a matter of law and a factual question for the jury.

Bodtke's complaint about the court's instruction on voluntariness focuses on the absence of the phrase "persons in authority," a phrase otherwise used in NJI 14.52. Bodtke

contends omission of that phrase was prejudicial to him because the given instruction deprived the jury of a definition of "persons in authority." We have not been previously asked to define or characterize "persons in authority" in relation to voluntariness of an accused's statement, admission, or confession.

> A confession is not ipso facto involuntary merely because it was made to a person in authority. However, where an inducement has been extended to the accused, the strength of the inducement may turn upon the power of the person offering it. A relatively slight inducement held out by a person in authority may render a confession involuntary because the accused would have reason to believe that such a person is not only credible but also is in a position to give effect to the inducement.

C. Torcia, 3 Wharton's Criminal Evidence § 683 at 468-69 (13th ed. 1973).

> A "person in authority," within the meaning of the rule excluding confessions made under promise of immunity from prosecution or to mitigate the punishment, made by a person in authority, includes, among others, the sheriff, constable, and police or peace officers arresting the prisoner and having him in control and custody, a jailer, prosecuting or district attorneys and their agents and authorized investigators, the prosecuting witness or a person representing him, an examining magistrate or his clerk, and an interpreter.
>
> . . . .
>
> Where an employee is charged with an offense against the property of his employer, the latter is regarded as a person in authority within the rule that a confession induced by a promise of immunity from such person is inadmissible.

29 Am. Jur. 2d *Evidence* § 564 at 622-23 (1967).

We conclude and hold, generally, before one is a person in authority perhaps affecting voluntariness of an accused's statement or confession, the accused must reasonably believe that the person making a promise or inducement related to a statement or confession is one who has the capacity, directly or

indirectly, to produce a represented material result in the prosecution or disposition of a matter in the criminal justice system.

In this case statements by representatives of Farmers Mutual were directed toward determination and disposition of Bodtke's civil liability and potential litigation for restitution of the payments obtained through Bodtke's falsity and forgery. Although there was mention of possible state involvement, Farmers Mutual never represented it possessed any position or capacity to control criminal prosecution or administrative action against Bodtke. On the contrary, expressions by Farmers Mutual negated capacity to control any state action against Bodtke. Under the circumstances of this case, Bodtke could not reasonably conclude that representatives of Farmers Mutual were "persons in authority."

In the final analysis and due to the absence of the phrase "persons in authority," the tenor of the given instruction allowed the jury to consider possible involuntariness regarding Bodtke's statement made in response to interrogation by *any person*, not just "persons in authority." The instruction given reflects a correct statement of the law under the circumstances and was favorable and beneficial to Bodtke, thereby negativing Bodtke's claim of prejudice. See *State v. Hamilton*, 217 Neb. 734, 351 N.W.2d 63 (1984).

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

AFFIRMED.

IN RE ESTATE OF KYLE CASSELMAN, DECEASED. JAMES H. CASSELMAN, APPELLEE, V. KYLA CASSELMAN ET AL., APPELLANTS, DANIELE CASSELMAN, BY AND THROUGH HER MOTHER AND NEXT FRIEND, SHIRLEY CASSELMAN MILLER, APPELLEE.

364 N.W.2d 27

Filed March 15, 1985. No. 83-629.

1. **Decedents' Estates: Wills: Summary Judgment.** Where an ambiguity in a codicil appears on the face of the document, the resolution of such a patent ambiguity is a matter of law and properly the subject of a motion for summary judgment if there is no dispute as to any material fact.
2. **Decedents' Estates: Wills.** Generally, where part of a codicil is invalid, the valid provisions of the codicil should be upheld unless to do so would defeat the testator's intent and interfere with his general scheme of distribution.

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

Dennis L. Arfmann, for appellants.

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

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

GRANT, J.

Kyle Casselman died on April 10, 1982, leaving five children surviving (four daughters: Kyla, Dawna, Cynthia, and Daniele; and one son: James). His will had been prepared by a lawyer and was executed by him on February 13, 1973. A petition for formal probate of this will was filed by Kyla in the county court for Scotts Bluff County on May 28, 1982. An amended petition was filed in the same court by Kyla on July 20, 1982. This amended petition sought formal probate of the same will and the probate of a codicil to that will. The codicil was holographic in nature and was dated September 25, 1974. Hearing on the amended petition was set for August 12, 1982. Notice was published as to this requested formal probate and all interested persons were notified by mail.

Objections to the probate of the will and codicil were filed in the county court by Daniele, who was a minor and appeared

through her mother, Shirley Casselman Miller. On August 26, 1982, James Casselman filed a "Notice of Transfer" in the county court, and the proceeding to determine whether decedent left a valid will was transferred to the district court for Scotts Bluff County, pursuant to the provisions of Neb. Rev. Stat. § 30-2429.01 (Cum. Supp. 1984).

On September 28, 1982, in the district court, James filed his objection to the codicil to the will, but not to the will itself. On June 2, 1983, a pretrial hearing was held in the district court. The five children were present by counsel. At the pretrial hearing all agreed that there was no objection by any of the heirs or devisees to the probate of Kyle Casselman's will of February 13, 1973. James then filed a motion for summary judgment, asking the district court to find that the September 25, 1974, codicil was invalid. On June 23, 1983, hearing was held on James' motion for summary judgment. The codicil of September 25, 1974, was received at the hearing. No other testimony or evidence was received. For purposes of the summary judgment hearing, all parties agreed that the codicil was duly executed by an uninfluenced and competent testator. The district court took the matter under advisement, and on July 5, 1983, granted the motion for summary judgment. The court found that all parties had stipulated that Kyle Casselman's will of February 13, 1973, should be admitted to probate. The court further found:

> The Codicil dated September 25, 1974, to the Will of Kyle Casselman is so ambiguous and contradictory that it does not dispose of property, appoint a personal representative, revoke an earlier executed testamentary instrument or revise an earlier executed testamentary instrument and is, therefore, not a valid will and is not entitled to be admitted to probate.

The court then ordered that the will of February 13, 1973, should be admitted to probate and denied probate to the codicil of September 25, 1974. Kyla, Cynthia, and Dawna Casselman and Edgar Russell (cousin of Kyle Casselman and personal representative named in the will) as "Proponents of the Codicil" appeal from the district court's order granting James' motion for summary judgment and denying probate to the

codicil. Appellants allege in this court that the district court erred in granting the motion for summary judgment. The appellants allege that the trial court erred in finding that there was no genuine issue as to any material fact and in determining that, as a matter of law, the codicil was so ambiguous and contradictory that it was invalid and not entitled to be admitted to probate.

The facts in the pleadings showed that Kyle executed his lawyer-prepared will on February 13, 1973. This will left $10,000 to Dawna, $3,000 to an employee, and the remainder to James and Kyla. Cynthia and Daniele were specifically disinherited. Kyla and Edgar Russell were named cotrustees of James' share until he reached 25 years of age. They were also named coexecutors.

On September 25, 1974, Kyle executed the holographic codicil which is the subject of this proceeding. The codicil is four pages long. The introductory statement in the codicil sets out that Kyle Casselman declares "this to be a codicil to alter a will and testiment [sic] . . . which at this time it is my feeling is necessary to alter to fit the times and the changed situations." Paragraph "1st" then states: "I hereby revoke and hold for naught any or all bequests made to and on behalf of my son James H. Casselman in my will or any other manner." In succeeding paragraphs the codicil expresses Kyle's dissatisfaction with the property settlement in a divorce case between Kyle and his former wife, Shirley (see *Casselman v. Casselman*, 191 Neb. 138, 214 N.W.2d 278 (1974)), provides that Cynthia should have a place to live and should be helped through school "by a loan of about half what a kid going through on a shoe string would get"; that "[c]ustody of James Casselman is to go to either Kyla Casselman or Edgar Russel [sic]"; and that if James were to quit high school, he "shall be provided a room, a TV. and $10.00 a month for funny books or records until he reaches legal age although if he goes to either one or the other of the executors they shall recieve [sic] the same compensation for support as the other children and the TV, Records Books and room is out." The codicil further provided that if James were to stay in school and go through college, he was to be helped through with "a nominal amount" and that

"[i]n event James over comes his laziness disinterest in property and management, sloppy and slothful living, laying around, lazyness [sic] and is not so influenced by his mother to follow in her footsteps and he has proven himself then he maybe come [sic] a joint administrator of this trust . . . ." "This trust" refers to Kyle's intention, expressed later in the codicil, that "[a]ll of the Casselman property shall be a sacared [sic] and God given trust be used, beautified and held for our successors" and "for a living and forwarding our education." Paragraph "5th" provided: "In event no one is interested in this property after the above is fulfilled then a conference shall be held equally between the Seventh Day adventist church and Harvard preferably Law School, or business School, or Divinity School to dispose or use the property . . . ."

The first issue to be resolved must be whether summary judgment was the proper remedy. We determine it was. Any ambiguity appearing in the codicil is patent rather than latent and may be found, or not found, within the four corners of the document. As stated in *In Re Estate of Florey*, 212 Neb. 665, 670-71, 325 N.W.2d 643, 646 (1982):

> A patent ambiguity is an ambiguity appearing on the face of the instrument, whereas a latent ambiguity is one outside the will. " 'A patent ambiguity must be removed by interpretation according to legal principles and the intention of the testator must be found in the will.' " [Citations omitted.]
>
> This is a patent ambiguity and it therefore becomes a question of law as to the meaning to be given to the language of the will itself. [Citations omitted.]

As this is a question of law, and since there was no genuine issue of fact, summary judgment was proper. Where an ambiguity in a codicil appears on the face of the document, the resolution of such a patent ambiguity is a matter of law and properly the subject of a motion for summary judgment if there is no dispute as to any material fact.

We next turn to the question of the validity of the codicil. The district court, after the transfer of the proceeding to that court, had authority to "determine whether the decedent left a valid will." Section 30-2429.01. A will is defined by Neb. Rev. Stat.

§ 30-2209(53) (Reissue 1979) as "any instrument, including any codicil or other testamentary instrument complying with sections 30-2326 to 30-2338, which disposes of personal or real property, appoints a personal representative, conservator, guardian, or trustee, revokes or revises an earlier executed testamentary instrument, or encompasses any one or more of such objects or purposes." The codicil in question was holographic in nature and was executed in compliance with Neb. Rev. Stat. § 30-2328 (Reissue 1979). As stated in *Brown v. Applegate*, 166 Neb. 432, 435, 89 N.W.2d 233, 236 (1958):

> It stands to reason, however, that a probate court is not required to admit to probate every instrument which may have been executed in the ceremonial form required of a will. The instrument must purport to be a will. It must purport to make a testamentary disposition of some property.

The issue, then, is whether the codicil disposes, appoints, or revokes or revises and thus is a will as defined in § 30-2209.

Paragraph "1st," which revokes previous bequests to James, is the only part of the codicil in dispute. All parties agree that after that paragraph the codicil does not effectively dispose, appoint, or revoke or revise, or do any testamentary act. The remainder of the purported codicil, after paragraph "lst," does not effectively dispose of any property, although the document does vaguely refer to a trust, whose corpus beneficiaries or purposes are not defined, nor does the codicil appoint any trustees of this trust. The codicil does, however, contain many statements which show the writer's general intent.

The trial court correctly found that paragraph "1st" was not an attempt to revoke but actually an attempt to revise. While, ostensibly, Kyle revoked all bequests to James in that paragraph, he provided in paragraph "3rd, 2nd," that James should have "a room, a TV. and $10.00 a month for funny books" and that he should be helped through college. In paragraph "3rd, 3rd," Kyle provided that James could become a joint administrator of "this trust," with one-fourth of the benefits for his own use, if James were to overcome his bad habits. The purported codicil states conflicting methods and aims.

The rule of partial invalidity of a will is discussed in *In re Estate of Marsh*, 216 Neb. 129, 342 N.W.2d 373 (1984), where we determined that the general rule is that where part of a will is invalid, the valid provisions should be upheld unless to do so would defeat the intent of the testator and interfere with his general scheme of distribution. Clearly, Kyle did not intend to disinherit his son, James, completely but, rather, wished to dangle James' inheritance in front of him as an inducement to change his lifestyle and to provide some form of economic aid to him. Kyle's attempt at this revision is unsuccessful. To disinherit James totally would, as stated in *In re Estate of George*, 144 Neb. 887, 898, 15 N.W.2d 80, 87 (1944), "defeat the testator's intent and interfere with the general scheme of distribution." Kyle Casselman obviously intended to provide for his son, James, in some fashion. Giving effect to paragraph "1st" alone would defeat this intention. Thus, in this case, where the remaining provisions of the codicil must fail for uncertainty, paragraph "1st" also must fail with the rest of the codicil.

The codicil, having failed of its essential purpose, that is, revising a previous will, is not operative at all and is therefore not entitled to probate. The judgment of the district court is affirmed.

AFFIRMED.

JUANITA NEFF, APPELLANT, V. EDWARD L. CLARK, JR., ET AL., APPELLEES.

DALE L. NEFF, APPELLANT, V. EDWARD L. CLARK, JR., ET AL., APPELLEES.

363 N.W.2d 925

Filed March 15, 1985. Nos. 83-916, 83-917.

1. **Invitor-Invitee: Negligence.** An owner or occupant of real estate owes a duty to an invitee to use reasonable care to keep the premises safe for the use of the invitee, but such owner is not an insurer against an accident.
2. **Summary Judgment: Negligence.** Where the facts are not in dispute and admit

only of the conclusion that the defendant was not guilty of any negligence proximately causing plaintiff's damages, summary judgment in favor of the defendant is proper.

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

James R. Welsh and Robert V. Roach of Welsh, Sibbernsen & Roach, and Maynard H. Weinberg of Weinberg & Weinberg, P.C., for appellants.

John R. Douglas of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

HASTINGS, J.

This was a slip and fall case brought by the plaintiff Dale L. Neff, a postman, against the defendants, Edward L. Clark, Jr., and Linda C. Clark, husband and wife, owners of the premises on which the accident occurred. The plaintiff Juanita Neff, wife of Dale, also filed a petition against the defendants for loss of consortium because of her husband's injuries.

The district court sustained motions for summary judgment in favor of the defendants in both cases. The orders for summary judgment were based on a finding of no actionable negligence on the part of the defendants. On appeal here, the cases have been consolidated for briefing and argument. We affirm.

At about 10 a.m. on January 22, 1982, following an overnight snowfall of approximately 3 to 4 inches, Edward Clark went outside and started to shovel the snow from his driveway and sidewalk. He completed that task at approximately 1 o'clock. According to Edward Clark's deposition testimony, there was bad ice on top of the snow, and it was misting and starting to freeze when he finished shoveling. He went into the house to get some sand or salt to scatter on the driveway. It was while he was getting these materials that he was alerted to the fact that Dale Neff had fallen on his driveway.

According to the deposition testimony of Dale Neff, he was in the process of delivering mail at this particular time, had

made his delivery to the Clark residence, and on his way back down the driveway slipped and fell. He said that before walking up the driveway he was aware of the mist falling and was concerned that the driveway might be slick, so he tested it with his foot before starting up the incline. He also knew that the mist that was falling at the time was freezing, because he was getting ice on his rain suit.

The sole issue in this appeal is whether there was a genuine issue of material fact that the defendants had failed to meet their duty to make the premises reasonably safe for the plaintiff, an invitee. The trial court found that there was not and that the defendants had not failed to discharge their duty.

An owner or occupant of real estate owes a duty to an invitee to use reasonable care to keep the premises safe for the use of the invitee, but such owner is not an insurer against an accident. *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 240 N.W.2d 32 (1976).

The plaintiffs cite two slip and fall cases in support of their contention that a genuine issue of fact as to defendants' discharge of their duty existed. Those cases are *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), and *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983). In both of those cases the possessor of land had adequate notice of the dangerous condition and did nothing about it. Both cases relied on that portion of the Restatement (Second) of Torts § 343 (1965) which suggests that possessors of land who know of a condition that involves an unreasonable risk of harm to an invitee and who should expect that the invitee will not discover or realize the danger are subject to liability if they fail to exercise reasonable care to protect the invitee against the danger.

Here, the defendants did not create the hazardous condition. Clark knew of the freezing mist only as he was completing his task of clearing the driveway of accumulated snow and ice, and immediately proceeded to obtain materials necessary to eliminate the danger presented by the icy condition. The law required nothing more of him than that. As a matter of law, we agree he was not guilty of any negligence proximately causing plaintiffs' damages.

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

AFFIRMED.

ANITA MACFIE, APPELLANT, V. ROBERT L. KAMINSKI ET AL., APPELLEES.

364 N.W.2d 31

Filed March 15, 1985. No. 84-065.

1. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove it.
2. _____: _____. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.
3. **Motor Vehicles: Negligence: Proof.** The mere skidding of an automobile without more does not prove negligence.

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

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

Alan L. Plessman, for appellees Kaminski and Cole, Inc.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

The appellant, Anita Macfie, appeals from an order entered by the district court for Lancaster County, Nebraska, granting a motion for directed verdict made by appellees at the close of Macfie's case in chief. In sustaining the motion for directed verdict, the district court filed a journal entry in which it made specific findings, including:

> 1. Plaintiff has failed to adduce sufficient evidence to warrant submission to the jury of any of the alleged acts of negligence in Plaintiff's Amended Petition.
>
> . . . .

4. The evidence adduced by Plaintiff establishes as a matter of law that even if Defendant Kaminski was negligent in some manner, such negligence was not a proximate cause of the collision in which this Plaintiff was involved and injured and damaged.

Macfie has appealed that order to this court, assigning specifically as error the district court's findings Nos. 1 and 4 set out above. We believe that the district court was correct in sustaining the motion for a directed verdict and therefore affirm the order of the district court.

The record discloses that on April 7, 1982, Kaminski was eastbound on Interstate 80, enroute from Grand Island, Nebraska, to Lincoln, Nebraska. Although various parties described the weather conditions differently, everyone agreed that some form of precipitation was falling. Kaminski testified that the temperature was in the 30s and near the freezing level. After crossing the bridge near the Milford interchange, Kaminski lost control of his automobile and started sliding sideways along the bridge until he was hit by a second automobile driven by Leah Jones. After the collision with the Jones vehicle, Kaminski's car came to a stop, straddling both eastbound lanes of the Interstate. At that point Kaminski's engine went dead, and he was unable to restart it. A few seconds later, a semitrailer driven by a Mr. Lucero struck the Jones vehicle. The third collision, and the one involved in this litigation, occurred when a vehicle driven by Anita Macfie's husband collided with the Kaminski vehicle. Macfie was injured as a result of that collision and sought damages.

It is elementary that in order for Macfie to recover from Kaminski, she must prove that the accident which caused her injury was proximately caused by some act of negligence committed by Kaminski. The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove it. *Fincham v. Mueller*, 166 Neb. 376, 89 N.W.2d 137 (1958). See, also, *Wolcott v. Drake*, 162 Neb. 56, 75 N.W.2d 107 (1956). As we observed in *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980):

> "The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does

> not prove it. . . . 'Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.' "

We therefore must examine the record to determine whether in fact Macfie has produced evidence from which a jury could reasonably conclude that her injuries were proximately caused by some negligent act of Kaminski as alleged by Macfie. See *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981).

Macfie alleged in her petition that Kaminski was negligent in operating his motor vehicle at an excessive rate of speed under the conditions then existing and in failing to have his automobile under proper control.

The evidence discloses that all of the vehicles involved in the collision, including the Macfie vehicle, were traveling at a lawful rate of speed and at nearly the same rate. The evidence establishes that Kaminski was traveling at about 55 m.p.h. and Macfie at about 50 m.p.h. Moreover, the evidence indicates that most of the traffic was also traveling at that speed.

Kaminski testified that as he approached the bridge where the accident occurred, he observed an automobile several car lengths ahead of him begin to fishtail. He applied his brakes and began to skid, turn sideways, and lose control of the vehicle. The driver of the second vehicle, Leah Jones, was killed in the accident. However, a passenger in her car, Mildred Sell, testified. She stated that the Jones vehicle was traveling slower than the speed limit when it came upon the bridge. Sell testified that Jones was unable to negotiate the vehicle around the Kaminski car, which was blocking both lanes, and struck the Kaminski car. Almost instantaneously, the semitrailer hit the rear of the Jones car, resulting in Jones' death.

Robert Macfie testified that he was operating his motor vehicle at approximately 50 m.p.h. and encountered some showers between Hastings and the bridge where the collision occurred. As a result, there was a little moisture kicking up off the pavement. Macfie further testified that he checked the road surface conditions and found that the road was not slippery. He testified that when they were within a mile of the bridge, he saw

two cars about a quarter of a mile ahead. The two vehicles then disappeared over the crest of a little hill, and he could not see them again until he came onto the bridge. When he was about 100 feet away, he saw an object ahead, which he later learned was the Kaminski car. He immediately hit his brakes but was unable to stop in time to avoid the collision with the Kaminski car.

With this state of the record we must agree with the district court's decision unless we are able to say that there is sufficient evidence from which a jury could reasonably determine that Kaminski was operating his motor vehicle at either an excessive rate of speed or without proper control and that one or the other of those acts proximately caused Macfie's injury. We believe that we cannot do that.

With regard to the matter of speed, the evidence is clear that both the Kaminski and the Macfie cars, as well as most all other traffic on the road, were traveling within the speed limit and, in any event, at nearly the same speed. Therefore, if Kaminski was operating his motor vehicle at an excessive rate under the conditions then existing, it is difficult to see how one must not also conclude that Robert Macfie was operating his motor vehicle at an excessive speed.

The same must be said with regard to control. The only evidence regarding Kaminski's "lack of control" was the fact that when he applied his brakes, his car began to skid. In *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980), we addressed that very issue and concluded that the mere evidence of skidding alone was not sufficient to establish negligence. In *Porter v. Black, supra* at 705-06, 289 N.W.2d at 764, we said:

> This leaves the remaining allegation that Black negligently lost control of his car. That it did skid and strike the guardrail is admitted. Even if Black's explanation be disregarded, we are left with the lone evidentiary fact that the car did skid on a somewhat slick highway. Is that alone sufficient to support an inference that the skid was negligently caused, i.e., that Black did something or failed to do something in the management of his car which he ought, in the exercise of reasonable care, to have done?

> This and many other courts have held that the mere skidding of an automobile without more does not prove negligence. Oakes v. Gregory, 133 Neb. 407, 275 N.W. 607; Davis v. Landis Outboard Motor Co., 179 Neb. 391, 138 N.W.2d 474; Fincham v. Mueller, *supra*; Svercl v. Jamison, 252 Minn. 8, 88 N.W.2d 839; Oldendorf v. Eide, 260 Minn. 458, 110 N.W.2d 310. This appears to be the majority rule. 58 A.L.R. 266 et seq.; 113 A.L.R. 1014.

It appears to us that the district court was correct in finding that "[p]laintiff has failed to adduce sufficient evidence to warrant submission to the jury of any of the alleged acts of negligence in Plaintiff's Amended Petition."

Macfie argues that *Porter v. Black, supra*, is inapplicable because in the instant case there was evidence of other negligent acts in addition to the skidding. We simply are unable to find sufficient evidence in the record to support that argument.

We do not believe that there was sufficient evidence of negligence on the part of Kaminski which was the proximate cause of Anita Macfie's injuries to submit the case to the jury. We therefore must agree with the district court. The judgment is affirmed.

AFFIRMED.

ARLIN F. ROSS, APPELLEE, V. INEZ E. ROSS, APPELLANT.

364 N.W.2d 508

Filed March 22, 1985. No. 83-882.

Property Division. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage.

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

James C. Cripe, for appellant.

Chris M. Arps, P.C., for appellee.

BOSLAUGH, WHITE, SHANAHAN, and GRANT, JJ., and HOWARD, D.J.

HOWARD, D.J.

The wife assigns as error that the trial court in dissolving her marriage failed to set off to her certain inherited property, failed to make an equitable division of the marriage assets, and failed to award her sufficient alimony.

At the time of trial the husband was 64 and retired, although available on a part-time basis if needed for maintenance work by Phillips service stations. He is partly disabled and has current health problems. The wife was 65, without employment or prospects of employment. Both draw Social Security; the husband has a small VA disability pension and a Phillips Petroleum pension, and the wife has cash rent from a farm in which she inherited a life estate and which was set off to her by the trial court. The parties were married in 1939, and the three children of the marriage are emancipated. Neither brought property of value to the marriage. The principal assets are shares of stock accumulated by the husband chiefly through a Phillips Petroleum payroll deduction plan, valued at approximately $54,000; the residence, unencumbered, valued at $45,000; and, at issue here, certificates of deposit valued with accrued interest at more than $30,000 at the time of trial.

The trial court awarded the stock to the husband, as well as a vehicle and a savings deposit, with a total valuation of about $59,400, and also awarded him the certificates of deposit on condition that he pay the wife $7,500 as her share thereof. The wife was awarded the home, a vehicle, household goods, and a savings deposit, with a total value of about $50,400, as well as the $7,500 for her share of the certificates. The husband was ordered to pay marital debts of $1,510 and the wife's attorney fees of $1,200. The trial court also noted, in making the division, that the wife had redeemed a fourth certificate of deposit for $6,100 soon after the petition was filed by the husband. Parenthetically, we note here that this fourth

certificate of deposit may have been purchased at least in part with the wife's receipts of rentals from the life estate in the inherited farm, but the record is silent on its source.

The court awarded lifetime alimony to the wife of $150 per month. If she survives the husband, the alimony will be replaced by her share of the Phillips pension in the amount of $162.37 monthly.

Leaving aside the problematical part-time employment income for the husband, the husband's income from Social Security, the pensions, and interest upon his share of the certificates of deposit as awarded amounts to about $1,370 a month, from which he is ordered to pay $150 per month alimony. The wife has net cash rent, Social Security, alimony, and interest on her share of the certificates as awarded, totaling about $834. Her residence is unencumbered, but of course subject to taxes in an undisclosed amount, while the husband is required to find other lodging.

The wife contends that the three certificates of deposit, totaling over $30,000, should be set off to her as funded from the proceeds of an $18,000 inheritance in 1975, with which she purchased (and titled jointly with the husband) three $6,000 certificates of deposit, and she cites *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982), which states:

> While we have not heretofore said in exact words how property acquired by inheritance or gift during the marriage should be considered, an examination of our previous decisions discloses that when awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. See, *Wenger v. Wenger*, 200 Neb. 446, 263 N.W.2d 855 (1978); *Cozette v. Cozette*, 196 Neb. 780, 246 N.W.2d 473 (1976); *Johnson v. Johnson, supra*. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior

> to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage. See *Rhodes v. Rhodes*, 210 Neb. 373, 314 N.W.2d 271 (1982).

See, also, *Applegate v. Applegate, post* p. 532, 365 N.W.2d 394 (1985).

We see nothing in the record which prevents the application of this rule. Accordingly, if the inheritance can be identified, it should be set off to the wife and eliminated from the marital estate to be divided. The three existing certificates are not shown to be the originals. Allusions in the testimony suggest more than one transmutation. There is no evidence one way or the other of contributions by the husband. One certificate at the time of the trial was shown to amount to only $1,321.48, without explanation. The husband does not seem seriously to contend that the existing certificates are not traceable to the inheritance, but does make the valid point that $10,000 thereof was removed by the wife, who in fact testified that she used the proceeds to buy her existing Cadillac automobile. While the husband testified that the certificates were only used as collateral for a loan in the amount of $7,500, nevertheless, in finding as we do from a sketchy record that the wife's inheritance can be identified in the three certificates, we can with assurance say only that, of the original $18,000, at least $8,000 of these jointly titled certificates must be set off to the wife. The remainder of the value of the certificates should be awarded to the parties equally.

The effect of this modification will increase the wife's income from interest and reduce the husband's in a like amount. With alimony to continue at the rate awarded by the trial court, the expected incomes of the parties are not widely disparate, especially as the wife's residence is paid for. The wife stated at the trial that she would sell the house; if she does, and invests the proceeds, her cash income should equal or exceed that of the husband with alimony deducted from his income.

We affirm the judgment of the trial court in all respects except we set off to the wife her inheritance in the amount of $8,000 and order the equal division of the remainder of the certificates of deposit or their value. The parties are charged

with their own attorney fees.

AFFIRMED AS MODIFIED.

ROBERT W. APPLEGATE, APPELLEE, V. VERA APPLEGATE, APPELLANT.

365 N.W.2d 394

Filed March 22, 1985. No. 83-911.

1. **Property Division.** How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved.
2. _____. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage.
3. **Property Division: Alimony.** The ultimate test for division of marital property and an award of alimony is one of reasonableness.

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

James R. Hancock of James R. Hancock, P.C., for appellant.

Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellee.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and MCCOWN, J., Retired, and BUCKLEY, D.J.

BUCKLEY, D.J.

On appeal from the trial court's decree of dissolution of the 19-year marriage of Robert and Vera Applegate, Vera assigns as

error: (1) Inadequate award of support to her and the two minor children whose custody was awarded to her; (2) Failure to award her alimony; (3) Inadequate award of the assets of the parties; and (4) Exclusion from the determination of marital assets real and personal property acquired by Robert during the marriage by gift or inheritance from his parents.

At the time of their marriage in 1964, Robert was 32 and Vera was 19. Neither brought any property into the marriage. The couple moved into a house that sat on a 152-acre tract owned by Robert's parents as tenants in common. Robert and his father farmed this land (tract No. 2), as well as an 80-acre tract (tract No. 1), north and adjacent to tract No. 2, which his father leased. In 1966 Robert and Vera jointly purchased the 80-acre tract on contract. At the time of the trial it was paid for.

In 1973 Robert's father traded small parcels of land with a party named Drumheller. Robert's father gave the Drumheller parcel to Robert by having Drumheller convey it directly to Robert. This tract (tract No. 3) contains approximately 14.7 acres and is contiguous to tract No. 1.

In 1978 Robert's father died. Robert inherited his father's one-half interest in the 152-acre farm (tract No. 2). Shortly thereafter, Robert's mother conveyed the one-half interest she had as a tenant in common to Robert and Vera as joint tenants.

The farming operation consisted primarily of raising corn and hay to feed cattle. The cattle were grazed in the summer at a nearby ranch in Sioux County and brought to the farm for wintering.

Three children were born of the marriage, who, at the time of trial, were Diana, age 17, Stephanie, age 16, and Sean, age 14. Although custody of the children appears to have been at issue until trial, the evidence at trial made it clear that the parties were in agreement that Robert should have custody of Diana and Vera should have custody of Stephanie and Sean, and the trial court so decreed. Robert was ordered to pay child support of $350 per month, reduced to $250 per month when his obligation to support Stephanie terminated. Vera was not required to pay child support for Diana.

The trial court determined the value and awarded the assets of the parties as follows:

Item	Value	Excluded from Marital Estate and Set off to Robert	Included in Marital Estate Awarded to Robert	Included in Marital Estate Awarded to Vera
Tract No. 1 (80 A)	$65,000		$65,000	
Tract No. 2 (152 A)	90,000	$67,500	22,500	
Tract No. 3 (14.7 A)	8,300	8,300		
Farm Machinery	16,495	4,935	11,560	
Livestock	37,475		37,475	
Unsold Crops	6,800		6,800	
1979 Ford Pickup	4,400		4,400	
1975 Ford Granada	200		200	
Life Ins. Policies	2,100		1,100	$1,000
1981 Mercury Cougar	5,500			5,500
Household Goods	1,000			1,000
Bank Accounts	2,000		2,000	
Totals	$239,270	$80,735	$151,035	$7,500

Robert was ordered to pay Vera $32,000 as property settlement, $2,000 of which was payable at once and $30,000 payable at $300 per month, with interest at the legal rate on the unpaid balance. Robert was ordered to pay all debts of the parties, which consisted of an ongoing loan from the Scottsbluff National Bank, with a balance at time of trial of $77,096. The net assets awarded to Robert, after deducting the bank loan and the property settlement, are $41,939. The award to Vera, after adding the property settlement, is $39,500. Vera disputes the values fixed by the trial court on most of the assets, but there is no evidence in the record to support the values set out in her brief, except as to the three tracts. There, two appraisal reports were received without testimony from the appraisers. The value placed on each tract by the trial court was higher than Robert's appraiser and lower than Vera's appraiser. We are not inclined to change the trial court's findings on any asset values.

Vera's major contention is that the trial court was wrong in excluding any of the three farm tracts from the total marital assets for two reasons: (1) That the marital estate includes all property owned by either party no matter how acquired, if it is a marriage of long duration; and (2) That during the marriage she

made substantial contributions to all of the property excluded.

In *Koubek v. Koubek*, 212 Neb. 2, 5, 321 N.W.2d 55, 58 (1982), we said: "How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved."

In *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982), we clarified what we said in *Koubek*, as follows:

> While we have not heretofore said in exact words how property acquired by inheritance or gift during the marriage should be considered, an examination of our previous decisions discloses that when awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. See, *Wenger v. Wenger*, 200 Neb. 446, 263 N.W.2d 855 (1978); *Cozette v. Cozette*, 196 Neb. 780, 246 N.W.2d 473 (1976); *Johnson v. Johnson, supra*. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage. See *Rhodes v. Rhodes*, 210 Neb. 373, 314 N.W.2d 271 (1982).

In asserting that all property, regardless of how it was acquired, should be a part of the marital estate, Vera asks us to overrule *Van Newkirk v. Van Newkirk, supra*. Since *Van Newkirk*, we have addressed the disposition of inherited or gifted property in *Ross v. Ross, ante* p. 528, 364 N.W.2d 508 (1985), in *Lord v. Lord*, 213 Neb. 557, 330 N.W.2d 492 (1983), and in *Anstine v. Anstine*, 214 Neb. 808, 336 N.W.2d 552 (1983), and specifically recognized *Van Newkirk* in *Shald v. Shald*, 216 Neb. 897, 346 N.W.2d 406 (1984), where we said that the ultimate test for division of marital property and an award of alimony is one of reasonableness. Our holdings regarding

disposition of inherited and gifted property are consistent with the objective of reaching an award that is reasonable, just, and equitable, and we decline to modify them.

Vera's contributions to the operation of the property were typical of a wife of a farmer-cattle raiser. Occasionally, she would help Robert with branding, dehorning, calving, sorting out, feeding, weed burning, irrigation, fencing, putting up hay, and resetting irrigation pipe. Her efforts, though not to be minimized, did not contribute directly to any preservation of or increase in value of the property.

However, as to tract No. 2, since one-half of that tract was clearly given by Robert's mother to both Robert and Vera as joint tenants with right of survivorship, at least one-half of the value of tract No. 2 should be included in the marital estate. In addition, the family home on tract No. 2 originally was a three-bedroom house with no plumbing or indoor water. Three or four years later, a kitchen and bathroom were added. During the last 4 years, the parties built a new addition next to the old house, then hooked it onto the old house in order to use the kitchen and bathroom, since the new part does not have running water. About $15,000 was spent for materials in the new addition. Although Robert basically furnished the labor, some work was hired out, and a considerable amount of the labor, including the framing and some of the roofing, Sheetrocking, and painting, was done by Vera's brothers and Vera herself. One appraiser gave no value to the old house but valued the new dwelling "as is" at the actual cost of $15,000, plus labor. Another appraiser included the old house and the new addition as a single building and valued it at $20,000.

Considering this contribution to the one-half of the property which was given to Robert only by his father, it is significant, and we therefore determine that 75 percent of the value of tract No. 2 should be included in the marital estate. We therefore modify the decree to increase the amount of property settlement Robert shall pay to Vera from $32,000 to $50,000, with the balance of $48,000 to be paid in payments of $500 per month for a period of 96 months.

During the marriage, Vera undertook the training to become a licensed practical nurse and did work as such from time to

time. The trial court found that she has the necessary education and earning capacity to adequately support herself, and ordered that no alimony be awarded to either party. We agree. Notwithstanding the long duration of the marriage, the division of assets which requires a substantial payment to Vera as property settlement makes additional payment as alimony neither feasible nor appropriate.

Vera complains that $350 for child support is inadequate. The record is silent as to any evidence of any amounts of her monthly expenses and those of the children living with her. Income tax returns show farm income ranging from a high of $9,400 in 1979 to a loss of $6,000 in 1982. Robert worked during the fall every year at the Great Western Sugar Company, earning $4,000 to $5,000 annually. We find no error in the trial court's determination of child support.

Lastly, Vera contends the award of $1,000 to her for attorney fees is inadequate. She argues that Robert sought custody of the children until the time of trial, necessitating time and effort that makes the award inadequate. The problem is that the record contains no showing of such time or effort expended other than court appearances, including a pretrial conference and the trial. We find no abuse of the trial court's discretion in the amount of the attorney fee awarded.

Although not assigned as error, we note that Robert has a policy of health and accident insurance that covers the entire family, including Vera, and he wants to continue to maintain this policy. The decree does not address the matter and should be modified to require that Robert continue this policy, or at least procure adequate health and accident insurance for the benefit of the minor children.

The decree of the district court is affirmed as modified. Vera is awarded the sum of $750 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

CHRISTINA A. KOCHENASH, APPELLEE AND CROSS-APPELLANT, V. ANTHONY KOCHENASH, APPELLANT AND CROSS-APPELLEE.

363 N.W.2d 926

Filed March 22, 1985. No. 83-942.

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

William L. Howland of Bump, Howland & Watson, for appellant.

Judy L. Raetz of Raetz & Bergfield, for appellee.

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

PER CURIAM.

Upon de novo review we conclude that the record fails to show an abuse of discretion in regard to the division of property or the award of alimony. The judgment is, therefore, affirmed.

The parties shall pay their own costs and attorney fees.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

While I agree generally with the findings of the trial court in this matter, I believe the record shows an abuse of discretion in the division of property.

There seems to be a wide latitude in the treatment of inherited property in our cases. See, *Applegate v. Applegate, ante* p. 532, 365 N.W.2d 394 (1985); *Ross v. Ross, ante* p. 528, 364 N.W.2d 508 (1985).

In this case the trial court set off $31,793 plus certain specific items as property received by the petitioner by gift or inheritance during a marriage of some 23 years.

In my opinion, a more equitable division of the property would be made if the respondent were awarded the $10,000 certificate of deposit in the Platte Valley Federal Savings and Loan Association.

GRANT, J., joins in this dissent.

CHERYL LARSON AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS, V. THE TRANSIT AUTHORITY OF THE CITY OF OMAHA, DOING BUSINESS AS METRO AREA TRANSIT, ET AL., APPELLEES.

364 N.W.2d 33

Filed March 22, 1985. No. 84-135.

1. **Labor and Labor Relations.** Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
2. _____. Where a union must negotiate meritorious but conflicting claims, and no clear showing has been made of bad faith in making a choice between two or more claims, it cannot be said that in making the choice it made, the union unfairly represented one group.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Edward F. Fogarty of Fogarty, Lund & Gross, and Mary Kay Green, for appellants.

Soren S. Jensen, John S. Sowiaczek, and J. Russell Derr, of Erickson & Sederstrom, P.C., for appellee Transit Authority of Omaha.

Robert E. O'Connor, Jr., of Robert E. O'Connor & Associates, for appellees Transport Workers Union of America Local 223 and Transport Workers Union of America.

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

KRIVOSHA, C.J.

The appellants, Cheryl Larson and all others similarly situated, are former employees of The Transit Authority of the City of Omaha, doing business as Metro Area Transit (MAT). On June 30, 1977, the contract between MAT and the Transport Workers Union of America Local 223 (Union), expired and the Union and MAT were unable to agree on a new contract. In July of 1977 MAT filed a petition with the Commission of Industrial

Relations (CIR), asking that the commission establish wages to be contained in a 1977-79 collective bargaining agreement between MAT and the Union. The Union responded by joining in the request. During this impasse, the bus system continued operating as usual. MAT increased salaries generally by 6 percent, effective July 17, 1977, and again in July of 1978. In June of 1979 the CIR rendered a decision and established rates for the period July 1, *1977*, to June 30, *1979*, which were higher than what MAT had in fact paid during that period. MAT appealed the decision of the CIR to this court. While the appeal was pending, MAT and the Union sought to negotiate a contract for the next period, July 1, 1979, to June 30, 1981. In August of 1979 they entered into an interim agreement and then a full contract for the period July 1, 1979, to June 30, 1981. By the terms of the interim agreement, the rates previously ordered by the CIR for the 1977-79 period would become effective July 1, 1979, and be used as the basis for setting the rates for 1979-81. Additionally, a cash settlement was to be paid to employees active on July 1, 1979, based upon a percentage of gross wages "earned in the 104 week period closest to July 1, 1977, and June 30, 1979." No contract was ever formally entered into for 1977 and 1978. The Union, however, agreed to accept the wages paid, pursuant to letters from MAT dated July 27, 1977, and July 10, 1978, and the appeal from the decision of the CIR was dismissed.

Larson then commenced this action to seek to recover for herself and "others similarly situated" the right to "back wages" for those who had left the company between July of 1977 and August 11, 1979. Following trial to the district court for Douglas County, Nebraska, the petition was dismissed. It is from that order which Larson and others now appeal. They assign two errors. The first assignment is that the district court erred in not deciding MAT was liable for backpay to the employees who worked between July 1, 1977, and July 1, 1979, but who had left MAT by July 1, 1979. In this regard, appellants maintain that the district court erred in deciding that former employees were not entitled to the difference between what they were actually paid and the rate the *CIR* determined they should have been paid, *or an approximation thereof* such as the cash

settlement payoff to employees on the payroll July 1, 1979. The second assignment by appellants is that the district court erred in not finding that the Union failed to represent the plaintiffs in good faith and without discrimination. We believe that the district court correctly resolved all of the issues, and for that reason the decision of the district court must be affirmed.

Part of the difficulty with appellants' claim is that they have attempted to meld together a host of facts, some of which are totally unrelated. As an example, they maintain that the district court should have ordered MAT to pay former employees the difference "between what they were actually paid and the rate the C.I.R. determined they should have been paid, or an approximation thereof such as the cash settlement payoff to employees on the payroll July 1, 1979." Brief for Appellants at 2. In essence, Larson and others wanted the district court to make a contract for them out of whole cloth. The district court had no way of directing MAT to pay anyone a rate previously determined by the CIR for the period 1977 to 1979, in view of the fact that the parties to that agreement, MAT and the Union, resolved their differences and agreed to something else. While in an appropriate case the district court can enter an order enforcing a previously entered order of the CIR, see *IBEW Local 763 v. Omaha P.P. Dist.*, 209 Neb. 335, 307 N.W.2d 795 (1981), it cannot require the parties to enter into a contract different from the one they have in fact agreed upon. Once the parties had resolved their differences and put the 1977-79 contract behind them, there was nothing for the district court to order in that regard. It is clear that while appellants would like to read into the 1979 agreement a retroactive pay raise, there is nothing in the agreement or the documents to in any way support such a position. Quite to the contrary, the agreement is clear that the payment is not a retroactive pay raise.

Appellants have cited a number of cases to the effect that where backpay is awarded retroactively to a *specific date* for all employees, even an employee who is no longer employed is entitled to share in the retroactive pay for the period actually worked. There is, however, no language in the 1979 agreement which provides for any retroactive backpay to a specific date that would be of benefit to appellants. Setting aside for the

moment the question of whether the Union could enter into such an agreement, we are unable to find any language which would indicate to us that there was any intent by either party to make any retroactive payment. As a matter of fact, the contract clearly provides that the letters of July 27, 1977, and July 10, 1978, constitute the contracts for those years. Appellants continually argue that where an employee performs services for an employer, there is an implied promise to pay a reasonable sum. That issue is not at all relevant in the instant case. The employees were all paid a rate set by the employer, MAT, though disputed by the Union. There is simply no way in which the district court could have arbitrarily directed MAT to pay employees at a rate different from that which had been established for the work, absent agreement by the parties. Appellants' first assignment of error is simply without merit.

The real question that needs to be decided is whether the district court erred when it found that the evidence failed to establish a conspiracy and that the Union did not fail to represent Larson and others in good faith and without discrimination. We believe an examination of the record in light of the applicable law resolves this question contrary to appellants' position.

The matter of labor negotiations is oftentimes a matter of compromise, wherein certain benefits are obtained while others are lost by both sides. This is the very essence of the collective bargaining procedure. Historically, the courts have recognized that while everyone may not be treated equally, so long as there has not been any intent to arbitrarily discriminate against one group in favor of another, a contract entered into pursuant to collective bargaining will be enforced. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38, 73 S. Ct. 681, 97 L. Ed. 1048 (1953), the U.S. Supreme Court said:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. A

> bargaining representative, under the National Labor Relations Act, as amended, often is a labor organization but it is not essential that it be such. The employees represented often are members of the labor organization which represents them at the bargaining table, but it is not essential that they be such. The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. In the instant controversy, International represented, with certain exceptions not material here, all employees at the Louisville works, including both the veterans with, and those without, prior employment by Ford, as well as the employees having no military service. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

And in *Johnson v. Air Line Pilots in Serv. of N. W. Airlines*, 650 F.2d 133, 137 (8th Cir. 1981), the U.S. Court of Appeals for the Eighth Circuit said:

> Under the facts of this case, we affirm the granting of the summary judgment in favor of ALPA on the basis of the union's good faith attempts to represent the conflicting rights of the various groups it represented. Where a union must negotiate meritorious but conflicting claims, "and no clear showing has been made of bad faith in making a choice between [two or more] claims, it can not be said that in making the choice it made, the union unfairly represented one group."

In the *Johnson* case the eighth circuit court of appeals specifically found that where a union made a good faith attempt to represent conflicting rights of various groups, including laid off employees, in negotiating and accepting a

collective bargaining agreement, the union did not breach its duty of fair representation in its negotiations with the employer or in its final acceptance of a collective bargaining agreement which did not extend seniority or recall rights of certain laid off employees. See, also, *Duggan v. International Association of Machinists*, 510 F.2d 1086 (9th Cir. 1975); *Van Leeuwen v. United States Postal Service*, 628 F.2d 1093 (8th Cir. 1980).

In the instant case the record is devoid of any evidence which would support a claim of conspiracy or lack of good faith by the Union. The Union attempted to negotiate a contract for its members for the years 1977-79. As is often the case, the period was nearly expired and a new contract period beginning before the previous dispute was resolved. The Union, when presented with an opportunity to get a new contract early for the 1979-81 period, agreed to submit the settlement proposal to the rank and file, who approved the contract. That hardly amounts to a conspiracy. Obviously, the interests of the present employees, on the one hand, and the former employees, on the other hand, were miles apart. All the former employees could be interested in was money. They had no interest in bargaining for future wages or benefits. While at first blush it may seem "unfair" of MAT to make such an offer, a fact we do not pass on, it was not illegal. Had the rank and file so desired, they were free to turn the contract offer down. They chose not to do so. The Union was presented with the difficult task of representing two groups having conflicting interests. Whenever that situation arises, some group may feel "shortchanged." That may be unfair, but it is not illegal.

We cannot say that because the Union sought to protect the interests of those who remained over the interests of those who had left, the Union thereby acted discriminatorily or without justification, or in bad faith. The decision of the trial court was correct. The judgment is affirmed.

AFFIRMED.

BUCKLEY D. STATES, APPELLANT, V. GLEN J. ANDERSON ET AL., APPELLEES.

364 N.W.2d 38

Filed March 22, 1985. Nos. 84-283, 84-362.

1. **Due Process: Notice.** Procedural due process requires the following: notice reasonably calculated to inform one of the accusation levied; identification of the accuser; factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board.
2. **Civil Service: Public Officers and Employees: Termination of Employment.** A civil service commission may require that a list of witnesses and documents to be relied upon at a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983) be furnished to an employee by the appointing authority.
3. _____: _____: _____. At a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983), it is improper to receive unsworn statements and to receive sworn statements from persons not required to submit to cross-examination.
4. **Costs.** It is within the discretion of a trial court to tax costs in certain proceedings as it "may think right and equitable." Neb. Rev. Stat. § 25-1711 (Reissue 1979).

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

J. Clark Noble of Aten, Noble & Ide, for appellant.

Anderson, Strasburger, Klein, Peterson and Swan, for appellees.

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

PER CURIAM.

On December 6, 1983, Buckley D. States received a written notice of the termination of his employment as chief of police from the mayor of the city of Holdrege, Nebraska, Helen D. Anderson. That evening the appellant filed a written request with the civil service commission for an investigation and hearing.

On December 12, 1983, the commission published a notice in the Holdrege Daily Citizen to the effect that a public hearing would convene at 2:30 p.m., December 21, 1983, to investigate termination charges against States. The notice further provided that "all interested persons will be given an opportunity to be heard." Nine days before the hearing, States filed a motion with

the commission, requesting a list of witnesses and copies of the documents which the mayor intended to rely upon in support of his termination. This request was denied by the commission on the following day.

After the hearing the commission found that the termination of States' employment was justified. Upon appeal the district court affirmed the dismissal on the grounds that States had failed to follow proper administrative procedures in purchasing supplies and that he was insubordinate in failing to follow requests from the mayor to comply with such procedures. The district court taxed all costs, including preparation of the bill of exceptions, to the city of Holdrege, Nebraska.

The appeal is pursuant to Neb. Rev. Stat. §§ 19-1801 et seq. (Reissue 1983). Insofar as is relevant here, § 19-1808 provides:

> No person in the classified civil service, who shall have been permanently appointed or inducted into civil service under the provisions of sections 19-1801 to 19-1823, shall be removed, suspended, demoted, or discharged except for cause and then only upon the written accusation of the appointing power or any citizen or taxpayer. . . . Any person so removed, suspended, demoted, or discharged may, within ten days from the time of his removal, suspension, demotion, or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether or not such removal, suspension, demotion, or discharge was made for political or religious reasons and in good faith for cause. After such investigation the commission may, if in its estimation the evidence is conclusive, affirm the removal. . . . All investigations made by the commission, pursuant to the provisions of this section, shall be by public hearing, after reasonable notice to the accused of the time and place of such hearing. . . . At such hearing the accused shall be afforded an opportunity of appearing, in person and by counsel, and presenting his defense. If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the

> district court. . . . The district court shall thereupon proceed to hear and determine such appeal in a summary manner; *Provided*, that such hearing shall be confined to the determination of whether or not the judgment or order of removal, discharge, demotion, or suspension, made by the commission, was made in good faith for cause. No appeal to such court shall be taken except upon such ground or grounds.

In *Frederickson v. Albertsen*, 183 Neb. 494, 161 N.W.2d 712 (1968), we held that in an appeal to the district court under § 19-1808, the only issue is whether the commission's order was made in good faith for cause. However, in *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983), we considered a due process challenge. In *In re Appeal of Bonnett*, 216 Neb. 587, 344 N.W.2d 657 (1984), the only issue presented was the constitutional sufficiency of the notice of dismissal.

The issues raised by the appellant are (1) whether the commission's refusal to grant his requests for discovery, and whether the commission's consideration of sworn and unsworn statements of the public as evidence, denied appellant due process and (2) whether there was sufficient evidence to support the commission's findings.

In *Levos, supra* at 515, 335 N.W.2d at 267-68, the "essence of procedural due process" was set forth as

> simply that fundamental fairness which a person has the right to expect—even demand—and receive through our system of law. For this reason, in proceedings before an administrative agency or tribunal which has jurisdiction, such as the hearing before the commission in the present case, procedural due process requires the following: notice reasonably calculated to inform one of the accusation levied; identification of the accuser; factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board. Cf., *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Brouillette v. Board of Dir. of Merged Area IX, Etc.*, 519 F.2d 126 (8th Cir. 1975). Under our standard of review, once the record discloses that those elements of due process existed with respect to the findings

and action of an administrative agency or tribunal, further judicial action is neither permissible nor required.

Appellant argues that pretrial discovery is among those due process elements absolutely imperative to a fair hearing. While that requirement is not specifically set forth in *Levos*, we believe that it was within the power of the commission to provide such discovery.

Section 19-1804(4) mandates that the commission has a duty to investigate and report upon all matters touching the enforcement and effect of the provisions of the civil service commission statutes. In conjunction with that duty § 19-1804(4) further provides:

> In the course of such an investigation, the commission, designated commissioner, or chief examiner shall have the power to administer oaths, issue subpoenas to require the attendance of witnesses and the production by them of books, papers, documents, and accounts, appertaining to the investigation, and to cause the deposition of witnesses, residing within or without the state, to be taken in the manner prescribed by law for like depositions in civil actions in the courts of this state. The oaths administered and subpoenas issued hereunder shall have the same force and effect as the oaths, administered by a district judge in a judicial capacity, and subpoenas issued by the district courts of Nebraska. The failure of any person so subpoenaed to comply therewith shall be deemed a violation of sections 19-1801 to 19-1823, and be punishable as such.

The commission, however, did not interpret this section as granting it the power to require any party to furnish to another party the names of witnesses, documents, or materials. Such an interpretation has the potential of rendering meaningless the provision of § 19-1808 that "the accused shall be afforded an opportunity of appearing, in person and by counsel, and presenting his defense." We think the better interpretation is that propounded in *La Petite Auberge v. R.I. Com'n for Human Rights*, ____ R.I. ____, 419 A.2d 274 (1980).

In *La Petite Auberge* the court held that under a statute similar to § 19-1804 (R.I. Gen. Laws § 28-5-13 (Reenactment

1979)), the commission has the responsibility to make its investigative and information-gathering powers available to parties to a contested proceeding. The court reasoned that an administrative hearing should be " 'less a game of blindman's buff [than] a fair contest with the basic issues and facts disclosed to the fullest practicable extent' " (quoting *United States v. Procter & Gamble*, 356 U.S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)). 419 A.2d at 282. Accord, *Shively v. Stewart*, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1967); *Newman v. Bd. of Ed. of City School Dist. of N. Y.*, 594 F.2d 299 (2d Cir. 1979). As the court determined in *La Petite Auberge*, it would seem that the opportunity to conduct discovery is consistent with the goals of a fairly conducted and efficient hearing. Despite the permissive informality of civil service commission hearings as compared to court proceedings, the statute does not manifest a legislative intent to sacrifice a respondent's entitlement to fairness for the sake of such informality.

In *Wegmann v. Dept. of Registration & Educ.*, 61 Ill. App. 3d 352, 377 N.E.2d 1297 (1978), the plaintiff contended that he was denied due process by an administrative agency's refusal to grant his discovery requests. Considering the role of discovery in an administrative agency proceedings, that court said at 356, 377 N.E.2d at 1301:

> The purpose of pretrial discovery is to aid the party in preparation and presentation of his case or defense, assuring the truth and to eliminate as far as possible surprise, so that judgments will rest upon the merits and not upon the skillful maneuvering of counsel. (See *Stimpert v. Abdnour* (1962), 24 Ill. 2d 26, 179 N.E.2d 602; *People ex rel. Terry v. Fisher* (1957), 12 Ill. 2d 231, 145 N.E.2d 588.) Presumably, the need for discovery at the administrative level is the same, so as to require disclosure by the agency of evidence in its possession which might be helpful to an accused. (See Davis, Administrative Law of the Seventies §8.15 (1976); *Shively v. Stewart* (1966), 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217.) While an administrative body possesses broad discretion in conducting its hearings, its discretion must be exercised

judicially and not arbitrarily. *Brown v. Air Pollution Control Board* (1967), 37 Ill. 2d 450, 227 N.E.2d 754; *Robert N. Nilles, Inc. v. Pollution Control Board* (1974), 17 Ill. App. 3d 890, 308 N.E.2d 640.

In this case the commission's failure to provide discovery did not prejudice the appellant or handicap his defense. At the hearing appellant's attorney made a statement on the record objecting to the commission's inaction in this respect. Yet, when asked if he desired a continuance so that the documents could be obtained by a deposition, the appellant's attorney declined, saying he was "willing to proceed." Furthermore, the examining officer granted the appellant a 5-minute recess during the course of the hearing to examine the documents in question.

The documents consisted of 24 invoices or statements for items States had requested and a summary statement of the fund balance for the fiscal year ending July 31, 1982. These documents, unaccompanied by purchase orders, demonstrated the appellant's failure to implement the mayor's purchase order system. The appellant now contends that by not being able to evaluate these documents in advance of the hearing, he lost the opportunity to tally the amounts involved and explain the circumstances involved surrounding each of them. Such an opportunity would not have altered the disposition of the case. Even if he had demonstrated that certain figures were incorrect or that he had a particular reason for not following the purchase order system, in each instance the gravamen of the complaint remains: he failed to follow the procedures set forth by the mayor.

The second portion of the appellant's contention that he was denied due process concerns the commission's permitting interested persons to make sworn and unsworn statements. The record indicates that the hearing lasted from 2:30 p.m. to 2:30 a.m. During the course of the proceedings, as it had stated it would do in its public notice, the commission received statements from persons in the audience. The commission permitted these persons to make sworn or unsworn statements, at their option, and did not require these persons to submit to cross-examination. Eight unsworn statements were recorded.

The appellant argues that this procedure turned a "public hearing" into a "public meeting" and that it deprived him of "knowing who he was going to face, what event they might testify to, of knowing when that event might have happened, of knowing where that event might have happened, or of giving him an adequate opportunity to obtain witnesses or documents to combat such type of testimony." Brief for Appellant at 26.

In the judgment affirming the order of the commission, the trial court commented on the way in which the commission had conducted the public hearing. The trial court stated:

> Although in the conduct of hearings, the Commission is not, pursuant to 19-1804 (5) R.R.S. 1943, bound by the technical rules of evidence, the findings and action of the Commission must still, nevertheless, in the final analysis and test be supported by competent evidence. Hearsay evidence does not constitute such evidence; nor does opinion evidence of a lay witness not rationally based on his perception; nor does evidence which is not relevant to the factual basis of the accusations which were in fact levied against the accused and upon which notice was given to him. Although pursuant to 19-1804(5) no informality in any proceeding or hearing or in the manner of taking testimony shall invalidate any order made by the Commission, the practice of taking sworn, as well as unsworn, statements of persons who have not been called as witnesses by the Appointing Authority, the accused, or the Commission, constitutes a procedure which should not be encouraged. It lends itself to the type of evidence described above as being incompetent, and the testimony so taken or permitted in this case is a good example of that. Section 19-1808 R.R.S. 1943 provides for a public hearing, not a public meeting.

Although the commission is not bound by technical rules of evidence, and no informality in any proceeding or hearing or in the manner of taking testimony shall invalidate any order made by the commission, the method in which the hearing was conducted is improper. Again, though, the admission of such testimony did not prejudice the appellant. The trial court found this testimony was incompetent, and thus it was not a basis for

that court's order affirming appellant's dismissal.

Since the appellant was not prejudiced by the claimed denial of due process, it is necessary to determine whether the evidence was sufficient to support the appellant's discharge. The standard of review was set out in *Ackerman v. Civil Service Commission*, 177 Neb. 232, 234-35, 128 N.W.2d 588, 590 (1964):

> Section 19-1808, R.R.S. 1943, provides that an employee who has been discharged may file with the civil service commission a written demand for an investigation. The commission then conducts an investigation to determine whether the discharge was made for political or religious reasons or in good faith for cause. If the commission finds that "in its estimation the evidence is conclusive," the commission may affirm the discharge or modify the order and direct a suspension or demotion.
>
> Section 19-1808, R.R.S. 1943, further provides that an employee may appeal from the order of the commission to the district court. The appeal is to be heard and determined in a summary manner. The review in the district court is limited to a determination of whether the order of the commission was made in good faith for cause.
>
> The act vests a wide discretion in the civil service commission but does not vest a similar discretion in the district court. The statute does not contemplate that the appeal to the district court shall be a trial de novo similar to the review on appeal of an action in equity. The purpose of the appeal to the district court is to permit the employee to obtain a determination only as to whether the order of the commission was made in good faith for cause. If the evidence in the district court is sufficient to show that the order of the commission was made in good faith for cause, then the order of the commission must be affirmed.

The record in this case demonstrates that the mayor established certain purchase order procedures within the police department as part of a plan to correct a $10,391 budget deficit in that department. The appellant admitted he had been told to implement this system; nonetheless, his testimony indicates that he failed consistently to use it. Section 19-1807 provides that a

person may be discharged for "(1) Incompetency, inefficiency or inattention to or dereliction of duty; (2) Dishonesty, intemperance, immoral conduct, insubordination . . . ." Within such limits the district court's order provided:

> With respect to the accusation that the Appellant was inefficient in the management and handling of his duties as Chief of Police in that he failed to follow proper administrative procedures in requesting the purchase of materials and supplies for use by the police department and also with respect to the accusation of insubordination in that he failed to comply with requests from the Mayor to follow efficient management procedures, the action of the Commission was based on competent evidence, was neither arbitrary or capricious nor the result of political or religious reasons, and was reasonably necessary for effectual and beneficial public service. The evidence is conclusive that the Mayor had instructed the Appellant to implement a purchase order system and that the Appellant failed to do so.

The record here contains sufficient evidence to support this finding.

The matter of costs remains to be considered. Neb. Rev. Stat. § 25-1711 (Reissue 1979) vests discretion in a court to tax costs as it "may think right and equitable." The district court did not elaborate on its reasons for taxing costs to the city, nor was it required to do so. Owing to the length of the proceedings, the manner in which they were conducted, and recognizing that only two of the numerous grounds originally stated for appellant's dismissal were supported by the evidence, the district court acted within its discretion.

The judgment of the district court is affirmed.

AFFIRMED.

VICKIE LEE WENTZ, APPELLEE, V. LARRY EUGENE WENTZ, APPELLANT.

364 N.W.2d 43

Filed March 22, 1985. No. 84-313.

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

James E. Case of Case, Reinsch & Slattery, P.C., for appellant.

Roger S. Brink of Harter and Brink, P.C., for appellee.

BOSLAUGH, WHITE, SHANAHAN, and GRANT, JJ., and HOWARD, D.J.

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.

STATE CODE AGENCIES EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. DEPARTMENT OF PUBLIC INSTITUTIONS, STATE OF NEBRASKA, APPELLANT.
NEBRASKA DEPARTMENT OF EDUCATION TEACHERS ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. DEPARTMENT OF EDUCATION, STATE OF NEBRASKA, APPELLANT.
STATE CODE AGENCIES EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. DEPARTMENT OF CORRECTIONAL SERVICES, STATE OF NEBRASKA, APPELLANT.
STATE CODE AGENCIES EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. DEPARTMENT OF PUBLIC WELFARE, STATE OF NEBRASKA, APPELLANT.

364 N.W.2d 44

Filed March 22, 1985. Nos. 84-429, 84-588, 84-589, 84-636.

Commission of Industrial Relations: Jurisdiction. The Commission of Industrial Relations, pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984), does have jurisdiction, that is, authorized power, to resolve industrial disputes between agencies or departments of the State of Nebraska and their employees.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellants Department of Public Institutions et al.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees State Code Agencies et al.

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

SHANAHAN, J.

Four separate appeals from the Commission of Industrial Relations (CIR) have been consolidated due to their community of question, whether the CIR has jurisdiction to establish wages for employees of state agencies. The CIR established salaries for agency employees and entered an order accordingly. There is no issue concerning the correctness of the CIR's determination; rather, the question relates only to the authority of the CIR to establish salaries for the employees of state agencies.

Each of the petitioners-appellees, as admitted by the respondents, is certified as the exclusive bargaining agent for the bargaining unit involved in these proceedings, namely, teachers employed in schools operated by a particular state agency. The units consist of teachers employed at the Nebraska Center for Children and Youth (Department of Public Welfare), at the Youth Development Centers in Geneva and Kearney and the Nebraska Center for Women in York (Department of Correctional Services), at the Lincoln Regional Center and Beatrice State Developmental Center (Department of Public Institutions), and at the Nebraska School for the Visually Handicapped and Nebraska School for the Deaf (State Department of Education).

All actions involved the 1983-84 contract year except proceedings involving the Department of Public Welfare, which relate to the contract year 1982-83. The appropriations bills for the contract years in question limited the amount payable in salaries or wages but did not designate the specific salary or wage attaching to any particular employment in the departments or agencies.

Unable to reach an agreement with the agency regarding base salary and salary schedule index factors, the petitioners requested the CIR to "resolve the industrial dispute including the establishment of wages and other terms, tenure and conditions of employment for the teaching employees . . . ." Each respondent answered and alleged that the respective agency "has no power or authority over the pay increases granted to the employees represented by the petitioner since the pay raises for such employees are established by legislation enacted by the Nebraska Unicameral." As a separate defense, each agency claimed that "the [CIR] lacks jurisdiction to order the respondent to provide its employees with benefits different than those authorized by statute or by a legislative enactment." In each case the CIR held that it had jurisdiction to resolve the dispute between the agency and employees and ordered salary adjustments and increases for the particular year involved in the proceeding.

The respondent agencies contend that the CIR does not have jurisdiction to resolve the dispute regarding salary or wages to

be paid employees of a state agency.

Respondents argue that the Legislature's appropriation bills for the fiscal years 1982-83 and 1983-84 have established the salary of agency employees so that any dispute about salary cannot be resolved within the framework of the statutes pertaining to the CIR. Resolution of such dispute, according to the state agencies, is a matter of negotiation with the Nebraska Legislature, not proceedings before the CIR.

In *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 31-32, 286 N.W.2d 102, 106 (1979), we stated:

> The public policy of the CIR is expressed in section 48-802, R.R.S. 1943, of the Act and points out that the Act is intended to provide public employees who do not otherwise have the right to strike an opportunity to mediate and arbitrate matters of employment which have not yet been agreed to by the employer.
>
> *By providing for a forum in which a public employer and a public employee may discuss future wages, hours, and conditions of employment or terms of employment without interruption of necessary public service*, the Legislature has sought to protect "its citizens from any dangers, perils, calamities, or catastrophes which would result" from interruption or termination of public service. § 48-802, R.R.S. 1943.

(Emphasis supplied.) Neb. Rev. Stat. § 48-810 (Reissue 1984) provides:

> All industrial disputes involving governmental service, service of a public utility, or other disputes as the Legislature may provide shall be settled by invoking the jurisdiction of the Commission of Industrial Relations; *Provided*, such commission shall have no jurisdiction over any persons, organizations, or school districts subject to the provisions of the Nebraska Teachers' Professional Negotiations Act, sections 79-1287 to 79-1295, until all provisions of such act have been exhausted without resolution of the dispute involved.

Neb. Rev. Stat. § 48-801 (Reissue 1984) sets forth the definition of the term "industrial dispute."

> (7) Industrial dispute shall include any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment.

This same statute sets forth the definitions of "employer," "employee," and "labor organization."

> (4) *Employer shall mean the State of Nebraska or any political or governmental subdivision of the State of Nebraska*, except the Nebraska National Guard or state militia, any municipal corporation or any public power district or public power and irrigation district. It shall also include any public utility as defined in sections 48-801 to 48-823;
>
> (5) Employee shall include any person employed by an employer as defined in sections 48-801 to 48-823;
>
> (6) Labor organization shall mean any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(Emphasis supplied.)

Although the Legislature has appropriated funds generally for the departments and agencies of the state in the cases before us, the appropriations bill enacted by the Legislature does not specifically allocate sums as salaries or wages for particular jobs or positions of employment in those departments or agencies. Allocation of funds among employees as salaries or wages is a matter for discretion in administration of the department or agency.

The clear import of § 48-801(4) brings the State of Nebraska and its agencies within the purview of the act pertaining to controversies between employer and employee. The respondents admit petitioners' capacity as the bargaining agent for the teachers-employees of the agencies. See § 48-801(6). Obviously, there is an "industrial dispute" as defined by

§ 48-801(7). Jurisdiction of the CIR over industrial disputes involving a department or agency of the State of Nebraska was recognized in *American Fed. of S., C. & M. Emp. v. Dept. of Public Institutions*, 195 Neb. 253, 237 N.W.2d 841 (1976) (the Legislature's valid exercise of its continuing control of the Department of Public Institutions subjected such department to the jurisdiction of the CIR under Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1974)). Further, in reference to orders of the CIR, § 48-818 provides in part: "The findings and order or orders may establish or alter the *scale of wages*, hours of labor, or conditions of employment, or any one or more of the same." (Emphasis supplied.) There is no qualifying statutory language to exempt the scale of wages for employees of a state agency from application of §§ 48-801 et seq. A legislative intent to include salary disagreements of state employees as an "industrial dispute" permeates §§ 48-801 et seq. Consequently, the CIR has jurisdiction to resolve the disputes of such nature. What may be a proper recourse available to petitioners or a permissible response by the Legislature to the order of the CIR establishing wages for agency or department employees are matters not presently before the court.

Nevertheless, it is our conclusion that the Commission of Industrial Relations, pursuant to §§ 48-801 et seq., does have jurisdiction, that is, authorized power, to resolve industrial disputes between agencies or departments of the State of Nebraska and their employees. The orders of the Commission of Industrial Relations in these proceedings are affirmed.

AFFIRMED.

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

STATE OF NEBRASKA, APPELLEE, V. DEAN D. MCKICHAN, APPELLANT.

364 N.W.2d 47

Filed March 22, 1985. No. 84-556.

1. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the sentencing court.
2. **Bail Bond.** A deposit of cash in lieu of or in support of bail under Neb. Rev. Stat. § 29-901 (Reissue 1979) is for the purpose only of ensuring the defendant's appearance in court when required; and upon full compliance with any such court orders and release of bail, the statutory refund must be made.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Affirmed as modified.

Judy L. Raetz, Dawes County Public Defender, for appellant.

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

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

HASTINGS, J.

The defendant has appealed a sentence of imprisonment of 18 months following his conviction on a plea of guilty to the offense of criminal nonsupport in violation of an order of the court. As provided for by Neb. Rev. Stat. § 28-706 (Reissue 1979), this is a Class IV felony.

The defendant assigns as errors, first, that the sentence is excessive, and, second, that the court erred in applying the cash bail bond posted by the defendant to the costs of this appeal.

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the sentencing court. *State v. Olson*, 217 Neb. 130, 347 N.W.2d 862 (1984).

The facts recited by the county attorney at the time of arraignment, contained in the presentence report, and uncontested by the defendant, are as follows: Following a divorce proceeding in South Dakota, the defendant was ordered to pay $105 per month child support commencing July

1, 1977. By June of 1981 he had paid but a total of $270. Proceedings under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), resulted in an order by the circuit court for Beadle County, South Dakota, requiring the defendant to pay $155 per month, a portion of which was to apply on his arrearage of $5,565. He made one payment of $100 during the period January 25, 1982, to July 26, 1982. The defendant was then charged with criminal nonsupport in the district court for Dawes County, Nebraska. He pleaded guilty to a reduced charge of child abandonment. He was placed on probation for 2 years and ordered to make the payments as earlier provided. He apparently made the proper payments for 5 months, but then discontinued paying anything, commencing in May of 1983. This present charge followed.

The record disclosed that during that last period of time, the defendant was fully employed, earning $750 per month. The defendant's only excuse for the original default which allowed this great delinquency to build up was that his former wife never asked him for support payments and he "got away from paying it."

We find no abuse of discretion on the part of the sentencing judge.

Pending sentencing, the defendant had been free on bail, having deposited $200 cash with the clerk's office, apparently amounting to 10 percent of a $2,000 bond. After sentencing, the court raised his appearance bond to $10,000. He was unable to post a bond that large and therefore surrendered himself to the court and requested that the original bond be discharged. He also asked that the statutory balance of the funds in support of the bond, in the amount of $180, be released to him.

The trial court ruled that the bail bond be released but that the clerk of the court hold the proceeds to apply on the costs of defendant's appeal to this court. The defendant argues that because the court had sustained his motion to proceed in forma pauperis and for the appointment of counsel, he was entitled to the return of his bond deposit unencumbered. Although not assigned as error, defendant's counsel argued that the trial court had in effect ordered that the appeal costs shall not exceed the

balance of defendant's deposit. This, of course, would be impermissible, but it is not what the court in fact ordered.

The question presented to us is not so much whether the defendant was entitled to proceed in forma pauperis under the provisions of Neb. Rev. Stat. § 25-2301 (Reissue 1979). That was decided by the trial court in its order sustaining that motion. Rather, we must decide what authority the court has over a bail deposit under the provisions of Neb. Rev. Stat. § 29-901(3)(a) (Reissue 1979). That subsection, which provides for the deposit of cash in a sum of not more than 10 percent of the amount of appearance bond posted, goes on to state "ninety per cent of such deposit to be returned to the defendant upon the performance of the appearance or appearances, and ten per cent to be retained by the clerk as appearance bond costs."

In *Crowell v. Circuit Court*, 50 S.D. 276, 209 N.W. 539 (1926), a South Dakota statute provided that deposit of the sum of money mentioned in the order admitting to bail is equivalent to bail. The defendant was convicted, and the court ordered payment of the fine imposed out of the cash deposit made in lieu of bail. The Supreme Court reversed, stating: "We have no statute permitting a cash deposit given in lieu of bail for appearance to be applied by the court in payment of a judgment." *Id.* at 279, 209 N.W. at 540. The court distinguished the statutes under its code of civil procedure, which specifically subjected a cash deposit to the payment of a judgment. The court went on to say:

> Finally, the statute says that the cash deposit is the equivalent of bail. If that is so, then the right of the owner of the cash deposit is the same as would be his right if he were surety on a formal bail bond. In such a case it would not be claimed that the bond for appearance would be held to cover a liability under the judgment.

Id.

Bolstering the reasoning of the South Dakota court are two cases which reached somewhat contrary results: *State v. Grant*, 44 Or. App. 671, 606 P.2d 1166 (1980), and *People v. Nicholls*, 71 Ill. 2d 166, 374 N.E.2d 194 (1978). However, as stated in *Grant*, the section of the Oregon statute, which is similar to our § 29-901(3)(a), provided:

> "* * * When conditions of the release agreement have been performed and the defendant has been discharged from all obligations in the cause, the clerk of the court shall return to the accused, *unless the court orders otherwise*, 90 percent of the sum which has been deposited and shall retain as security release costs 10 percent of the amount deposited." (Emphasis supplied.)

606 P.2d at 1167.

In *Nicholls* the court pointed out that the Illinois statute, which provides for the deposit of 10 percent of the bail, goes on to state:

> "After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made . . . the balance of such deposit, after deduction of bail bond costs, shall be applied *to the payment of the judgment.*" (Emphasis added.) [Citation omitted.] Thus, under this section the deposit of 10% of the bail is not only for the purpose of ensuring defendant's presence in court at an appointed time but also constitutes a fund from which a judgment for fine and costs against the defendant may be satisfied without the necessity of having an execution issue and a levy made upon the deposit . . . .

71 Ill. 2d at 177, 374 N.E.2d at 198.

We therefore hold that the deposit of cash in lieu of or in support of bail under § 29-901 is for the purpose only of ensuring the defendant's appearance in court when required; and upon full compliance with any such court orders and release of bail, the statutory refund must be made. The district court's order is modified accordingly.

The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

SANITARY AND IMPROVEMENT DISTRICT NO. 95 OF DOUGLAS COUNTY, NEBRASKA, A CORPORATION, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

365 N.W.2d 398

Filed March 29, 1985. No. 83-774.

Municipal Corporations: Sanitary and Improvement Districts. Under the provisions of Neb. Rev. Stat. § 31-740 (Reissue 1984), the authority of the city council, in the first instance, and the mayor thereafter to approve or disapprove proposals for the construction of a recreational facility to be built by a sanitary and improvement district is limited to a determination of whether or not the proposals conform to the municipality's master plan and construction specifications and standards.

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

Robert J. Huck of Croker, Huck & McReynolds, and Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

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

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

KRIVOSHA, C.J.

Sanitary and Improvement District No. 95 (S.I.D. No. 95), which encompasses the Mockingbird Hills West Subdivision in Douglas County, Nebraska, appeals from a judgment entered by the district court for Douglas County, Nebraska, sustaining the action of the mayor of the city of Omaha in vetoing a certain resolution earlier adopted by the city council of the city of Omaha approving the construction of a recreational facility by S.I.D. No. 95.

At least part of the basis for the mayor's veto was set out in his message attached to the veto. That message, as quoted in the district court's order, reads in pertinent part:

> The area in question, in addition to other areas adjacent to our corporate limits, is ready for annexation both from the standpoint of the orderly growth of City and financial

> criteria regarding debt. The Directors of both the Planning and Finance Department (sic) have advised me that these annexations should take place 1 January, 1981.
>
> Since the proposed improvement is to be paid by obligation bonds, it is obvious that the annexation of this particular area will be postponed for a period of eight to ten years. This will not only interrupt the orderly growth of the City, but will cause the loss of revenue to the City in the form of sales and other taxes.
>
> Further, there has [sic] been inquiries of the same nature made by other Sanitary Improvement Districts. It will be difficult to justify this request and not grant others. In the alternative, if the policy will be to grant such requests, the annexation program will be incomplete [sic] chaos.

The district court, in its judgment, further noted that in a newspaper article the mayor stated that the reason he decided to veto the council's approval of the facilities was "the fact that the City Council wants surrounding communities to study the I-80 interchange . . . ." The district court concluded that the mayor's power to veto legislation stems from § 2.16 of Omaha's home rule charter of 1956 and that the mayor, therefore, has unlimited authority to veto a resolution even though the authority of the city council in adopting the resolution in the first instance was limited by statute. Specifically, the district court found:

> The Mayor may veto any ordinances proposed under Neb. Rev. Stat. §31-740 (1978) for any reason he considers appropriate, and is not required by the Home Rule Charter to base his veto on the fact that the proposed construction does not conform with the Master Plan or the construction specifications and standards established by the Municipality.

Because we believe that the district court was in error in this regard, we reverse and remand.

The record discloses what can best be described as sheer frustration by the residents of S.I.D. No. 95. Sometime prior to 1975, S.I.D. No. 95 determined that it would construct an outdoor swimming pool for its residents. The city of Omaha advised the district, however, that it would not approve any

more outdoor swimming pools and that if S.I.D. No. 95 wanted to build a pool, it would have to be enclosed. Because this type of structure was more costly, S.I.D. No. 95 elected to wait until it could afford the construction.

In 1978 the board of trustees of S.I.D. No. 95 consulted with its fiscal agent regarding the financial ability of the S.I.D. to construct an indoor swimming facility. The S.I.D. by that time was financially very responsible. Its assessed valuation had sufficiently increased, and its debt had sufficiently decreased. Such a facility could be constructed by the S.I.D. without having to significantly raise its mill levy. The board then consulted with Omaha's parks and recreation department, which informed S.I.D. No. 95 that the city would not approve an enclosed swimming pool but now wanted a regional community center built in the area, which not only would include an indoor swimming pool but should further contain meeting rooms, multipurpose rooms, arts and crafts rooms, and some type of financially self-sustaining handball courts. The proposal was submitted to the residents of the district, and more than 95 percent of those contacted approved the proposal.

Armed with the full support of the city's parks and recreation department and the approval of nearly all of the residents of the district, the S.I.D. No. 95 board, in August of 1979, presented a proposal to build this facility to the Omaha City Council. The financial data submitted to the city council indicated that the S.I.D. No. 95 tax levy would retire the amount of debt necessary to pay for such a community center over a 6-year period and that S.I.D. No. 95 was capable of making the payment at a reasonable mill levy if the city chose not to annex the district before the debt was paid. By a vote of 6 to 1 the city council approved the construction of the facility. The resolution was then submitted to the mayor, who vetoed the proposal and returned it to the city council, which failed to override the veto.

In August of 1980 S.I.D. No. 95 once again appeared before the city council of the city of Omaha seeking approval of a resolution which would authorize the construction of the recreational facility. At that meeting some of the council members indicated that they wanted to wait until after the

September S.I.D. No. 95 board elections before voting on this matter, since some opposition to the plan had apparently surfaced. The council president publicly announced that Mayor Veys had told him that if the council approved the resolution, the mayor would not veto it. S.I.D. No. 95 agreed to wait and come back after the September election. No comment was ever made by anyone during any of this time that the plan for the recreational facility did not conform to either the master plan, if indeed one existed, or to construction specifications and standards established by the city of Omaha.

In September of 1980 elections were held by S.I.D. No. 95. Five persons ran on a platform which favored immediate construction of the community center. Three of those were write-in candidates. Opposing them were three candidates on the ballot who ran on a "wait-and-see" attitude toward the community center. The five candidates who were totally in favor of the community center were elected. Armed with that encouragement, S.I.D. No. 95, on September 9, 1980, again appeared before the city council and requested approval of the construction plan. By a vote of 6 to 1 a resolution approving the construction of the community center was adopted by the Omaha City Council and sent to the mayor. On September 17, 1980, Mayor Veys vetoed the resolution, giving as his reasons those statements recited by the district court in its journal order. The city council failed to override the mayor's veto.

S.I.D. No. 95 maintains that the action of the district court in approving the veto entered by Mayor Veys was in error for one or more of the following reasons: (1) The mayor had no authority to veto the resolution for any reason, because Neb. Rev. Stat. § 31-740 (Reissue 1984) delegated the authority to either approve or disapprove a proposed recreational facility only to the "governing body" of the city of Omaha, which did not include the mayor; (2) If the mayor had authority to veto the resolution, he did not have unlimited authority, but could only veto the resolution if the proposed facility did not conform to either the master plan adopted by the city of Omaha or the construction specifications and standards established by the city of Omaha; (3) The veto by Mayor Veys was arbitrary, capricious, and unreasonable, and therefore invalid; and (4)

The city of Omaha does not have a master plan, and therefore its governing body acquired no jurisdiction in this matter.

We believe, for reasons which we will set out more fully hereinafter, that we need only discuss the question addressed by the district court, to wit, whether the authority of the mayor to veto such a resolution is unlimited or whether it is in some manner limited by the provisions of § 31-740. Because we believe that the authority to approve or disapprove a recreational facility is not unlimited but, in fact, is limited as provided by the specific language of § 31-740, we reverse the decision of the district court.

S.I.D. No. 95, like all other S.I.D.s, is a creature of statute, created pursuant to the provisions of Neb. Rev. Stat. §§ 31-727 to 31-762 (Reissue 1984). An S.I.D. is specifically described by statute as "a body corporate and politic," and has power and authority to take and hold real and personal property necessary for its use, to make contracts, to sue and be sued, to have and use a corporate seal, and to exercise any and all other corporate powers necessary to carry out the purposes of the act. See § 31-732. The method of forming an S.I.D. is described by statute. See § 31-727. An S.I.D. *may not* include land within a municipality. See § 31-730. See, also, *Sanitary & Improvement Dist. v. City of Ralston*, 182 Neb. 63, 152 N.W.2d 111 (1967). The provisions of the statutes regarding the creation, operation, and maintenance of S.I.D.s are internally complete, and it is clear that but for the language of § 31-740 the city of Omaha would have no authority to approve or disapprove the action sought to be taken by S.I.D. No. 95. If, then, the authority of the city of Omaha to affect the rights of S.I.D. No. 95 in any manner is conferred by statute, it seems clear beyond question that such authority cannot exceed that granted by statute.

The authority so delegated is clear and unambiguous. Section 31-740 grants to S.I.D.s the power and authority to construct various amenities necessary for residents living within the S.I.D.s, including recreational facilities. Section 31-740 then further provides:

> Prior to the installation of any of the improvements provided for in this section, the plans or contracts for such

> improvements, *other than* for public parks, playgrounds, and recreational facilities, whether a district acts separately or jointly with other districts as permitted by section 31-727, shall be approved *by the public works department* of any municipality when such improvements or any part thereof are within the area of the zoning jurisdiction of such municipality; *Provided*, that if such improvements are without the area of the zoning jurisdiction of any municipality, plans for such improvements shall be approved by the county board of the county wherein such improvements are located, and plans and exact costs for *public parks, playgrounds, and recreational facilities shall* be approved by resolution of the *governing body* of such municipality or county after a public hearing held not less than five days after notice of the hearing has been published in a newspaper of general circulation in such municipality or county.

(Emphasis supplied.)

A reading of the statute makes it clear that what the Legislature intended was a procedure whereby it could be determined in advance that facilities which may ultimately be made a part of a city are compatible with the facilities in place or contemplated to be constructed by the city which may annex the S.I.D. *Except* for public parks, playgrounds, and recreational facilities, the governing body has *no* authority to approve or disapprove the proposal or to adopt a resolution which must then, under the Omaha city charter, be forwarded to the mayor. If what was involved here was a sewer facility, a street facility, or a water main, the approval would be by the public works department only and not by either the city council or the mayor, or whatever group of officials constitutes the "governing body." Only with regard to public parks, playgrounds, and recreational facilities does the "governing body" obtain the right to approve or disapprove by resolution. Section 31-740 goes on further, however, to provide:

> Such approval [of public parks, playgrounds, and recreational facilities] shall relate to conformity with the master plan and the construction specifications and standards theretofore established by such municipality or

> county; *Provided*, when no master plan and construction specifications and standards have been established such approval shall not be required.

It is difficult to conceive how the authority of at least the city council could be any more specific and limited. If the city of Omaha has not developed a master plan and construction specifications and standards, the decision whether to build a recreational facility would be left solely to the discretion of the S.I.D. It therefore seems clear beyond question that when the statute provides that "[s]uch approval *shall* relate to conformity with the master plan and the construction specifications and standards theretofore established by such municipality or county" (emphasis supplied), the Legislature has delegated to the "governing body," whomever it may be, limited authority. That limited authority was to determine whether the recreational facilities were contrary to the master plan or construction specifications and standards developed by the city which might ultimately one day annex the S.I.D. and thereby acquire a recreational facility not in conformance with either the city's master plan or its construction specifications and standards.

The city agrees with the district court that at least so far as the city council was concerned, its authority to approve or disapprove was limited. They both agree that the city council could not refuse to approve the resolution if indeed the proposal conformed with the master plan and the construction specifications and standards. In that regard they are both correct. See *Reid v. City of Omaha*, 150 Neb. 286, 34 N.W.2d 375 (1948). The dispute, however, appears to arise by reason of the language of § 2.16 of the charter of the city of Omaha, which provides in pertinent part:

> The Mayor, within seven days of receipt of an ordinance or resolution, shall return it to the City Clerk with or without his approval, or with his veto. If an ordinance or resolution is vetoed, the Mayor shall attach a written statement explaining the reasons for his veto. Ordinances or resolutions vetoed by the Mayor shall be considered at the next regular meeting of the Council, and the Council may pass the ordinance over the veto by the affirmative

> vote of five of its members. . . . The Mayor's veto power shall extend to . . . any ordinance or resolution, except appropriations for auditing or investigating any part of the executive branch.

The city argues that while the city council may be limited in adopting the resolution, the mayor, by reason of the home rule charter, is vested with unlimited authority to veto. On its face, such an argument seems to make little sense. It is difficult to imagine why the Legislature would grant to the city council limited authority regarding recreational facilities and grant to the mayor unlimited authority to veto. While there may be some question as to whether in fact the mayor is a part of the "governing body," we need not resolve that issue. It seems clear to us that if the mayor is a part of that governing body, he has no greater authority with regard to exercising his veto power over a recreational facility to be constructed by an S.I.D. than the city council has in adopting or disapproving the resolution.

The city seems to argue that this is a matter of local concern and therefore the charter of the city of Omaha must take precedence over the state statutes, at least insofar as the mayor's authority is concerned. Initially, we find no such distinction made in § 31-740. Moreover, we do not believe that this is a matter of "local concern." This is not at all a matter involving the action of a municipality within its boundaries but is, rather, a matter involving a governmental body entirely outside the boundaries of a municipality. In *Axberg v. City of Lincoln*, 141 Neb. 55, 58, 2 N.W.2d 613, 614-15 (1942), we observed:

> The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality *where the legislature has not entered the field*. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter. But where the legislative act deals with a *strictly local municipal concern*, it can have no application to a city which has adopted a

> home rule charter. Whether or not an act of the legislature pertains to a matter of local or state-wide concern becomes a question for the courts when a conflict of authority arises.

(Emphasis supplied.)

One need only examine cases previously decided by this court to quickly conclude that the authority delegated to the city of Omaha by the provisions of § 31-740 is clearly of statewide concern and that the home rule charter of the city of Omaha is limited by the provisions of § 31-740 to whatever extent they may be in conflict. See, *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *Midwest Employers Council, Inc. v. City of Omaha*, 177 Neb. 877, 131 N.W.2d 609 (1964); *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956); *Michelson v. City of Grand Island*, 154 Neb. 654, 48 N.W.2d 769 (1951); *Carlberg v. Metcalfe*, 120 Neb. 481, 234 N.W. 87 (1930).

Generally, it can be said that matters are of local concern only when they do not extend beyond the limits of the municipality. See, *Nagle v. City of Grand Island*, 144 Neb. 67, 12 N.W.2d 540 (1943); *Pester v. City of Lincoln*, 127 Neb. 440, 255 N.W. 923 (1934); *Salsbury v. City of Lincoln*, 117 Neb. 465, 220 N.W. 827 (1928). And even then they may be of statewide concern, as already noted. See *Jacobberger v. Terry*, 211 Neb. 878, 320 N.W.2d 903 (1982). Where, as here, the action by the city affects land wholly outside the boundaries of the city, it is difficult to conceive how it can be argued that this is not a matter of statewide concern, but only of local interest. Just as the mayor of the city of Omaha is limited in his authority to veto resolutions adopted by the city council, as more particularly set out in § 2.16 of the Omaha city charter, so too is his authority limited by the provisions of § 31-740 in the case of S.I.D.s. The statutory requirements must be complied with in exercising the veto power. Under the provisions of § 31-740 the authority of the city council, in the first instance, and the mayor thereafter to approve or disapprove proposals for the construction of a recreational facility to be built by a sanitary and improvement district is limited to a determination of whether or not the proposals conform to the municipality's master plan and

construction specifications and standards.

The city cites to us the case of *Green's Bar Incorporated v. Johnson*, 275 Minn. 471, 147 N.W.2d 686 (1967), in support of its position that the mayor has unlimited authority to veto any resolution adopted by the city council. The Minnesota decision, however, does not stand for that proposition and is readily distinguishable. The Minnesota statute, Minn. Stat. Ann. § 340.11 Subd. 4 (West 1957), which delegated to the governing bodies the authority to approve or disapprove the issuance of all "on-sale" liquor licenses had no limiting provision such as § 31-740. The Supreme Court of Minnesota, in upholding the action of the mayor in vetoing the resolution, said at 473, 147 N.W.2d at 688:

> The statute does not undertake to specify the manner in which the authority so delegated is to be exercised. We attribute to the legislature an intent that the governmental authority delegated by the statute be exercised by the various municipalities in the way specified by the documents giving rise to their existence.

The facts simply are not the same. The authority delegated to the "governing body," if indeed it included the mayor, unlike the Minnesota statute, was limited under the provisions of § 31-740.

Where, as here, no question was ever raised that the proposal submitted by S.I.D. No. 95 did not conform to whatever limited master plan the city of Omaha had regarding parks and recreational facilities or that the proposal did not comply with the construction specifications and standards, the action of the mayor in vetoing the resolution adopted by the city council for reasons other than noncompliance with the master plan or construction specifications and standards was beyond the authority delegated to the "governing body" by § 31-740, and cannot stand. The mayor did not have unlimited authority under the facts in this case to veto the resolution.

The mayor's concern that the construction of the facility would inhibit annexation is not relevant to this issue. The city may, if it chooses, annex the area and assume the obligation or delay annexing the area and be free of any obligations. The fact that S.I.D. No. 95 has obligations is merely a factor which the

city must take into account in deciding whether to annex the area. The construction of the facility and the debt which goes with it does not preclude the city from annexing the area, and is not within the limitations prescribed by § 31-740. Should the Legislature wish to take that matter into account, it may amend the statutes to do so. It may very well be that it would have been far less expensive for the city of Omaha to permit S.I.D. No. 95 to build its simple outdoor swimming pool more than 10 years ago, when it would now be paid for. Having failed to permit that to happen, and having delayed construction by insisting on the enlarged facility, the city is not now in a position to deny its construction simply because it does not want to assume the obligation at some future time.

The decision of the district court is therefore reversed and the cause remanded with directions to find that the action of the mayor in vetoing the resolution adopted by the city council approving the construction of the recreational facility was beyond his authority and therefore invalid, and to order and direct the approval of such construction forthwith.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE and CAPORALE, JJ., not participating.

C. GEORGE BLEICK, APPELLANT, V. CITY OF PAPILLION, APPELLEE.

365 N.W.2d 405

Filed March 29, 1985. No. 83-938.

1. **Municipal Corporations: Public Utilities.** The furnishing by a city of water or sewer service to persons outside the corporate limits of the city is contractual and permissive and not a duty imposed upon the city by statute.
2. _____: _____. Public utilities generally may discriminate, in respect to rates, between consumers within and those outside the municipalities primarily served.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Gregory Garland of Garland, Pettis & Wills, for appellant.

Michael N. Schirber of Schirber Law Offices, P.C., for appellee.

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

BOSLAUGH, J.

The plaintiff, C. George Bleick, is a resident of Sarpy County, Nebraska. His residence property is located outside the city limits but within the zoning jurisdiction of the city of Papillion, Nebraska (City), and within the boundaries of Sanitary and Improvement District No. 108 (S.I.D. No. 108).

On March 15, 1977, S.I.D. No. 108 entered into a contract with the City for water and sewer service to be provided to the S.I.D. by the City at rates to be prescribed by ordinances of the City, but not to exceed twice the fees charged to residents of the City. The contract provides for payment by the district of the amounts due under the contract, or direct billing to the "users." The contract provides for a term of 20 years, with automatic renewal for successive terms of 20 years each unless one of the parties to the contract advises the other of its desire not to do so at least 6 months prior to the end of the term. Under the ordinances now in effect the water service fees are twice the rate charged to residents of the City, and sewer usage fees are one and one-half times the rate charged to residents.

This action was commenced April 7, 1981, on behalf of the plaintiff and, by stipulation, all other persons similarly situated, to enjoin the City from collecting the amounts due under the contract. The plaintiff's theory of the case is that the rate which the City has fixed is unreasonable, arbitrary, and unfairly discriminatory, since the higher fees charged to the S.I.D. are based solely upon the fact that "users" within the S.I.D. are nonresidents of the City.

Both parties filed motions for summary judgment. The motions were submitted upon a stipulation of facts, documentary evidence concerning the contracts between the City and the S.I.D. and other sanitary and improvement districts, and the deposition of the city administrator of the City. The trial court sustained the motion of the defendant City and dismissed the petition. The plaintiff has appealed.

The authority for the City to enter into a contract to furnish water and sewer service beyond its limits is set out in Neb. Rev.

Stat. § 19-2701 (Reissue 1983), which provides:

> A city of the first or second class may enter into a contract or contracts to sell electric, water, or sewer service to persons beyond the corporate limits of such a city when, in the judgment of the mayor and council of such a city not having a board of public works or of its board of public works in such a city having such board, it is beneficial to any such city to do so. No such contract shall run for a period in excess of twenty-five years. Such a city is hereby authorized and empowered to enter into contracts for the furnishing of electric service to persons, firms, associations, and corporations beyond the corporate limits of such a city.

The authority for the S.I.D. to enter into a contract for purchase of water and sewer service for resale to the residents of the district is set out in Neb. Rev. Stat. § 31-740 (Reissue 1984), which provides in part: "The district may . . . contract with corporations or municipalities for disposal of sewage and use of existing sewerage improvements, and for a supply of water for fire protection and for resale to residents of the district."

The furnishing by a city of water or sewer service to persons outside the corporate limits of the city is contractual and permissive and not a duty imposed upon the city by statute. *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967). Statutory provisions such as Neb. Rev. Stat. § 16-681 (Reissue 1983), which requires the city to furnish service "subject to reasonable rules and regulations," apply only to residents of the city.

The plaintiff relies upon *McGinley v. Wheat Belt P.P. Dist.*, 214 Neb. 178, 332 N.W.2d 915 (1983), as authority in support of his contentions. The *McGinley* case involved a dispute between customers within the boundaries of the district. The defendant district in that case attempted to distinguish between "old" and "new" customers and charge different rates accordingly. The case has no application here.

The plaintiff also relies upon *City of Texarkana v. Wiggins*, 151 Tex. 100, 246 S.W.2d 622 (1952), a 5 to 4 decision of the Supreme Court of Texas, in support of his contentions. We have examined the opinion in that case and do not consider it

controlling here. Rather, we believe the law as stated in the dissenting opinion is correct.

The great majority of the cases support the rule that public utilities generally may discriminate, in respect to rates, between consumers within and those outside the municipalities primarily served. See Annot., 4 A.L.R.2d 595 (1949).

> A municipally owned waterworks system supplying water without its corporate limits may, generally, charge more for that service than is charged users of the water service who reside within the corporate limits. . . . The fact that residents of the municipality have borne the cost of establishing or financing the system will justify charging a higher rate to nonresidents.

64 Am. Jur. 2d *Public Utilities* § 120 at 647 (1972).

As the opinion in the *Burger* case stated, a city furnishing utility services to persons outside the limits of the city is engaged in a business enterprise. Here, the City and the S.I.D. dealt at arm's length, and we know of no reason why their contract should not be enforced as written. See *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210 (1939).

The rates fixed by the City are uniform as to residents and uniform as to nonresidents. The City has no assurance that the S.I.D. will continue to purchase service in the future, and whatever expense or improvement that may be necessary in the facilities of the City will be solely the responsibility of the City.

There are additional reasons why the plaintiff could not prevail in this action. The contract in question is between the City and the S.I.D. The plaintiff is not the real party in interest, and the S.I.D., an indispensable party, was not joined. See, Neb. Rev. Stat. §§ 25-301 and 25-323 (Reissue 1979); *Redding v. Gibbs*, 203 Neb. 727, 280 N.W.2d 53 (1979); *Johnson v. Mays*, 216 Neb. 890, 346 N.W.2d 401 (1984).

The judgment of the district 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 once the majority determines that the appellant is not the real party in interest in this case, anything more we say or do is mere dictum. A similar, though not exact,

issue was previously presented to this court in *Evans v. Metropolitan Utilities Dist.*, 184 Neb. 172, 166 N.W.2d 411 (1969). In affirming the action taken by the district court in sustaining a demurrer and dismissing the action, we observed at 174, 166 N.W.2d at 413:

> [A] real party in interest is the person "entitled to the avails of the suit," that the person who is asserting the cause of action has a "remedial interest which the law of the forum can recognize and enforce," and that he has a "justiciable interest in the subject matter in litigation, either in his own right or in a representative capacity."

We then observed in *Evans* that the plaintiff had not made demand upon M.U.D. before filing suit in his own name. In noting that this failure was critical, we said at 174-75, 166 N.W.2d at 413: "The requirement of a demand to sue and a subsequent refusal or a waiver of demand by an indication on the part of the public corporation of an intent not to sue are conditions precedent to a representative or derivative suit on behalf of public corporations." We concluded by noting in *Evans* at 175, 166 N.W.2d at 413-14:

> It seems to be quite obvious that plaintiff and the others in his class have no standing as parties to bring this suit for the simple reason that they cannot be considered real parties in interest. As far as this action is concerned they are not sui juris and neither do they have any justiciable interest in this controversy at the present time because the action exists on the part of M.U.D., and M.U.D. has not refused to bring it. Further, of course, they have no interest or right to the avails of any suit of this nature, since M.U.D. itself would be the proper party plaintiff and would be entitled to all avails in the event of the successful determination that L.B. 425 is unconstitutional.

It seems clear to me that a similar situation exists in the instant case. The contract which is challenged is not a contract between Bleick and the city of Papillion but, instead, is one between the S.I.D. and the city of Papillion. Furthermore, Bleick's claim is not to the effect that his rate alone is illegal but, rather, that the rate for all customers residing within the S.I.D.

is illegal. It is therefore of a derivative nature, though not so pleaded. If, indeed, the contract is illegal as contended for by Bleick, then he must first demand that the S.I.D. bring suit to have the contract set aside. It seems clear to me that only in the event the S.I.D. refuses to bring such suit does Bleick have standing. I believe that is exactly what the majority suggests, and with which I am in complete agreement. I do not understand, however, how we can determine the issues between parties once we recognize that Bleick does not have standing.

CAPORALE, J., joins in this concurrence.

ROBERT MADER, APPELLANT, V. NICKIE J. KALLOS ET AL., APPELLEES.

365 N.W.2d 408

Filed March 29, 1985. No. 84-029.

1. **Actions: Quiet Title.** In an action to quiet title the plaintiff is required to recover based upon the strength of his own title and not upon any weakness in the title of his adversary.
2. **Real Estate: Vendor and Vendee: Consideration: Notice: Words and Phrases.** A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry.
3. **Real Estate: Vendor and Vendee: Consideration: Notice: Proof.** The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice.
4. **Real Estate: Vendor and Vendee: Notice.** A purchaser having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by want of notice in his vendor.
5. **Real Estate: Notice: Landlord and Tenant.** Generally, the open, notorious possession of real property by a tenant is notice of the owner's title.

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

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

Patrick A. Brock of Cunningham, Blackburn, VonSeggern,

Livingston, Francis & Riley, for appellees.

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

BOSLAUGH, J.

The plaintiff, Robert Mader, brought this action in the district court for Hall County, Nebraska, against the defendants Nickie J. and Rosie Kallos to quiet title to certain real estate known as 419 North Vine, Grand Island, Nebraska. The defendants answered, alleging that they were the record title owners of the property. After a hearing the district court dismissed the plaintiff's petition. The plaintiff has appealed.

The record shows that the defendants purchased the property from Venneth E. and Phyllis A. Clark, husband and wife, on July 8, 1974. At that time there were no liens or other encumbrances of record on the property. Defendants recorded their warranty deed for the property on May 11, 1981.

Meanwhile, on February 22, 1977, and October 2, 1979, notices of federal tax liens against the then record title owners, Venneth E. and Phyllis A. Clark, were filed against the property. When the tax liens were not paid, a sale of the property was conducted by the Internal Revenue Service on June 25, 1982. Plaintiff was the successful bidder and received a certificate of sale for the property; when it was not redeemed, plaintiff surrendered his certificate of sale on November 8, 1982, and received a district director's deed.

" 'In an action to quiet title a recovery by a plaintiff must be based upon the strength of his own title and not upon any weakness in the title of his adversary.' " *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 493, 249 N.W.2d 750, 753 (1977).

The plaintiff argues that the government's federal tax liens took priority over the defendants' unrecorded deed. The plaintiff relies on the recording statute, Neb. Rev. Stat. § 76-238 (Reissue 1981), which provides:

> All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the

> register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; *Provided*, that such deeds, mortgages and other instruments shall be valid between the parties.

The plaintiff contends that the Internal Revenue Service had neither actual nor constructive notice of any prior unrecorded deed from Venneth and Phyllis Clark to defendants and that the interest of the Internal Revenue Service in the property in question was superior to defendants' interest. Therefore, plaintiff claims title to the property by virtue of having purchased it at the seizure sale.

A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry. The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice. *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 74 N.W.2d 546 (1956). This burden includes proving that he was without notice, actual or constructive, of another's rights or interest in the land. 92 C.J.S. *Vendor & Purchaser* § 371 (1955). It is in this regard that the record is lacking in evidence.

The plaintiff called as a witness a revenue officer for the Internal Revenue Service, district of Omaha, Nebraska, who testified that he had no actual knowledge of the defendants' interest in the land prior to the filing of the federal tax liens. However, this officer also testified that he was not assigned to collect on both tax liens and that he may not have been in charge of the matter at the time either lien was filed. Instead, he indicated that he did not know whether anyone else had actual notice and that he received actual notice at least as early as April of 1980.

Although the evidence as to possession of the property at the time the notices of federal tax liens were filed is somewhat vague, it is sufficient to support an inference that the

defendants went into possession of the property after they purchased it from the Clarks and remained in possession or constructive possession.

The property in question is an apartment building. During the time that the defendants have owned the property, they have paid the taxes and remodeled the apartments. The possession of tenants under these circumstances would be constructive notice of the interest of the defendants in the property. See, 58 Am. Jur. 2d *Notice* § 14 (1971); Annot., 1 A.L.R.2d 322 (1948); *Conlee v. McDowell*, 15 Neb. 184, 18 N.W. 60 (1883); *Ostergard v. Norker*, 102 Neb. 675, 169 N.W. 5 (1918).

In *Claremont Terrace Homeowners' Ass'n v. U.S.*, 146 Cal. App. 3d 398, 194 Cal. Rptr. 216 (1983), the appellee entered into an option contract to purchase land from a taxpayer on December 1, 1974. The option was not exercised until December 15, 1975, and not recorded until December 22, 1975. On July 11, 1975, the United States, the appellant, filed its tax lien. The court reasoned that since the appellee's option to purchase was never recorded,

> appellant's lien must be given priority as first in time unless the grant of the option to purchase *ipso facto* divested [the taxpayer] of his interest in the property, so that, in effect, at the time the Internal Revenue Service lien arose, the taxpayer had no property interest to which it could attach.

146 Cal. App. 3d at 220, 194 Cal. Rptr. at 405. Quoting *Aquilino v. United States*, 363 U.S. 509, 80 S. Ct. 1277, 4 L. Ed. 2d 1365 (1960), the court continued: " 'The threshold question in . . . all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the lien could attach.' " 146 Cal. App. 3d at 220, 194 Cal. Rptr. at 405. Referring to its state law to determine the nature and extent of the competing property interests, the court in *Claremont* held that the appellant had not met its burden of establishing lack of notice of appellee's interest and that, therefore, appellee's option had priority. See, also, *Sav. & Loan Assn. v. Wehrly*, 25 Ohio Misc. 221, 263 N.E.2d 801 (1970).

State law must determine the relative property interests in this case. *Aquilino, supra*. In *Mingus v. Bell*, 148 Neb. 735, 29

N.W.2d 332 (1947), this court held, in reference to § 76-238, that "a purchaser, having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by the want of notice in his vendor." *Id.* at 737, 29 N.W.2d at 333. In this case the recording of the defendants' warranty deed prior to the seizure sale was notice to the plaintiff of their interest in the property.

The remaining question is whether the plaintiff was protected by the Internal Revenue Service's "want of notice." We think the record fails to show that the Internal Revenue Service did not have notice of the defendants' interest in the property. Since the plaintiff failed to carry his burden of proof, the judgment of the district court must be affirmed.

AFFIRMED.

HASTINGS, J., participating on briefs.

LORRETTA M. SONNTAG, APPELLEE, V. RICHARD N. SONNTAG, APPELLANT.

365 N.W.2d 411

Filed March 29, 1985. No. 84-031

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

Wesley H. Hauptman of Erickson & Sederstrom, P.C., for appellant.

Tim B. Streff and Jon S. Okun of Higgins & Okun, for appellee.

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

PER CURIAM.

Richard N. Sonntag appeals the division of property and alimony ordered in dissolution proceedings in Douglas County involving his marriage with Lorretta M. Sonntag. Richard

claims the property division and alimony are unreasonable. We affirm.

Lorretta and Richard were married in 1963, when Lorretta was 19 years of age and Richard 28. Lorretta had a high school diploma and was working full time. Richard had a bachelor of science degree. Two daughters were born of the Sonntag marriage, namely, Christine, born in 1964, and Jacqueline, born in 1965. During the marriage, Lorretta has had no employment but has raised the Sonntag children. Since 1969, Richard has been employed at Mutual of Omaha and has received periodic raises in salary to the point that during 1982 Richard received $26,020 as wages from Mutual. Richard's prospective pension from Mutual is totally funded by the company, that is, Richard makes no monetary contribution to his pension fund. The pension is vested and available to Richard if he leaves employment at Mutual.

Approximately 20 years ago, Lorretta and Richard purchased their house, a one-story ranch home in the Westgate area of Omaha, for $16,500 and accumulated various items of household furnishings and personal property, including automobiles.

On May 20, 1983, Lorretta petitioned for a dissolution of marriage. At trial on November 21, Lorretta, then 42 years of age, was employed as a bookkeeper with a net monthly wage of $731. The Sonntag children resided with their father in the family home, while Lorretta lived in an apartment and paid rent of $385 per month. Christine, 19, was in her second year at Metro Tech, and Jacqueline, 18, was working but intended to return to school. Richard's monthly net wages are $1,819.

The Sonntag real estate was appraised for trial. Lorretta's appraiser valued the property at $54,500, and Richard's at $47,000. At trial the real estate was subject to a mortgage with an unpaid balance of approximately $8,900. Richard lived in the family home and paid $192 per month on the mortgage. At one point in his testimony Richard stated he would pay $10,000 in cash as a lump sum settlement for Lorretta's equity in their house. However, if Lorretta's equity were valued in an amount greater than $10,000, Richard would pay Lorretta over a 3-year period.

A representative from Mutual testified that the present value of Richard's pension was $19,642.97. Were Richard to leave employment at Mutual at the date of trial, pension benefits would be payable at $130.25 each month for the remainder of Richard's life. If Richard continues employment at Mutual and retires at age 65, the monthly benefits will be $1,156.66.

Life insurance policies acquired had a cash surrender value of $5,600.

Lorretta's monthly expenses after separation were $1,397, including $135 per month to be set aside as an educational fund to pay tuition in obtaining an accounting degree from University of Nebraska-Omaha. Expected tuition for the accounting degree is $6,500. Richard's monthly expenses are $1,582, including the $192 monthly house payment.

In its dissolution of marriage entered December 9, the district court divided the property approximately one-half to each party. No child support was ordered. Specifically, the court ordered redemption of the cash value for the life insurance policies ($5,600), with the proceeds divided equally between the parties. Concerning the real estate, the court ordered an equal division of the equity, after deduction for expenses of sale, if the house was sold before January 1, 1985; otherwise, if there were no sale of the house, Richard must pay Lorretta a lump sum of $20,500, representing her share of the equity in the property. Upon Richard's failure to pay the $20,500 as ordered, that amount bore interest at the current rate for judgments from January 1, 1985.

Further, the court ordered that Richard pay Lorretta $9,821.45 in cash by January 1, 1985, in view of the pension at Mutual. Failure to pay such amount resulted in the assessment of interest from January 1, 1985.

Finally, the decree required Richard to pay alimony at $500 per month for 5 years, commencing January 1, 1984, and terminating on Lorretta's death or remarriage before expiration of the 5-year period.

Neb. Rev. Stat. § 42-365 (Reissue 1984) reads in pertinent part as follows:

> 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. . . .
>
> 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 other criteria enumerated in this section make it appropriate.

A court must include a pension or retirement plan as a part of the marital estate. See Neb. Rev. Stat. § 42-366(8) (Reissue 1984).

The ultimate test for a division of property, as well as alimony, is reasonableness determined by the facts of each case. See, *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983); cf. *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984). Cf., also, *Ford v. Ford, ante* p. 13, 360 N.W.2d 495 (1985). In a dissolution proceeding a trial court has broad discretion in valuing pension rights and dividing such rights between the parties. See *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981).

We have reviewed the record de novo and find the division of property and award of alimony, in accordance with the dispositions made by the trial court, are reasonable. Cf. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984).

Lorretta has not requested, and we do not award, an attorney fee for Lorretta's counsel regarding proceedings before this court.

AFFIRMED.

MARVIN W. OWEN, APPELLEE, V. DOROTHY M. OWEN, APPELLANT.

365 N.W.2d 414

Filed March 29, 1985. No. 84-211.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

LeRoy Anderson of Roeder & Anderson, for appellant.

Donald E. Rowlands II of Baskins & Rowlands, for appellee.

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

PER CURIAM.

This case is an appeal in a domestic relations proceeding.

The court has reviewed the record in this matter de novo and agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY R. WILLIAMS, APPELLANT.

365 N.W.2d 414

Filed March 29, 1985. No. 84-352.

1. **Trial: Witnesses.** The right of cross-examination is an essential and fundamental requirement of a fair trial. A defendant is entitled to engage in searching and wide-ranging cross-examination, including anything tending to affect the accuracy, veracity, or credibility of a witness.
2. **Trial: Evidence: Witnesses: Appeal and Error.** A ruling on evidence of a collateral matter but intended to affect the credibility of a witness falls within the discretion of a trial court, and absent an abuse of discretion, a trial court's ruling on such evidence is not grounds for reversal.
3. **Trial: Evidence: Witnesses.** Evidence which does not tend to impeach a witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.
4. _____: _____: _____. The test of whether a fact inquired of in cross-examination in criminal proceedings is collateral is, Would the

cross-examining party be entitled to prove it as a part of the case tending to establish his plea?

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

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

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

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

PER CURIAM.

Timothy R. Williams appeals his conviction in the district court for Douglas County for burglary, that is, breaking and entering the residence of Jasmine Davis with intent to steal property belonging to Davis. See Neb. Rev. Stat. § 28-507(1) (Reissue 1979).

Shortly before 2 a.m. on January 7, 1984, Jasmine Davis entered the front door of her residence and saw Timothy R. Williams running out the back door. Davis discovered that some of her personal property, principally clothing, was missing from her home. Davis got into her car and, while driving around the block, noticed Williams walking down the street. Davis returned to her home. Shortly thereafter, Williams appeared at Davis' house and pounded on the front door, but when Davis did not come to the door, Williams left. Around 3 a.m., Davis telephoned the Omaha Police Department and reported a burglary. During investigation by the police, Davis was uncertain about the burglar's identity but gave Williams' name as the burglar. Police took Williams into custody on January 10. After a preliminary hearing Williams was bound over to district court for a jury trial which commenced on February 10.

Before trial the prosecutor made a motion in limine as follows: "Also, I want to make a motion in limine. . . . [O]ne of my witnesses, Miss Davis, has a prior conviction for prostitution and lewd conduct, and it's irrelevant to the issues in this trial so I would make a motion in limine that that not be

brought up in the presence of the jury." Defense counsel objected, but the court sustained the motion in limine.

During the trial, Davis positively identified Williams as the burglar leaving her house through the back door. The gist of testimony from police officers was (1) Williams always denied involvement in the alleged burglary and (2) no fingerprints were obtained during investigation of the burglary.

After the State rested its case, and outside the jury's presence, defense counsel requested permission to recall Davis to ask whether as a state's witness at Williams' preliminary hearing she had testified falsely in denying she was a prostitute. Defense counsel intended to question Davis about her sworn denial of prostitution to impeach her credibility by showing "the fact that she had perjured herself" at the preliminary hearing. The prosecutor objected and claimed the proposed use of Davis' prior testimony was irrelevant to the present prosecution because "We're not trying a prostitution case; we're trying a burglary case." The court denied the request to recall Davis for the cross-examination proposed. Williams did not testify, and rested his case without further evidence. The jury found Williams "guilty of burglary."

As his only assignment of error, Williams contends that the trial court's refusal to permit impeachment of Davis' credibility by showing her falsehood at the preliminary hearing constituted reversible error as an abuse of discretion.

The fundamental question to be resolved is whether use of Davis' previous testimony at the preliminary hearing was a proper method of testing credibility in view of Rule 608(2) of the Nebraska Evidence Rules, which provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness, or (b) concerning the character for truthfulness or untruthfulness of another witness as to which character the

witness being cross-examined has testified.

Neb. Rev. Stat. § 27-608(2) (Reissue 1979).

It is clear that defense counsel fully informed the trial court about the reason for recalling Davis. See Rule 103(1)(b), Nebraska Evidence Rules, Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1979).

There are two aspects to the question raised by Williams: (1) Was the proposed cross-examination of Davis a permissible means to attack the witness' credibility? (2) Did the trial court abuse its discretion and thereby commit reversible error by prohibiting the proposed cross-examination?

The right of cross-examination is an essential and fundamental requirement of a fair trial, and a defendant is entitled to engage in searching and wide-ranging cross-examination, including anything tending to affect the accuracy, veracity, or credibility of a witness. *State v. Thaden*, 210 Neb. 622, 316 N.W.2d 317 (1982). However, a ruling on evidence of a collateral matter but intended to affect the credibility of a witness falls within the discretion of a trial court, and absent an abuse of discretion, a trial court's ruling on such evidence is not grounds for reversal. *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980). See, also, *State v. King*, 197 Neb. 729, 250 N.W.2d 655 (1977).

It is apparent that the trial court and the prosecutor viewed any reference to Davis' testimony at Williams' preliminary hearing as an attempt to impeach Davis' credibility by virtue of her being a prostitute, a misdemeanor prohibited by Neb. Rev. Stat. § 28-801 (Reissue 1979). Ordinarily, a prostitution offense does not substantially impugn credibility, since such conduct does not necessarily entail dishonesty or false statement and, therefore, is not probative of untruthfulness. See *State v. Bittner*, 188 Neb. 298, 196 N.W.2d 186 (1972). See, also, *United States v. Cox*, 536 F.2d 65 (5th Cir. 1976); *United States v. Mansaw*, 714 F.2d 785 (8th Cir. 1983).

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. See, *State v. Claire*, 193 Neb. 341, 227 N.W.2d 15 (1975); *State v. Wilson*, 174 Neb. 86, 115 N.W.2d 794 (1962). The test of whether a fact inquired

of in cross-examination in criminal proceedings is collateral is, Would the cross-examining party be entitled to prove it as a part of the case tending to establish his plea? See *State v. Zobel*, 192 Neb. 480, 222 N.W.2d 570 (1974).

Davis' prostitution was not a material point in any proceedings against Williams, including the preliminary hearing and the jury trial. Prostitution on the part of Davis was a collateral matter and not substantive proof of any fact relative to the breaking and entering charged against Williams. If evidence of Davis' prostitution was irrelevant in Williams' trial, as we have previously so held in *State v. Bittner, supra*, Davis' denial of prostitution was, likewise, irrelevant. The fact that Davis' false denial may have occurred under oath during a preliminary hearing does not alter our conclusion that reference in any form to Davis' alleged prostitution was properly excluded by the trial court as an attempted inquiry into a collateral matter. To allow Williams to impeach Davis by reference to her testimony at the preliminary hearing is to allow Williams to do indirectly what he could not do directly during his trial. This we cannot permit. There was no abuse of discretion by the trial court.

AFFIRMED.

SHANAHAN, J., dissenting.

The issue is prevarication, not prostitution.

"The character of a witness for truthfulness or mendacity is relevant circumstantial evidence on the question of the truth of particular testimony of the witness." McCormick on Evidence § 41 at 89 (E. Cleary 3d ed. 1984). Therefore, Rule 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1979), permits cross-examination through use of a specific instance of a witness' conduct to demonstrate the truthful or untruthful character of the witness. Cf., *United States v. Nogueira*, 585 F.2d 23 (1st Cir. 1978); *United States v. Estell*, 539 F.2d 697 (10th Cir. 1976) (application of Fed. R. Evid. 608(b)). Under Rule 608(2) a cross-examiner can question a witness about a specific instance which adversely reflects on the witness' character for truthfulness. Previous misconduct may discredit a witness, when such misconduct has probative value that the witness is not one to be believed.

In determining whether to allow cross-examination to impeach credibility through use of a specific instance of a witness' misconduct, the following factors should be considered in measuring the scope of cross-examination: (1) The relevance of the misconduct to a witness' truthfulness; (2) The importance of the testimony to the cross-examiner's case; and (3) The danger of prejudice, confusion, or delay raised by the evidence intended to be adduced in cross-examination. *United States v. Leake*, 642 F.2d 715 (4th Cir. 1981); McCormick on Evidence § 42 (E. Cleary 3d ed. 1984). Some other factors affecting cross-examination are found in Rule 611, Neb. Rev. Stat. § 27-611 (Reissue 1979) (mode of interrogation during cross-examination), and Rule 403, Neb. Rev. Stat. § 27-403 (Reissue 1979) (overriding protection afforded by the balancing test regarding relevancy and unfair prejudice), of the Nebraska Evidence Rules.

Was testifying falsely under oath relevant to Davis' truthfulness? A witness' response to the question whether that witness has told the truth on a previous occasion could well be probative of the witness' character for truthfulness or untruthfulness. *United States v. Fortes*, 619 F.2d 108 (1st Cir. 1980). See, also, *United States v. Cole*, 617 F.2d 151 (5th Cir. 1980); 3A J. Wigmore, Evidence in Trials at Common Law § 982 (J. Chadbourn rev. 1970). Disdain for truth in sworn testimony and deliberate disregard of obligatory veracity consequent to an oath are probative of a witness' untruthfulness.

Was existence of Davis' previous falsehood important to Williams' case? Davis was the State's principal witness, the only eyewitness, and Williams' accuser. Existence of incriminating fact or inference was related to Davis' credibility, perhaps even in direct proportion. As a very practical matter, conviction or acquittal depended on the jury's assessment of Davis' credibility.

When placed on a balance, the final factor—the danger of prejudice, confusion, or delay—is outweighed by the importance of cross-examination in the present case. If Davis admitted she had testified falsely at Williams' preliminary hearing, impeachment of her credibility would have been

finished and the trial would have moved on, with the jury taking the admission of falsehood into account when evaluating Davis' credibility. No minitrial or further questioning on Davis' credibility was needed if the specific instance of Davis' previous falsehood was conceded. On the other hand, were Davis to deny her previous falsehood, there still would have been no great amount of time lost, because Williams was not entitled to present extrinsic evidence in the form of rebuttal evidence to contradict Davis' denial of falsehood. Rule 608(2). See, also, *State v. Tainter*, 218 Neb. 855, 359 N.W.2d 795 (1984). However, in Williams' case the trial court prevented Williams from even asking the question about Davis' previous falsehood. What would have been Davis' response is absolute speculation.

It is "extrinsic evidence" on credibility that is prohibited by Rule 608(2), not cross-examination to impeach credibility by an attack from the appropriate base, namely, evidence probative of untruthfulness. When we enter an era wherein an oath of a witness becomes just whimsical words in some perfunctory promise to tell the truth, perhaps then, and only then, will a witness' falsehood under oath be an insignificant index to test or doubt a witness' credibility. In prohibiting Williams' cross-examination into Davis' character for veracity, the trial court abused its discretion. Williams was prevented from exercising his right of cross-examination as a fundamental requirement in a fair trial. See *State v. Thaden*, 210 Neb. 622, 316 N.W.2d 317 (1982). A new trial should be granted.

WHITE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DAVID E. WARE, APPELLANT.

365 N.W.2d 418

Filed March 29, 1985. No. 84-513.

1. **Arrests: Probable Cause.** If probable cause to arrest without a warrant exists, a person may be arrested within such person's home, provided the officer's entry was lawful, such as for the purpose of executing a valid search warrant.
2. _____: _____. The test of probable cause for a warrantless arrest is whether, at the moment of arrest, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the individual had committed or was committing an offense.
3. **Constitutional Law: Search and Seizure.** The fourth amendment prohibition against unreasonable searches and seizures is inapplicable to the conduct of private parties not acting as agents of law enforcement authorities.

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

James Martin Davis, for appellant.

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

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

HASTINGS, J.

Following waiver of a jury, the defendant was convicted by trial to the court of first degree murder. He has appealed and assigns as errors that (1) the court erred in admitting into evidence a statement of the defendant obtained as a product of an illegal arrest and (2) the court erred in admitting into evidence certain items of evidence unlawfully seized from the defendant without a search warrant. We affirm.

On December 20, 1983, Charles Malstead, owner of Malstead Music Center in Omaha, was shot and killed while in his store. At approximately 6:30 p.m. the victim was discovered face down behind the counter in his music shop. During the course of the police investigation, it was discovered that the victim's wallet, keys, and automobile were missing.

Later that evening, the defendant approached a police officer on the grounds of Boys Town and indicated that he had

left his car in the parking lot. This automobile, which the defendant claimed was his, was the one belonging to the victim.

The following day, December 21, the police were notified by the owner of Brown's Music Store that an individual had traded in two new Vantage guitars sometime after 6 p.m. the previous day. The guitars were of a type which was sold locally only at the Malstead Music Center. This individual said he had purchased the guitars from Malstead's. Both the owner and an employee identified a picture of David Ware, the defendant, as being the person who traded in the guitars. A latent print from one of the guitars was identified as belonging to the defendant.

Also on December 21 the police went to Boys Town to pick up the vehicle registered there by the defendant and belonging to the victim. Officers then went to the defendant's living quarters at Boys Town and spoke with his family teachers, who resided with him and other students. The teachers stated that Ware had been dropped off at the bus line at 9 a.m. the previous day and did not return until approximately 10 p.m.

After being told that the defendant was a suspect in a homicide case, one of the teachers advised that he makes regular checks of the residents' rooms, and he wanted to check Ware's room. The officers waited until the teacher returned, at which time he gave them a suicide note which was found in a wastebasket.

Based on all of this information, the police obtained a search warrant for the home owned by the defendant's mother, which was defendant's city residence. Upon their arrival at this home on December 21, the defendant himself answered the officers' knock. After identifying themselves and advising that they had a search warrant, the officers placed David Ware under arrest for first degree murder. The defendant was taken to the police station, and after having been read his rights and interrogated, he confessed to shooting and robbing Charles Malstead. The defendant then led the police to the area in which the murder weapon was thrown, and the gun was subsequently recovered there.

The defendant's first assignment of error is based on the premise that he was illegally arrested. This argument takes two forms: (1) The arrest, in his home without an *arrest* warrant, is

in violation of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); and (2) The arrest was without probable cause.

In *Payton v. New York, supra*, the U.S. Supreme Court ruled that a completely warrantless, nonconsensual entry into one's home for the purpose of making a felony arrest was unconstitutional in the absence of exigent circumstances. The Court found the following reasoning to be persuasive:

> "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present."

445 U.S. at 589 (quoting *United States v. Reed*, 572 F.2d 412 (2d Cir. 1978), *cert. denied* 439 U.S. 913, 99 S. Ct. 283, 58 L. Ed. 2d 259).

In examining fourth amendment rights, the Court noted substantial similarities in the intrusiveness of an entry of the home to search for property and to search for a person.

> But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line

> at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

445 U.S. at 589-90. Clearly, the emphasis is upon the breach of privacy entailed in entering an individual's home.

In *Payton* the Court considered a police entry into the defendant's home for the purpose of arresting him. They had neither an arrest warrant nor a search warrant, and no exigent circumstances were presented. The Court found this to be an unacceptable invasion of the sanctity of the defendant's home, stating that the defendant's "threshold may not reasonably be crossed without a warrant." 445 U.S. at 590.

In the case at bar the facts are distinctly different in that the Omaha police in fact had a warrant to enter the home. The search warrant, which was not challenged and is presumably valid (see, *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977)), entitled the police to search the house for instrumentalities and fruits of the Malstead homicide. Thus, the police lawfully crossed the defendant's threshold, and the concerns of the *Payton* court have been met.

Several jurisdictions have considered this question and have stated that an arrest in the home during the execution of a valid search warrant is legal if based on probable cause. In *People v. Kite*, 97 Ill. App. 3d 817, 423 N.E.2d 524 (1981), an Illinois appellate court reviewed a situation where the police executed a valid search of the defendant's home and, upon entering the premises, found the defendant sleeping and arrested him. The appellate court evaluated the facts in light of the decision in *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

> It is apparent that the [*Payton*] court emphasized that a warrantless entry was unreasonable. In the case at bar, the police entered [the defendant's] residence with a search warrant which affords the same justification for their entry into his residence as would an arrest warrant. (*Payton v. New York*.) [The defendant] was found in the house after a lawful entry. The officers had probable cause to believe that [he] had committed a felony . . .

> consequently, his arrest was lawful . . . . We therefore conclude that the trial court erred in finding that [the defendant's] arrest without an arrest warrant was not a lawful arrest. The police had a right to enter [his] residence; and once lawfully inside, they had a right to arrest him.

97 Ill. App. at 827, 423 N.E.2d at 531.

A California appellate court made a similar finding in *People v. McCarter*, 117 Cal. App. 3d 894, 173 Cal. Rptr. 188 (1981). The court stated: "Given probable cause to arrest . . . an officer may make an arrest outside the home without judicial authorization. If officers have authorization to enter the home, an arrest inside is of no greater constitutional significance than an arrest elsewhere." *Id.* at 908, 173 Cal. Rptr. at 196.

Also, the Supreme Court of Minnesota has noted, in dicta, that the *Payton* rationale is inapplicable to an arrest made during the execution of a valid search warrant of a residence. See *State v. Galde*, 306 N.W.2d 141 (Minn. 1981). Consequently, the first prong of the appellant's argument is without merit.

The second prong of the argument is that the police did not have probable cause to arrest Ware.

> In Nebraska, the test of probable cause for a warrantless arrest is whether, at the moment of arrest, the facts and circumstances within 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 commiting [sic] an offense.

State v. Tipton, 206 Neb. 731, 734-35, 294 N.W.2d 869, 872 (1980). See, also, *State v. Harrison*, 218 Neb. 532, 357 N.W.2d 201 (1984); Neb. Rev. Stat. § 29-404.02 (Reissue 1979).

In the case at bar the police knew that the defendant had possession of the victim's car on the evening of the murder. They also knew that Ware had traded in two new guitars, sold only at the victim's store, shortly after the murder took place. Thus, the defendant was directly linked to the scene of the crime on the day of the crime. *Tipton* requires that the information be reasonably trustworthy and such that a prudent person would

believe that the individual had committed a crime. The information within the officers' knowledge was sufficient to create such a belief; consequently, probable cause existed to arrest Ware.

The second assignment of error concerns searches of the defendant's part-time residence at Boys Town, conducted by his family teachers. The first search, as previously related, resulted in the finding of a suicide note. A second search made later that day, December 21, after the police had gone, uncovered the keys to the victim's car. These keys were given to the Omaha police the following day, and the police used them to open the trunk of the victim's car. Found inside the trunk were several guitars, traced to Malstead Music Center and Brown's Music Store, and the victim's billfold.

Although these items apparently were not introduced in evidence, certainly there was testimony concerning them which would tend to link the defendant with the murder. In any event, the defendant claims that these items are the fruits of an illegal, warrantless search.

It is clear that the fourth amendment prohibition against unreasonable searches and seizures is inapplicable to the conduct of private parties. *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). See, also, *State v. Skonberg*, 194 Neb. 550, 233 N.W.2d 919 (1975); *State v. Gundlach*, 192 Neb. 692, 224 N.W.2d 167 (1974).

The appellant contends that the family teachers were acting on behalf of the police, as their agents, and consequently they were not acting as private parties. This is asserted by the defendant without any reference to the record. The appellee's brief references the testimony of one of the police officers involved, given at the suppression hearing:

> He [a family teacher] asked us about the [defendant's] room, and we were talking that maybe we should get a search warrant for the room, his room where he was staying along with two other boys. And they stated, well, that it was their policy to search rooms when boys were in trouble, and we told them if they wanted to and it was their policy, they could. So they did.

The defendant never disputed, and thus it is uncontested,

that a policy existed for family teachers, who are Boys Town employees, to search the rooms of the residents. It is also undisputed that the family teacher *offered* to search the room and was not asked.

In *Gundlach, supra*, this court addressed an analogous situation. A manager for Omaha Airplane Supply had information that goods stolen from the company were being stored in a garage. He contacted the police, who informed him they would not act without a criminal complaint. They suggested he check his inventory to ascertain if property was missing, and indicated that he should contact them if he found something. The manager went to the garage, which was opened for him by the landlady, and found stock items. He reported his findings to the police and stated that he did not know definitely if his company was short on inventory. The police subsequently obtained a search warrant and found stolen items, some belonging to Omaha Airplane Supply. This court held there was no violation of the defendant's fourth amendment rights as "there was no police participation or direction in [the] search." 192 Neb. at 695, 224 N.W.2d at 170. The court stated:

> Unless a private citizen in making a search is acting as an agent for the police, his acts may not be attributed to them. [The manager] was acting in the interests of his employer and not under the direction of the police. At no time prior to the search pursuant to a valid warrant did any police officer enter the garage. The facts do not constitute an agency or representative situation as urged by the defendant.

192 Neb. at 695-96, 224 N.W.2d at 170.

In the defendant's case there is nothing to indicate that the police participated in or directed the actions of the family teachers. To the contrary, it was the Boys Town employees who asserted their responsibility and willingness to search Ware's room. The uncontroverted testimony is that the teachers instigated and carried out the searches, and the only police response was that "if they wanted to and it was their policy, they could."

In light of these facts there was no agency relationship created by the police. Therefore, the searches of the defendant's

residence in Boys Town were conducted by private individuals not subject to the warrant requirement embodied in the fourth amendment.

The defendant's assignments of error are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL P. BENNETT, APPELLANT.

365 N.W.2d 423

Filed March 29, 1985. No. 84-585.

1. **Speedy Trial.** It is the State's burden to prove by a preponderance of the evidence that there has been compliance with Neb. Rev. Stat. § 29-1207 (Reissue 1979).
2. _____. One cannot take advantage of a delay in being brought to trial where he is responsible for the delay either by action or inaction.
3. **Aiding and Abetting.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
4. **Convictions: 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 trier of fact. The verdict 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 Douglas County: JOHN E. CLARK, Judge. Affirmed.

Donald W. Kleine, for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Michael P. Bennett, was convicted, pursuant to a jury verdict, of burglary. In this appeal he urges

that the conviction should be set aside as (1) he was denied his right to a speedy trial and (2) the verdict is clearly wrong. The record supports neither contention, and we accordingly affirm.

This proceeding began with the filing of an information on February 10, 1983. The first trial thereon resulted in a mistrial on July 22, 1983. A new trial was scheduled for October 5, 1983, for which Bennett did not appear. As a consequence, a warrant was issued resulting in his arrest on April 8, 1984. The trial resulting in the aforesaid conviction commenced on June 4, 1984, at which time Bennett's motion for dismissal on the ground that he was denied a speedy trial was overruled.

Neb. Rev. Stat. § 29-1207 (Reissue 1979) requires that every person informed against be brought to trial within 6 months thereof. In the case of a mistrial such 6-month period is deemed to begin on the date the mistrial is ordered. This statute excludes from the computation of the 6-month period any "delay resulting from the absence or unavailability of the defendant."

Neb. Rev. Stat. § 29-1208 (Reissue 1979) mandates the absolute discharge of an accused if compliance is not had with § 29-1207.

It is clear that it is the State's burden to prove by a preponderance of the evidence that there has been compliance with § 29-1207. See, *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982); *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982); *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

Although Bennett claims that he was available at all times and simply was not notified of the trial scheduled for October 5, his then trial attorney testified to the contrary. The trial attorney testified that she had been contacted by the trial judge on October 3, 1983, concerning the scheduling of a trial. She had a conference with Bennett in her office on that very same day, at which a proposed plea bargain was presented to him. At that time he indicated he would come in later to accept the bargain but wanted to talk it over with his girl friend. He did not return, the trial judge scheduled the October 5 trial, and the attorney left a message advising Bennett of that fact at his mother's house, where she had been told to call him. Bennett called his attorney's office on October 6, 1983, and was advised that a warrant had been issued for his arrest because of his

failure to appear for trial as scheduled. His attorney had at least two subsequent conversations with Bennett, at which she advised him to surrender to the police.

The trial attorney's testimony fulfills the burden the State was required to meet in order to excuse the delay from October 5, 1983, to April 8, 1984, because of the "absence or unavailability of the defendant." Subtracting that period results in a trial within the time requirement imposed by § 29-1207.

Bennett places heavy reliance on *State v. Beck, supra*, wherein we held that where there was no evidence the defendant had been unavailable and no evidence he had ever, either personally or through counsel, been notified to appear, the State had failed to meet its burden. That simply is not the situation presented by this case. Here, there is evidence, albeit contradicted, that Bennett was notified by the means he had requested but nonetheless failed to appear for trial. The trial judge listened to the evidence and so found. In *Beck* we said: "We can accord no weight to findings which find no support in the evidence." 212 Neb. at 704, 325 N.W.2d at 151. Here, the finding of the trial court is supported by the record. We can and do accord weight to that finding. Rather than a situation such as presented in *Beck*, this case falls within the rule which states that one cannot take advantage of a delay in being brought to trial where he is responsible for the delay either by action or inaction. *State v. Craig, ante* p. 70, 361 N.W.2d 206 (1985).

There being no merit to Bennett's first argument, we turn to his second.

The manager of the Wayside Inn Motel in Omaha, Nebraska, testified that around 8 to 8:15 in the evening of February 1, 1983, he was watching television in the room in which he and his wife lived. He heard a noise outside and, after opening the front door, observed a maroon four-door Cadillac out in front. He then walked out into the walkway in front of his second-floor room and saw two men apparently coming out of the meeting room directly below. Since the walkway hung out past the door below, he did not actually see the two come out of the door. One of the men he saw was carrying a television set which was partially covered by a sheet. After the manager yelled at them the man carrying the set threw it onto the back seat of the

Cadillac and got into the back seat beside it. The other man got in the front passenger's seat. A third man who had remained behind the wheel then drove away. The manager got the license number, and his wife telephoned the police, giving them a description of the car and its license number.

Upon investigation the manager discovered the door to the meeting room, which was last previously checked and found to be locked at 2:30 p.m., was now ajar and a television set which had been on a stand inside the door was gone. Although there were no signs of forced entry into this room, footprints in the freshly fallen snow indicated that the two men had come out of it.

The next morning, when the maids reported to work, it was discovered that the maids' supply room, eight rooms north of the meeting room, had been broken into. The door to this room had been forcibly opened and the doorjamb torn out. The master keys fitting every room and kept in the maids' room were missing.

A police officer testified that at approximately 8:25 on the evening of February 1, he received a radio broadcast describing the Cadillac and giving the license number. At 8:30 he spotted the car and followed it, but did not try to stop it until another patrol car arrived. The three male occupants of the car were then apprehended. One was identified as Bennett and the others as Ernest Tanner and Kevin Floyd. No television sets were found by the police in the Cadillac, but a bag containing various tools was found in the back seat.

At trial Tanner, having previously pled guilty to a burglary charge arising out of the same incident, became a witness against Bennett. Tanner was the owner, and had been the driver, of the Cadillac. He testified that he picked up Bennett about 7 p.m. on February 1, 1983. Floyd, who had been picked up after Bennett, began talking about stealing a television set. Tanner and Bennett, sitting in the front seat, did not join in this conversation. Floyd directed Tanner to pull into the Wayside Inn. Tanner realized that the purpose of going to the Wayside Inn was to allow Floyd to steal a television set. Floyd then left the car, returning in about 20 minutes carrying a television set that he put in the back seat. Floyd then returned to the same

room from which he had just carried the television set and called for Bennett. In response Bennett got out of the Cadillac for the first time. Tanner at first testified that Bennett had only stepped out of the car for a "split second" before someone began to yell, and then got back in. When confronted with the testimony he had given at Bennett's first trial, Tanner admitted that Bennett was gone for approximately 5 minutes, but he did not see whether Bennett went into the meeting room. Tanner thought Floyd was the one carrying the second television set back. Tanner's testimony in Bennett's earlier trial was that both Bennett and Floyd had handled the television sets, whereas his later testimony was that only Floyd had touched them.

According to Tanner, the three, after leaving the motel, stopped behind an apartment complex where Floyd left the television sets so that if they were stopped by the police, they would not have the stolen property with them. The police did stop and arrest them shortly thereafter. That same evening, Tanner gave a statement and showed the police where the television sets and the sheet had been left. The apartment manager did not realize two sets were stolen until the police informed him that two had been recovered.

Bennett testified that the reason Floyd was picked up was so they could go to work that evening. Bennett also stated he was sitting in the front seat on the passenger's side, and he was not paying much attention to the ongoing conversation because he was tired. He realized Floyd was going to do something wrong, but Bennett never took part in the conversation.

According to Bennett, after Floyd took the first television set, Floyd went back into the room and then told Bennett in a threatening manner to "come here." After Bennett "walked to the door" Floyd instructed Bennett to take one of the television sets, but Bennett did not comply and instead headed for the car, with Floyd following behind.

Bennett also testified that they then drove to the rear of an apartment complex where Floyd left the two television sets after Bennett refused to assist him. Once arrested, Bennett denied any knowledge of the burglary, since he was afraid Floyd would harm him if he divulged anything.

The two substantive statutes involved are Neb. Rev. Stat.

§§ 28-507 and 28-206 (Reissue 1979). Section 28-507(1) reads: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Section 28-206 provides: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982); *State v. Dirgo*, 196 Neb. 36, 241 N.W.2d 351 (1976); *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976).

Moreover, 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984).

Tanner's testimony from Bennett's first trial, stating that Bennett had handled the television sets, was admissible as substantive proof in his second trial. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979) states:

> A statement is not hearsay if: (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

The evidence was indeed sufficient to enable the jury to find that Bennett had assisted in the commission of the burglary and

therefore had aided and abetted it.

The judgment of the trial court is entirely correct and is therefore affirmed.

AFFIRMED.

THEODORE PROSOSKI AND JAMES DUBAS, APPELLANTS, V. COMMERCIAL NATIONAL BANK AND TRUST COMPANY, GRAND ISLAND, NEBRASKA, A CORPORATION, ET AL., APPELLEES.

365 N.W.2d 427

Filed March 29, 1985. No. 84-685.

1. **Vendor and Vendee: Bankruptcy.** A seller of goods may not reclaim such goods from one who has been adjudicated a bankrupt unless such seller demands in writing reclamation of such goods before 10 days after receipt of such goods by the bankrupt.
2. **Conversion: Pleadings.** In an action for conversion the plaintiff must allege facts showing a right to immediate possession of the property at the time of the conversion.
3. **Pleadings: Demurrer.** Where a petition fails to plead actionable facts, it is subject to a general demurrer.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed.

Philip T. Morgan of Morgan & Morgan, for appellants.

Patrick L. Neid of Lauritsen, Baker & Brownell, for appellee Commercial National Bank.

Judith A. Spindler of Dixon Dixon & Minahan P.C., for appellee Bank of Burwell.

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

PER CURIAM.

Theodore Prososki and James Dubas appeal from an order entered by the district court for Garfield County, Nebraska,

dismissing their petition. We affirm.

The appellants filed a petition in the district court for Garfield County, Nebraska, alleging that they had delivered 494,230 pounds of popcorn to Tyler Popcorn Co., Inc., of Chapman, Nebraska (Tyler), and at that time were advised by Tyler that it could not pay for the delivered popcorn. Appellants further allege that instead of removing the popcorn, they left it in storage with Tyler and received a receipt from Tyler.

The petition then alleges that Tyler filed a petition in bankruptcy and was thereafter adjudicated a bankrupt. Appellants further allege that when they were unable to obtain possession of the popcorn from the trustee in bankruptcy by merely showing their receipt, they filed an adversary proceeding with the bankruptcy court. The proceeding was dismissed by the bankruptcy court on the basis that the appellants did not have standing to file such a proceeding. Appellants' petition then alleges that the bankruptcy court authorized and directed the trustee to pay out the proceeds of the sale of the assets of Tyler, including the popcorn previously delivered by appellants, to the Commercial National Bank and Trust Company of Grand Island, Nebraska, and the Bank of Burwell, Burwell, Nebraska. By their prayer appellants seek to recover from the appellee banks $64,249.90, the amount they would have received from the sale of the popcorn to Tyler.

To this petition each of the appellees filed a motion to make more definite and certain, which was sustained by the district court. The appellants then filed an amended petition which essentially repeated all of the allegations of the original petition except that the amended petition contained certain additional facts added pursuant to the motions to make more definite and certain. To this amended petition the appellees filed demurrers. The district court sustained the demurrers, and when appellants refused to plead further, the district court sustained motions filed by the appellees asking to have the action dismissed.

To suggest that the amended petition would not serve as a model for pleading in cases of this nature is to give the petition all of the benefits which can be granted to it. A reading of the petition fails to disclose under what legal theory the appellants

sought recovery against the appellees. The petition contains no allegations concerning fraud. We must therefore conclude that if appellants alleged any cause of action, it was in some manner an action seeking to recover the value of the popcorn on a theory of conversion. As we have already indicated, it is not easy to reach that conclusion by a simple reading of the amended petition. We do so, however, because even if we assume the amended petition was based upon a theory of conversion, the amended petition was subject to a demurrer. A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights. See *B. E. Implement Co. v. Valley Farm*, 216 Neb. 269, 343 N.W.2d 892 (1984). In the instant case, however, the amended petition alleges that it was the trustee in bankruptcy who sold the property and delivered the proceeds to the appellees herein and that such action was done pursuant to order of the bankruptcy court. That would not appear to constitute an act of conversion by the appellees. They are simply the recipients of a court-directed payment.

Furthermore, if the bankruptcy court was in error either in refusing to allow appellants to file an adversary proceeding or in ordering the proceeds of the sale paid to the two banks, the appropriate procedure to test those questions was by appeal to the U.S. District Court for the District of Nebraska and not by filing an independent action in a state district court. See 28 U.S.C. § 1334 (1982).

The most serious defect, however, in appellants' amended petition is its failure to allege facts sufficient to bring the appellants within the provisions of 11 U.S.C. § 546(c)(1) (1982) or the law regarding conversion. Those subsections provide:

> (c) The rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory right or common-law right of a seller, in the ordinary course of such seller's business, of goods to the debtor to reclaim such goods if the debtor has received such goods while insolvent, *but*—
>
> (1) such a seller may not reclaim any such goods unless such seller *demands in writing* reclamation of such goods before *ten days* after receipt of such goods by the debtor.

(Emphasis supplied.)

There is no allegation in the amended petition that appellants made demand in writing within the 10-day period. Having failed to make such demand, it is clear that the property became the property of the bankrupt estate and subject to the orders of the bankruptcy court. In *Pinkerton v. Leonhardt*, 184 Neb. 430, 168 N.W.2d 272 (1969), we said: "In an action for conversion the plaintiff must allege facts showing a right to immediate possession of the property at the time of the conversion." (Syllabus of the court.) Where, as here, a petition fails to plead actionable facts, it is subject to a general demurrer. See, Neb. Rev. Stat. § 25-806 (Reissue 1979); *Johnson v. Ruhl*, 162 Neb. 330, 75 N.W.2d 717 (1956). The district court correctly sustained the demurrers filed by the appellees and, when appellants refused to plead further, properly sustained the motions to dismiss thereafter filed by the appellees.

AFFIRMED.

GRANT, J., not participating.

SHANAHAN, J., concurs in the result.

YANKTON PRODUCTION CREDIT ASSOCIATION, A CORPORATION, APPELLEE, V. CHRIS LARSEN ET AL., APPELLANTS.

365 N.W.2d 430

Filed April 5, 1985. No. 83-734.

1. **Summary Judgment.** A summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to a judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment the court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence.
3. **Contracts: Breach of Contract: Forbearance: Estoppel.** A promise which the promisor should reasonably expect to induce action or forbearance on the part

of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

4. **Contracts: Promissory Notes: Consideration.** In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
5. **Uniform Commercial Code: Contracts.** There is a good faith obligation in the performance or the enforcement of every contract or duty within the Nebraska Uniform Commercial Code. Neb. U.C.C. § 1-203 (Reissue 1980).

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded for further proceedings.

Patrick J. Birmingham of Birmingham & Scholer, for appellants.

Robert E. Otte of Jewell, Otte, Gatz & Collins, and Steven M. Johnson of Brady, Kabeiseman, Reade, Abbott & Johnson, for appellee.

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

WHITE, J.

The defendants, Chris and Ardith Larsen, husband and wife, appeal from the order of the trial court sustaining the motion of the plaintiff, Yankton Production Credit Association (PCA), for a summary judgment on the defendants' counterclaim for breach of contract.

The PCA initiated the litigation by filing a replevin action against the Larsens, claiming that the defendants had defaulted in payments due to the plaintiff and that the defendants owed the PCA the principal sum of $522,290.95, together with interest. The parties stipulated that judgment be entered in favor of the PCA and that the Larsens reserved their right to file counterclaims.

The amended counterclaim later filed by the defendants alleged that the plaintiff refused to advance them the balance of three separate loans agreed to by the parties and that the plaintiff breached its duty to deal in good faith. The counterclaim also alleged that the PCA expressly and impliedly

represented to the Larsens that it would provide the Larsens a continuing line of credit to finance an expansion of their operation, livestock inventory, and operating expenses.

The plaintiff filed an answer expressly denying that there was an agreement to advance to the defendants any particular sum of money and alleging that any advancement was at the option of the plaintiff. The plaintiff moved for summary judgment and offered depositions of the defendants in support of the motion. The district court ruled in favor of the plaintiff and found that there was no contractual obligation on behalf of the PCA to loan any specific amount of money to the defendants and that any advances were at the sole discretion of the PCA.

In their appeal the defendants allege three assignments of error. The first two assignments may be combined in that they generally allege that the trial court erred in interpreting the note, security agreement, and loan application to mean that the PCA was entitled to advance to the Larsens unreimbursed commitments at its sole discretion. The third assignment of error alleges that the trial court erred in finding that there existed no genuine issue of material fact and that the PCA was entitled to a summary judgment. We reverse and remand for the reasons hereinafter set forth.

The Larsens own and operate a large farm in Knox County, Nebraska. To facilitate an expansion of their livestock breeding operation, they commenced borrowing money from the PCA on April 7, 1978, and proceeded to finance their entire farming and ranching operation through the PCA. At that time they requested $821,982.37 and executed a loan application, security agreement, and promissory note. The loan agreement in each of the loan applications that the Larsens signed contained the following provisions:

> *To accept advances of loan proceeds to be made at the option of the Association* and to pay interest (which may be variable) on such advances at a rate(s) provided in promissory note(s) to be executed by the undersigned in a form requestd [sic] by the Association from the date of the advance(s) until paid.
>
> That the Association may disburse from the proceeds of the loan the amount required to (1) purchase Class B

> stock; (2) pay the cost and expense incident to the making of the loan; (3) pay all prior liens on the property offered as a security; (4) pay such other obligations as are listed in schedule "Purpose of Loan" in this application; (5) *and to disburse any and all other proceeds to the undersigned in the Bank of Verdigre . . . Acct. #277-088.*

(Emphasis supplied.) The security agreements that the Larsens signed contained the following provision:

> It is understood and agreed between the parties hereto that nothing herein contained *shall be construed to obligate the Secured Party to make loans or advances to the Debtor and that the sole purpose of this instrument is to provide collateral security for presently existing indebtedness and loans and advances which in the absolute discretion of the Secured Party, may be made concurrently or hereafter to the Debtor.*

(Emphasis supplied.) The promissory notes did not contain any language purporting to limit the obligation of the PCA to advance funds at its option.

The initial request for $821,982.37 was approved and the money was released by the PCA as the Larsens needed it. Initially, this arrangement was satisfactory to the Larsens. On January 10, 1980, the Larsens executed and delivered to the PCA a promissory note in the sum of $737,000, of which $570,000 was for the purpose of purchasing livestock and approximately $167,000 was for operating expenses. From January 10, 1980, until the end of April 1980, the PCA provided the Larsens with $251,382 of the $570,000 earmarked for purchasing livestock. The PCA thereafter refused to loan the Larsens the remainder of the previously committed $570,000 for livestock inventory. This amounted to approximately $318,618. Consequently, the defendants could not buy the livestock needed to fully utilize their expanded operation and generate the necessary profits to make the payments on their debt. On January 6, 1981, the PCA agreed to loan the Larsens $362,825. The Larsens executed a promissory note and received $154,975 of the total loan amount. The PCA refused to advance the remaining amount of $207,850 to the Larsens. Finally, on May 29, 1981, the PCA agreed to loan

$10,000 to the Larsens. Later, they refused to advance the Larsens $5,527 of this agreed-upon amount. The Larsens claim that the failure of the PCA to loan them the remainder of the agreed-upon loan amounts cost them $650,000 in lost profits.

A summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to a judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Witherspoon v. Sides Constr. Co., ante* p. 117, 362 N.W.2d 35 (1985); *Cummings v. Curtiss, ante* p. 106, 361 N.W.2d 508 (1985); *Gilbreath v. Ridgeway*, 218 Neb. 822, 360 N.W.2d 474 (1984); *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984); *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983).

Upon a motion for summary judgment the court examines the evidence to discover if any real issue of fact exists. We are required, as was the trial court, to take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Piper v. Hill*, 185 Neb. 568, 177 N.W.2d 509 (1970); *Bank of Valley v. Shunk*, 208 Neb. 200, 302 N.W.2d 711 (1981); *McHenry v. First Nat. Bank*, 216 Neb. 580, 344 N.W.2d 652 (1984); *Strong v. K & K Investments*, 216 Neb. 370, 343 N.W.2d 912 (1984); *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984). Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Bank of Valley, supra.*

Upon our review of the record and in light of the above standard, we find at least two genuine issues of material fact in the defendants' counterclaim. First, there is a factual issue as to whether the PCA made a promise to the Larsens to finance the expansion of their livestock feeding operation with its increased working capital requirements and, if this promise was made, whether the Larsens relied on it to their detriment. From the facts available to us it appears that there may be an issue of promissory estoppel. Promissory estoppel is explained in

Restatement (Second) of Contracts § 90 at 242 (1981), as follows:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

In *Leach v. Treber*, 164 Neb. 419, 82 N.W.2d 544 (1957), we adopted the first Restatement of Contracts § 90 (1932), and stated: " 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' " 164 Neb. at 423, 82 N.W.2d at 547; *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945); *Kucera v. Kavan*, 165 Neb. 131, 84 N.W.2d 207 (1957); *Pike v. Triska*, 165 Neb. 104, 84 N.W.2d 311 (1957); *Schrempp v. Gallup*, 210 Neb. 415, 315 N.W.2d 248 (1982).

In *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 77, 54 N.W.2d 392, 400 (1952), we held that "in order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them." See, *Leach v. Treber, supra; Schrempp v. Gallup, supra.*

Taking the view of the evidence most favorable to the defendants, the parties against whom the motion was directed, the record reveals that the Larsens relied to their detriment on the representations of the PCA. The Larsens approached the PCA about financing their expansion. The PCA expressly agreed to finance this expansion and to provide the Larsens with a continuing commitment for a line of credit to service the intended expansion-oriented operation, to include financing for livestock inventory. The Larsens subsequently made capital improvements to expand their livestock feeding operation and their feed storage facilities. This reliance by the Larsens on the PCA's representation was reasonable and foreseeable. By

financing the Larsens' expansion and then cutting off the funds necessary to buy livestock to utilize the expanded facility, the PCA contributed to the financial difficulties that the Larsens later encountered. Consequently, taking this view of the evidence, the promise of the PCA to finance the Larsens' operation and provide a continuing line of credit should be enforced to avoid injustice to the Larsens.

Secondly, there may be a genuine issue of material fact as to whether the PCA acted in good faith when it refused to loan the Larsens the amount of their budget loan. Neb. U.C.C. § 1-203 (Reissue 1980) provides: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement." The PCA refused to advance to the Larsens the balance of the loan dated January 10, 1980.

The PCA now takes the position that the loan agreement gives them the absolute right to refuse further advances of the budget loan. However, Dennis Miller, the vice president of the Yankton PCA, testified by deposition that he alone did not have the authority to refuse to advance the sum of money in the budget loan. He further stated that the PCA had the obligation to advance funds as directed by the budget loan based on loan performance. The loan committee had the authority to determine loan performance and, based on that determination, could refuse to advance funds in a budget loan. Consequently, the PCA, in accordance with its procedures, does not operate as though it had an absolute right to refuse to advance funds in a budget loan. The PCA's normal operating procedures are inconsistent with the position that the PCA is taking in this litigation.

The record does not reveal whether the PCA's refusal to the Larsens was based on a reasonable, good faith business judgment. If the PCA's decision to cut off funds from the defendants was not based on a good faith business judgment, the plaintiff would be liable to the defendants for damages caused as a result of that action.

In view of the evidence there exists a substantial and genuine issue of material fact as to whether the defendants' detrimental reliance was within the express or implied contemplation of the parties and agreed to by them and whether the plaintiff acted in

good faith in refusing to advance to the defendants the balance of the loan.

" 'A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.' " *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 437, 109 N.W.2d 733, 738 (1961). See, also, *Fay Smith & Associates, Inc. v. Consumers P.P. Dist.*, 172 Neb. 681, 111 N.W.2d 451 (1961); *Hansen v. Hill*, 215 Neb. 573, 340 N.W.2d 8 (1983). The motion by the PCA for summary judgment should have been overruled.

The judgment of the lower court in favor of the plaintiff, dismissing the counterclaim of the defendants, is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL M. CONLEY, RESPONDENT.

365 N.W.2d 434

Filed April 5, 1985. No. 83-760.

Original action. Judgment of suspension.

Alison L. Larson, Assistant Counsel for Discipline, for relator.

Paul E. Galter of Bauer, Galter, Geier & Flowers, for respondent.

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

PER CURIAM.

This is an original proceeding in which the Nebraska State Bar Association, relator, filed formal charges in this court

against Paul M. Conley (respondent), an attorney licensed to practice law in this state. The charges allege that respondent had violated his oath of office as an attorney (Neb. Rev. Stat. § 7-104 (Reissue 1983)) and that he had violated provisions of the Code of Professional Responsibility, to wit, Canon 1, DR 1-102 (misconduct), and Canon 6, DR 6-101 (failing to act competently). Relator prayed that this court proceed against respondent in accordance with our Rules of Disciplinary Proceedings.

The proceedings began before the Committee on Inquiry of the First Disciplinary District on charges filed by the Counsel for Discipline of the bar association. A hearing was held before that committee on August 2, 1983. The committee on inquiry determined that there were reasonable grounds for disciplining respondent and that the filing of formal charges was warranted. The committee recommended that respondent be publicly censured by the Nebraska Supreme Court and placed on probation for 1 year, with the probation to include six specific conditions as to how respondent was to operate his law office. The committee's formal charges and recommendations were forwarded to the Disciplinary Review Board, which board in turn also determined that reasonable grounds existed for the discipline of respondent and recommended that this court follow recommendations similar to those of the committee on inquiry. Thereafter, a referee was appointed by this court to hear the evidence on the case. Respondent filed an answer to the charges, in the form of a general denial.

The facts in the hearing before the referee were presented in the form of a stipulation agreed to by counsel for the relator and for the respondent, and in the form of evidence and testimony of respondent adduced before the referee. The evidence consisted of 33 exhibits, including the transcript of a hearing before the committee on inquiry and on the testimony of respondent. The transcript of the hearing before the committee on inquiry contained the testimony of the county judge handling the estate matter, the personal representative of that estate, and the respondent. The evidence established that on April 30, 1980, respondent entered his appearance, as an attorney, in an estate matter in Lancaster County Court by

filing an application for informal probate of a will and the informal appointment of the decedent's widow as personal representative. The proceedings in the estate were simple and straightforward. On March 17, 1981, a final hearing was held in the probate proceedings. At this final hearing the county judge declined to execute the formal order for final settlement of the estate because respondent had failed to complete the inheritance tax proceedings. Respondent had neglected to submit the voluntary appearance and waiver of the county attorney in connection with the inheritance tax determination and an affidavit of mailing notice with respect to the final hearing. Respondent and the county judge discussed what filings were needed to close the estate.

Shortly after this meeting, on April 7, 1981, the personal representative of the estate paid respondent his fee of $1,485 for handling the estate, and gave respondent two checks, each in the amount of $161.04, to pay the county inheritance tax for the two devisees named in the decedent's will (the decedent's daughters). These checks were never presented to the county treasurer and remained in respondent's file up to the date of the disciplinary hearing. Later evidence showed that payment on these checks was stopped and new checks, in a different amount, were issued to pay the tax.

On January 31, 1983, the county judge wrote to the respondent and advised respondent that the estate file was not completed and requested immediate closing of the estate. The letter stated that the county judge had received a letter from the personal representative, dated January 28, 1983, complaining that the personal representative had called respondent repeatedly about closing the estate and, while respondent told her he would do so, he did not take care of this matter. In his letter the judge requested respondent to give the matter his immediate attention. Respondent did not respond to this letter.

On June 8, 1983, the county judge again wrote to respondent. The judge informed respondent that he (the judge) had taken time to work on the inheritance tax problem and enclosed a copy of the inheritance tax computation together with a signed order determining that tax. The order had been prepared previously by respondent and had been left in the

probate file since the hearing of March 17, 1981. In connection with the tax computation, the judge had obtained the county attorney's voluntary appearance and waiver. The judge concluded his letter by stating: "I implore you to file an affidavit of mailing notice at once so that this modest estate can finally be brought to a conclusion." Respondent did not respond in any way to this letter.

On June 24, 1983, the judge again wrote to respondent, again asking respondent to file the affidavit of mailing notice so that the estate could be closed. There was no specific response to this letter, but on July 7, 1983, respondent filed an "Affidavit of Mailing" the notice in question. This affidavit was signed by respondent on July 7, 1983, and indicated that notice of the hearing of March 17, 1981, had been mailed to the interested parties on March 7, 1981.

The county judge's computation on the estate's inheritance question shows that inheritance taxes of $177.26 were due from each of the two devisees, instead of the original amount of $161.04. The judge ordered that all interest due on such amounts should be paid by respondent. At the time of the hearing before the committee on inquiry on August 2, 1983, the respondent had not paid the ordered amount.

In the meantime, on May 11, 1983, the respondent received notice that he was under investigation by the Counsel for Discipline of the state bar association for his delay in closing this estate matter. Respondent was informed that he had 15 working days to send "an appropriate written response." On May 31, 1983, respondent wrote to the Counsel for Discipline that he would not be able to respond to the notice he had received until approximately June 6, 1983. Respondent did not, at any time, respond to the Counsel for Discipline on the investigation.

The evidence also showed that on September 18, 1981, this court issued a public reprimand to respondent, as shown at 209 Neb. 717, 310 N.W.2d 520 (1981), for unprofessional conduct in issuing an insufficient fund check from his trust account.

We further note that at the hearing before the committee on inquiry, which hearing began at 10 a.m. on August 2, 1983, there were six members of the committee and two witnesses

present, as well as the Counsel for Discipline and the court reporter. The hearing began at some time after the noticed hour, without respondent present. The chairman of the committee made some general statements about the hearing on the record and then recessed the hearing to await the appearance of respondent. The hearing was eventually reconvened after the recess, without respondent present, and 11 exhibits were offered and received in evidence. Respondent then arrived at the hearing. All matters that had occurred at the hearing were again explained to respondent, and the hearing continued to conclusion.

It is clear that respondent is guilty beyond any doubt of the charges against him. He has violated his oath of office as an attorney. That oath required respondent to "faithfully discharge the duties of an attorney and counselor." The evidence showed respondent did not so discharge his duties either toward his client or the county judge, representing the system of law in this instance.

He has also violated DR 1-102(A)(1) and DR 6-101(A)(3), in that he clearly violated a disciplinary rule and neglected a matter entrusted to him.

Additionally, it is clear that respondent has displayed complete indifference, if not disdain, to his client, to the county court representing the legal system, and to a number of active lawyers and lay persons spending much of their valuable time at each level of these protracted disciplinary proceedings.

It is also clear, however, that respondent's actions have not resulted in any financial loss to his client. His client, indeed, wrote a letter to the referee herein, which letter was received in evidence, indicating that the personal representative had no feelings of ill will toward respondent and asking that "one of the lesser penalties" be considered against respondent.

Additionally, other evidence shows that respondent has provided great assistance to younger members of the bar in many legal proceedings, without any compensation for such services. Respondent has, in particular, served competently in difficult proceedings in juvenile court and has performed many worthwhile services to children in the juvenile system. He has written thoughtful articles in publications, discussing juvenile

problems both in general and in the context of the relation of children and the law.

The evidence also established that respondent has sought professional help "in order to better ascertain the factors which led to his seemingly self destructive behavior concerning the lack of timely and appropriate response in the matter of the closing of an estate." Respondent has also voluntarily stopped accepting estate work or other matters he feels are inappropriate for him to handle as an attorney, and has shown an approach in his office procedures which indicates that he recognizes fully what he must do to be an effective lawyer. The evidence did not show in any way that respondent is not an honest, able lawyer.

In consideration of all the evidence before us, we conclude that it would be inappropriate to only censure respondent, particularly in view of his earlier public reprimand.

Accordingly, it is ordered that respondent be suspended from the practice of law for 6 consecutive months; that his suspension shall begin within 1 month of the issuing of the mandate in this case; and that the suspension shall be monitored by the office of the Counsel for Discipline of the Nebraska State Bar Association.

JUDGMENT OF SUSPENSION.

CORBET, INC., APPELLANT AND CROSS-APPELLEE, V. COUNTY OF PAWNEE, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

365 N.W.2d 437

Filed April 5, 1985. No. 83-806.

1. **Political Subdivisions: Bridges: Negligence.** Failure of a county to post a bridge load capacity may be negligence or evidence of negligence.
2. **Political Subdivisions: Bridges: Negligence: Proof.** It is incumbent upon the plaintiff to prove that the negligence of the county was the proximate cause of the bridge collapse before recovery may be had against the county.
3. **Proximate Cause: Evidence.** The question of proximate cause, in the face of

conflicting evidence, is ordinarily one for the trier of fact.

4. **Proximate Cause: Words and Phrases.** Proximate cause is that cause which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
5. **Negligence: Proximate Cause.** An efficient intervening cause consists of the intervening negligence of a third person who has full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
6. **Political Subdivisions Tort Claims Act: Appeal and Error.** In an action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), the findings of fact of the trial court will not be overturned unless clearly wrong.

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

Joseph S. Daly and P. Shawn McCann of Sodoro, Daly & Sodoro, for appellant.

L. Joe Stehlik, Pawnee County Attorney, for appellee.

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

HASTINGS, J.

This was an action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).

Corbet, Inc., sought damages as a result of the August 26, 1980, collapse of a bridge on a county road while its tractor-trailer was in the process of crossing that bridge. Although the district court found the county was negligent in failing to post a load limit sign on the bridge, it concluded that such negligence was not a proximate cause of the accident. It also determined that the driver of the unit, David Day, was guilty of negligence more than slight, which was imputed to the plaintiff and which barred its recovery. The court dismissed the petition.

In its appeal the plaintiff assigns as errors that (1) the court failed to find the negligence of the county to be a proximate cause or proximately contributing cause of the accident, (2) the court found that the driver of the vehicle was guilty of contributory negligence sufficient to bar recovery as a matter of

law, and (3) the court found the contributory negligence of David Day imputable to the plaintiff.

Pawnee County contracted with an engineering firm to inspect its 189 bridges to determine their condition and load capacity. The county had information from its engineering firm in March of 1980 that this particular bridge was rated at 4 tons. However, no sign, as of the day of the collapse of the bridge, had been posted showing this information.

The bridge in question was 32 feet long and 16 feet wide. It consisted of wooden abutments made of 3-by-12 bridge planks and had a transverse deck containing a total of 10 stringers, including two 12-inch I-beams, two channel irons, and six 3-by-12 wooden stringers. Although not specified in the testimony, pictures of the bridge make it obvious that the deck is constructed of 15 wooden bridge planks.

On the day in question David Day had a load of grain on his rig, weighing perhaps as much as 22 tons. In addition, the tractor and trailer weighed about 12 1/2 tons. He was driving down what he himself called mostly a farm road, and came to this single-lane bridge. He drove onto the bridge and could feel it "give or something," but continued on until the bridge went down with him. He had crossed this bridge unloaded, to pick up this grain, and thought he had hauled cattle over it.

It seems from the record that Day lives within 7 miles of this particular bridge and is familiar with the various alternative routes that could have been utilized. He said that he had never inspected this particular bridge, he was aware of the fact that it was not posted, and he did not check with the county officials or with the farmers living nearby as to the condition of the bridge.

The county highway superintendent, Charles Morin, testified that in his previous experience as a driver of large semi rigs, the ordinary and prudent thing for a truckdriver to do if he is going into an area with such a heavy load would be to check the route first. Also, if suspicious at all, the driver should get out of his vehicle and look underneath the bridge so as to check its construction.

As noted in *Hansmann v. County of Gosper*, 207 Neb. 659, 300 N.W.2d 807 (1981), there was no evidence as to why this

bridge collapsed, other than the inference that the load exceeded the carrying capacity of the bridge. We did suggest in that case that the failure of a county to post a load limit sign on a bridge may be negligence or evidence of negligence. However, in that case the particular bridge was known to have been posted earlier as a 10-ton bridge, and we also concluded that there was nothing unusual about the load and that it did not exceed the weight that the bridge was accustomed to bear. Such is not the case here.

Assuming negligence on the part of the county, as the trial court found, it is nevertheless incumbent upon the plaintiff to prove that such negligence was a proximate cause of its damages. *Christensen v. City of Tekamah*, 201 Neb. 344, 268 N.W.2d 93 (1978).

However, the question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of facts. *Hydroflo Corp. v. First Nat. Bank*, 217 Neb. 20, 349 N.W.2d 615 (1984).

Proximate cause is that cause which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982).

An efficient intervening cause consists of the intervening negligence of a third person who has full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff. *Shelton, supra.*

As there is no evidence in the record to establish that there was any relationship between Corbet and Day, the driver, which would charge Corbet with Day's negligence, if any, we must assume that no such relationship existed. On those facts alone Corbet would be entitled to recover if the county was guilty of any negligence proximately contributing to the accident. However, if the collapse of the bridge was caused by the negligence of Day, which the trial court found to be true, albeit the same was labeled as contributory negligence, Corbet could not recover because Day's negligence would be the negligence of

a third party and would constitute an efficient intervening cause.

In an action under the Political Subdivisions Tort Claims Act, the findings of fact of the trial court will not be overturned unless clearly wrong. *Hume v. Otoe County*, 212 Neb. 616, 324 N.W.2d 810 (1982).

An examination of exhibit 1, consisting of three photographs of the subject bridge, two showing the top surface and approaching road and one depicting the undercarriage, supports the trial court's finding that no reasonable and prudent person would expect another to attempt to drive a loaded vehicle weighing a total of some 34 tons across that structure.

That being true, particularly when supported additionally by the testimony detailed above, there remains no reasonable doubt but that the driver of the rig was negligent and that such negligence constituted an efficient intervening cause to prevent a finding that the negligence of the county was a proximate cause of this accident.

The trial court's findings were not clearly wrong and will not be set aside. As this disposes of the case, it is not necessary to consider the question of the imputation of contributory negligence to the plaintiff nor the claim of the defendant on cross-appeal as to alleged jurisdictional defects. The judgment of the trial court is affirmed.

AFFIRMED.

E. JAMES KULA, APPELLANT, V. KENNETH M. PROSOSKI ET AL., APPELLEES.

365 N.W.2d 441

Filed April 5, 1985. No. 83-920.

1. **Constitutional Law: Property: Damages.** When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. art. I, § 21.
2. **Constitutional Law: Property: Damages: Legislature.** Neb. Const. art. I, § 21,

is self-executing, and legislative action is not necessary to make the constitutional remedy available.

3. **Constitutional Law: Political Subdivisions Tort Claims Act: Property: Damages.** The fact that a landowner could have sued in tort under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), for damage caused to property for a public use does not preclude such landowner from proceeding in a direct action for damages under the Constitution.
4. **Actions: Property: Public Officers and Employees: Injunction: Eminent Domain.** A landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain.
5. **Actions: Property: Equity: Damages.** A landowner has a right to join with an action for equitable relief a claim for temporary damages.
6. **Property: Damages: Causes of Action: Pleadings: Proof.** It is not necessary that the constitutional provision relating to damage for a public use be set out or its existence alleged in the petition stating the cause of action. All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for further proceedings.

Steven M. Curry of Sampson, Curry & Hummel, for appellant.

John Morgan of Morgan & Morgan for appellee Nance County.

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

HASTINGS, J.

This was a suit for injunctive relief and damages. It arose out of alleged acts of the defendants Kenneth M. and Karen L. Prososki, adjoining landowners to the plaintiff's farm, and the defendants county of Nance and East Newman Township, the parties responsible for the construction and maintenance of a public road and culverts separating the farms of the plaintiff and the defendants Prososki.

The claim of the plaintiff was that the Prososkis filled in a natural watercourse, causing surface waters to back onto the plaintiff's land. He alleged that the other defendants raised the

adjoining highway and installed inadequate culverts so as to cause floodwaters to dam onto his land.

The district court, following trial of the matter, granted the plaintiff injunctive relief, requiring the county of Nance to install culverts of sufficient capacity to adequately drain the area in question. The defendants Prososki were enjoined from restricting the flow of water in three designated depressions. No judgment was entered against East Newman Township.

As to the prayer for damages, the trial court held that the damages sustained by the plaintiff, if any, as a result of the acts of the county of Nance were barred because of failure of the plaintiff to comply with the "Nebraska Tort Claims Act" (Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983)) and that the action had not properly been brought as an inverse condemnation case.

Plaintiff's sole assignment of error on appeal is the failure of the trial court to consider an award of damages for the alleged wrongful taking of his property by Nance County. Apparently, it is conceded that there was no compliance by the plaintiff with the Political Subdivisions Tort Claims Act.

We assume the district court, in ruling that the case had not properly been brought as an inverse condemnation action, relied on Neb. Rev. Stat. § 76-705 (Reissue 1981). That section provides:

> If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, *in addition to any other available remedy*, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined.

(Emphasis supplied.) That procedure was not followed in this instance. That statute became effective in 1951.

However, Neb. Const. art. I, § 21, provides that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor." When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under that constitutional provision. *Beach v. City of Fairbury*, 207 Neb. 836, 301 N.W.2d 584 (1981).

That section of the Constitution is self-executing, and legislative action is not necessary to make the remedy available. *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962). The fact that the plaintiff could have sued in tort under the Political Subdivisions Tort Claims Act does not preclude him from proceeding in a direct action for damages under the Constitution. *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977).

Additionally, a landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain. Also, the plaintiff had the right to join with his action for equitable relief his claim for temporary damages. *Armbruster v. Stanton-Pilger Drainage Dist.*, 165 Neb. 459, 86 N.W.2d 56 (1957).

It is not indispensable that the constitutional provision be set out or its existence alleged in the petition stating the cause of action. *Patrick v. City of Bellevue*, 164 Neb. 196, 82 N.W.2d 274 (1957). All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it. Neb. Rev. Stat. § 25-804 (Reissue 1979). Therefore, it is necessary to consider both the pleadings and evidence to determine whether a cause of action for property damaged for a public use existed.

In this instance the plaintiff alleged that the county of Nance graded the highway in such a manner as to raise and narrow the surface thereof; that such action blocked the natural flow of surface waters across the highway and caused such waters to back up and onto the plaintiff's land; that as a result of those acts, the land became unfit for the use for which it was intended; and that the reasonable rental value of that land was $3,000 for the year 1979; and further alleged loss of yield for the 1982 crop-year and expected loss of yield for the 1983 crop-year.

That the grading of the highway was for a public use cannot be doubted. As a matter of law, the counties are charged with the responsibility of maintaining roads for the use of the public. Neb. Rev. Stat. § 39-1501 (Reissue 1984).

The trial court should have considered the plaintiff's claim for damages. Accordingly, the judgment of the trial court is

reversed, and the cause is remanded to the district court for further proceedings. *Patrick v. City of Bellevue, supra.*

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOHN R. MOHRLANG, APPELLEE AND CROSS-APPELLANT, V. LARRY DRAPER, APPELLANT AND CROSS-APPELLEE, AND JUDY DRAPER, APPELLEE.

365 N.W.2d 443

Filed April 5, 1985. No. 83-952.

1. **Specific Performance: Real Estate: Contracts.** Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.
2. **Specific Performance: Real Estate.** Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance.
3. **Specific Performance: Real Estate: Contracts.** In an action for specific performance of a contract to sell real estate, generally, it is no defense that there is other available land as good as or even better than the land which is the subject of the contract to be performed.
4. **Specific Performance: Contracts.** Hardship equitably excusing specific performance of a contract may be a circumstance unforeseeable at entry into the contract. Hardship of such nature, however, cannot be self-inflicted or caused through inexcusable neglect on the part of the person seeking to be excused or exonerated from specific performance.
5. **Contracts.** An imprudent or bad bargain in and of itself is not an excuse for nonperformance of a contract.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Reversed and remanded with directions.

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

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

BOSLAUGH, WHITE, SHANAHAN, and GRANT, JJ., and HOWARD, D.J.

SHANAHAN, J.

Larry Draper appeals a money judgment awarded by the district court for Adams County in an action brought by John R. Mohrlang for specific performance of a contract for the sale of real estate. Mohrlang cross-appeals the district court's denial of specific performance. We reverse and remand with directions.

On June 8, 1981, in a written offer, a "Purchase Agreement" prepared by his realtor, Mohrlang offered to purchase an unimproved tract owned by Draper, a lot in a proposed subdivision to be known as "Draper Subdivision." The purchase agreement specified a purchase price of $14,875, namely, $500 earnest money paid by Mohrlang when he signed the purchase agreement, $2,475 payable at "closing" on January 1, 1982, and the balance of the purchase price, $11,900, payable in monthly installments of $131.14 per month based on a 20-year schedule, with a "balloon" payment in 5 years and interest at the rate of 12 percent per annum on the unpaid purchase price.

The purchase agreement also contained the following provisions: Draper was required to obtain the release of a "right-of-way" easement across the lot and termination of a buried gasline belonging to Kansas-Nebraska Natural Gas Company, Inc., and Draper would bear the cost of relocating the gas company's line and paving a street abutting the lot to be purchased.

On June 9 Draper signed his written acceptance of Mohrlang's offer submitted and contained in the purchase agreement of June 8. Mohrlang hired an architectural firm and embarked upon plans for a solar home requiring the southern exposure available on the Draper lot.

The gas company's line was located in an easement 33 feet wide which diagonally crossed the subject lot for approximately 200 feet. After visiting with personnel of the gas company, Draper, by an estimate of cost prepared by the gas company on July 7, was informed that the cost of relocating the gasline would be $10,050. Continued location of the gasline rendered the lot unusable for the residential construction intended by Mohrlang.

Mohrlang had obtained finances to complete the purchase, but the gasline was not moved and the abutting street was not paved. Although his realtor had numerous contacts with Draper about a closing, Mohrlang was unsuccessful in scheduling a closing notwithstanding Draper's failure to provide paving on the street adjacent to the subject lot and relocate the gasline. Draper offered, but Mohrlang refused, another lot as a substitute for the agreed lot.

Mohrlang filed a petition on July 29, 1982, and requested specific performance of his agreement with Draper for sale of the lot in question. In his answer Draper alleged that he had attempted to relocate the gasline, but had neither the power nor means to obtain such relocation. Further, Draper alleged that Mohrlang had an adequate remedy at law.

At trial Mohrlang testified that, although other real estate had been investigated, no other lot had the particular features and adaptability found in the Draper lot sought to be purchased by Mohrlang. A representative of the gas company testified that the gasline could have been moved at a cost of $10,050, as indicated in the gas company estimate prepared for Draper. Draper did not present any evidence of his inability preventing performance of the Mohrlang contract and never described any hardship to be suffered if he were required to perform the contract.

The district court found that Mohrlang had offered to perform his contract with Draper; that Mohrlang was "ready, willing and able to perform" such contract; but that "ordering of specific performance of the contract by the Court would work an undue hardship" on Draper. Instead of specific performance, the district court awarded damages to Mohrlang.

As the assignment of error in his appeal, Draper claims the district court "erred in awarding [Mohrlang] monetary damages," because Mohrlang had not mentioned or requested damages in his petition. In his cross-appeal Mohrlang contends that the district court should have granted specific performance of the Mohrlang-Draper contract for the sale of real estate.

Because the questions to be reviewed have arisen from an action in equity for specific performance of a written contract for the sale of real estate, and as with any equity action, we

review this matter de novo on the record. See *Litz v. Wilson*, 208 Neb. 483, 304 N.W.2d 48 (1981). An action for specific performance is governed by the elements, conditions, and incidents which control the administration of all equitable remedies. See *Bauer v. Bauer*, 136 Neb. 329, 285 N.W. 565 (1939).

When land or any interest therein is the subject matter of a contract, the power of a court of equity to grant specific performance is beyond question. *Russell v. Western Nebraska Rest Home, Inc.*, 180 Neb. 728, 144 N.W.2d 728 (1966). We have held that specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate. *Reese v. Hatfield*, 201 Neb. 540, 270 N.W.2d 898 (1978). Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance. See *Moser v. Thorp Sales Corp.*, 256 N.W.2d 900 (Iowa 1977). This assumption is based upon the status of land as the favorite and favored subject in England and all countries of Anglo-Saxon origin. See 81 C.J.S. *Specific Performance* § 76 (1977). In an action for specific performance of a contract to sell real estate, generally, it is no defense that there is other available land as good as or even better than the land which is the subject of the contract to be performed. See *Shreeve v. Greer*, 65 Ariz. 35, 173 P.2d 641 (1946).

Exoneration from specific performance may be available when specific performance would be inequitable or unjust due to hardship on the one from whom performance is sought. Whether a contract is fair, and, therefore, subject to equitable enforcement, is determined by the circumstances existing when the contract is entered rather than by subsequent events intervening before specific performance is sought. See *Shell Oil Co. v. Kapler*, 235 Minn. 292, 50 N.W.2d 707 (1951).

Although *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950), was an action at law for damages due to a breach of contract, the principles stated in

Wilson regarding excuse for nonperformance—impossibility in a law action vis-a-vis hardship in an equitable action—are applicable in the present case:

> "Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. . . . A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. It has been said that difficulties, even if unforeseen and however great, are no excuse, and that the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission." . . .
>
> ". . . A contract which is possible of performance when made does not become invalid or unenforceable because conditions afterwards arise which render performance impossible. * * * If a party by his own contract creates a duty or imposes a charge on himself, he must under any and all conditions substantially comply with the undertaking."

Id. at 177, 43 N.W.2d at 666-67.

One form of hardship equitably excusing specific performance of a contract may be a circumstance unforeseeable at entry into the contract. Hardship of such nature, however, cannot be self-inflicted or caused through inexcusable neglect on the part of the person seeking to be excused or exonerated from specific performance. See *Derwell Company v. Apic, Inc.*, 278 A.2d 338 (Del. Ch. 1971). See, also, *Craft Builders, Inc. v. Ellis D. Taylor, Inc.*, 254 A.2d 233 (Del. 1969). Were the rule otherwise, one would derive a benefit from his or her own inexcusable neglect.

Draper entered the contract on June 9 and through the gas company's estimate of July 7 learned about the cost of relocating the gasline. The inescapable inference is that complete information about relocating the gasline was

available when Draper entered the contract to sell his lot. The contract expressly required that Draper bear the cost of relocating the gasline, as well as paving the street. Although the exact extent of expense for relocating the gasline was apparently unknown to Draper when he entered the agreement, relocating the gasline was a burden undertaken by Draper when the parties made their contract. Draper's belated realization that his financial burden under the contract was greater than initially anticipated at origination of the agreement does not constitute hardship excusing specific performance of his contract with Mohrlang. An imprudent or bad bargain in and of itself is not an excuse for nonperformance of a contract. See *Dean v. Gregg*, 34 Wash. App. 684, 663 P.2d 502 (1983). See, also, *Craft Builders, Inc. v. Ellis D. Taylor, Inc., supra*. It was Draper's neglect which increased his burden, not an unforeseeable circumstance.

Because there is no hardship equitably excusing Draper from specific performance of the contract in question, we reverse and set aside the judgment of the district court and remand this matter to the district court with directions to order specific performance of the Mohrlang-Draper contract in accordance with the provisions contained in the written agreement of the parties.

REVERSED AND REMANDED WITH DIRECTIONS.

BARBARA J. HIATT, APPELLANT AND CROSS-APPELLEE, V. MARY ANN TALLMAGE, APPELLEE, PATRICK KRUG, APPELLEE AND CROSS-APPELLANT.

365 N.W.2d 448

Filed April 5, 1985. No. 83-954.

1. **Landlord and Tenant: Negligence: Words and Phrases.** A stairway servicing only a tenant's second story apartment is not a common area under a landlord's control.

2. **Landlord and Tenant: Negligence: Animals.** Generally, a landlord has no duty to supervise the general maintenance of tenants' animals in the building.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

Thomas R. Wolff, for appellant.

William J. Brennan, Jr., of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee Krug.

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

BOSLAUGH, J.

The plaintiff, Barbara J. Hiatt, brought this action in the district court for Douglas County, Nebraska, against the defendants, Mary Ann Tallmage and Patrick and Katherine Krug, to recover damages for the personal injuries she sustained when she fell down a flight of stairs. The action against Katherine Krug was dismissed by stipulation of the parties.

After a trial the jury returned a verdict for the plaintiff in the amount of $85,000. Both of the remaining defendants filed motions for a new trial. The district court sustained the motion of the defendant Krug only. The plaintiff has appealed and the defendant Krug has cross-appealed; the defendant Tallmage did not perfect an appeal.

The principal issues here are (1) whether the jury should have been allowed to determine whether the stairway was a common area and (2) whether the allegation that the defendant Krug failed to supervise the maintenance of the animals of tenants was a proper allegation of negligence.

The record shows that the plaintiff and Tallmage were tenants in an apartment building at 5501 South 33d Avenue, Omaha, Nebraska, which was owned by the defendant Krug. The building, which is in a residential area, was described as a two-story dwelling with an apartment on the first floor and an apartment on the second floor. The plaintiff lives in the second floor apartment.

The front entrance of the building leads to the first floor apartment only. To gain access to her second floor apartment, the plaintiff had to enter through a door in the rear of the

building. Inside the rear door is a porch area used by both tenants. On the left of the porch area is a small landing. A back door to the first floor apartment is on this landing. A 17-step stairway leads from this landing to the doorway of the second floor apartment and serves no purpose but to provide access to that apartment.

Both the plaintiff and Tallmage owned dogs. At the time of the accident, Tallmage's dog, Coco, and its 1- to 2-week-old puppies were being kept in the porch area. There is a conflict in the testimony as to the difficulties this posed insofar as keeping the area clean and in the complaints made by the plaintiff to Krug and Tallmage concerning the problem. Nonetheless, the plaintiff testified that on the morning of September 27, 1982, she noticed a dog's excretions on the lower third and/or fourth steps to her apartment. She called Krug that morning from work to complain, leaving a message with his wife in his absence. When the stairs were not cleaned when she returned home that evening, plaintiff knocked on Tallmage's door and told Tallmage's mother about the problem. Tallmage's mother responded that she would clean it up right away. Plaintiff then proceeded up the stairs.

On one of the steps near the top of the stairs, plaintiff stepped in further dog excretions, causing her to slip and fall down the length of the stairs to the landing.

The first issue on appeal concerns the status of this stairway as a common area. In granting Krug's motion for a new trial, the district court found that "the questions as to whether or not the stairs involved herein were a 'common area' should also have been for the jury's determination at least, to be determined in the light of all significant circumstances, such as the location of the stairway and the use actually made of it."

While the plaintiff urges that the jury instructions given did not foreclose the jury from considering this question, under the facts in this case the jury should have been instructed, as a matter of law, that the stairway was not a common area.

Where different parts of an apartment house are leased to several tenants, the approaches and common passageways normally do not pass to the tenant but remain in the possession and control of the landlord. An exception to this rule is where a

stairway services only one apartment. Prosser and Keeton on the Law of Torts, *Owners and Occupiers of Land* § 63 at 440 (5th ed. 1984).

The defendant Krug testified that he considered the stairway a part of plaintiff's leased premises; furthermore, the plaintiff kept the stairs clean and referred to the area as "my entryway and stairs." There was no evidence that the defendant landlord, Krug, retained any control over the stairway whatsoever; rather, it was intended for the exclusive use of the plaintiff.

In *Porter v. Miller*, 13 Ohio App. 3d 93, 468 N.E.2d 134 (1983), the court held: " 'If a landlord, in renting an apartment, retains no right to the possession and control of a stairway leading from a first floor landing to the second floor landing of the leased apartment, then he is under no legal duty to keep it free from ice and snow.' " *Id.* at 97, 468 N.E.2d at 138. In *Porter* the tenant brought an action for damages against a landlord after she slipped on a walkway which led from the sidewalk to the steps adjacent to her apartment. Her apartment was one of four units in a two-level house. The court found, as a matter of law, that the landlord could not be found liable on a negligence theory because the walkway in question was not a common area. Furthermore, the fact that another tenant infrequently used the same steps or pathway did not suffice to show it was a common area.

Similarly, in *Seago v. Roy*, 97 Ill. App. 3d 6, 424 N.E.2d 640 (1981), the plaintiff was injured when he fell through a wooden guardrail on stairs which exclusively serviced his upstairs apartment. The landlord denied that the stairs were a common passageway. The court found that the landlord had no legal duty to maintain the stairs. "Whether such a legal duty exists may well become a legal question for the court to decide. [Citation omitted.] Based on the record before us which indicates the stairway led only to plaintiff's apartment, there is insufficient evidence to find . . . a duty to fix the stairway and its railing." *Id.* at 8, 424 N.E.2d at 641-42. Furthermore, the court found that a landlord does not become accountable to fix areas under the tenant's control or assume liability merely because he has made minor repairs or cosmetic changes to that property in the past.

The same conclusion was reached in *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973), where the court held that a stairway servicing only the plaintiff's second story apartment was not a common stairway or otherwise under the landlord's control. Thus, the landlord was not liable under the "control test." *Id.* at 393, 308 A.2d at 531-32, citing Annot., 26 A.L.R.2d 468 (1952). See, generally, Annot., 67 A.L.R.3d 587 (1975).

In this case the facts demonstrate that the stairway constituted a separate entrance to the plaintiff's upstairs apartment and that it was intended for that exclusive use. As such, it was not a common area. *Parson v. Whitlow*, 453 S.W.2d 270 (Ky. 1970); *Schachter v. Conen*, 258 A.D. 487, 17 N.Y.S.2d 88 (1940).

Since the stairway was under the control of the plaintiff, the only remaining theory of liability pleaded was the failure to supervise the maintenance of tenants' animals in the building. The plaintiff cites no case law imposing such a duty upon a landlord.

While some authority may be found establishing a landlord's liability for injuries caused by a tenant's vicious pet, it would be unreasonable to extend liability under the facts in this case. See, generally, Annot., 81 A.L.R.3d 638 (1977). Under the circumstances in this case the landlord was not liable for the acts of his tenant. In *Gonzales v. Wilkinson*, 68 Wis. 2d 154, 227 N.W.2d 907 (1975), it was held that a duplex owner owed no duty to a plaintiff who was bitten by a tenant's dog. The court found that absent an allegation that the landlord was the owner or keeper of the dog, or had dominion over the dog, he could not be found liable on the basis of common-law negligence.

It is unnecessary to discuss the remaining issues.

The defendant Krug's motion for judgment notwithstanding the verdict should have been sustained. The judgment is reversed and the cause remanded with directions to dismiss the petition as to Patrick Krug.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., dissenting.

As a matter of law, according to the majority, the stairway in question "serves no purpose but to provide access" to Barbara

Hiatt's upstairs apartment, and, therefore, such exclusive use negated any characterization of the stairway as a common area. As a matter of fact, there was every indication that the stairway was a common area utilized by the tenants in the two-apartment structure.

Barbara Hiatt and Mary Ann Tallmage were Krug's tenants since September 1980—over 2 years before the accident. Tallmage lived with her children and her mother in the ground-level apartment, while Hiatt and her young son lived upstairs. At the base of the stairway there was no door or any other obstruction prohibiting movement up or down the stairs. Although the apartment had a backyard where the children played, as acknowledged by Tallmage's mother, during cold or inclement weather the Tallmage children and the Hiatt boy played on the porch and would "play games on the steps." Tallmage also verified that her children and young Hiatt played on the porch and ran "up and down the stairs."

Phyllis Deloa, a visitor to the Hiatt apartment, testified that during her visits for 2 weeks before the accident, she observed "piles of dog excretion" on the porch-entry and on the lower stairs. The Tallmages, in particular Mother Tallmage, scrubbed the porch with Pine-Sol. Krug testified that the porch was a common area belonging "to both apartments. They both used it." Further, Krug admitted receiving Hiatt's letter approximately 10 days before the accident. That letter contained Hiatt's complaint about the dog problem.

The real issue in this case is whether the stairway was a common area under the control of Krug.

Other jurisdictions have recognized that a porch or roof of an apartment, when used as a playground or recreational area by children of tenants, may constitute a common area. See, *Henry v. Haussling*, 114 N.J.L. 222, 176 A. 564 (1935) (roof); *Bolcar v. Mintz*, 119 N.J.L. 219, 195 A. 619 (1937) (porch); *Campagna v. Cozzi*, 59 Ill. App. 2d 208, 207 N.E.2d 739 (1965) (porch); *Gill v. Jakstas*, 325 Mass. 309, 90 N.E.2d 527 (1950) (piazza). The same rationale applies in cases of hallways or stairways so used.

In this case the evidence points to a common use of the stairway by Hiatt and Tallmage. There is strong circumstantial

evidence that Tallmage's dog used the stairway, euphemistically speaking, as an exercise area. More important, there is positive, direct testimony that the children of the tenants used the porch and stairway as a playground or recreational area. Such use in common by the tenants may well have been an adjunct in the enjoyment of the apartment rented by each tenant and may have been a mother's salvation on a rainy day. At least there was a jury question.

STATE OF NEBRASKA, APPELLEE, V. CHARLES CASPER, APPELLANT.

365 N.W.2d 451

Filed April 5, 1985. No. 84-006.

Post Conviction: Appeal and Error. The Supreme Court will not consider a question not presented to the district court for disposition through a defendant's motion for post conviction relief.

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

Steven Lefler, for appellant.

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

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

SHANAHAN, J.

Charles Casper appeals the judgment of the district court for Douglas County denying Casper post conviction relief. We affirm.

On November 2, 1973, a jury found that Casper, while perpetrating a robbery, murdered one Joseph Armstrong. After his conviction Casper was sentenced to life imprisonment. Casper's conviction and sentence were affirmed by this court. See *State v. Casper*, 192 Neb. 120, 219 N.W.2d 226 (1974).

On June 18, 1982, and pursuant to Neb. Rev. Stat. § 29-3001

(Reissue 1979), Casper filed his verified motion to vacate the sentence imposed as a result of his 1973 conviction. In his motion filed in the district court, Casper alleged two grounds for post conviction relief, namely, (1) in Casper's trial for the Armstrong homicide, the district court failed to instruct the jury on lesser offenses of second degree murder and manslaughter and (2) the district court's admitting Casper's confession as evidence in the jury trial. After reviewing the files and records the district court found that an evidentiary hearing was not necessary and denied post conviction relief to Casper.

In his appeal from the district court's denial of post conviction relief, Casper, in an addition to the two grounds specified in his motion presented to the district court, assigns other grounds for appellate review: (1) admission of an opinion expressed by an expert witness concerning the cause of Armstrong's death, (2) admission of evidence concerning an autopsy performed on Armstrong, and (3) the jury should have been instructed that, as an alternative to conviction on the homicide charge, Casper could be found guilty of robbery only. Casper also contends that an evidentiary hearing should have been held on his motion for post conviction relief.

A proceeding pursuant to the Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979), is civil in nature. In *Russell v. First York Sav. Co.*, 218 Neb. 112, 115, 352 N.W.2d 871, 874 (1984), we stated the purpose of proper pleading: "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."

Casper's assignments of error regarding admission of evidence concerning the cause of Armstrong's death, the Armstrong autopsy, and jury instruction on robbery were not presented to the district court as grounds for post conviction relief. We will not consider a question, as an assignment of error, not presented to the district court for disposition through a defendant's motion for post conviction relief. See § 29-3001. See, also, *State v. Taylor*, 193 Neb. 388, 227 N.W.2d 26 (1975).

Regarding Casper's two allegations contained in his motion filed in the district court, we can only repeat what we have

frequently and previously stated:

> "A motion for post conviction relief can not be used as a substitute for an appeal or to secure a further review of issues already litigated." [Citation omitted.] Additionally, a defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution. [Citation omitted.] One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous. [Citations omitted.] The reasons for such rules are obvious. As we noted in *State v. Weiland*, 190 Neb. 111, 113, 206 N.W.2d 336, 338 (1973): "There must be an end to litigation. A defendant will not be permitted to rephrase issues previously raised or raise new issues which could have been previously raised for the purpose of securing another review on appeal."

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

The grounds stated in Casper's motion for post conviction relief were matters which could have been raised in Casper's direct appeal of his conviction and sentence. An evidentiary hearing was not necessary under the circumstances. The district court was correct in denying post conviction relief for Casper.

AFFIRMED.

DONALD J. MANGAN, APPELLANT, V. CLARENCE L. LANDEN, JR., ET AL., APPELLEES.

365 N.W.2d 453

Filed April 5, 1985. No. 84-078.

1. **Limitations of Actions: Time.** The point at which a statute of limitations commences to run must be determined from the facts of each case; 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, even though such plaintiff may be ignorant of the existence of the cause of action.

2. **Contracts.** One who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
3. **Limitations of Actions: Fraud: Time.** If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made.

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

Bruce G. Mason of Ross & Mason, P.C., for appellant.

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick, for appellees.

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

KRIVOSHA, C.J.

Donald J. Mangan appeals from an order entered by the district court for Douglas County, Nebraska, sustaining a motion for summary judgment filed by the appellees, Clarence L. Landen, Jr., and Security National Bank. In sustaining the appellees' motion for summary judgment, the district court dismissed Mangan's petition. We affirm.

Little purpose will be served in this appeal by attempting to describe Mangan's alleged cause of action in any great detail. When the conclusory statements pled by Mangan are ignored, as they must be, see *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976), and *Johnson v. American Smelting & Refining Co.*, 80 Neb. 255, 116 N.W. 517 (1907), one is hard pressed to describe the nature of the claim. It is, however, based upon a written agreement entered into by and between Mangan and Landen under date of March 6, 1978.

Mangan claims that Landen occupied a fiduciary, confidential position of trust with regard to Mangan even though Landen was the purchaser in an arm's-length transaction between Mangan and Landen. We are not favored with any citation of authority to support that position. However, for reasons which we point out in a moment, we need not consider the theory of liability, whatever it may be.

Setting aside all of the chaff contained in the petition and amended petitions filed in this case, it appears that Mangan's claim against Landen is to the effect that Landen should have included in the contract of March 6, 1978, a provision indemnifying Mangan from all personal liabilities incurred by Mangan in connection with two businesses, Sam's Corporation and Northwest Real Estate Company, Ltd., which were being purchased by Landen from Mangan. In fact, the contract contained an agreement to indemnify Mangan as to only one of the businesses. Mangan then alleges that because he relied upon the alleged confidential relationship between himself and Landen, he did not discover the absence of that provision in the contract until 1980, when he was sued by a creditor. The petition does not allege facts explaining why he could not discover the absence of a second indemnity provision, but only that he did not make the discovery.

We believe that we may quickly dispose of this matter on the basis that the action, if any ever existed, an issue we do not determine, was barred by the statute of limitations prior to the time the petition was filed.

Whether one concludes that the cause of action concocted by Mangan sounds in tort and is therefore covered by the provisions of Neb. Rev. Stat. § 25-207 (Reissue 1979) or more appropriately falls within the provisions of Neb. Rev. Stat. § 25-212 (Reissue 1979) for the reason that it is an action not otherwise specified, it is clear that, absent some reason to toll the statute of limitations, any action relying on a contract entered into by the parties on March 6, 1978, must be filed within 4 years from that date. The instant action was filed on February 4, 1983, which was more than 4 years from the date on which the contract was executed.

Mangan concedes that if the statute of limitations is not tolled, the cause of action in this case is out of time. He maintains, however, that because of some claim of fraud, he was unable to discover the fact that the contract did not contain the indemnity provision which he was led to believe was included in the contract. That does not constitute grounds for tolling the statute of limitations. As we observed in the case of *Interholzinger v. Estate of Dent*, 214 Neb. 264, 270, 333

N.W.2d 895, 899 (1983):

> [T]he point at which a statute of limitations commences to run must be determined from the facts of each case; 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, even though such plaintiff may be ignorant of the existence of the cause of action.

See, also, *Jones v. Johnson v. Pullen*, 207 Neb. 706, 300 N.W.2d 816 (1981); *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979).

Furthermore, we have held that one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. See, *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982); *Commodity Traders, Inc. v. Palmer*, 203 Neb. 667, 280 N.W.2d 49 (1979). And in *Lee v. Brodbeck*, 196 Neb. 393, 397-98, 243 N.W.2d 331, 334 (1976), we said:

> If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made. Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N.W.2d 327 (1941). To avoid the statute of limitations for fraud, plaintiff must plead and prove the impediments to an earlier prosecution of the claim, all facts which relate to or explain the failure to prosecute, and when he first obtained knowledge of the fraud. Reed v. Barnes, 113 Neb. 414, 203 N.W. 567 (1925).

This Mangan has failed to do. The contract entered into between Landen and Mangan clearly recited what it was that Landen agreed to indemnify Mangan against. Paragraph 6 of the contract provides: "Landen does hereby indemnify Donald J. Mangan and Donna J. Mangan and Wilton C. Stibbs, Jr. and Barbara F. Stibbs against loss resulting on account of any *Sam's corporation liabilities* on which said Mangans and Stibbs have given *personal guarantees* . . . ." (Emphasis supplied.) Mangan's claim against Landen is that the agreement should have contained an additional paragraph similar to paragraph 6, in which Landen agreed to indemnify Mangan against loss resulting on account of any personal guarantees given by

Mangan on behalf of Northwest Real Estate Company. One with but minimal amount of education and the ability to read the English language could have discovered at once that the indemnity provision contained in the contract of March 6, 1978, did not include an indemnity provision with regard to Northwest Real Estate Company. It is clear that the agreement only indemnified Mangan with regard to liabilities incurred in connection with Sam's Corporation. Paragraph 5 of the contract specifically referred to Landen's purchase of Mangan's interest in Northwest Real Estate Company. Yet the very next paragraph makes no mention of Northwest Real Estate Company when setting out the indemnity agreement between the parties. How Mangan can therefore assert that he did not know, could not know, and could not discover that such promise of indemnity was not included in the contract is beyond the court's comprehension. The cause of action, if any, occurred on the date of the execution of the agreement, March 6, 1978, and any action filed more than 4 years thereafter was barred by the statute of limitations. For that reason the decision of the district court in sustaining the motion for summary judgment and dismissing the plaintiff's petition is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

IN RE APPLICATION OF SANITARY AND IMPROVEMENT DISTRICT NO. 65.

SANITARY AND IMPROVEMENT DISTRICT NO. 65 OF SARPY COUNTY, NEBRASKA, APPELLEE, V. MARY ANNE WEFSO ET AL., APPELLANTS.

365 N.W.2d 456

Filed April 5, 1985. No. 84-079.

1. **Sanitary and Improvement Districts: Warrants: Equity: Appeal and Error.** An application seeking an extension of time within which to retire warrants, filed pursuant to Neb. Rev. Stat. § 31-755 (Reissue 1984), is an equitable proceeding reviewed by the Nebraska Supreme Court de novo on the record.

2. **Municipal Corporations: Words and Phrases.** Although a municipal corporation is a body corporate and politic, not all bodies corporate and politic are municipal corporations.
3. _____: _____. In its strict and proper sense, a municipal corporation is a body corporate and politic constituted by the incorporation of the inhabitants of a city or town for the purposes of local government.
4. **Municipal Corporations: Sanitary and Improvement Districts: Words and Phrases.** Bodies other than those within the strict and proper sense of the term "municipal corporations" are at times referred to as such for certain purposes; a sanitary and improvement district is a municipal corporation for the purposes of Neb. Rev. Stat. § 77-2201 (Reissue 1981).

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

Gary J. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., and E.W. Hollstein of Hollstein and Wefso, for appellants.

Robert C. Doyle of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

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

CAPORALE, J.

Sanitary and Improvement District No. 65 of Sarpy County, Nebraska, applied, pursuant to the provisions of Neb. Rev. Stat. §§ 31-755 et seq. (Reissue 1984), for an extension of time within which to retire certain warrants it had issued and which, but for favorable action on the application, would become due and payable on April 22, 1983. The district court granted an extension to January 1, 1986, and certain of the warrant holders appeal. They assign as error that court's failure (1) to increase the district's tax levy and (2) to require that the district use particular funds to retire, in the order of registration, the outstanding warrants at issue. We reverse and remand with directions.

The warrants involved were issued for capital outlays prior to July 10, 1976. They bore no maturity dates. Section 31-755 provides in relevant part:

> Warrants issued prior to July 10, 1976, for capital outlays of the district shall become due and payable twelve

> months after April 21, 1982 . . .; *Provided*, that such warrants need not be retired on such date . . . and shall not be in default if the district court of the county shall determine, upon application to it by the district, that the district does not have the funds to retire such warrants and either (1) the district is unable to sell its bonds in amount sufficient to retire such warrants, or (2) an unreasonably high tax levy, as compared to the levy on other similar property in the county, would be required in order to cover the debt service requirements on bonds issued to retire such warrants. . . . Upon making such determination the district court may make such orders concerning retirement of the warrants as it shall determine proper under the circumstances of the district including ordering an increase in the tax levy of the district to provide funds for warrant redemption, except that no court-ordered tax levy for redemption of warrants shall cause the total tax levy of the district to be unreasonably high as compared with the tax levy of other similar property in the county. Such warrants shall draw interest at such rate as fixed by the board of trustees or the administrator and endorsed on the warrants, from the date of presentation for payment and shall be redeemed and paid from the proceeds of special assessments or from the sale of the bonds issued and sold as provided in this section or from any other funds available for that purpose. Bonds to redeem such warrants shall be issued as soon as economically feasible and to the extent warrants are not redeemed from bond proceeds or other funds available for such purpose, the district shall make a tax levy to provide a sinking fund for warrant redemption, except that such obligation shall not require a total tax levy by the district which shall be unreasonably high as compared with the tax levy on other similar property in the county.

This appears to be our first opportunity to review an application filed pursuant to the foregoing statute seeking to extend the time within which to retire warrants; accordingly, it is appropriate that before proceeding further we settle upon the scope of this court's review. In *S.I.D. No. 32 v. Continental*

Western Corp., 215 Neb. 843, 343 N.W.2d 314 (1983), we held that an action to determine the nature and validity of warrants issued by a sanitary and improvement district was one at law. *City of Omaha v. S.I.D. No. 287*, 214 Neb. 371, 334 N.W.2d 429 (1983), *modified* 214 Neb. 873, 334 N.W.2d 429, held that Neb. Rev. Stat. § 31-749 (Reissue 1978), granting the district court power to review assessments made by the board of a sanitary and improvement district "in a summary manner as in equity," empowered both the district court and this court to review the matter de novo as in other equity actions. In *Metropolitan Life Ins. Co. v. SID No. 222*, 204 Neb. 350, 281 N.W.2d 922 (1979), a case questioning the validity of certain special assessments made under the provisions of then § 31-755 (Reissue 1978), this court conducted an equity review.

The instant case does not involve the validity of the warrants as did *S.I.D. No. 32*, nor does it arise under statutory language directing an equity review as did *City of Omaha*. Although the issue here is different, and no prior decision of the board of the district is involved, the present case nonetheless arises out of the same statute as did *Metropolitan Life Ins. Co.* It arises under a statutory proceeding which empowers the district court, after making certain statutory findings, to either delay retirement of the warrants or to order steps resulting in their retirement. These species of relief operate to render the administration of justice more complete than would be the case without them, and consequently sound in equity rather than in law. See *Ricketts v. Lincoln Safe Deposit Co.*, 139 Neb. 318, 297 N.W. 544 (1941) (observing that equitable modes of relief are not fixed and rigid).

We therefore conclude that our review is equitable in nature and to be conducted de novo on the record in order that we may reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court, subject to certain other rules not relevant to this case. *Burgess v. Omahawks Radio Control Org., ante* p. 100, 362 N.W.2d 27 (1985); Neb. Rev. Stat. § 25-1925 (Reissue 1979).

The uncontroverted evidence, adduced from a specialist in sanitary and improvement district financing employed by the

fiscal agent for the district, established that the district covers the Meadows Subdivision, a residential area in Sarpy County, which was approximately 80 percent completed at the time of the subject hearing in 1983. The district's tax base at that time was $14 million, having increased from a 1982 tax base of $11,800,000. There was substantial ongoing construction, and it was the witness' opinion that all construction would begin by the summer of 1985 and that a full tax base of $20 million would be reached by 1986.

The district's levy at the time of the hearing of $1.06 per $100 of taxable value made it the 21st highest levy of the 83 sanitary and improvement districts in the county. The tax levy in the other Sarpy County districts ranges from a high of $2.07 to a low of $0.02. The average levy for the 20 districts with higher levies is $1.36 per $100 of taxable value, or $0.30 higher than the district's levy. The witness testified that a mill levy substantially higher than those of other districts produces an adverse effect on construction in the district with the higher levy.

The district currently has bonds outstanding in the principal amount of $3,350,000. The debt service on these bonds is approximately $144,000 "for the next sixteen years." The total principal value of all warrants outstanding is $3,800,000, and in the area of $5 million when accrued interest is added. Only so-called Type 1 warrants, having a principal value of $1,359,000, are the subject of this application for extension. Neither the rate of annual interest borne by the warrants nor the amount of accrued interest is disclosed by the record. However, according to the witness, the interest "is not paid" until the warrant is "called for payment." The record does not tell us whether the interest "is not paid" because the district has elected not to do so or because the warrants so provide.

The assets of the district consist of its tax base of $14 million, a bond sinking fund totaling approximately $675,000, and receivables from special assessments totaling approximately $800,000.

Based on the district's financial condition, it was the witness' recommendation that the district not issue bonds in order to retire the Type 1 warrants. First of all, the witness thought it would be difficult, if not impossible, to sell such bonds in light

of the district's financial condition. If such bonds could be sold, the interest rate would have to be at least 13 percent, 3 percent above what a sanitary and improvement district with adequate financial resources would have to pay.

Secondly, the witness estimated that bonds totaling $2,600,000, which figure includes selling costs, would have to be issued in order to retire the warrants involved. Based on a 13-percent interest rate, this would require an additional tax levy of approximately $2.64. Added to the tax levy of $1.06 already in existence, the district's levy would be $3.70, far higher than the next highest levy of $2.07 in a comparable sanitary and improvement district.

The warrant holders argue that since there are enough funds to pay off some of the earlier Type 1 warrants, the district should be ordered to retire those particular warrants. We agree.

Neb. Rev. Stat. § 77-2201 (Reissue 1981) provides: "All warrants upon the State Treasurer, the treasurer of any county, city, school district or other municipal corporation shall be paid in the order of their presentation therefor."

Neb. Rev. Stat. § 31-705 (Reissue 1984) has always stated that a sanitary and improvement district "shall be a body corporate and politic." It is clear that although a municipal corporation is a body corporate and politic, not all bodies corporate and politic are municipal corporations. In its strict and proper sense, a municipal corporation is a body corporate and politic constituted by the incorporation of the inhabitants of a city or town for the purposes of local government. *McDowell v. Rural Water Dist. No. 2*, 204 Neb. 401, 282 N.W.2d 594 (1979); *Evans v. Metropolitan Utilities Dist.*, 187 Neb. 261, 188 N.W.2d 851 (1971). Nonetheless, bodies other than those within the strict and proper sense of the term have been referred to as municipal corporations for certain purposes. *Buras v. School Dist. No. 37*, 190 Neb. 836, 212 N.W.2d 632 (1973), refers to a school district as such; and *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979), and *Hayes v. Sanitary & Improvement Dist. No. 194*, 196 Neb. 653, 244 N.W.2d 505 (1976), refer to sanitary and improvement districts as municipal corporations. We consider sanitary and improvement districts

as municipal corporations for the purposes of § 77-2201.

Neb. Rev. Stat. § 77-2206 (Reissue 1981) states in pertinent part: "It shall be the duty of every treasurer to pay each registered warrant, in the order of its registration."

So far as the record reflects, the district is free to use the $800,000 in receivables from special assessments to retire as many of the Type 1 warrants which became due and payable on April 22, 1983, as such sum permits. We direct that such be done.

We agree with the district, however, that it is not presently economically feasible to issue bonds to retire all of the warrants in question. We also conclude, however, that raising the tax levy by $0.30 per $100 of taxable valuation to establish a sinking fund to retire the remaining Type 1 warrants will not result in a tax levy "unreasonably high as compared with the tax levy on other similar property in the county." The district's levy will then be equal to the average of the levies of the 20 districts with levies higher than that of the district. We therefore direct that the district so raise its levy, establish such a sinking fund, and retire the remaining Type 1 warrants on a yearly basis commencing on April 22, 1986, in accordance with § 77-2206, until all of the subject warrants shall have been retired.

Accordingly, we reverse the decree of the district court, remand the cause, and direct that a decree in accordance with this opinion be entered.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF KYLE CASSELMAN, DECEASED. KYLA CASSELMAN AND EDGAR RUSSELL, APPELLANTS, V. JAMES CASSELMAN, APPELLEE.

365 N.W.2d 805

Filed April 5, 1985. No. 84-189.

1. **Courts: Judgments: Judicial Notice: Res Judicata.** Where cases are interwoven and interdependent, and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the

court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

2. **Decedents' Estates: Wills: Notice.** Formal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted before a judge, with notice to interested persons.
3. _____: _____: _____. Informal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.
4. **Decedents' Estates: Wills: Appeal and Error.** In appeals from the appointment of personal representatives in probate cases, the district court reviews the matter under Neb. Rev. Stat. §§ 24-541.01 et seq. (Cum. Supp. 1982), and this court reviews the matter under Neb. Rev. Stat. § 25-1911 (Reissue 1979); both such reviews being for error appearing on the record.
5. **Decedents' Estates: Wills: Notice.** Notice of a formal hearing under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), must be given to all interested persons unless these persons waive notice.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded with directions.

James M. Carney of Atkins, Ferguson, Zimmerman, Carney & Law, for appellants.

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

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

GRANT, J.

This is the second appearance of this case before this court. The first was *In re Estate of Casselman, ante* p. 516, 364 N.W.2d 27 (1985) (*Casselman I*). In that case we held that the purported codicil to Kyle Casselman's will was invalid, and, as a result, Kyle's son, James, remained a devisee under the will itself, which was valid. Other devisees under the will were Dawna (sometimes Donna) Filbey, now Dawna Casselman (a daughter), Kyla Casselman (a daughter), and Harold Clark. Two other daughters were specifically disinherited in the will. The instant appeal (*Casselman II*) is from the district court's affirmance of an order of the county court refusing to appoint Kyla Casselman and Edgar Russell, both named in the will as

coexecutors, to the position of personal representatives, and an order of the county court appointing to that position Harry R. Meister, a stranger to the will and not related to the testator but nominated by James Casselman.

We first observe that, as appellee states, the record in this proceeding is "scanty." Appellee suggests that, since we review only errors appearing on the record, our review in this matter is limited. We note that

> where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

Peterson v. The Nebraska Nat. Gas Co., 204 Neb. 136, 138, 281 N.W.2d 525, 527 (1979); *Cedars Corp. v. Sun Valley Development Co.*, 213 Neb. 622, 330 N.W.2d 900 (1983). We therefore take judicial notice of the record in *Casselman I*.

As many of the facts are set forth in *Casselman I*, we need only recite the additional facts relevant to this particular appeal. Kyla Casselman (Kyla) and Edgar Russell (Edgar), appellants herein, were nominated as coexecutors in Kyle's will. On July 20, 1982, Kyla filed an amended petition for formal probate of Kyle's will and codicil and for the appointment as personal representatives of the persons nominated in the will as coexecutors. This amended petition complied fully with the requirements of Neb. Rev. Stat. § 30-2426 (Reissue 1979). In accordance with the provisions of Neb. Rev. Stat. § 30-2427 (Reissue 1979), the county court set a hearing on the amended petition for August 12, 1982. Proper notice was given to all parties of the hearing, as required by Neb. Rev. Stat. § 30-2220 (Reissue 1979). On August 11, 1982, Daniele Casselman, a minor daughter of Kyle, appearing through her mother, filed her objection to the will and codicil.

On August 12, 1982, the date set for hearing on the amended formal petition, the record does not show that any hearing was held, nor was any order of continuance as to the date of trial entered. Instead, on that day, Kyla and Edgar filed an "Application for Appointment of Special Administrator in

Informal Proceeding."

By definition set out in Neb. Rev. Stat. § 30-2209(1) (Reissue 1979), an "application" means "a written request to the registrar for an order of informal probate or appointment under part 3 of Article 24 [Neb. Rev. Stat. §§ 30-2414 to 30-2424 (Reissue 1979)]." Pursuant to Neb. Rev. Stat. § 30-2457(1) (Reissue 1979), a special administrator may be appointed "informally by the registrar on the application of any interested party when necessary to protect the estate of a decedent prior to the appointment of a general personal representative . . . ." Accordingly, the county judge appointed Kyla and Edgar as special administrators and issued letters of special administration to them. As stated, this appointment was done in an informal proceeding. No notice was given to anyone. It is obvious that this informal proceeding took place while a formal hearing was pending. (The statutory difference between formal and informal proceedings is determined by the definitions of the respective terms in subsections (16) and (20) of § 30-2209; i.e., formal proceedings are "those conducted before a judge with notice to interested persons," while informal proceedings are "those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.")

This overall procedural approach is contemplated by the Nebraska Probate Code (with exceptions hereinafter noted) in Neb. Rev. Stat. § 30-2407 (Reissue 1979), which states in subsection (1) that "each proceeding before the court or registrar is independent of any other proceeding involving the same estate." We note, however, that Neb. Rev. Stat. § 30-2425 (Reissue 1979) provides in part: "During the pendency of a formal testacy proceeding, the registrar shall not act upon any application . . . for informal appointment of a personal representative of the decedent." A personal representative includes a special administrator. See § 30-2209(33). In this case the special administrators were appointed in an informal proceeding. The informal appointment took place on the day a formal hearing was set, and, as a result, apparently all interested parties had notice that some hearing was to occur on

that date; and the appointed special administrators served from August 12, 1982, to October 3, 1983, without challenge. The relevancy of the actions of the special administrators to the present proceedings is only that those actions became the basis of the county court's refusal to appoint Kyla and Edgar as the regular personal representatives, as discussed below.

As stated, the county court did appoint Kyla and Edgar as "Special Administrators" on August 12, 1982. On August 23, 1983, Kyla and Edgar filed their "Application for Appointment of Co-Personal Representatives." By the use of the word "application" rather than the word "petition," and from the wording of the document, this filing appeared to seek an informal proceeding on the requested appointment. No notice is shown to have been given, nor was any hearing date requested or set. On October 3, 1983, in the county court, James Casselman filed his objection to the appointment of Kyla and Edgar and asked for the appointment of Harry R. Meister. Again, no hearing date was requested or set. The attorney for James certified that on that same date a copy of the objection was sent to "the attorney for the opposing party."

The record shows no further court orders or notices concerning a hearing on the application of Kyla and Edgar to be appointed as personal representatives, nor on the objection of James nor James' request that Harry R. Meister be appointed.

On October 3, 1983, the same day James' pleading was filed, a hearing was held before the county judge. At the hearing James was present with counsel; Kyla and Edgar were present with counsel; and Daniele was present by counsel. No other interested persons or counsel for such persons were shown to be present. The trial judge of the county court stated at the beginning of the hearing that the matters before the court were the "petition for the appointment of the personal representatives . . . . We have also an objection to the appointment of the nominated individuals . . . ." The hearing then ensued. Three witnesses were called. Accounting reports of the activities of the appointed special administrators were received in evidence. These reports represented six of the seven exhibits received at the hearing and covered the periods from April 10 to August 12, 1982; August 12, 1982, to March 8, 1983;

March 8 to March 23, 1983; April 10, 1982, to August 12, 1983; March 16 to September 8, 1983; and August 12, 1982, to February 28, 1983. The seventh exhibit was a group of 34 carbons reflecting checks written by the special administrators and sent to James Casselman, so he "was able to know what was going on." The carbons did afford a way to determine "what was going on" if unfolded and held up to a mirror for reading.

Based on the evidence presented at that hearing as to the activities of the special administrators, the county court found that "Kyla Casselman and Edgar Russel [sic] are not suitable persons to act as personal representatives of the estate." The county court then appointed Harry R. Meister.

Kyla and Edgar timely appealed from the county court to the district court, alleging that the county court erred in refusing to appoint them as personal representatives and in appointing Harry R. Meister. The district court reviewed the case for error appearing on the record, as provided in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982) (now amended in Cum. Supp. 1984, effective July 1, 1985), and affirmed the judgment of the county court. Kyla and Edgar appeal to this court, alleging as error that the district court failed "to find that the County Court had not proceeded according to the provisions of [Neb. Rev. Stat. § 30-2412 (Reissue 1979)] of the Nebraska Probate Code in appointing Harry Meister as personal representative." We affirm in part and reverse in part.

In their brief appellants contend that § 30-2412 controls the appointment of personal representatives in estate matters in Nebraska. It is true that § 30-2412 sets out the priorities among various persons seeking appointment as a personal representative, but it is not accurate to say that the statute controls all aspects of appointing personal representatives. Neb. Rev. Stat. § 30-2438 (Reissue 1979) describes the procedures necessary in "Formal proceedings concerning appointment of personal representative." Section 30-2426 concerns "Formal testacy or appointment proceedings; petition; contents." Both §§ 30-2438 and 30-2426 refer back to § 30-2414, which latter statute controls informal appointment proceedings. Appeals from all these proceedings are now

governed by Neb. Rev. Stat. § 30-1601 (Cum. Supp. 1984), effective August 30, 1981, which provides, "In all matters arising under the Nebraska Probate Code, appeals shall be allowed as provided in sections 24-541.01 to 24-541.10 and 24-551." It must be noted that those sections apply only to appeals from county court to district court.

With regard to the appeal to this court from the district court, the Nebraska Probate Code has departed from the Uniform Probate Code and does not set out the provisions of Unif. Prob. Code § 1-308, 8 U.L.A. 42 (1983), which is the uniform code's equivalent of Nebraska's Neb. Rev. Stat. § 30-2217 (Reissue 1979). Instead of the Uniform Probate Code's provisions concerning appeals to a state's highest appellate court, § 30-2217 states, "Appellate review under this code shall be governed by Chapter 30, article 16," which now consists only of § 30-1601, and only provides that appeals are to be conducted as set out in Neb. Rev. Stat. §§ 24-541.01 to 24-541.10 (Cum. Supp. 1982) and § 24-551 (Reissue 1979). The Nebraska Probate Code, therefore, does not set out the procedures governing appeals to this court from the district court. In those circumstances the general rule as to the standard of review is set out in Neb. Rev. Stat. § 25-1911 (Reissue 1979), which provides for appellate review "for errors appearing on the record" in cases such as this involving the appointment of a personal representative by the county court.

Our review of the record presented to us leads us to the conclusion that there is no error in the county court's finding that Kyla and Edgar were not suitable to act as personal representatives of the estate of Kyle Casselman. The accounting reports of the activities of Kyla and Edgar, while acting as special administrators, show clearly that their fiduciary position was thoroughly abused. The reports are confusing and overlapping, and show questionable items of expense, including donations to churches and disbursements to Kyla for personal needs. As set out above, requests for information made by another devisee were responded to by forwarding carbons, which by the nature of retained carbons were transposed so that they were unreadable unless held in front of a mirror. The actions of Kyla and Edgar as special

administrators were such that they were disqualified from having any priority to be appointed as personal representatives, even though nominated in the decedent's will to be coexecutors. See § 30-2414.

With regard to the appointment of Harry R. Meister, a different situation is presented. Kyla, Edgar, James, and Daniele all took part in the hearing of October 3, 1983, in the county court. There are, however, other devisees affected by the appointment of a personal representative of Kyle Casselman's estate. Dawna Casselman and Harold Clark were named as devisees. Those devisees had no notice of the October 3, 1983, hearing, although they had been notified of the filing of the formal petition on July 20, 1982, and had been notified of a hearing to be held on that petition on August 12, 1982. Such notice, however, could not operate to serve as notice of a contested hearing on October 3, 1983, particularly when the requested appointment of Harry R. Meister was filed on the same day.

Harry R. Meister, as nominee of James, a devisee, has certain priorities as set out in Neb. Rev. Stat. § 30-2412 (Reissue 1979). Other devisees have the same priority, and those devisees are entitled to notice of the hearing to appoint a personal representative. That notice, as required by § 30-2220, was not given. The case, therefore, must be remanded to the district court with directions to return the case to the county court for a hearing on the question of who shall be appointed the personal representative of Kyle Casselman's estate.

That part of the order of the county court refusing to appoint as personal representatives the persons named in the will is affirmed. A further hearing shall be held on the appointment of Harry R. Meister as personal representative, and proper notice of such hearing shall be given to all interested persons.

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

CIRCLE 76 FERTILIZER, INC., A NEBRASKA CORPORATION, APPELLANT, V. DALE E. NELSEN, ALSO KNOWN AS DALE NELSON, ET AL., APPELLEES, MID-STATE CO-OP, INC., A NEBRASKA CORPORATION, APPELLANT, FIRST NATIONAL BANK OF HOLDREGE, INTERVENOR-APPELLEE.

365 N.W.2d 460

Filed April 5, 1985. No. 84-343.

1. **Estoppel.** The elements necessary to establish equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
2. **Banks and Banking: Fraud: Liability: Estoppel.** As a general rule, where a bank has given an honest opinion as to the financial worth and standing of a third party as to whether the third party was entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion would not make it liable for fraud and deceit. The positive assertion of fact, and not the mere expression of an opinion, is necessary to constitute an estoppel.
3. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues will be limited to those pleaded.
4. **Prejudgment Interest.** If no reasonable controversy exists as to a party's right to recover or as to the amount of such recovery, the claim is generally considered to be liquidated and prejudgment interest should be allowed.

Appeal from the District Court for Rock County: EDWARD E. HANNON, Judge. Affirmed.

Steven O. Stumpff, for appellant Circle 76 Fertilizer.

Brad Roth of Black & Sennett, for appellant Mid-State Co-op, Inc.

Curtis A. Sikyta, for appellee State Bank of Scotia.

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

HASTINGS, J.

This case deals with the relative priority of a security interest held by the State Bank of Scotia under Neb. U.C.C. § 9-312 (Reissue 1980), a fertilizer lien claimed by the plaintiff, Circle 76 Fertilizer, Inc., under Neb. Rev. Stat. §§ 52-1101 et seq. (Reissue 1984), and a petroleum products lien claimed by Mid-State Co-op, Inc., under Neb. Rev. Stat. §§ 52-901 et seq. (Reissue 1984), with preference alleged as to crops in possession under Neb. U.C.C. § 9-310 (Reissue 1980). These conflicting claims arose, during the year 1981, over money advanced by each party to and crops grown by farmers by the name of Dale and Geraldine Nelsen.

The case arose as a suit for money judgment by Circle 76 against the Nelsens for failure to pay a promissory note held by Circle 76 for fertilizer and labor in applying the fertilizer. Circle 76 applied fertilizer through the first week in August 1981 to the Nelsens' land. Circle 76 claimed it agreed to carry the Nelsens' fertilizer and chemical bill until harvest, based on representations made by the bank that the Nelsens were financially secure.

Circle 76 sought judgment in its favor for $85,592.64, claiming that any security interest held by the defendant bank was subordinate on the grounds of equitable estoppel. Circle 76 also sought priority over Mid-State, which had filed a petroleum products lien against the Nelsens' corn crop on December 2, 1981. Circle 76 also claimed priority against C. Walter and Elaine McGuire, the lessors of the Nelsens' land, and the McGuires' intervenor, First National Bank of Holdrege. However, the interests of these last two defendants are not represented in this appeal.

The State Bank of Scotia cross-claimed, alleging it had priority over the crops in question by virtue of its perfected security interest held against all the Nelsens' property, including their crops. The bank had advanced funds to the Nelsens on June 19, 1980, and had filed its financing statement and security agreement on July 10, 1980. The financing statement included an after-acquired property clause, a description of the collateral, and a description of the land on which the crops were to be grown. The Nelsens' line of credit was renewed by the

bank on December 20, 1982. The bank sought priority over all other liens, judgment against the Nelsens, and recovery of the value of the corn delivered to and sold by defendants Mid-State and McGuires, which was subject to the bank's security agreement.

Mid-State cross-claimed, seeking priority for its petroleum products lien and the right to keep the proceeds from the corn sold by it and credited against the Nelsens' debt. It also sought a deficiency judgment from the remainder of the Nelsens' debt. It argued its priority was established either under § 9-312(2) or § 9-310.

Section 9-312(2) allows a perfected security interest in crops to have priority over a previous security interest if new value (1) was given the debtor to produce new crops during the production season and (2) not given more than 3 months before the crops became growing crops, provided the earlier security interest secured obligations due more than 6 months before the crops became growing crops.

On the other hand, § 9-310 would allow a statutory lienholder in possession of the collateral to have priority over a prior security interest where the lienholder had provided materials or services which enhance the value of the collateral. The only exception is where the statute establishing the lien specifically denies such priority.

Finally, Mid-State argued for the first time on rebuttal that the bank's security agreement did not clearly show that the corn held by Mid-State was subject to the bank's security interest, since the legal description of Section 11 of the Nelsens' land in the security agreement was different from the Section 11 description listed in Mid-State's lien.

The district court found that Circle 76 had no valid lien on the Nelsens' 1981 corn crop for failure to comply with the statutory requirements creating such a lien. See §§ 52-1101 et seq. Section 52-1103 requires the lien to be filed within 60 days after the last product was furnished or the last labor performed. Even if the court employed a liberal construction which would allow the lien to be filed either 60 days before or after the last delivery of goods or labor, the lien filed by Circle 76 on May 7, 1981, would not be within these statutory limits. Since the last

fertilizer was supplied on around August 1, 1981, the filing was still more than 60 days prior to that date.

Second, the court found that Circle 76 failed to establish the representations of the Nelsens' financial stability made by the bank were so materially false as to require the application of equitable estoppel.

The court found that Mid-State's petroleum products lien did not have priority under § 9-312(2), since the court refused to substitute the word "lien" for "security interest" within the meaning of § 9-312(2). The section was simply inapplicable. With respect to the applicability of § 9-310, the court apparently found it inapplicable either because (1) the lien was not properly foreclosed under § 52-903, and thus invalid, or (2) the court did not find the lienholder to be in possession of the collateral as required by that section.

The court dismissed Mid-State's contention that the bank's security interest and Mid-State's lien did not cover the same crops, since Mid-State failed to raise the issue in its pleadings. It only arose after the close of each claimant's case in chief.

The court found that the bank had a perfected security agreement which granted it priority over all other purported liens on the Nelsens' 1981 corn crop. It found the amount of the security interest to be $143,750, plus 12.5 percent annual interest from December 20, 1982, the date the Nelsens' line of credit was renewed. It ordered all amounts held by the clerk of the district court for the case credited against this amount.

The court awarded judgment to the bank against Mid-State for the corn it received, plus prejudgment interest from the date Mid-State recorded a transfer of the corn. The bank was also granted judgment and interest thereon against defendants McGuire for corn received by them. The court awarded Circle 76 a judgment against the Nelsens for $78,653.18. Mid-State was awarded a judgment of $53,308.86, plus interest from January 21, 1982. Motions for new trial were denied, and this appeal followed.

Circle 76 assigns as error the district court's denial to grant it relief based on equitable estoppel.

Mid-State assigns as error the district court's (1) finding that the State Bank of Scotia had sustained its burden of showing

the crops received by Mid-State Co-op, Inc., were subject to the bank's security interest; (2) finding that the bank's security interest had priority over Mid-State's petroleum products lien; and (3) granting prejudgment interest on the award made to the bank from Mid-State Co-op, Inc.

With respect to the estoppel issue raised by Circle 76, in Nebraska there are six elements which must be present to establish equitable estoppel. They are as follows:

> [A]s to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Cillessen Constr. v. Scotts Bluff Co. Hous. Auth., 217 Neb. 39, 43, 348 N.W.2d 418, 421 (1984); *Kohlbeck v. City of Omaha*, 211 Neb. 372, 318 N.W.2d 742 (1982).

These elements must be established by clear and convincing evidence. See *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984).

In the present case there was simply no sufficient showing that the behavior of the State Bank of Scotia amounted to a false representation or concealment of material facts. The testimony revealed that the bank's officer made only general statements to Circle 76 or its representatives about Dale Nelsen's financial stability. The bank felt Nelsen had the capabilities and machinery to meet his fertilizer debt. It produced a property statement of Nelsen's assets and liabilities as of January 19, 1981, which accurately reflected the collateral subject to the bank's security agreement.

The bank informed Circle 76 that the bill for the Nelsens' 1980 fertilizer costs would be settled as soon as that corn crop was sold. There was no clear evidence the bank represented to Circle 76 that it would subordinate its interest to assure Circle 76 would have a first lien on Nelsen's 1981 corn crop. At most, it gave its opinion that Nelsen was relatively secure.

Such an opinion is not without support on the record. Nelsen had been a customer of the bank since 1977, was doing custom farming in addition to the farming he was doing on his own, and he had, to the best of the belief of the bank, land in Minnesota on which he was drawing payments. The bank had no way of knowing that Nelsen's crop would be flooded out in 1981, that 1,170 acres would be planted but only 921 acres harvested, and that irrigated corn would produce only 50 to 60 bushels per acre.

The bank's opinion, in and of itself, is insufficient to invoke equitable estoppel. This situation is analogous to the one presented in *Albion Milling Co. v. First Nat. Bank of Weeping Water*, 64 Neb. 116, 89 N.W. 638 (1902), where the plaintiff creditor charged the debtor's bank with fraud for misrepresenting the debtor's ability to pay his bills.

The court refused to hold the bank liable, saying that where the bank gave an honest opinion as to the financial worth and standing of a third party as to whether the third party was entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion would not make it liable for fraud or deceit. The positive assertion of fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. *Talbott v. City of Lyons*, 171 Neb. 186, 105 N.W.2d 918 (1960).

Further, Circle 76 did not lack the knowledge or means of knowledge of the truth as to the facts in question. The company manager had checked the Rock County Courthouse files against Nelsen before delivering the fertilizer. He knew the bank had an outstanding security interest against Nelsen's property. Further, Circle 76's bank had access to the same records as the State Bank of Scotia for purposes of ascertaining Nelsen's creditworthiness.

Reviewing the record as a whole, Circle 76 was not in a

position of total reliance upon the bank's representations sufficient to find estoppel. Its assignment of error is without merit.

With respect to the first claim advanced by Mid-State, the district court was correct in refusing to consider whether the bank's security interest and Mid-State's lien covered the same land. That there may have been a variance in the land description was never raised in the pleadings.

The purpose of pleadings is to frame the issues upon which a cause is to be tried. *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984). The issues in a given case will be limited to those which are pleaded. *Omaha Fish & Wildlife v. Community Refuse*, 213 Neb. 234, 329 N.W.2d 335 (1983).

The failure of Mid-State to raise the variance in the description of Section 11 of Nelsen's land in the bank's security agreement and its own lien amounts to an admittance that the land in question was the same in both documents. See *Dinkel v. Hagedorn*, 156 Neb. 419, 56 N.W.2d 464 (1953).

The bank's burden in this case was to prove each element of its case which was not expressly or impliedly admitted by the defendant Mid-State. *Associates Finance Co. v. Teske*, 190 Neb. 747, 212 N.W.2d 572 (1973). There was no need for the bank to establish the land covered by its security agreement, since no conflict in this regard was raised in the pleadings. The bank met its other burden of proof by establishing it had a perfected security agreement, Neb. U.C.C. §§ 9-302 to 9-306 (Reissue 1980), covering the collateral in question, Neb. U.C.C. § 9-203 (Reissue 1980), which was timely filed.

Mid-State next questions the priority of the bank's security interest over its petroleum products lien. Evidence disclosed that the bank perfected its security interest by filing a financing statement and security agreement on July 10, 1980, with the Rock County clerk's office, and with the Nebraska Public Service Commission on November 19, 1980. The agreement described the collateral as "[a]ll farm products including but not limited to . . . crops . . . now owned or her after [sic] acquired," and described the land on which the secured crops were to be grown. It was signed by Dale Nelsen.

The security interest was taken to secure a loan made to the

Nelsens in the amount of $118,225.34 on June 19, 1980. By January 1, 1981, the Nelsens' indebtedness to the bank rose to $124,725.34, and by December 1, 1981, the Nelsens owed $131,250 as the result of new advances.

Mid-State's petroleum products lien was filed on December 2, 1981, for nonpayment of petroleum products. Corn from Nelsen was delivered to Mid-State for storage in the month preceding the filing of the lien. Around Christmas 1981, Nelsen and Mid-State had an oral agreement for Mid-State to purchase Nelsen's corn and credit his account. However, the actual transfer did not occur until January 7, 1982, and thus the petroleum products lien was not foreclosed until that time.

In considering the applicability of the U.C.C. in this case, Mid-State argues that either § 9-312(2) or § 9-310 applies.

Section 9-312(2), as explained *infra*, is inapplicable because it deals with the relative priority of competing security interests in crops and not the priority between a security interest and a statutory lien. Neb. U.C.C. § 9-104(c) (Reissue 1980) provides that the U.C.C. is inapplicable to liens except as provided in § 9-310. That § 9-310 applies in some cases where a lienholder is in possession of collateral does not automatically trigger the code's application in situations other than that defined in § 9-310. This first argument is without merit.

Section 9-310 provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Comment 1 to § 9-310 says the liens in question are those which improve or enhance the value of the collateral.

If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate, this section provides a rule of interpretation that the lien should take priority over the security interest. § 9-310, comment 2; *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973).

Mid-State claims that its petroleum products lien falls within

the purview of § 9-310 because it provided services and materials to Nelsen which enhanced the value of the collateral and it is a lienor in possession. However, for § 9-310 to apply, it must be determined if Mid-State met all the requirements of §§ 52-901 et seq. to create a valid petroleum products lien.

Section 52-902 requires a provider of products to file his lien within 6 months after furnishing the fuel or lubricants. Section 52-903 requires that proceedings to foreclose such a lien shall be instituted within 30 days after the filing of the lien.

Here, the lien was filed on December 2, 1981, but not foreclosed until January 7, 1982. While there was an oral agreement to do so around Christmas, the fact remains that no formal transaction took place within the 30 days' statutory period. As the lien was not foreclosed on time, it was not a valid lien within the meaning of § 9-310, and this section does not apply.

As Mid-State's lien was not superior to the bank's security interest, the district court did not err in granting the bank priority status.

Finally, Mid-State challenges the district court's award of prejudgment interest on the corn proceeds held by Mid-State. The general rule governing prejudgment interest is that " 'prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. . . .' " *Land Paving Co. v. D. A. Constr. Co.*, 215 Neb. 406, 407, 338 N.W.2d 779, 780 (1983).

" '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. [Citation omitted.]' " *Land Paving Co., supra* at 407, 338 N.W.2d at 780; *Classen v. Becton, Dickinson & Co.*, 214 Neb. 543, 334 N.W.2d 644 (1983); *Slusarski v. American Confinement Sys.*, 218 Neb. 576, 357 N.W.2d 450 (1984).

In the present case the district court awarded judgment to the State Bank of Scotia in the amount of $143,750, the amount of the Nelsens' outstanding debt at the time their credit was

renewed on December 20, 1982. There is no doubt the bank's claim was liquidated. Neither is there a reasonable controversy over the bank's right to recover this amount. The debt was due and it was the only claimant with a valid security interest covering all of the Nelsens' property. The evidence was also clear that Mid-State held corn from the Nelsens worth $34,412.50, which was subject to the bank's security interest.

The trial court allowed the bank to recover principal in the amount of $34,412.50 and interest of $8,023.73, dated from the day of transfer of the corn to Mid-State, January 7, 1982. Although we have some question as to whether the court applied the correct interest rate, it was within both the statutory limitations and the provisions of the written instrument, and the bank claimed no error as to that amount. Accordingly, we will not disturb that finding.

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

AFFIRMED.

CYNTHIA K. VOICHOSKIE, APPELLEE, V. DONALD R. VOICHOSKIE, APPELLANT.

365 N.W.2d 467

Filed April 5, 1985. No. 84-567.

Child Support: Modification of Decree: Equity. Where the failure to pay child support is the result of intentional conduct, an application for modification may be denied on the basis of the equitable doctrine of clean hands.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Richard E. Mueting of Mueting, DeLay & Stoffer, for appellant.

Paul M. Smith of Jewell, Gatz & Collins, for appellee.

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

BOSLAUGH, J.

The respondent, Donald R. Voichoskie, appeals from the order of the district court denying his application for modification of a decree of dissolution dated December 31, 1981, insofar as it pertains to child support.

In *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983), the district court dismissed the application upon a showing that the respondent was delinquent in his child support payments. We remanded the case for a hearing on the merits, stating at 779, 340 N.W.2d at 445, "If the evidence shows that the petitioner is able to pay the arrearage or is unable to pay through some intentional conduct on his part, the doctrine of clean hands may be invoked to bar his claim for relief."

After an evidentiary hearing on June 22, 1984, the trial court denied the respondent's application for modification. The respondent appeals from that order.

The parties have four children who are between the ages of 2 and 11. The decree of dissolution awarded custody of the children to the petitioner, Cynthia K. Voichoskie, and ordered the respondent to pay child support at the rate of $500 per month until further order of the court or until the children reached the age of majority, or became emancipated, married, or deceased.

At the time of the divorce respondent was employed and had an income of $370 per week. A history of respondent's unsteady employment prior to his application to modify the decree on January 11, 1983, is contained in this court's earlier opinion. At that time the respondent was delinquent in child support payments in the amount of $3,230.98.

The record from the June 22, 1984, hearing indicates that in the first 3 months of 1982 respondent made one payment of $200 and two payments of $250 each for child support. In April of 1982 respondent paid a total of $700. Thereafter, respondent's employer was ordered to withhold $275 per pay period, totaling $550 per month, to be applied to child support. The last such payment was made in September 1982, when the respondent was fired by that employer.

In October 1982 respondent was employed at a rate of $220 per week for 6 weeks. Respondent made no child support

payments during this time, nor did he make any other payments prior to filing for modification. The respondent has since made two voluntary payments of child support totaling $300. Seven of the remaining nine payments made were drawn by the State of Nebraska from his unemployment compensation.

The respondent worked for at least two different employers before securing his present job in February 1984 as a ranch hand on the Charles Swanson Ranch near Valentine, Nebraska, where he receives room and board and $500 per month. Throughout the years, it appears that the respondent has often been content to live on unemployment and has not made a substantial effort to obtain employment at a salary equal to the one he received at the time of his divorce.

In *Voichoskie v. Voichoskie, supra*, we discussed at some length the general holding that when a party owes past due child support, the failure to pay must be found to be a willful failure in spite of ability to pay before a request for modification of a decree may be dismissed on the basis of unclean hands.

The record sustains the finding of the trial court that the respondent is an able-bodied man capable of being employed and capable of paying child support. Most of the child support which he has paid in recent years has been that which has been forcibly extracted from him by withholding or garnishment proceedings. When the respondent was working full time, his earnings went to others and not to his children.

The judgment of the district court is affirmed.

AFFIRMED.

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

365 N.W.2d 469

Filed April 5, 1985. No. 84-580.

1. **Motions for Continuance.** A motion for continuance of a trial is addressed to the sound discretion of the trial court.
2. **Right to Counsel: Waiver.** A defendant may waive counsel as long as the waiver is done intelligently, knowingly, and voluntarily.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Affirmed.

Thomas B. Donner, for appellant.

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

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

PER CURIAM.

Defendant was issued a speeding ticket for driving 69 miles per hour in a 55 m.p.h. zone in Cuming County. He asked for and received a continuance of his appearance date, was permitted to enter a not guilty plea by telephone, and was given a trial date. He later obtained a continuance of trial because of weather conditions.

Defendant appeared in county court for trial and informed the trial judge he would like to obtain an attorney for trial. The trial judge continued the case until the next day. Defendant rejected the continuance, waived any right he had to counsel, and asked for an immediate trial, and the trial proceeded on the scheduled day.

The State proved that a state patrolman had caught the defendant speeding, as charged, by radar, which was properly operated, maintained, and calibrated. In his cross-examination defendant asked the arresting officer if the officer remembered being told by defendant that defendant's speedometer cable had broken at Fremont and that defendant could not tell how fast he was going. The officer so remembered. Defendant did not testify. Defendant was found guilty, was fined $22 plus costs, and has appealed.

Defendant assigns two errors: (1) That the county court abused its discretion by granting too short a continuance; and (2) That the county court erred in finding that defendant knowingly, intelligently, and voluntarily waived his right to counsel. Both assignments are wholly frivolous, and we affirm.

As set out in *State v. Clark*, 216 Neb. 49, 59, 342 N.W.2d 366, 372 (1983), " ' "[a] motion for a continuance is addressed to the sound discretion of the court, and in the absence of a

showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal." ' " The trial court did not abuse its discretion in this case.

With regard to defendant's second assignment of error, it is clear that a defendant may waive counsel, so long as that waiver is done knowingly and voluntarily. *State v. Jones*, 214 Neb. 145, 322 N.W.2d 702 (1983). Whether there had been such an intelligent waiver depends on the facts and circumstances of each case. *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976). The facts of this case show conclusively that defendant knowingly and voluntarily waived counsel.

In *State v. Clark, supra* at 58, 342 N.W.2d at 371, we noted that " '[d]efendants are not permitted to utilize the constitutional right to counsel to manipulate or obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.' "

AFFIRMED.

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

STATE OF NEBRASKA, APPELLEE, V. LYLE N. FIX, APPELLANT.

365 N.W.2d 471

Filed April 5, 1985. No. 84-581.

1. **Criminal Law: Appeal and Error.** Undue delay in ruling upon an appeal does not warrant dismissal of a criminal charge.
2. **Evidence: Appeal and Error.** If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, we must keep in mind that 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.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be overturned on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed.

Curtis A. Sikyta, for appellant.

A. Eugene Crump, Deputy Attorney General, and Jill Gradwohl, for appellee.

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

KRIVOSHA, C.J.

The appellant, Lyle N. Fix, was charged in the county court for Garfield County, Nebraska, in a three-count complaint. Count I charged him with violating Neb. Rev. Stat. § 39-669.07 (Reissue 1984), operating a motor vehicle while under the influence of alcohol. Count II charged him with violating Neb. Rev. Stat. § 39-669.08(4)(a) (Reissue 1984), refusing to submit to a chemical test of his blood or urine when directed to do so by an officer. Count III charged him with violating Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1979), furnishing false information to a police officer with the intent to instigate an investigation of an alleged crime. Following a trial to the court, Fix was found guilty of all three charges. On counts I and II he was sentenced to the county jail for a period of 7 days on each count, the sentences to run concurrently. Additionally, he was fined $200 on each count and ordered not to operate a motor vehicle for a period of 6 months. On count III he was sentenced to the county jail for a term of 30 days, to run consecutively to the sentences imposed on counts I and II. Fix appealed to the district court for Garfield County, Nebraska, where the convictions and sentences were affirmed.

He now appeals to this court, setting out a number of assignments of error. We believe, however, that none of them entitle him to either a reversal of the convictions or a new trial, and we therefore affirm.

Fix maintains that the district court committed reversible error for one or more of the following reasons: (1) In failing to dismiss the charges against him due to unreasonable delay in processing the appeal to the district court; (2) In failing to find that the county court erred in admitting into evidence exhibits 2

and 5; (3) In failing to determine that the county court had abused its discretion in questioning witnesses during the course of the trial in the county court; (4) In failing to find that there was insufficient evidence upon which Fix could be found guilty of any of the charges; and (5) In failing to find that the sentences imposed were an abuse of discretion. We shall address the matters in the order in which they are listed above.

The record discloses that Fix's appeal was filed in the district court for Garfield County, Nebraska, on September 20, 1983, and was not decided until June 12, 1984. While we do not condone delay, in the instant case the delays were occasioned through no one's real fault but, rather, due to the illness and retirement of two former district judges handling the matter prior to its ultimate decision. The legal issue, however, has been recently determined by us, and contrary to Fix's contention. In the case of *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984), we held that undue delay in ruling upon an appeal does not warrant dismissal of a criminal charge. In reaching that conclusion we pointed out that there is no guaranteed right of appeal, in a criminal conviction, under the federal Constitution, nor a state constitutional right to appeal in misdemeanor cases. Fix's first assignment of error must be overruled.

Fix's second assignment of error is likewise of no avail to him. During the course of the trial, the court permitted the State to introduce into evidence exhibits 2 and 5. Exhibit 2 is an offense report prepared by the investigating officer. Exhibit 5 is a voluntary statement made by Fix's son to the investigating officer. We need not address the question of whether the exhibits were properly admitted into evidence. The contents of the exhibits contain nothing more than statements concerning the events and were testified to without objection by both the investigating officer and the son during the course of the trial. At best, they were cumulative and in no way prejudiced the rights of Fix. We have frequently held that if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal. See, *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984); *State v.*

Massey, 218 Neb. 492, 357 N.W.2d 181 (1984). We have further held that this court will not set aside a judgment in a criminal case on the grounds of improper admission of evidence if, after an examination of the entire case, we consider that no substantial miscarriage of justice actually occurred. See *State v. Massey, supra*. Our examination of the record leads us to that very conclusion, and for that reason Fix's second assignment of error must be overruled.

Fix next argues that the county court abused its discretion in questioning witnesses. While, generally, the trial court should leave the trial of a lawsuit to the lawyers, there is statutory authority for the trial court to ask questions. Specifically, Neb. Rev. Stat. § 27-614(2) (Reissue 1979) provides in part: "The judge may interrogate witnesses, whether called by himself or by a party." While we do not condone the practice of the trial judge's interrogating witnesses so as to assist one or the other of the parties, we do recognize that in certain instances it may be necessary for the trial judge to interrogate the witness in order to develop the truth. See, *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984); *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982); *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980).

An examination of the record in this case clearly points out that the questions asked by the county court judge did not in any way assist the State. As a matter of fact, in one instance, after asking several questions, the trial court sustained an objection made by Fix, and on another occasion inquired of a reserve officer how many reserve officers were on the force.

Additionally, Fix made no objection at the time of trial. While we recognize that counsel may find it uncomfortable to object to questions propounded by the court, nevertheless, § 27-614 makes it clear that such objections must be made, and provides an opportunity to do so without prejudicing the jury in the event that one should be present. In the instant case, of course, there was no jury, and counsel should have indicated for the record any objections he may have had to questions propounded by the court. In any event, an examination of the specific questions discloses that there was no prejudice to the defendant, and his assignment of error in that regard must

likewise be overruled.

We turn, then, to Fix's next assignment, that there was insufficient proof to convict him. In determining the sufficiency of the evidence to sustain a conviction, we must keep in mind that 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. *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984); *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984). 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. Schroder, supra.*

There is evidence in the record from which a trier of fact could find that on April 13, 1983, a car belonging to Fix's son, Rodney, and occupied by Fix and his son was eastbound on a residential street in Burwell, Nebraska, when it slid into a ditch. While there is some conflict in the evidence as to who was driving the automobile, Rodney testified without objection that Fix was driving the vehicle. It would seem that such evidence was sufficient to establish the identity of the driver of the vehicle. Additionally, both the operator of a motel located next to where the accident occurred and the investigating officer described Fix's appearance. The investigating officer testified that Fix's speech was slurred, he was unsteady on his feet, he definitely smelled of alcohol, his appearance was flushed, and his eyes were bloodshot. Moreover, Fix had difficulty in retrieving identification from his billfold. It was further revealed that while the investigating officer was unlocking the door to the sheriff's office, Fix stumbled and fell and had to be helped into the office. Fix's son testified that the parties had been drinking prior to the accident. The motel operator testified that when Fix entered the motel he was unsteady on his feet, had difficulty getting into the toilet of the motel, and was not coherent when speaking. While some of the evidence may be in conflict, there certainly was sufficient evidence from which the trier of fact could find that Fix was operating a motor vehicle while under the influence of alcohol in violation of § 39-669.07. The evidence is further without contradiction that

the investigating officer requested Fix to submit to a blood or urine test and he refused to do so. That constitutes a violation of § 39-669.08(4)(a).

The evidence with regard to count III, violating § 28-907(1)(a), is a little more confusing, but still sufficient to permit the trier of fact to find Fix guilty. The record discloses that when Fix was initially arrested, he reported to the investigating officer that an envelope containing money was in the vehicle and that it contained an amount of money once said to be $1,900 by Fix and on another occasion $9,700 by his son. The officer was told that the money represented funds which, at least in part, had been given to Fix by his mother. However, when she was contacted by the investigating officer, Fix's mother denied giving Fix any large sums of money and, in fact, testified at trial that she had only given him some $35 or $40 in order to purchase gasoline. The investigating officer spent most of the night attempting to locate the envelope. When the investigation failed to turn up any money, and when Fix's mother denied having given Fix any such money, the investigating officer again talked to Fix's son. At that time the son admitted that there was no money in the vehicle. During the course of the trial, the son denied that fact, but admitted he did not know how much, if any, money was in the envelope in the vehicle, even though he had told the investigating officer on the night of the accident that there was $9,700 in the vehicle. Furthermore, there was evidence to the effect that Fix had not been gainfully employed on a full-time basis since 1974 and was not likely to have accumulated any significant amount of money. What the evidence does clearly establish, however, is that the evil which § 28-907 is intended to prevent occurred in this case. The law enforcement department for this community is extremely small. The record indicates that it consisted of only two officers, one working days and one working nights. Because of the statement made by Fix, the one officer was required to occupy his entire evening investigating the allegedly missing money and was taken away from his real purpose, that of patrolling the community during the night hours. The evidence was sufficient to permit the trier of fact to find Fix guilty on count III. For that reason Fix's assignment of error

that the evidence was insufficient is overruled.

That leaves us then with the final assignment, regarding the abuse of discretion in sentencing. The sentences on counts I and II were well within the statutory limits. We have repeatedly held that a sentence imposed within the statutory limits will not be overturned on appeal in the absence of an abuse of discretion by the trial court. *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984). See, also, *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984). Fix has pointed out to us no evidence of any abuse of discretion, and therefore we are not inclined to overturn the sentence on appeal. With regard to count III the offense is a Class I misdemeanor punishable by a maximum of up to 1 year's imprisonment. Fix's sentence of 30 days was well within the limits of a sentence which could be imposed for a violation of count III, and, in fact, nearly minimal. As observed by the sentencing court, the violation was, however, a serious matter and not one which could be ignored. We are simply unable to say that the county court in any manner abused its discretion when imposing the sentences in this case. For that reason the last assignment of error must likewise be overruled. For all of these reasons, therefore, the judgment and sentence of the district court affirming the judgment and sentences of the county court are affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

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

365 N.W.2d 475

Filed April 5, 1985. No. 84-709.

1. **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.
2. **Pleas.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for further proceedings.

John R. Malek, 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.

This is an appeal from an order of the district court for Lancaster County denying without hearing appellant's application for post conviction relief. We reverse for a determination of whether the appellant's guilty plea was the result of certain representations made to appellant by a third party, at least with the knowledge, and possibly with the approval, of the sentencing court, and therefore involuntary.

In February 1978 the appellant, John R. Malek, while incarcerated at the Nebraska Penal and Correctional Complex, suffered a stab wound and was hospitalized at Lincoln General Hospital. During this hospitalization, the appellant escaped from custody. A few days later, the appellant surrendered himself to Lincoln police officers. Malek was subsequently charged in a two-count information with the crimes of escape, being a habitual criminal, and with the use of a firearm to commit a felony.

Appellant assigns as error the denial of his application for post conviction relief without an evidentiary hearing. 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. *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984). A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly

and voluntarily. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

Although appellant's pro se motion may not artfully state his allegations, an examination of his motion and attached exhibits raises serious questions as to the voluntary nature of his plea.

Appellant's pro se motion contains as an exhibit the complete record of the arraignment and sentencing. The facts relating to the allegations are taken from that exhibit.

The arraignment, held August 8, 1978, was in due form. However, at the sentencing held September 14, 1978, the court, after hearing statements of appellant's attorney, made the following observation:

> THE COURT: Have — the Court recognizes in the courtroom Jim Moore, and Jim — Jim, would you come forward, sir? Let the record show that Mr. Moore has talked with the Court about this particular case, and he has — the Court has permitted him to examine the presentence report, is that right, Mr. Moore?

According to the record, Mr. Moore, a volunteer prison counselor, became involved in the appellant's case about a month and a half prior to sentencing. At the sentencing, after being called forward by the court, Mr. Moore was permitted to address the court at length, converse with the appellant, and elicit promises from the appellant that he would cooperate with authorities in controlling problems of sexual assault and drug abuse at the penitentiary. After giving the appellant an extended lecture, the following dialogue took place between Mr. Moore and the appellant:

> MR. MOORE: Now, do you promise me that totally and completely? Now, you have been on smack, you have been on heroin, right?
>
> THE DEFENDANT: Yes, sir.
>
> MR. MOORE: All right. And I want to know are you at the present time in any way addicted?
>
> THE DEFENDANT: No, sir.
>
> MR. MOORE: You are in no way addicted?
>
> THE DEFENDANT: No, sir, I'm healthy now.
>
> MR. MOORE: All right, okay. He has given me his word that he is not on drugs. I believe that totally, Your

Honor. I believe that he is not going to get on drugs again.

Now, I am making a promise to you at this present moment. Within three years' time regardless of whether you get a habitual criminal rap or not, see, you and I are going to be in the swimming pool at the YWCA swimming side by side. The YWCA, see. The YWCA. My wife belongs to it. I've been over there and swim every couple of weeks.

Now, I'm trying to give you hope this morning. This is the worst day of your life. That man sitting up there, he has a tremendous problem. This is a habitual criminal thing. This is a ten-to-sixty bit, see, this is the ten-to-sixty bit. This is no chief runaround, see?

(Emphasis supplied.) The court thereupon addressed the defendant as follows:

THE COURT: I can't give you much clemency. The minimum is tough. It's the law and the Court must follow the law, but Mr. Moore knows and this court knows that if you demonstrate out there the things that Mr. Moore has told you about, *there's ways in which this court and Mr. Moore and others can go to the proper authorities and you can get out of the Penal Complex. It may be under a parole or something like that for some time, but they can make exceptions and go through the proper authorities.* You're not going to make that, however, unless there's something unusual in your good behavior, and this is what Mr. Moore's talking about and he's going to be watching you and in communication with you and with others who know you.

All right. It is the sentence of this court and that the defendant be and he hereby is imprisoned and confined to the Nebraska Penal & Correctional Complex for a term of ten years. That is the minimum.

THE DEFENDANT: Yes, sir.

THE COURT: To pay the costs of this action. Said sentence shall run consecutively to the unexpired terms and the sentences which you are serving or have yet to serve. If you go the usual way and — and work with — and — get involved out there with the little games they play, it's

> a long time you're going to be serving. The Court cannot go further until you have had the opportunity to do these things which you've promised; and, Mr. Moore, this court will — on — on a demonstration here through a period of time of good work of this — of John out there in the penal institution, you document that for me and I'll join hands with you about this long tenure.

(Emphasis supplied.)

We note from the briefs that appellant at the time of sentencing had yet to complete an existing sentence and to start another sentence for two prior robbery convictions in addition to the escape-habitual criminal sentence imposed by the trial court, with the earliest possible release date on the prior charges of 1985.

Appellant argues that having fulfilled his contract with Moore, which contract from the record seems to have been approved by the court, he is entitled to immediate release. This court does not have the power to commute a lawful sentence any more than did the trial court, notwithstanding Mr. Moore's assertion.

However, in view of the nature of the representations made to appellant, this court concludes appellant is entitled to an evidentiary hearing as provided in § 29-3001.

The remaining issues raised by appellant concerning ineffective assistance of counsel need not be discussed, as the same will be considered by the trial court.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V. BRUCE ALLEN WILKINSON, APPELLEE.

365 N.W.2d 478

Filed April 5, 1985. No. 84-745.

1. **Criminal Law: Preliminary Hearings.** A preliminary hearing is not a criminal prosecution or a trial. Its purpose is to ascertain whether a crime has been committed and whether there is probable cause to believe the accused committed it.
2. **Criminal Law: Judges: Jurisdiction.** A county judge sitting as an examining magistrate has no jurisdiction to dismiss a felony complaint with prejudice.
3. _____: _____: _____. The jurisdiction of an examining magistrate is limited to discharging the defendant or holding him for trial by a court which has jurisdiction over the offense charged.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Exception sustained.

James R. Kozel, Deputy Platte County Attorney, for appellant.

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

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

BOSLAUGH, J.

This is a proceeding under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1984) to review the order of the district court affirming the order of the county court dismissing with prejudice a felony complaint against the defendant, Bruce Allen Wilkinson.

The defendant was arrested on April 13, 1983, in Platte County, Nebraska, for possession of a controlled substance, a Class IV felony. The next day, the defendant posted bond and was released from custody. At that time the defendant agreed to appear before the court at a later date to answer charges against him. When no charges had been filed by April 28, 1983, the defendant's bond was discharged.

On November 18, 1983, a complaint charging the defendant with possession of a controlled substance was filed. The defendant was brought before the county judge on February

17, 1984, and a date was set for a preliminary hearing. The defendant then filed a motion for discharge setting forth the above facts and alleging that he had been denied his constitutional right to a speedy trial. The county court found that the defendant's motion should be sustained and dismissed the complaint with prejudice. The State then appealed to the district court, where the order was affirmed.

The issue here is whether a county judge sitting as an examining magistrate has jurisdiction to dismiss a felony complaint with prejudice.

A preliminary hearing is not a criminal prosecution or a trial. "Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it." *Delay v. Brainard*, 182 Neb. 509, 512, 156 N.W.2d 14, 17 (1968).

After the defendant had been charged with a felony, he was entitled to a preliminary hearing pursuant to Neb. Rev. Stat. § 29-504 (Reissue 1979). The scope of that hearing is defined in Neb. Rev. Stat. § 29-506 (Reissue 1979), which provides:

> If upon the whole examination, it shall appear that no offense has been committed or that there is no probable cause for holding the accused to answer for the offense, he shall be discharged; but if it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law . . . .

In this case the county judge was sitting as an examining magistrate. Neb. Rev. Stat. § 29-201 (Reissue 1979). A magistrate's function at a preliminary hearing is solely to determine those issues set forth in § 29-506. As stated in *Van Dam v. Morris*, 571 P.2d 1325, 1327 (Utah 1977):

> The authority of a magistrate is purely statutory. A judge, who sits as a magistrate does not carry his court or his judicial attributes with him, except to the extent they inhere in the office of magistrate.
>
> The statutory power conferred on a magistrate conducting a preliminary hearing is limited to discharging

> the defendant . . . or holding him for proceedings in the district court . . . . The powers to dismiss criminal proceedings . . . are conferred on courts in the proper exercise of their respective jurisdictions.

A magistrate's authority does not extend to adjudicating whether the defendant was denied a speedy trial. See *Janklow v. Keller*, 90 S.D. 168, 238 N.W.2d 688 (1976). The court which has jurisdiction over the felony is the proper forum for such a determination.

EXCEPTION SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. TIMM, APPELLANT.

364 N.W.2d 916

Filed April 5, 1985. No. 84-806.

1. **Effectiveness of Counsel.** Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
2. _____. In any ineffectiveness case a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

James L. Timm, pro se.

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

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

PER CURIAM.

The defendant, James L. Timm, pleaded guilty to use of a firearm in the commission of a felony and was sentenced to imprisonment for 4 to 12 years. The judgment was affirmed on direct appeal by this court on June 20, 1984.

On August 15, 1984, the defendant filed an amended petition

for post conviction relief alleging that the State had failed to disclose evidence of mental instability on the part of the victim, ineffective assistance of counsel, and that the defendant was acting in self-defense at the time the crime was committed.

The trial court found that the first and third grounds alleged in the motion were not a basis for post conviction relief and held an evidentiary hearing as to the second ground. Counsel other than the public defender was appointed to represent the defendant at that hearing. After the hearing the trial court found that the defendant had not been denied the right of effective assistance of counsel.

The defendant has appealed. A prior motion to withdraw by appointed counsel was sustained by this court on November 5, 1984.

The record shows that the public defender conferred with the defendant in person on several occasions and by telephone on other occasions. The public defender testified that in addition to discussing this case in detail with the county attorney on several occasions, he had complete access to the county attorney's files in this matter and had reviewed them in their entirety. The files included police reports, interviews, statements, and other documents relating to the case. He also reviewed the results of a lie detector test given to the victim. After this review the public defender arranged for a meeting with the defendant. They discussed the results of the lie detector test, and the public defender told the defendant that there was enough information to support three additional charges of first degree sexual assault. On these facts the public defender recommended that the defendant accept the plea bargain.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. ____, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984).

The record supports the findings of the trial court in all respects. The judgment is, therefore, affirmed.

AFFIRMED.

JOSEPH ROSENBERG, APPELLANT, V. LINCOLN FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLEE.

365 N.W.2d 809

Filed April 12, 1985. No. 83-867.

1. **Accord and Satisfaction.** The principal questions to be asked in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction? and (2) Does that performance constitute a sufficient consideration for a return promise or for a discharge?
2. _____. The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact.
3. _____. An accord and satisfaction of a claim or demand, whether liquidated or unliquidated, may be, and where the parties so intend or agree is, effected by the transfer and acceptance of property.

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

George O. Rebensdorf, for appellant.

J. Michael Rierden of Wolfe, Hurd, Rierden & Luers, for appellee.

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

COLWELL, D.J., Retired.

Plaintiff-appellant, Joseph Rosenberg (Rosenberg), sought cancellation of a deed conveying real estate to the defendant-appellee, Lincoln Federal Savings and Loan

Association (Lincoln Federal). The trial court dismissed the petition upon a finding that Lincoln Federal had proved its affirmative defense of accord and satisfaction. We affirm.

We review this equity action de novo on the record, making independent findings and conclusions. Neb. Rev. Stat. § 25-1925 (Reissue 1979).

On January 18, 1980, Lincoln Federal loaned $1,200,000 to L & L Investments (L & L), a partnership comprised of Ronald Rosenberg (plaintiff's son) and Richard Svoboda. The note, cosigned by plaintiff, was secured by a mortgage on the Terminal Building, Lincoln, Nebraska, owned by L & L.

Lincoln Federal required additional collateral which was provided by plaintiff, who gave a collateral security agreement to Lincoln Federal pledging Lot 15, Block 1, Spencer's Addition, Lincoln, Lancaster County, Nebraska, known as the Midas property, as additional security.

In October 1980 L & L needed $350,000 to pay improvement costs. A second loan in the amount of $1,550,000 was secured from Lincoln Federal and a new mortgage given on the Terminal Building. This loan was used to pay off the first $1,200,000 loan and to provide the $350,000. There is some dispute, but the evidence supports a finding that a condition of the second loan was that the same properties and the security agreement would provide the loan security. Rosenberg again acted as a cosigner for the note; no new security agreement was executed by him.

L & L defaulted the $1,550,000 loan, and in December 1982 Lincoln Federal commenced a foreclosure action claiming $1,655,351.97 due on the note secured by the Terminal Building mortgage and the security agreement. Named defendants were the partnership, all partners, and Joseph Rosenberg. On December 15, 1982, the parties reached a settlement agreement. Lincoln Federal agreed to dismiss the foreclosure action against all parties and to release them from any further liability. In exchange L & L and plaintiff agreed to convey the secured properties to Lincoln Federal. This was accomplished by the dismissal of the suit on January 19, 1983, and corresponding transfers of deeds—L & L conveyed the Terminal Building to defendant, and plaintiff conveyed the Midas property to

defendant. Further, plaintiff was given an option to repurchase the Midas property within 60 days at a cost of $170,000. During the option period, plaintiff received all rental from the property; the option was not exercised.

In substance, Rosenberg's assignments of error are that the trial court erred (1) in finding that Lincoln Federal has met its burden of proving an accord and satisfaction and that he had failed to meet his burden of proof; (2) in failing to find that the doctrine of merger should operate to release the Midas property from liability to Lincoln Federal; and (3) in failing to find fraud on the part of Lincoln Federal.

Plaintiff contends that the collateral security agreement which he signed incident to the $1,200,000 loan was released when that loan was paid, since the security agreement was not renewed. The evidence shows that the security agreement continued as security for the new loan.

" 'An accord and satisfaction is predicated upon an agreement between the parties based upon a consideration and fully executed on the part of the defendant, whereby the plaintiff's cause of action is satisfied or discharged.' " *Ruehle v. Ruehle*, 161 Neb. 691, 699, 74 N.W.2d 689, 694 (1956). See, also, *Crilly v. Ruyle*, 87 Neb. 367, 127 N.W. 251 (1910).

Defendant had the burden to prove its affirmative defense of accord and satisfaction.

The principal questions to be asked in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction? and (2) Does that performance constitute a sufficient consideration for a return promise or for a discharge? The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact. *Kurkowski v. Bailey*, 203 Neb. 582, 279 N.W.2d 401 (1979). See, also, *Cox v. Rippe*, 146 Neb. 309, 19 N.W.2d 514 (1945).

The key element of accord and satisfaction is the intent of the parties, which, although as a general rule presents a question of fact, becomes a question of law when evidence creates no

conflict as to intent. *Meyers v. Frohm Holdings, Inc.*, 211 Neb. 329, 318 N.W.2d 716 (1982).

There is no merit to plaintiff's claim that Lincoln Federal agreed to dismiss the foreclosure suit with prejudice, which was breached by its dismissal without prejudice, and, therefore, there was no meeting of the minds. The negotiations for the dismissal were between officers of Lincoln Federal and Ronald Rosenberg, attorney for plaintiff and one of the defendants. There is no evidence of such an agreement, and the release (later discussed) effectively released plaintiff of all liability.

The evidence is clear that there was a meeting of minds between the parties on or about December 15, 1982, when plaintiff, in exchange for his release from potential liability under the note which he cosigned on December 29, 1980, and in exchange for the dismissal of the foreclosure action which was then in progress, conveyed to Lincoln Federal the deed to the Midas property. Rosenberg testified: "Q. Do you understand this document to mean that given those conveyances [the Terminal Building and Midas property] to Lincoln Federal, that you would be released from any further liability on all notes, mortgages, collateral security agreement? A. Yes."

Further, in a letter to Gerald Maddox, then president of Lincoln Federal, dated February 11, 1983, plaintiff stated that it was his understanding the deed to the Midas property was delivered in exchange for a release from personal liability on the December 1980 promissory note which he had signed.

Lincoln Federal's intent is shown by the execution and delivery of this "RELEASE," which reads in part:

> The undersigned, President of Lincoln Federal Savings and Loan Association, . . . for and in consideration of conveyance of properties owned by L & L Investments, a partnership, and commonly known as the Terminal Building, the parking lot adjacent to the South and the parking garage at the Southwest corner of 9th and "O" Streets, Lincoln, Nebraska, and property owned by Joseph Rosenberg described as Lot 15, Block 1, Spencers Addition to Lincoln, Lancaster County, Nebraska [the Midas property], does hereby *forever and unconditionally discharge Ronald Rosenberg and Sheila Rosenberg,*

husband and wife, and Joseph Rosenberg, a single person, from any and all further liability due the said Lincoln Federal Savings and Loan Association which may have been incurred as a result of execution of notes, mortgages and collateral security instruments for purposes of obtaining a loan in the original principal sum of $1,550,000 upon said aforementioned properties.

(Emphasis supplied.)

" '[A]n accord and satisfaction of a claim or demand, whether liquidated or unliquidated, may be, and, where the parties so intend or agree, is effected by the transfer and acceptance of *property . . . .*' " (Emphasis supplied.) *Meisinger v. Johnson*, 162 Neb. 360, 367, 76 N.W.2d 267, 272 (1956); *Dunbier v. Stanton*, 170 Neb. 541, 103 N.W.2d 797 (1960).

Any question of the sufficiency of consideration is resolved by *Farmland Service Coop., Inc. v. Jack*, 196 Neb. 263, 242 N.W.2d 624 (1976), holding that the settlement of a dispute between parties is a sufficient consideration for purposes of supporting an accord and satisfaction.

Lastly, there is no dispute that Rosenberg accepted the agreement. He stated in his testimony that he understood the consequences of his actions and that he freely and voluntarily signed the deed and transferred title to Lincoln Federal. This being true, the third prong of the *Kurkowski* test has been met, and the defense of accord and satisfaction was proved.

In view of the dismissal of the foreclosure action without prejudice, and the proof of accord and satisfaction, the issue of merger is not discussed.

Concerning the last assigned error, there is no evidence of a fraudulent intent on the part of Lincoln Federal, and that issue fails. " '[A] fraudulent intent or the equivalent thereof is an essential element of fraud . . . .' " *Trebelhorn v. Bartlett*, 154 Neb. 113, 118, 47 N.W.2d 374, 379 (1951).

AFFIRMED.

STATE OF NEBRASKA EX REL. CHARLES A. KANDT, LINCOLN COUNTY ATTORNEY, APPELLEE, V. NORTH PLATTE BAPTIST CHURCH OF NORTH PLATTE, NEBRASKA, ET AL., APPELLANTS.

365 N.W.2d 813

Filed April 12, 1985. Nos. 84-042, 84-261.

1. **Final Orders: Judgments: Appeal and Error.** Generally, appellate jurisdiction of the Supreme Court is limited to a review of final orders and judgments.
2. **Contempt: Final Orders: Judgments: Appeal and Error.** If a contempt is criminal, the judgment is final and a proper subject for an appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal.
3. **Contempt.** A civil contempt order can be attacked by a party litigant only through a habeas corpus proceeding.
4. _____. Criminal contempt is a prosecution to preserve the power and vindicate the dignity of the court and to punish for disobedience of the court's orders.
5. _____. Civil contempt is an action brought by a party litigant to preserve and enforce his rights and compel obedience to orders and decrees adjudicated in his favor.
6. _____. The true character of a contempt proceeding lies in the procedures used in conducting the contempt hearing and the sentence imposed.
7. _____. Incarceration, standing alone, is not determinative of criminal contempt. If the imprisonment is not inflicted as punishment but is intended to be remedial by coercing the defendant to do what he has refused to do, the contempt is civil.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Appeal dismissed.

David C. Gibbs, Jr., Charles E. Craze, and Richard W. Moore of Gibbs & Craze Co., and George E. Clough of Clough & Hays, P.C., for appellants.

Charles A. Kandt, Lincoln County Attorney, for appellee.

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

BOSLAUGH, J.

The defendants North Platte Baptist Church and Robert D. Gelsthorpe, pastor of the church, appeal from the order of the district court finding them in contempt for their refusal to comply with the court's order to cease operating a nonaccredited Christian school in North Platte, Nebraska, until it met state certification requirements.

In *State ex rel. Kandt v. North Platte Baptist Church*, 216 Neb. 684, 345 N.W.2d 19 (1984), the judgment enjoining the operation of the school was affirmed. We held that the case was controlled by *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), which had discussed and disposed of identical issues concerning first amendment matters.

Despite the injunction, the defendants continued to operate the school. On December 5, 1983, the State filed a motion for an order to show cause why the defendants should not be held in contempt. An order was issued and an evidentiary hearing was held. At an earlier hearing held on September 13, 1983, the trial court announced that it was a case of civil contempt in which the court sought compliance with its order, and the standard of proof needed to find the defendants in contempt was a preponderance of the evidence.

The only evidence introduced by the State at the evidentiary hearing was the deposition of the defendant Gelsthorpe. The defendants rested without introducing any evidence. The defendants were found to be in willful contempt of the injunction and fined $200 for each day the school remained in operation. The defendant Gelsthorpe was required to report to the Lincoln County sheriff's office each Monday through Friday from 9 a.m. to 3 p.m. for each day the school remained in operation.

On March 15, 1984, the trial court on its own motion modified the order to require the defendant Gelsthorpe to be accompanied by the Lincoln County sheriff to the sheriff's office each day. He was to be allowed no telephone calls or visitors without permission of the court. This modification was in response to a letter from Gelsthorpe in which he said, "1. I can not in good conscience report to the Sheriff's Office after the 48 days I have spent in confinement; 2. I am compelled to resume the *full* responsibilities of the pastorate including the administration of the North Platte Christian School."

Separate appeals from the orders have been consolidated in this court.

The defendants have assigned as error: (1) The standard of proof used by the district court was incorrect; (2) There was

insufficient evidence to establish a "willful" violation of the order; (3) The injunction on which the contempt order was based was void for failure to comply with statutory procedures; and (4) Defendants should have been allowed to put on evidence to demonstrate that due to violation of constitutional rights, the State's allegations of contempt failed to state a claim upon which relief could be granted.

Before considering the assigned errors this court must determine if it has jurisdiction to hear the case. Generally, appellate jurisdiction of the Supreme Court is limited to a review of final orders and judgments. Neb. Rev. Stat. §§ 25-1911 (Reissue 1979) and 25-1912 (Cum. Supp. 1984); *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973). The question here is whether the contempt order from which the defendants appeal was a final order.

If a contempt is criminal, the judgment is final and a proper subject for an appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal. *In re Contempt of Sileven, ante* p. 34, 361 N.W.2d 189 (1985); *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984); *Fox v. Capital Co.*, 299 U.S. 105, 57 S. Ct. 57, 81 L. Ed. 67 (1936); *Southern Railway Company v. Lanham*, 403 F.2d 119 (5th Cir. 1968). See, also, *McFarland v. State*, 165 Neb. 487, 86 N.W.2d 182 (1957). A civil contempt order can be attacked by a party litigant only through a habeas corpus proceeding. *Liles, supra*. See, *Thorlakson v. Wells*, 207 N.W.2d 326 (N.D. 1973); 39 Am. Jur. 2d *Habeas Corpus* § 96 (1968).

Criminal contempt is a prosecution to preserve the power and vindicate the dignity of the court and to punish for disobedience of the court's orders. *Sileven, supra; Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). Civil contempt is an action brought by a party litigant to preserve and enforce his rights and compel obedience to orders and decrees adjudicated in his favor. *Eliker, supra*.

The true character of a contempt proceeding lies in the procedures used in conducting the contempt hearing and the sentence imposed. D. Dobbs, Handbook on the Law of Remedies, *Equity and Equitable Remedies* § 2.9 (1973).

A case tried under all the rules for criminal proceedings, in

> which the defendant is given all of the criminal due process, and sentenced to a certain term in jail, is clearly a criminal contempt case, even though the act of contempt is the violation of an injunction in a civil case. Likewise, if the case is tried under ordinary civil procedure, and the court orders the defendant to jail until he complies with the decree, the contempt proceeding is clearly a civil one.

Id. at 97.

Incarceration, standing alone, is not determinative of criminal contempt. If the jail term is for a definite period, and intended to punish for a past act already accomplished, the contempt is criminal. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911). However, if the imprisonment is not inflicted as punishment but is intended to be remedial by coercing the defendant to do what he has refused to do, the contempt is civil. *Gompers, supra.*

> The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. . . . If imprisoned . . . "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

Gompers at 442, quoting *In re Nevitt*, 117 F. 448 (8th Cir. 1902); *Reeder v. Morton-Gregson Co.*, 296 F. 785 (8th Cir. 1924); *Liles, supra.*

In the present case the procedures used in the contempt hearing were civil in nature. The motion for citation to show cause was brought by the State in its capacity as a party litigant to the original civil action, and not by information in the name of the State.

Further, the trial court made it clear at the earlier hearing that it was a civil contempt proceeding and not a criminal action. Its purpose was to compel compliance with the court's order, and the rules of civil, not criminal, procedures would be used. Any penalties imposed would be coercive in nature.

The penalty handed down was in fact coercive. The fine of $200 accumulated on a daily basis; the defendant Gelsthorpe's time at the sheriff's office was on a day-to-day basis until he complied with the order. After handing down the penalty, the

trial court stated that the sanction would remain effective only until the order had been complied with and was not intended as punishment. "The Court is not punishing you or the other Defendants for actions that have taken place in the past." The defendants knew that they could purge themselves of contempt at any time by complying with the injunctive order.

Finally, if there was any question as to the civil nature of the contempt sanctions, it was clarified when the trial court denied the defendants' motion for a stay of execution. The court stated that the motion was inappropriate, since it was clearly a civil contempt proceeding.

As the contempt was civil in nature, the order appealed from was not a final order, and this court is without jurisdiction. The appeal must be dismissed.

APPEAL DISMISSED.

H. DANIEL SMITH AND FREDERICK D. STEHLIK, APPELLANTS, V. RUSSELL S. DAUB, APPELLEE.

365 N.W.2d 816

Filed April 12, 1985. No. 84-074.

1. **Statutes: Partnerships: Contracts.** The provisions of Neb. Rev. Stat. § 67-318(a) (Reissue 1981) may be modified either by an agreement between the partners or by a course of dealing amounting to an agreement between the partners.
2. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract, and ordinarily such construction of the contract should be enforced.
3. **Partnerships.** A partnership only terminates when the business of the partnership has been wound up.
4. _____. No partner is entitled to remuneration for acting in the partnership business.

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

H. Daniel Smith of Stehlik, Smith & Trustin, for appellants.

Virgil J. Haggart, Jr., of Gaines, Otis, Haggart, Mullen &

Carta, for appellee.

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

KRIVOSHA, C.J.

This is an action by two members of a dissolved law partnership for an accounting. Following trial, the district court for Douglas County, Nebraska, found generally for appellee partner, Russell S. Daub, and against appellant partners, H. Daniel Smith and Frederick D. Stehlik. Specifically, the district court in effect found that a course of dealing among the parties amounting to an agreement entitled Daub to be compensated during the life of the partnership at a rate twice that of Smith and Stehlik. The district court further found that in winding up the affairs of the partnership the various partners were not entitled to receive any additional salary for their services and were entitled to be compensated during the winding up of the partnership in the same proportion as they were paid during the existence of the partnership. The district court therefore held that appellant Smith should be compensated for handling various contingent fee cases assigned to him in connection with the winding up of the partnership in the same ratio as he was compensated during the life of the partnership. Finally, the district court found that the time expended on legal services in connection with appellee Daub's personal business interests did not obligate Daub to reimburse the partnership for time so spent.

Smith and Stehlik have appealed the decision and assign as error the district court's findings in regard to these three issues. On review we believe the district court was correct in its findings, and, accordingly, we affirm.

The record discloses that the three lawyers formed a partnership in March of 1980 and continued the partnership under the firm name of "Daub, Stehlik & Smith" until it was dissolved by mutual consent of all of the parties on October 13, 1982. No formal partnership agreement was ever executed by the parties, and all agreements such as may have existed were oral. While there was a conflict in the evidence as to whether there had been any prior discussions concerning the

distribution of profits, the manner in which the profits were in fact distributed is without dispute. For the first year Daub drew at a rate of $3,000 per month, while Stehlik and Smith each drew at a rate of $1,500 per month. At some time in 1980 Stehlik's draw was increased to $1,700 per month, without any corresponding increase in Daub's or Smith's draws, but this does not appear to be a significant issue. The 1980 partnership tax return and schedules K-1 for the individual partners reflected that the profits were divided 50 percent to Daub and 25 percent each to Stehlik and Smith.

In 1981 the partnership realized greater profitability and the partners' monthly draws were increased so that Daub drew $4,000 per month and Stehlik and Smith each drew $2,000 per month. At several times during 1981 when the parties determined that the firm had accumulated cash in excess of current expenses and partners' draws, the excess funds were distributed 50 percent to Daub and 25 percent each to Stehlik and Smith. The partners' draws for 1982 remained $4,000 per month for Daub and $2,000 per month each for Stehlik and Smith. Any surplus funds accumulated in 1982 were distributed in a ratio of 50 percent to Daub and 25 percent each to Stehlik and Smith. With the exception of the 1981 partnership tax return, all of the evidence reflects that whenever the parties in fact drew or distributed moneys, it was always done on the basis of 50 percent to Daub and 25 percent each to Stehlik and Smith. The one bit of conflicting evidence was the 1981 partnership tax return, which showed a beginning profit ratio of 50 percent to Daub and 25 percent each to Stehlik and Smith and a yearend ratio of one-third to each of the parties. Stehlik and Smith argue that this demonstrates either a lack of "course of dealing" or a change in such "course of dealing" to reflect equal shares in distribution. Daub, on the other hand, argues that the return, the preparation of which was supervised by Stehlik, shows either a mistake on the part of the accounting firm or an unauthorized exercise of authority on the part of Stehlik. Regardless of what the 1981 return may reflect, the fact of the matter is that the funds were distributed at all times on a basis of 50 percent to Daub and 25 percent each to Stehlik and Smith.

The evidence further reflects that at the time of the

dissolution of the partnership, the parties apparently divided up the various pending cases to be completed. Smith ended up with the responsibility for most of the contingent-fee cases. He argues that at a minimum he should receive one-third of the fees realized from these cases, and, in any event, should receive additional compensation for closing the files.

The evidence further discloses that prior to the formation of the partnership, the parties agreed that if any of them did any legal work for members of their families other than themselves, the work would be billed and the individuals for whom the work was done should be required to pay the partnership. The evidence is in conflict, however, with regard to the partners' own personal work. Stehlik maintains that the parties agreed that the partnership would be paid for all legal work, including work personally done for the partners. Daub, on the other hand, maintains that the parties agreed to charge members of their families but not the partners themselves. Smith was billed for work done by Stehlik in connection with his divorce, although Smith was not billed for the work he did himself. After the partnership was dissolved Daub was billed for time he spent in connection with certain personal business matters in which he or his wife had an interest.

As this is an action for an accounting between partners and therefore an equitable proceeding, the standard of review by this court is de novo on the record. *Langness v. "O" Street Carpet Shop*, 217 Neb. 569, 353 N.W.2d 709 (1984); *Badran v. Bertrand*, 214 Neb. 413, 334 N.W.2d 184 (1983); *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982). Although it is de novo on the record, we must nevertheless recognize that where the evidence is in conflict, we will give weight to the fact that the trial court had the opportunity to see the witnesses and weigh their credibility. *Jackson v. Clemens*, 216 Neb. 641, 345 N.W.2d 28 (1984); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984).

With these rules in mind we turn to the first issue, which requires us to determine whether, for purposes of sharing profits, the parties were equal partners or had reached some other agreement.

Neb. Rev. Stat. § 67-318 (Reissue 1981), which is a part of

the Uniform Partnership Act, Neb. Rev. Stat. §§ 67-301 to 67-343 (Reissue 1981), provides in part as follows: "The rights and duties of the partners in relation to the partnership shall be determined, *subject to any agreement between them*, by the following rules: (a) Each partner shall . . . share equally in the profits and surplus remaining after all liabilities . . . ." (Emphasis supplied.) Smith and Stehlik argue that the evidence fails to disclose any contrary agreement between the parties, and therefore the provisions of § 67-318(a) require that the profits and advances be shared equally. More specifically, Smith and Stehlik argue that while there may be evidence of some course of dealing, § 67-318(a) provides for equal distribution of profits unless the partners *expressly* agree to the contrary. We find, however, no such language in § 67-318, nor do the cases which have considered this matter reach such a conclusion. In support of their position Smith and Stehlik cite to us the case of *Barthuly v. Barthuly*, 192 Neb. 610, 223 N.W.2d 429 (1974). *Barthuly* was an action for an accounting between partners in a retail service station. One of the partners sought to receive *additional* compensation for bookkeeping services performed by her. In refusing to permit her to receive this additional compensation, this court said:

> The evidence does not support a finding that Reuben agreed to a salary for Frances. . . . A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for such services. Gee v. City of Sutton, 149 Neb. 603, 31 N.W.2d 747. It follows, therefore, that the accounting cannot include compensation for Frances' services as a partner since there was no express agreement between the partners for such compensation.

Id. at 614, 223 N.W.2d at 432.

A careful reading of the *Barthuly* decision discloses that it has no application in the instant case. In *Barthuly* the parties conceded that they were 50-50 partners, and the partner seeking *additional* compensation had never received such compensation during the course of the partnership. She was simply seeking to require an accounting for such services long after the services had been performed and unpaid. This court

held that absent an express agreement to compensate her for those services, she was not entitled to receive them upon dissolution of the partnership. While perhaps the use of the phrase "express agreement" was unnecessary, it is clear that *Barthuly* does not stand for the proposition asserted by Smith and Stehlik. In *Barthuly* the evidence established that the parties had neither an express agreement nor a course of dealing which could be considered as an agreement intending to vary the provisions of § 67-318(a). One would be required to simply disregard all of the evidence in this case and the past dealings of the parties in order to arrive at the conclusion contended for by Smith and Stehlik.

In view of the fact that § 67-318 does not require "an express agreement," and in view of the fact that the evidence discloses that the parties dealt with each other in a particular manner, we believe that the parties did in fact modify the provisions of § 67-318(a) so as to provide that the profits and advances of the parties were to be distributed 50 percent to Daub and 25 percent each to Stehlik and Smith. This court, in attempting to construe the meaning of a contract, has frequently held that the interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract, and ordinarily such construction of the contract should be enforced. See *Lortscher v. Winchell*, 178 Neb. 302, 133 N.W.2d 448 (1965). This rule has been applied not only with regard to ambiguities contained within a written contract but with regard to oral contracts as well. See, *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981); *Dunmire v. Cool*, 195 Neb. 247, 237 N.W.2d 636 (1976). Our review of the record convinces us that § 67-318(a) does not require an "express agreement" in order to vary the terms of that section but that the manner in which the parties dealt with each other during the life of the partnership may be considered in determining whether there was an agreement between the parties. In making such a review we are convinced that the parties agreed, contrary to the provisions of § 67-318(a), to divide the profits and advances in a ratio of 50 percent to Daub and 25 percent each to Stehlik and Smith. The district court committed no error in regard to this issue.

We turn, then, to the second issue, of whether Smith is entitled to be compensated at some rate other than that which existed during the term of the partnership for work performed by him following the dissolution of the partnership. The district court found that he was not entitled to additional compensation, and we agree.

The Uniform Partnership Act makes it clear that the dissolution of the partnership does not terminate the partnership for all purposes. Specifically, § 67-329 provides: "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Section 67-330 provides that "[o]n dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed." Both under the provisions of the Uniform Partnership Act and the Code of Professional Responsibility, the partnership of Daub, Stehlik, and Smith was obligated to complete the work for the clients or afford the clients an opportunity to seek other counsel. Until the work was either completed or the partnership discharged from any further responsibility in connection with the work, the partnership could not be terminated. A partnership only terminates when the business of the partnership has been wound up. See *Essay v. Essay*, 175 Neb. 689, 123 N.W.2d 20 (1963). Therefore, whatever rules apply with regard to distribution before the partnership is dissolved apply after it is dissolved but before it is terminated by winding up the affairs of the partnership. Section 67-318(f) specifically provides: "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs." Smith, of course, was not here a surviving partner. Section 67-318(f), like § 67-318(a), is subject to change only where the evidence establishes, either expressly or by course of dealing, that the parties intended to modify the language of the statute. Because the record is devoid of any evidence to establish either an agreement or a course of dealing amounting to an agreement, the district court was correct in its ruling on this point.

That leaves us, then, with the final issue, of whether Daub is indebted to the partnership for services performed by him on his own behalf in connection with personal matters. In this regard the evidence is simply in irreconcilable conflict. Smith and Stehlik maintain that the parties agreed that each would bill himself for his own personal work. Daub maintains that personal work was an exception. The evidence reflects instances in which both positions were followed. In resolving this conflict we are persuaded by two points. First, the district court had an opportunity to view the witnesses and resolve any dispute. We are further inclined to affirm the trial court on this last matter due to the fact that the evidence indicates that the parties were at all times aware that Daub was performing these services and not billing himself, yet no demand was made that billings be rendered or payment made. We are inclined to believe that the parties did not intend that the partnership be compensated for the partners' personal work.

The lesson to be learned from all of this is that most disputes and subsequent litigation could be eliminated if parties reduced to writing that to which they agreed. Once again we have the situation of the poor shoemaker's son who has no shoes—only this time it is the shoemakers themselves who are barefoot.

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

AFFIRMED.

IN RE TRUST ESTATE OF FRANCES ROBERTS DARLING, DECEASED. JOHN DAVID DARLING ET AL., APPELLANTS, V. ROBERT J. DUDEN AND JOHN R. O'HANLON, TRUSTEES, STEPHEN DARLING ET AL., APPELLEES.

365 N.W.2d 821

Filed April 12, 1985. No. 84-128.

1. **Decedents' Estates: Adoption.** Under the provisions of Neb. Rev. Stat. § 43-110 (Reissue 1984), an adopted child, in the absence of specific testamentary directions to the contrary, inherits from the antecedents of an adoptive parent to

the same extent as do the adoptive parent's natural children. Section 43-110 negates *In re Estate of Clarke*, 125 Neb. 625, 251 N.W. 279 (1933).

2. **Wills: Perpetuities.** The rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth.
3. _____: _____. The law looks with favor upon the early vesting of estates, and a remainder will not be held to be contingent if it can reasonably be held to be a vested remainder.
4. _____: _____. The rule against perpetuities, by its terms, relates solely to the vesting of estates or interests and is not concerned with their possession or enjoyment.
5. **Wills: Presumptions.** In the absence of a contrary intention, there is a presumption that a class will be determined upon the death of the testator.

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

Gregory P. Drew, for appellant John David Darling.

John H. Bernstein of Dixon Dixon & Minahan, P.C., for appellants Bruce Darling and Mark Hearn.

Virgil J. Haggart, Jr., of Gaines, Otis, Haggart, Mullen & Carta, for appellees.

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

CAPORALE, J.

Some of the natural children of the late David H. Darling challenge the district court's affirmance of the county court's ruling that Darling's adopted children should share in the testamentary trust established by the last will and testament of Darling's mother. We affirm.

Darling's mother, Frances Roberts Darling, hereinafter referred to as the testatrix, died testate in 1967. Her will, in pertinent part, established a trust which required the trustees

> (l) To pay whatever costs of the funeral and burial of my son David are proper in the judgment of the Trustees and promptly upon his death to divide, distribute and transfer the remaining property of the trust fund equally to the children of the said David H. Darling who survive him. In the event that any of my said grandchildren entitled to

> share in my estate under the terms of this, my last will and testament, shall not be of the age of 25 years at the time of the death of my said son, David H. Darling, then and in that event, the share of my estate to which they are entitled shall be held by my trustees, under the provisions of said trust, and paid by said trustees to said grandchildren upon their attaining the age of 25 years.

Darling, the son referred to in the foregoing passage, was married four times. His first marriage produced a son, Stephen, in 1949. Bruce and Mark, born in 1958 and 1960, respectively, were products of Darling's second marriage. The third marriage produced another son, John, in 1966. David married a fourth time, after the testatrix's death, in 1972. In 1977 he adopted his last wife's children, namely, Kimberly Sue, David, and Jayne. Darling then died in December of 1982.

Certain of Darling's four natural children assert the district court erred, in that the interpretation given the trust by the county court violates both the testatrix's intention and the rule against perpetuities. They also urge that the class consisting of Darling's "children" or testatrix's "grandchildren" closed as of the death of the testatrix, thus excluding the adopted children.

The argument concerning the alleged violation of the testatrix's intention rests on the assertion there is a presumption that children adopted after the death of a testator are not meant to be included in the estate. Cited in support of this position is *In re Estate of Clarke*, 125 Neb. 625, 251 N.W. 279 (1933), which quotes with approval from Annot., 70 A.L.R. 626 (1931):

> "The question of the right of a child adopted after the testator's death to take under the will, as under other circumstances, is one of intent upon the part of the testator. The fact that the adoption was subsequent to the testator's death raises a grave presumption against an intention to include such adopted child, and the better rule seems to be that the fact that the testator had no knowledge of the adoption at his death overcomes the presumption that his intention was so to draw his will as to harmonize with the adoption laws."

Id. at 632, 251 N.W. at 282.

Clarke went on to hold that a daughter adopted in California after execution of the will and after the testator's death was not entitled to receive any of the residue of an estate left to her adoptive father's "heirs at law." The opinion reasoned that the phrase "heirs at law" was not to be given a technical meaning but, rather, the meaning intended by the testator. The court concluded that as there had been no familial relationship prior to the testator's death and there was no knowledge on his part that the daughter was to be adopted, the testator had no intention to include her as a beneficiary of the residue.

It is clear, however, that the enactment of Neb. Rev. Stat. § 43-110 (Reissue 1984) negates the *Clarke* holding. Section 43-110 states:

> After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child *and the person or persons adopting such child and his, her or their kindred.*

(Emphasis supplied.)

Neil v. Masterson, 187 Neb. 364, 191 N.W.2d 448 (1971), decided under the current statute, involved the rights of relatives of the adoptive parents to inherit from the adopted children. The case held the current statute "can only mean that it is the intention of our statute that the next of kin of adoptive parents shall have the same right to inherit property from an adoptive child as they would from a natural child of said adoptive parents." *Id.* at 369, 191 N.W.2d at 451. The reverse of that proposition is equally true; that is, an adopted child, in the absence of specific testamentary directions to the contrary, inherits from the antecedents of an adoptive parent to the same extent as do the adoptive parent's natural children.

It is true, as certain of the natural children argue, that the testatrix could not have known of the adoptions, for she had both executed her will and died before they took place. Her lack of knowledge, however, is not significant. She would have been equally ignorant of any natural children sired by Darling after her death. The important point is that she had no control over who became Darling's children or by what means. She chose to

benefit Darling's children. He elected to make the children produced by his fourth wife his own by adopting them. Having become his, those children qualify as beneficiaries of the testamentary trust.

We turn now to the perpetuities issue. The rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth. *In re Estate of Schmitz*, 214 Neb. 28, 332 N.W.2d 666 (1983).

The trust requires that the trustees "divide, distribute and transfer" the remaining property "equally to the children of the said David H. Darling who survive him." Darling was a life in being, both at the time when the trust was written and at the time it became effective—on the death of the testatrix. With Darling being the measuring life, any interest in his children vested at the instant of his death. In other words, the identity of Darling's children who survived him was ascertainable well within the time limitation of the rule against perpetuities. The language providing that if "any of my said grandchildren entitled to share in my estate . . . shall not be of the age of 25 years at the time of the death of my said son," then their share shall be held by the trustees "and paid by said trustees to said grandchildren upon their attaining the age of 25 years" does not delay vesting beyond the time permitted. This clause merely delays the right of possession and enjoyment of the res until a child's 25th birthday. The rule against perpetuities, by its terms, relates solely to the vesting of estates or interests and is not concerned with their possession or enjoyment. 70 C.J.S. *Perpetuities* § 7 (1951).

"The policy of the law has always been to look with favor upon the early vesting of estates, and a remainder will never be held to be contingent if it can reasonably be held to be a vested remainder." *Wilkins v. Rowan*, 107 Neb. 180, 186, 185 N.W. 437, 439 (1921). The *Rowan* case is directly on point in quoting 2 H. Underhill, A Treatise on the Law of Wills § 860 (1900):

> "Whenever it is possible the future interest will be construed as vested, and hence alienable and devisable by the remainderman. It is not so much the certainty or

> uncertainty of the enjoyment of the fee in remainder after the life estate ends as the uncertainty of the person who has a present right to enjoy the future estate if the particular estate came to an end now, which determines the character of the remainder. A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. *The fact that his enjoyment is postponed, and, on a certain event, as on his death, may never take place at all, does not make the remainder contingent*. But where there is no person now in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman, if the particular estate were to terminate, the remainder is contingent."

(Emphasis supplied.) 107 Neb. at 186-87, 185 N.W. at 440. In accord, *Gade v. Descendants of Unitt*, 197 Neb. 713, 250 N.W.2d 644 (1977); *Lowry v. Murren*, 195 Neb. 42, 236 N.W.2d 627 (1975); *Tiehen v. Hebenstreit*, 152 Neb. 753, 42 N.W.2d 802 (1950).

The trust provisions do not violate the rule against perpetuities.

Lastly, certain of the natural children argue, in a variety of ways, that the class consisting of Darling's "children" or testatrix's "grandchildren" closed upon the death of the testatrix, thereby excluding the adopted children. They cite numerous cases holding that, *in the absence of a contrary intention*, there is a presumption that the class will be determined upon the death of the testator. For example, *In re Testamentary Trust of Criss*, 213 Neb. 379, 329 N.W.2d 842 (1983). That is a correct statement of the rule. What the natural children ignore is that the language dividing the trust res among "the children" of Darling "*who survive him*" clearly establishes the testatrix's intent to be that the class be determined at the time of Darling's death, not at the time of her own death. (Emphasis supplied.) The rule was correctly applied by the district court.

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

AFFIRMED.

HOWARD R. MCCOLLISTER, APPELLEE, V. SHIRLEE RUSHTON MCCOLLISTER, APPELLANT.

365 N.W.2d 825

Filed April 12, 1985. No. 84-131.

1. **Property Division: Alimony: Appeal and Error.** The standard of review of the division of property and the award of alimony in marriage dissolution cases is that these matters are 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.** The rules for determining the division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Such awards are to be determined by the facts in each case.
3. _____. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
4. **Property Division: Alimony.** 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, and a history of the contributions to the marriage by each party.
5. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.

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

Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Daniel J. Duffy of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

COLWELL, D.J., Retired.

Respondent, Shirlee Rushton McCollister, appeals a dissolution of marriage decree, assigning three errors: (1) The unreasonable division of property; (2) The amount and duration of alimony; and (3) The cancellation of a $41,135

nonnegotiable note executed by appellee, Howard R. McCollister, in favor of appellant.

The decree, entered December 30, 1983, included these orders (summarized): Each party was awarded his or her personal effects, jewelry, and the other personal property possessed at the time of marriage. Appellant was awarded (1) the household goods and furniture located in the parties' Omaha condominium ($10,000), (2) her undivided one-half interest in an investment rental house on Parker Street, Omaha, Nebraska, (3) a 1978 Cadillac car, and (4) all certificates of deposit and bank accounts registered in her name. Appellee was awarded (1) the household goods and furniture located in the parties' Colorado condominium, (2) all stocks, bonds, bank accounts, insurance policies, and pension benefits owned and possessed by him, (3) the condominium located at 1030 South 111th Plaza, Omaha, Nebraska, subject to encumbrances to be paid by him, and (4) the condominium located at 3350 Camels Ridge Lane, Colorado Springs, Colorado, subject to encumbrances to be paid by him. Appellee was ordered to pay $4,798 marital debts, pay to appellant as alimony $1,000 per month commencing December 1, 1983, for a period of 36 months or until death or remarriage of appellant or death of appellee, and to pay appellant $2,500 for attorney fees. The disputed $41,135 promissory note, exhibit 11, was ordered canceled.

The parties were married February 14, 1976, at Greeley, Colorado; both had been previously married. Howard, age 58 years, as plant manager of Witco Chemical Corporation, Omaha branch, earned an average annual salary of $60,000; he had been employed by that company and its predecessors for 29 years. Shirlee, age 56 years, was not employed; she had worked for less than 1 year as an apprentice interior decorator at $4 per hour. During the marriage, she had cancer surgery, and her condition requires regular medical attention.

During the 1976 to 1982 taxable years, they reported total taxable income (rounded) of $850,000, including: wages, $411,000; interest, $84,000; dividends, $55,000; capital gains, $280,000; and miscellaneous, $24,000.

The parties jointly owe federal and Nebraska state income

tax deficiencies. Exhibit 26 is a notice from the IRS of their liability for $89,586 tax deficiencies and penalties for 1977 and 1978. Exhibit 12 contains a computation prepared by Howard's tax consultants on September 12, 1983, showing federal and state tax liability and penalties of $105,169, interest of $41,424 for 1977 to 1980, and Howard's payment of $75,000, leaving a balance of $71,593. The trial court ordered Howard to pay the tax liability and to hold Shirlee harmless therefrom.

The court assigned all of Howard's pension rights to him; however, no required finding was made of its value. Neb. Rev. Stat. § 42-366 (Reissue 1984); *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981). Exhibits 18, 24, and 27 show that after January 1, 1990, his lifetime annual retirement benefit was projected as $23,565; it is vested, with preretirement death benefits. Further, on January 1, 1984, he had an option for early retirement benefits in a life annuity of $1,098 a month or 10-year-certain benefits of $1,045 a month.

At the time of marriage each party owned property, exclusive of tangible personal items, as follows: Howard: residence, $80,000; stocks and bonds, $431,000; and contracts, $12,000; all subject to $54,000 in debts, for a net value of $469,000. Shirlee: residence, $90,000; stocks, $6,000; savings certificate, $6,000; and contracts, $9,000; all subject to a $16,000 house mortgage, for a net value of $95,000. The joint total value was $564,000.

During the marriage, these property changes occurred. Shirlee's residence was sold for $80,000, and she received a $30,000 gift from her father; all of these funds were retained by her. Howard's residence was sold for $120,000; he sold his shares in Southwest Petro-Chem, Inc., for $659,125, netting a $232,000 capital gain; and he inherited an interest in real estate, which was sold for $144,000; all of these funds were either invested in present, identifiable, marital assets or expended for regular family expenses.

Soon after their marriage, they built as their home the Omaha condominium, toward which Howard contributed $75,000 from the sale of his residence; at trial it had a net value of about $97,800. In 1979 they built the Colorado condominium, primarily as an investment; Shirlee contributed

the $5,000 downpayment, which is included in the disputed note. There is strong evidence that Howard contributed most of his $144,000 inheritance, along with other assets and earnings. At trial Howard testified the net value of the Colorado condominium was about $145,264; however, this value included as a liability the disputed $41,135 note, which, when canceled by the court, increased the net value to about $186,400. Shirlee's expert estimated the Colorado condominium's value at $60,000 less. Both condominiums were titled in the names of the parties as joint tenants.

At trial the total marital property, exclusive of tangible personal property, totaled $524,000, which was assigned by the decree as follows (values rounded): To Howard: furniture, $8,000; Omaha condominium, $97,000; Colorado condominium, $186,000; life insurance (value), $21,000; stocks and bonds, $160,000; pension, no value assigned; and cash, $10,000; for a total of $482,000, subject to $100,000 in debts and tax deficiencies, for a net value of $382,000. To Shirlee: furniture, $10,000; rental house, $1,200; and certificates of deposit, $131,000; for a total of $142,000; the disputed note is not included.

From the beginning, with no objection by Howard, Shirlee kept and segregated all of her original assets as her separate property, including gifts and the proceeds from the sale of her residence. Her property was generally invested and reinvested in certificates of deposit. There is no evidence that any other funds were included.

During the marriage, Howard commingled all property and earnings as needs arose. With minor exceptions he voluntarily paid and invested in all of the parties' household fixed charges and expenses, taxes, home maintenance, insurance premiums, health care, entertainment, interest, mortgage payments, tax penalties, and condominium purchases and construction costs.

The record does not provide a clear explanation of the dramatic change in the value of the marital assets, except the parties' unrestrained spending.

The standard of review of the division of property and the award of alimony in marriage dissolution cases is that these matters are 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. See, *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984); *Reuter v. Reuter*, 218 Neb. 732, 359 N.W.2d 78 (1984).

The first and third assigned errors are discussed together.

In an action for dissolution of marriage, the rules for determining the division of property owned by the parties, including that owned at marriage and acquired by gift or inheritance, provide no mathematical formula by which such awards can be precisely determined. Such awards are to be determined by the facts in each case. See *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, 701, 340 N.W.2d 400, 401 (1983).

It is not necessary to set out the note in full. It was dated October 19, 1981, and signed by Howard, promising to pay Shirlee for future money advances made by her for mortgage payments and other expenses related to the Colorado condominium, all with interest. Howard endorsed on the note his receipt of seven such advances between December 30, 1981, and September 1, 1982, totaling $41,135.59.

At the time the court announced the decree, the record shows:

> MR. LUSTGARTEN: You have no provision in here for the repayment by Mr. McCollister to Mrs. McCollister.
>
> THE COURT: No. As a matter of fact, if it's necessary, I do specifically find that the note should be canceled.
>
> MR. LUSTGARTEN: And she gets no return of the monies?
>
> THE COURT: That's right, *other than alimony award.* I don't think that agreement is any more valid than the antenuptial agreement.

(Emphasis supplied.)

Shirlee argues that the note is a debt that Howard owes, and she should recover it in the property division.

Neb. Rev. Stat. § 42-201 (Reissue 1984) relates to a wife's separate property, generally providing that the property owned by the wife at the time of marriage, together with profits, increases, purchases, and gifts, remains her sole property. In *May v. May*, 9 Neb. 16, 2 N.W. 221 (1879), a wife was allowed to recover from her husband on a promissory note. See, also, *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979). However, in *May* the recovery on the note was the issue pleaded and proved. The dissolution proceedings here are equitable in nature; Shirlee does not plead an issue to recover money from Howard on the note. Rather, the only consideration of the note as an issue is included along with that of all the parties' property in the issues joined in the pleadings for a reasonable division of property and award of alimony. The evidence concerning the note was proof of money advanced to Howard and his intent, at the time, to repay.

"In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation *irrespective of how legal title is held*." (Emphasis supplied.) *Cozette v. Cozette*, 196 Neb. 780, 784, 246 N.W.2d 473, 475 (1976). It was not error for the court to consider the money advancements shown in the note and to order its cancellation, since that was a part of the court's discretion in dividing the property, although the reason assigned may have been incorrect. The question is, What consideration was given to the note advancements? The record is not clear; however, we conclude that the trial judge considered the same in the alimony award, and we will do the same.

The absence of any finding of value for Howard's pension rights presents speculative factors that are better treated in this case in the later consideration of alimony.

Shirlee's beginning assets were valued at $95,000; later, the value of the property assigned to her was $142,000, an increase of $47,000. Howard's beginning assets were valued at $469,000; the value of the property assigned to him, not including pension, was $382,000; whether there was a final gain or loss is speculative.

Considering the whole record, the division of property as made by the court was reasonable, and there was no abuse of

discretion therein.

> 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 . . . .

Neb. Rev. Stat. § 42-365 (Reissue 1984). "In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion . . . is one of reasonableness." *Johnson v. Johnson*, 209 Neb. 317, 325, 307 N.W.2d 783, 789 (1981); § 42-365.

The second assigned error argues that the alimony award of $1,000 a month for 36 months was inadequate. From all the evidence these particular considerations are present. The parties were married 7 years. Shirlee's $41,135 note representing cash advancements was canceled and disregarded in the division of property; further, it was given inadequate consideration in the allowance of alimony. From the record no consideration was given to the value of Howard's pension rights when alimony was awarded, although his annual benefit was substantial. Shirlee was 56 years of age and without occupational skills; her health required regular medical attention, resulting from cancer surgery. The purpose of alimony is to provide for the continued maintenance or support of Shirlee when economic conditions and other circumstances make it appropriate. § 42-365. Shirlee testified that her maintenance and support needs exceeded $3,000 a month.

Shirlee's investment income comes from the interest on $131,000 in bank certificates of deposit; she has no debts. Howard's income exceeds $70,000 annually, and he has substantial vested pension rights. There was a dramatic reduction of marital asset values during the marriage, considering the gross incomes, capital gains, inheritances, and stable economic conditions. Both condominiums are potential income-producing assets, either as rentals or from their sale proceeds. There are, however, substantial monthly condominium expenses chargeable to Howard for expenses, mortgage payments, taxes, and insurance. Howard was

ordered to pay $4,798 marital debts, and he was ordered to pay and hold Shirlee harmless for both mortgage indebtedness and the income tax deficiencies of $71,593 and interest.

From the whole record we conclude that the alimony award was unreasonable, amounting to an abuse of discretion. It should be modified to provide that appellee shall pay to appellant as alimony the sum of $1,000 each month beginning December 1, 1983, for a period of 36 consecutive months, and thereafter to likewise pay $750 each month for 36 consecutive months. All such alimony payments are to terminate upon either the death or remarriage of Shirlee or the death of Howard. Appellant is allowed $1,000 as attorney fees in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ALEXIUS L. BIDEAUX, APPELLANT.

365 N.W.2d 830

Filed April 12, 1985. No. 84-172.

1. **Expert Witnesses.** The admission of opinion testimony of an expert is generally discretionary with the trial court, and the determination of its weight is largely a matter for the jury. A general objection as to foundation to a question requesting the opinion of a witness does not reach the issue of the qualification of the witness as an expert.
2. _____. Both the court and opposing counsel are entitled to know that an objection goes to the qualifications of the witness as an expert rather than to the factual foundation for the opinion.
3. **Trial: Judges.** The trial court should refrain from making remarks prejudicial to a litigant or calculated to influence the minds of a jury.
4. **Criminal Law: Witnesses: Evidence.** It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime.
5. **Motions for New Trial.** A motion for a new trial based on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed.
6. _____. Newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.

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

Kirk E. Naylor, Jr., and Mark M. Sipple of Luckey, Sipple & Hansen, for appellant.

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

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

HASTINGS, J.

Following a jury trial, the defendant was convicted of the felony offense of arson and was sentenced to a term of imprisonment for 18 months. He has appealed to this court and details the following assignments of error: (1) The court erred in overruling defendant's foundational objection to an opinion given by the Schuyler fire chief as to the cause of the fire; (2) The court erred in overruling defendant's motions for mistrial; and (3) The court erred in overruling defendant's motion for a new trial based on newly discovered evidence. We affirm.

At approximately 11:49 p.m. on January 25, 1983, a fire was reported at Johnnies Steakhouse located in Schuyler and owned by the defendant. The fire ultimately destroyed the building and its contents. The defendant filed a claim with his insurance company and sometime later was charged with arson in connection with that fire.

The evidence adduced by the State tended to show that the fire was deliberately set, that it started shortly after the defendant himself had closed the restaurant for the evening, and that the steakhouse was not doing well financially. An examination of the record discloses that the evidence, if properly admitted and believed by the jury, was sufficient to support the conviction, and appellant makes no argument to the contrary.

Richard Kracl testified that at the time in question he had been chief of the Schuyler Volunteer Fire Department for 7 years and a member of the department for 16 years. He was the first member of the department to arrive at the fire. He had responded to the 11:49 p.m. alarm, and was followed by the

first assistant chief and the first fire engine, which appeared on the scene at 11:58 p.m. He described in some detail how he determined that no one was inside the building; made a visual inspection of the building by walking all around it; determined that there had been no forced entry of the building; noticed a large concentration of smoke coming from the furnace room; and opened the front door, located in the middle of the south end of the building, and found a large buildup of smoke and heat in that area.

Kracl's testimony, which is the subject of the first assignment of error, was as follows:

> Q. Chief, based upon your years in the Schuyler Volunteer Fire Department, both as a fire fighter and as a chief, based on your observations at the scene of Johnnie's Steak House, based on your observations when you had gone by earlier that evening and based particularly on your observations at the south doorway when you opened it, based on your observations when the windows were knocked out, did you form an opinion at the time you were fighting this fire with respect to its cause or origin? That calls for a yes or no answer.
>
> A. Yes, I did.
>
> Q. What was that opinion, sir?
>
> MR. NAYLOR: I would object. Lack of foundation.
>
> THE COURT: I'm going to overrule. He can answer the question.
>
> THE WITNESS: I suspected arson at that particular time.

The defendant does not argue a lack of foundation, i.e., absence of underlying factors from which the conclusion could be made, but, rather, that the witness did not possess the necessary qualifications to qualify as an expert witness. There is no question but that this is a proper subject of expert testimony.

In the first place we do not believe a general objection on foundation reaches the qualifications of the witness. In *State v. Johnson*, 96 Idaho 727, 536 P.2d 295 (1975), the witness testified that he was the fire chief, had been with the department for 15 years, and had observed the fire. Over an objection that improper foundation had been laid, he was

permitted to give his opinion that gasoline was involved in the fire. In affirming the trial court the Supreme Court of Idaho stated:

> The admission of opinion testimony of an "expert" is largely discretionary with the trial court and the determination of its weight is largely a matter for the jury. [Citation omitted.] No issue was presented by appellant as to the qualifications of these witnesses, his objection being simply to the effect that the opinion was without foundation. Under these circumstances we find no error.

Id. at 732, 536 P.2d at 300. The reasoning supporting this conclusion is very sound; both the court and opposing counsel are entitled to know that the objection goes to the qualifications of the witness as an expert rather than to the factual foundation for the opinion.

Even assuming error, there was no prejudice. The witness Kracl went on to testify:

> Q. As the Fire Chief is it your responsibility to determine whether or not the Fire Marshal will be called to make an investigation?
>
> A. It is whoever is in charge.
>
> . . . .
>
> Q. I take it that you don't call the Fire Marshal regularly for all fires?
>
> A. No, I don't.
>
> Q. What basis do you use in determining whether or not the Fire Marshal ought to be called?
>
> A. I call the Fire Marshal when I cannot come up with a probable cause and when I suspect arson.
>
> Q. In this case you did call him?
>
> A. I did.

Earlier in the trial, Paul Lambrecht, a deputy state fire marshal, gave the following testimony without objection:

> Q. What is the Fire Marshal's responsibility in the State of Nebraska with respect to fire investigations?
>
> A. We assist Fire Chiefs in determining the causes of the fires.
>
> . . . .
>
> Q. Anytime there is a fire is the Fire Marshal's Office

called?

A. Only when the Fire Chief himself cannot find the cause or feels the fire is of suspicious origin.

. . . .

Q. What did you do?

A. Met with Deputy McDonald [of the fire marshal's office] at Johnnie's Steak House.

. . . .

A. He informed me of what time he was called and the information that he had and the people they have interviewed and talked to.

The only inference that can be drawn from the testimony of that witness was that the fire chief suspected arson. That is all to which Chief Kracl testified, and it was cumulative of the testimony of the other witnesses.

The second assignment of error deals with two motions for mistrial made by the defendant. The first involved a statement by the trial judge, which it is claimed misstated the record.

During closing argument, defense counsel stated: "Then we move on to the kitchen. At long last they [State's witnesses] finally admit to us that those burns in that kitchen area could be caused by spilled grease. That was like pulling teeth, but they finally admitted it." The prosecutor interposed the following: "I object to the extent he misstates the evidence on all of the kitchen area. It was only in one of the kitchen areas." The ruling of the court followed: "The jury shall not consider this. I believe the evidence does show in some of the kitchen areas, counsel."

It is somewhat difficult to follow defendant's argument in that he states in his brief at 14, "While the record does not show to which area of the kitchen defense counsel was pointing, the testimony of the State's expert . . . would tend to provide evidence in support of counsel's argument that burns in the kitchen area could have been caused by spilled grease."

The record supports the statement of the trial judge. Defense counsel inquired of a State's witness, Frederick King, "[I]f that grease got loose on the floor in the kitchen area . . . it could cause burning on the tiles consistent with that area you found around the doorway and in the area of the table, could it not?"

to which the witness replied, "It's a possibility." The effect of the trial court's ruling was in fact to advise the jury to disregard both the overbroad generalizations of the "kitchen area" by the defense and the underinclusive characterization of "one of the kitchen areas" by the prosecutor.

The second objection relating to defendant's motion for mistrial occurred during the State's closing argument:

> MR. O'BRIEN: . . . And how did the office burn? Do you remember the testimony? All of the ducting work out of that furnace is in the south end, every bit of it. We have got fire walls, concrete block fire walls between there and the office. We have a distance with little or no damage. We have no damage on this side. We have no damage on this side. The roof caves in but no damage except for the complete and total destruction of the office.
>
> MR. NAYLOR: Maybe it is my time to object. Not reflecting the evidence.
>
> THE COURT: I think the evidence does reflect it, counsel.

The defendant argues that this constituted an impermissible comment on the evidence by the trial judge, which tended to preclude the jury from reaching its own conclusion in that regard, and tended to discredit defense counsel in the eyes of the jury. He also insists that the trial judge's characterization of the evidence was wrong. We do not agree.

Defendant's objection goes to the prosecution's statement that, in effect, there was no damage on either side of the office, but complete and total destruction of the office.

The witness Eldon Boh had testified that the Mediterranean Room area, immediately to the west of the office, showed little damage. He said that probably 75 percent of the office had experienced total consumption. Also, he commented that the dining area adjacent to the office on the other side gave no indication of low burn. The witness repeated almost identical statements on cross-examination.

In light of the record we cannot say that the prosecuting attorney misstated the record. Furthermore, when counsel objects to a statement as "not reflecting the evidence," had the trial judge replied with a simple "Overruled," that is

tantamount to saying, "I think the evidence does reflect it, counsel."

We agree with the defendant that the court should refrain from commenting on the evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962); *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946). Both of those cases were reversed for additional reasons than misconduct of the court. In the one case it was found to be prejudicial error not to have submitted lesser-included offenses, and in the other there were unconstitutional searches and seizures.

In any event, in *Goff* the trial court overruled defense counsel's motion to sequester witnesses, and in doing so stated, "I think perhaps it is nonsense. I have no patience with that type of motion whatsoever. However, in this case under the existing circumstances since the defendant feels he is being persecuted so unfairly I am going to give him the benefit of the motion and sustain the motion." 174 Neb. at 557, 118 N.W.2d at 631.

In *Moore* defense counsel interrupted examination of the State's witness in order to interpose an objection and was told by the trial judge, "Wait a minute. We will try this lawsuit the way it should be tried and there will be no more of that *shyster stuff*. Answer that question." (Emphasis in original.) 147 Neb. at 397, 23 N.W.2d at 556. A short time later, before the witness had answered a question favorable to the defendant but unfavorable to the State, the judge stated: "Wait a minute, that will all go out and the jury will ignore it. . . . Answer the question and tell the truth because you are not interested in this prosecution. This is the State of Nebraska, and you remember what I tell you or I will send you to jail. . . ." *Id.*

The "comments" of the trial judge in the instant case certainly did not rise to the level of those quoted above, and were not prejudicial to the defendant. This is especially true when considering the remarks of the prosecutor immediately following the overruling of defendant's motion:

> Ladies and gentlemen, you listened to evidence, you recall the evidence and you pay attention to what you heard and saw. You do it while the Court proceeding went

forward. Do you think that? Is that what the witnesses said, or is that not what the witnesses said? You make your judgments based on that, ladies and gentlemen.

Finally, on the second general assignment of error, defendant complains that he should have been granted a mistrial because a witness was permitted, over objection as to relevance, to testify as to defendant's drinking of alcoholic beverages on the night of the fire, and as it progressed. Lynn Steffensmeier, an employee of the defendant, testified that at around 12:45 a.m., during the course of the fire, she had occasion to see the defendant drinking. Over objection by the defendant, she was permitted to testify that the defendant became intoxicated. It is the defendant's contention that his objection and motion for mistrial should have been sustained because the evidence was not relevant as to whether the defendant set this fire.

The State contends that this evidence demonstrated the defendant's disinterest in monitoring the efforts of the firefighters to save his building, because he had intentionally set the fire for the purpose of collecting insurance money. This would be a permissible inference to draw, in which event the evidence was relevant. " 'It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime. These are circumstances to be shown.' " *State v. Martin*, 198 Neb. 811, 819, 255 N.W.2d 844, 849 (1977).

His conduct perhaps could also show remorse over the loss of his building and business, which would be favorable to the defendant's case. At the very worst, if completely irrelevant, it was harmless error not requiring reversal because it did not affect the substantial rights of the defendant. *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976). We do not believe that the trial court abused its discretion in allowing such evidence to be received. *State v. Fries*, 214 Neb. 874, 337 N.W.2d 398 (1983).

The defendant's final assignment of error is that the trial court incorrectly overruled the motion for a new trial based on newly discovered evidence. After the jury verdict was rendered and prior to sentencing, the defense moved for a new trial based on the following information. During the day of January 25,

1983, some 12 hours *before* the fire occurred, a customer in Johnnies Steakhouse in *Columbus*, Nebraska, commented that Johnnies in *Schuyler* had burned down the previous night. Additionally, a couple, who very generally matched the description of the customer and his companion, were seen in Johnnies in Schuyler between 9 and 9:45 p.m. on the same day.

"A motion for new trial on the ground of newly discovered evidence 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. Record*, 208 Neb. 90, 92, 302 N.W.2d 367, 368 (1981).

Neb. Rev. Stat. § 29-2103 (Reissue 1979) provides in pertinent part:

> In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial . . . .

This court has stated that new evidence in support of such a motion " 'must be so potent that, by strengthening evidence already offered, a new trial would *probably* result in a different verdict.' " (Emphasis supplied.) *State v. Pittman*, 210 Neb. 117, 121, 313 N.W.2d 252, 256 (1981). See, also, *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980).

The defendant's evidence offered in support of his motion falls far short of the requisite showing of a probable different result. If credible, it tends to show no more than that someone else knew in advance of the intentional burning of the restaurant. Rather than bolstering Mr. Bideaux's defense, it strengthens the evidence proffered by the State indicating arson. The ruling of the trial court was well within the bounds of its discretion and consequently will not be disturbed.

The judgment and sentence of the district court are affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent on two points. First, I believe that the testimony of the chief of the Schuyler Volunteer Fire Department was inadmissible as that of an expert when he testified that his opinion as to the cause of the fire was that "I suspected arson at that particular time." While defendant did not move to strike the answer, I believe that the answer was so prejudicial as to require reversal. If the chief's *opinion* was that the cause of the fire was arson, a different question would be presented. I do not reach that question. If in a criminal case an alleged expert witness is permitted to testify that at the time of a fire, after making observations about the affected building and the nature of the fire, he *suspects* arson, we have opened the door to a flood of expert suspicions that are particularly prejudicial in a criminal case.

The danger of allowing this sort of answer is pointed out by the next question propounded by the State's counsel: "Why was it that you had that suspicion?" This question was answered by the chief, "Because of the involvement of the building in the elapsed time that I was there."

The word "suspect" is defined in part in Black's Law Dictionary 1297 (5th ed. 1979) as follows: "To have a slight or even vague idea concerning;—not necessarily involving knowledge or belief or likelihood." "Suspicion" is defined in the same dictionary at 1298 as follows: "The act of suspecting, or the state of being suspected; imagination, generally of something ill; distrust; mistrust; doubt. The apprehension of something without proof or upon slight evidence. Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to proof."

I do not believe that even an expert's suspicions have any place in a criminal trial. In none of the chief's testimony is there any *opinion*, firm or otherwise, as to the cause of the fire. If "suspicions" are held admissible in a criminal case, it seems that the day is not far distant when in a civil case an expert will testify that he "suspects negligence." I believe that in this case the chief's "suspicions" are not admissible and that the admission of such testimony was reversible error.

I also believe that defendant's motion for mistrial because of the admission of evidence as to defendant's intoxication should have been granted. Defendant's employee Lynn Steffensmeier was called by the State apparently for the primary purpose of establishing that before the fire defendant did not order certain amounts of liquor usually ordered in the course of defendant's business. The employee also testified that while the fire was being fought, she saw defendant drinking at the home of a mutual friend with the employee and other friends. The employee was specifically asked, "Did you have occasion to observe him putting on his coat to leave?" Over defendant's objection, the witness answered, "When Lex [defendant] left, he had quite a bit of drink and he put his coat on inside out." This question as to a specific incident is irrelevant, immaterial, and prejudicial to defendant.

Further, the State then established that the employee-witness had in the past consumed alcohol, knew "the effect and feel that it gives you," had observed people that the witness knew were "under the influence," and knew how they would act. Having thus established the employee as an expert, the State inquired, "Would you have an opinion on whether or not the defendant was at that time that you are describing intoxicated?" Over objection, the witness answered, "Yes, I would say so." The subject of intoxication was then dropped.

Defendant contended that this evidence was not relevant. I agree. Relevant evidence is defined in Neb. Rev. Stat. § 27-401 (Reissue 1979) as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I cannot see how evidence of defendant's specific acts and intoxication at 4 a.m. the morning after the fire tends to prove anything except that defendant had consumed too much alcohol. The State's contention in its brief that this evidence "is consistent with the conclusion that [defendant] was disinterested in monitoring the firefighters' efforts since he had intentionally set the fire for the purpose of collecting insurance money" (Brief for Appellee at 14) only shows that inferences descend to suspicions when based on irrelevant facts. An equally plausible "inference" would be that

defendant was so distraught at seeing his business go up in flames that he, unfortunately, turned to strong drink. Since there was no other evidence as to the reason for defendant's drinking, I do not believe that the court should let a jury flip a coin, in effect, to decide what that behavior means.

The difficult question to me in this connection is whether the admission of such evidence was prejudicial. I believe that the evidence is prejudicial, given the growing, warranted concerns of this State and its individual citizens as to drinking alcoholic liquor and driving and what I feel is the inevitable spread of those concerns to many aspects of drinking at all. There is no lawyer worth his salt who does not delight in establishing that the opposing party has become intoxicated in any connection with any incident before any jury. It is the duty of the courts to keep such evidence from the jury unless the intoxication is relevant to the issue at hand.

The State, in its brief, cites *State v. Martin*, 198 Neb. 811, 255 N.W.2d 844 (1977), as holding that it is proper in a criminal case to show circumstances such as defendant's conduct, demeanor, statements, and relation to the crime. *Martin* does state that, but that case specifically holds only that a statement made by defendant to a victim's mother that "he [defendant] didn't mean to shoot her [the victim], he just meant to nick her," is admissible to show a shooting was deliberate, not accidental. That does not concern "demeanor" at all.

The case is close. Defendant's conviction is based on circumstantial evidence proved by expert witnesses and is disputed by defendant by evidence including that of an expert witness. I would reverse and remand for a new trial.

CAPORALE, J., dissenting.

I join in that portion of Judge Grant's dissent which characterizes the evidence of defendant's intoxication as inadmissible.

Moreover, I cannot agree with the majority's statement that the trial judge's comment during the prosecutor's closing argument that the judge thought "the evidence does reflect it, counsel," is "tantamount" to, or the equivalent of, saying "Overruled." The latter suggests only that there is no merit to the objection, perhaps only because different inferences could

be drawn from the evidence. The former implies that the judge has weighed the evidence and has concluded the fact to be as stated by the prosecution. Those are obviously two different things; thus one cannot be the equivalent of the other.

In reversing a condemnation award in *Langdon v. Loup River Public Power District*, 144 Neb. 325, 13 N.W.2d 168 (1944), in part because of the trial judge's misconduct, this court recognized that a party is entitled to have the jury pass on the evidence without interference by the trial judge. Such a concept can be no less important in a criminal trial than it is in a civil one.

To suggest that the prosecutor's admonition to the jury that it make its own judgment on the evidence cures any error arising from the judge's comment is to ignore the realities of jury trials. As noted in *Hansen v. State*, 141 Neb. 278, 3 N.W.2d 441 (1942), jurors are alert to the judge's attitude respecting the merits of a case, particularly in criminal trials.

During the course of a trial, the judge should refrain from making remarks which may have a tendency to influence the jury. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984). He or she should be ever mindful that a judge's role is to govern a trial in such a manner that each party is assured fairness. Persuasion is the task of advocates, not of jurists.

As Judge Grant has observed, this case rests upon circumstantial evidence which presents close questions of fact. I cannot conclude that the admission of evidence concerning defendant's intoxication and the trial judge's editorial comment did not prejudice the defendant. I also would reverse and remand for a new trial.

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

365 N.W.2d 838

Filed April 12, 1985. No. 84-250.

1. **Limitations of Actions.** The statute of limitations runs from the date the cause of action first accrues. A cause of action accrues when the aggrieved party has the right to institute and maintain a suit.
2. **Contracts: Limitations of Actions: Time.** Generally, a suit to declare a contract void, which if void was void at its inception, must be commenced within 4 years of the execution of the contract.

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

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

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick, and Gordon G. Busdicker of Faegre & Benson, for appellee Piper, Jaffray and Hopwood.

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

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

PER CURIAM.

The plaintiff, William K. Lake, appeals from the order of the district court sustaining the motions for summary judgment filed by the defendants, Piper, Jaffray and Hopwood Incorporated (PJH), and Omaha Public Power District (OPPD). The trial court found that the suit was barred by the statute of limitations and res judicata.

The plaintiff is a ratepayer who filed suit on March 17, 1983, alleging that OPPD entered into a financial consulting contract with PJH on March 17, 1977, which was illegal and void as against public policy because (1) its compensation provision violated Neb. Rev. Stat. § 70-624.01 (Reissue 1981), and (2) it was the result of misrepresentations made by PJH that its fees for consulting services would be less than that of OPPD's previous financial advisor. The plaintiff sought a declaration

that the agreement was void, an injunction to prevent OPPD from making any further payments under the agreement, and recovery by OPPD of all payments made under the agreement.

Both defendants filed motions for summary judgment alleging that the plaintiff's suit was barred by the statute of limitations and res judicata. The trial court sustained both motions, stating that the plaintiff's suit was barred by Neb. Rev. Stat. § 25-207 (Reissue 1979). This statute bars trespass, conversion, fraud, and similar tort actions not filed within 4 years of the accrual of the action.

The trial court also found that the suit was barred by res judicata.

In 1977 the plaintiff filed a suit alleging the same contract was void and seeking to recover any payments made thereunder. That action was dismissed on defendants' demurrers for failure to state facts sufficient to constitute a cause of action. The judgment was affirmed by this court in *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982). The plaintiff had failed to make a demand upon OPPD prior to filing suit or to amend his petition, after making a demand, when given the opportunity by the trial court. The district court considered the decision a judgment on the merits and thus a bar to the present suit.

The plaintiff contends that his suit is not barred by the statute of limitations or res judicata. As the statute of limitations issue is dispositive of the appeal, it is the only issue we address.

The statute of limitations runs from the date the cause of action first accrues. A cause of action accrues when the aggrieved party has the right to institute and maintain a suit. *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984); *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982); *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979).

The plaintiff characterizes his suit as one to recover payments made *upon* a contract, and argues that the cause of action accrued on March 29, 1979, the date the payments were made. The plaintiff argues that the action is not barred by the 5-year statute of limitations for actions based on contract, Neb. Rev. Stat. § 25-205 (Reissue 1979), because the petition was

filed on March 17, 1983.

The plaintiff's characterization is mistaken. The suit seeks to declare the March 17, 1977, agreement illegal and void. If the contract is illegal, it was illegal on the date of its execution. Consequently, plaintiff's cause of action accrued on March 17, 1977.

The trial court found that the action was barred by § 25-207, primarily because the first cause of action alleged in part that the contract was illegal because of misrepresentation by PJH as to the amount of its consulting fees; thus, the statute of limitations governing fraud was applicable. There was no issue as to discovery because the plaintiff had knowledge of the representations by PJH at the time the first suit was filed, March 24, 1977.

We believe the statute of limitations applicable in this case is the general statute, Neb. Rev. Stat. § 25-212 (Reissue 1979), which bars actions "not hereinbefore provided for" that have not been commenced within 4 years. Since the petition was filed more than 4 years after March 17, 1977, the action is barred by the statute of limitations. However, since the action is barred, even if we apply the longer limitation period of § 25-205, it is not necessary for us to determine if an action to declare a contract illegal is an "action upon a . . . contract" or one of those actions "not hereinbefore provided for." § 25-212.

It is unnecessary to consider the second and third causes of action, since the plaintiff has made no assignment of error concerning them.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE and GRANT, JJ., not participating.

GERALD J. HIMES, APPELLANT, V. CHARLES W. CARTER, APPELLEE.

365 N.W.2d 840

Filed April 12, 1985. No. 84-391.

1. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove it.
2. _____: _____. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.

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

Lynn R. Carey, Jr., for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Denise A. Hill, for appellee.

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and WOLF, D.J.

WOLF, D.J.

The appellant, Gerald J. Himes, plaintiff below, appeals from an order entered by the district court for Douglas County, Nebraska, granting a motion dismissing appellant's petition at the close of appellant's case in chief.

Himes has appealed the order of dismissal to this court, and assigns as error the action of the district court in withdrawing the issues from the jury and in dismissing his petition. After reviewing the bill of exceptions and the pleadings in this case, we find the action of the district court to be proper, and therefore affirm the order of the district court dismissing plaintiff's petition.

The record discloses that on May 6, 1978, the plaintiff was a passenger in a motor vehicle going north on 30th Street in Omaha and colliding with the defendant's vehicle in the intersection of 30th and Lake Streets. The evidence shows that the defendant's vehicle was traveling south on 30th and was turning left on Lake at the time of the collision. The evidence further establishes that the vehicle in which the plaintiff was a passenger entered the intersection on a red light. There is also

evidence in the record that the traffic light system at the intersection had directional turn signals for southbound traffic to turn left in the intersection, although there is no evidence as to whether the accident occurred during the period of such directional signal.

Himes' petition alleges negligence by the defendant in the following: (1) Failing to maintain a reasonable and proper lookout; (2) Failing to have his vehicle under proper control; and (3) Failing to yield the right-of-way to plaintiff's vehicle.

Other than the evidence summarized above and the fact that the collision occurred, there is no evidence to support any of the allegations of negligence.

As this court observed in *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980):

> "The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it. . . . 'Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.' "

Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court to dismiss the action on the motion of the defendant. *Sinnett v. Dial Constr. Co.*, 187 Neb. 190, 188 N.W.2d 681 (1971).

We find no evidence of negligence on the part of the defendant, and the district court was correct in dismissing plaintiff's petition upon proper motion. The judgment is affirmed.

AFFIRMED.

BONITA B. PARSONS, APPELLANT, V. ROBERT R. PARSONS, APPELLEE.

365 N.W.2d 841

Filed April 12, 1985. No. 84-494.

1. **Child Custody: Appeal and Error.** Determinations as to the custody of children in a marriage dissolution case 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. **Child Custody: Modification of Decree.** Merely moving children out of the state of domicile does not ipso facto constitute a change of circumstances, but may be considered with other evidence to be a change of circumstances which will warrant a modification of the decree.

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

Timothy J. Pugh of Boland, Mullin & Walsh, for appellant.

Daniel P. Chesire of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

GRANT, J.

This is an appeal from the district court's modification of a divorce decree changing the custody of three minor children from the appellant mother to the appellee father. Custody matters are 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. See *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). The *Guggenmos* case determined the scope of review of this court in reviewing division of property and awarding of attorney fees in marriage dissolution cases. The same scope of review is now held

applicable in child custody matters in marriage dissolution cases.

On May 9, 1983, a decree was entered dissolving the marriage of the parties and granting custody of the couple's three minor children, ages 9, 8, and 5, to the children's mother, pursuant to an agreement between the parties. On February 1, 1984, Mrs. Parsons, the children's mother, moved the children to California. On February 28, 1984, Mr. Parsons, the children's father, filed a petition to modify the decree, asking the court to grant custody of the three minor children to him, or, in the alternative, to order Mrs. Parsons to return to the jurisdiction with the children, or, in the alternative, to modify the decree to terminate the alimony payments he was required to make to Mrs. Parsons. On April 6, 1984, Mrs. Parsons filed an application for modification of the decree, asking permission of the court to remove herself and the children to California and asking the court to increase the child support and alimony then being paid by Mr. Parsons.

After hearing on April 17, 1984, the court denied Mrs. Parsons' application to move the children to California and determined that a change of circumstances had occurred and that the best interests of the children required that their custody be awarded to the father. Mrs. Parsons filed a motion for new trial, which was overruled by the court on May 29, 1984. She then appealed to this court.

It is obvious both parents love and want to bring up their children and that both are fit parents. Unfortunately, the parents, who best know their situation and most love their children, are unable to agree on where and with whom the children should live. At the time of the hearing Mrs. Parsons was a certified schoolteacher without a job. Her ex-husband, Mr. Parsons, was an accountant and vice president of Lyman-Richey Sand & Gravel Corporation. After the dissolution in Cass County, Mrs. Parsons moved with the children to Omaha from Plattsmouth, where they had resided, to finish out the 1982-83 school term. The children began the 1983-84 school year in the Omaha school system. In January 1984 Mrs. Parsons accepted a job offer in California. She and the three children flew to Rancho Cordova, California, on

February 1, 1984. Mrs. Parsons then enrolled the children in school in Rancho Cordova. At the time of the hearing Mrs. Parsons and the children had been living in California with her uncle for 3 months. Mrs. Parsons' job offer had been unfruitful, and she was without employment at the time of the hearing.

Mrs. Parsons took the children to California without the permission of the court, informing Mr. Parsons of the move 7 days before she left the state. The move effectively eliminated Mr. Parsons' visitation. There was conflicting evidence presented on whether Mr. Parsons had acquiesced in Mrs. Parsons' decision to move and whether Mrs. Parsons was moving the children because she felt they did not need to see their father.

On our review we find that the trial court did not abuse its discretion, either in the denial of Mrs. Parsons' application to move the children or in the court's modification of the divorce decree changing custody to Mr. Parsons, and we affirm.

A divorce decree fixing custody of minor children should not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. *Krueger v. Krueger*, 211 Neb. 568, 319 N.W.2d 445 (1982). It was not contended that Mrs. Parsons was unfit to have custody of the children. Therefore, the trial court's ruling is based on the determination that there had been a material change in circumstances indicating that the best interests of the children required a change of custody.

The trial court found that Mrs. Parsons had moved the children to California without the acquiescence of Mr. Parsons. Mrs. Parsons had admitted the move was without the consent of the court. The court further found that the move without consent was a change of circumstances and that it was in the children's best interests to modify custody by granting custody to Mr. Parsons, who remained in Nebraska. Mrs. Parsons claims that the court erred in finding the move by her a sufficient change of circumstances and that the court also erred in finding it was in the best interests of the children to change their custody to Mr. Parsons.

We have held that while it is true that "merely moving [children] out of the state of domicile to another state does not ipso facto constitute a change of circumstances . . . ; nevertheless, when considered in conjunction with other evidence, such a move may well be a change of circumstances which would warrant a modification of the decree." *Marez v. Marez*, 217 Neb. 615, 620, 350 N.W.2d 531, 534 (1984). In this case Mrs. Parsons had moved the children three times in 1 year, and she admitted, although she stated it was not her sole purpose for the move, that she believed the children did not need to see their father and that the farther away the children were from their father the better it would be for the children. There was also testimony to indicate that although Mrs. Parsons testified she did not have time to apply to the court for permission to leave the jurisdiction before she took the children to California, she had planned to move since the date of the dissolution of the marriage and, in fact, had made three trips out to California in the furtherance of that objective.

Mrs. Parsons testified that the children were happy in California, but she also admitted that they were happy in Omaha and that she was the one who was unhappy in Nebraska. She also claimed that she had always encouraged visitation between the children and her ex-husband, but on the day of the April 17 hearing it was clear that she did not inform Mr. Parsons that his eldest son had flown back to Omaha with her 3 days before the hearing, even though he and his son had not seen each other in months. The move to California could be viewed as effectively denying Mr. Parsons visitation rights, and that denial may also be considered by the trial court in determining the best interests of the children. *Murdoch v. Murdoch*, 206 Neb. 327, 292 N.W.2d 795 (1980).

The trial court did not abuse its discretion in denying Mrs. Parsons' application to move the minor children to California. The evidence showed that the children had lived happily in Nebraska for at least 4 years before the move to California and that both grandmothers of the children lived in this state. When Mrs. Parsons filed her application to move the children to California, they were already residing there. Mrs. Parsons had not been gainfully employed since her move, and she and the

children were still living with Mrs. Parsons' uncle at the uncle's home. We cannot say that the lower court abused its discretion in denying permission for Mrs. Parsons to "move" the children, on these facts. Neither did the court abuse its discretion in determining it was in the best interests of the children to change their custody to Mr. Parsons. In our review we reach the same conclusions as did the trial court. The decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JIMMY L. WILEY, ALSO KNOWN AS JIMMY L. BROOKS, APPELLANT.

365 N.W.2d 844

Filed April 12, 1985. No. 84-687.

Statutes. Where the language of a statute is plain and unambiguous, no interpretation is needed, and this court is without authority to change the language.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

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

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

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

WHITE, J.

In exchange for the dismissal of an additional charge, the appellant, Jimmy L. Wiley, also known as Jimmy L. Brooks, entered a plea of guilty to a violation of Neb. Rev. Stat. § 28-611(1)(a) (Cum. Supp. 1984), issuance of a check for an amount in excess of $1,000 and obtaining "property, service, or present value," knowing that he did not have sufficient funds or

credit with the drawee bank for the payment in full upon presentation. Appellant was found guilty and sentenced to a term of 18 months to 3 years' imprisonment, with credit for time served in jail awaiting trial. A violation of § 28-611(1)(a) is a Class III felony, which carries a sentence ranging from 1 to 20 years' imprisonment, a $25,000 fine, or both. This appeal followed.

Only one error is assigned—that an insufficient factual basis existed for the acceptance of a plea of guilty to a Class III felony. The following facts elicited by the court at arraignment and as shown in the presentence investigation report will serve to highlight the contention of the appellant.

On May 2, 1984, the appellant negotiated the purchase of 27 bookcases for the Universal Bethel Baptist Church at 8017 Farnam Drive in Omaha, Nebraska, from the Unpainted Furniture Center in Omaha, for a price of $3,238.65. Appellant issued a check to the store for $3,386.65. Appellant received the difference of $148 in cash. The owner of the store became suspicious and, upon investigation, learned that the drawee bank account in Milwaukee was closed. The owner of the store conveyed this information to the Omaha Police Department, and the appellant was arrested the following day. It was determined that 8017 Farnam was a fictitious address for a nonexistent church.

Appellant's argument, simply stated, is that the statute should be construed as to punish the offender for the amount the drawer actually has obtained from the payee in a fraudulent scheme. Appellant suggests that the record would strongly indicate that he never intended to take possession of the 27 bookcases nor would the furniture store likely have delivered the bookcases to 8017 Farnam Drive when no such address existed.

There are only two flaws in the appellant's argument. First, the statute is absolutely clear that the essential elements of the crime are the issuance of a check for more than $1,000 and the obtaining of property of value, with no particular amount required (subject, of course, to the requirement that the act is done with the intent to defraud). *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980). We are not free to change the language of

a plain and unambiguous statute. *State v. Suhr, supra; State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984).

Second, the appellant having pled guilty and admitted the essential elements of the offense is not now free to change that admission here. *State v. Jones*, 214 Neb. 145, 332 N.W.2d 702 (1983).

No error having been found, the judgment is affirmed.

AFFIRMED.

JEAN ANN KAHRHOFF, APPELLEE, V. VEDA KOHL, APPELLANT.

366 N.W.2d 128

Filed April 19, 1985. No. 84-080.

1. **Pleadings: Motor Vehicles: Negligence.** Allegations that a motorist involved in an accident failed to apply brakes or turn aside are nothing more than descriptions of the manner in which he or she is alleged to have failed to keep the vehicle driven under reasonable control.
2. **Negligence.** Negligence is never presumed; the burden of proving negligence is on the party who alleges it and is not proved by the mere happening of an accident.
3. **Motor Vehicles: Negligence.** A motorist owes the duty to see what is in plain sight and to drive in such a manner that he or she is able to stop or turn aside in time to avoid a collision with an object within his or her range of vision.
4. _____: _____. Whether a motorist who experiences a previously unmanifested mechanical failure is negligent in controlling the vehicle driven depends upon the opportunity to use other mechanical equipment at his or her disposal.
5. **Motions to Dismiss: Directed Verdict.** The party against whom a motion for dismissal or direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Reversed and remanded for a new trial.

Jeffrey H. Jacobsen of Jacobsen, Orr & Nelson, P.C., for appellant.

John A. Wolf of Cronin, Shamberg & Wolf, for appellee.

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

CAPORALE, J.

In this negligence action the automobile which defendant-appellant, Veda Kohl, was driving inexplicably accelerated and crashed into a building. As a result, the plaintiff-appellee, Jean Ann Kahrhoff, an occupant of the building, was struck and injured. Kohl assigns as errors the sustainment of Kahrhoff's motion made at the close of all the evidence for a directed verdict on the issue of liability, and the denials of Kohl's motions for a directed verdict of dismissal made both at the close of Kahrhoff's evidence and at the close of all the evidence. We reverse and remand for a new trial.

In her petition Kahrhoff alleged that Kohl was negligent in that she failed (1) to have the automobile under control, (2) to keep a proper lookout, (3) to apply her brakes in order to avoid striking Kahrhoff, and (4) to turn aside in order to avoid striking Kahrhoff. Allegations (3) and (4) are nothing more than descriptions of the manner in which Kohl is alleged to have failed to keep the vehicle she was driving under reasonable control. See, *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.*, 161 Neb. 152, 72 N.W.2d 669 (1955); *Fick v. Herman*, 159 Neb. 758, 68 N.W.2d 622 (1955). Therefore, Kahrhoff's operative allegations are that Kohl was negligent in failing to keep reasonable control of the vehicle she was operating and in failing to keep a proper lookout. Kohl filed an answer denying any negligence.

Kohl was the only trial witness called to prove her alleged negligence. In response to Kahrhoff's questions on direct examination, Kohl testified that as she came upon the building, a beauty shop she intended to patronize, she prepared to park. While traveling at 5 to 10 miles per hour, she took her foot off the accelerator and applied the brakes. Although the brakes worked, the engine nonetheless raced and the automobile accelerated, the accelerator pedal having activated itself. The brakes were inspected following the accident and found to be in proper working order; however, the accelerator was not inspected. She had experienced no prior difficulty with the

operation of the accelerator and has experienced none since the accident. In response to one of Kahrhoff's questions, Kohl testified that her mechanic said "there was a possibility sometimes that there was a little cog missing and it would stick and it might only happen once and — and might never happen, again, and it might."

We begin our legal analysis by reviewing some basic principles relating to automobile negligence cases. The first of these is that negligence is never presumed, that the burden of proving negligence is on the party who alleges it and is not proved by the mere happening of an accident. *Macfie v. Kaminski, ante* p. 524, 364 N.W.2d 31 (1985); *Burrows v. Jacobsen*, 209 Neb. 778, 311 N.W.2d 880 (1981); *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980). A motorist owes the duty to see what is in plain sight, *McKenzie v. Ladd Trucking Co.*, 214 Neb. 209, 333 N.W.2d 402 (1983), and to drive in such a manner that he or she is able to stop or turn aside in time to avoid a collision with an object within his or her range of vision, *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977).

It is well to also remind ourselves that the party against whom a motion for dismissal or direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Whitaker v. Burlington Northern, Inc.*, 218 Neb. 90, 352 N.W.2d 589 (1984); *Teegerstrom v. H. J. Jeffries Truck Line*, 216 Neb. 917, 346 N.W.2d 411 (1984); *Schutz v. Hunt*, 212 Neb. 228, 322 N.W.2d 414 (1982).

There is no evidence whatsoever that Kohl did not see the building into which she crashed. In fact, the only evidence is that she knew she had reached her destination and was preparing to park. Therefore, Kahrhoff did not prove Kohl failed to "keep a proper lookout." If that were all she had alleged, the trial court would have been obligated, in response to Kohl's motion, to dismiss Kahrhoff's petition at the close of her evidence. *Anderson v. Farm Bureau Ins. Co., ante* p. 1, 360

N.W.2d 488 (1985). However, Kahrhoff also alleged that Kohl had failed to have the automobile she was driving under control, meaning under reasonable control.

In *Bezdek v. Patrick*, 167 Neb. 754, 94 N.W.2d 482 (1959), the plaintiff stopped his automobile at a stop sign and then started to drive across the street. He was unable, for some unknown cause, to shift from low gear to second and was losing speed, so he put the vehicle into low gear. These activities consumed time so that the plaintiff was struck by the defendant, who had been operating his truck on the favored street. We held there was no showing that plaintiff had reason to expect the mechanical difficulty he experienced, and the trial court therefore erred in submitting to the jury the issue of plaintiff's failure to control his vehicle.

Unlike *Bezdek*, wherein there was no action the plaintiff could have taken under the circumstances to avoid the defendant's truck, here, there was a question of fact as to whether Kohl reasonably should have brought her automobile under control by taking action such as turning off the racing engine or shifting the automobile out of gear.

Consequently, it would have been erroneous to sustain Kohl's motion for dismissal at the close of Kahrhoff's evidence or, since the evidence on the issue of liability remained the same, at the close of all the evidence.

However, since the evidence presented a fact issue, it was equally erroneous to sustain Kahrhoff's motion for a directed verdict on the issue of liability. See *Amelsburg v. Lunning*, 234 Iowa 852, 14 N.W.2d 680 (1944), wherein the defendant was unable to stop for a stop sign because of the failure of brakes which had previously functioned properly. The court noted that there was no evidence the defendant tried to use the emergency brake, and held that the issue of his negligence was one for the jury.

Kahrhoff's reliance on *Ott v. Frank*, 202 Neb. 820, 277 N.W.2d 251 (1979), for the proposition that she was entitled to a directed verdict on the issue of liability is misplaced. Therein, the defendant drove into a store and struck and killed plaintiff's decedent. We affirmed a summary judgment in plaintiff's favor. However, in *Ott* there was no evidence of a previously

unmanifested mechanical failure; it appears the case was defended not on the basis that the defendant had not been negligent but, rather, on the basis that plaintiff's decedent had an opportunity "to step out of the way." The opinion notes the evidence showed no such opportunity. As noted previously, the evidence in this case permits, but does not compel, an inference that Kohl reasonably could and should have taken action to bring the automobile she was driving under control.

Accordingly, the judgment of the trial court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SHANAHAN, J., dissenting.

Before and after the collision Kohl's car was in good mechanical condition. Never had there been any malfunction of the accelerator of Kohl's 1976 Chevrolet with 55,000 miles. Yet, inexplicably, the car's "footfeed by itself went down," causing Kohl's automobile to burst through the window of a beauty shop and travel "up to the driers." Proper function of the footfeed-accelerator was immediately restored by some unknown and unmentioned means, however, as moments later Kohl backed her car out of the beauty shop, away from the dryer where Kahrhoff had been seated, and experienced no difficulty in backing her car to a site where she encountered a police officer who "was there right as soon as I got stopped."

Nebraska has had a long-standing rule consisting of conjunctive duties: a motorist must keep a lookout for objects in plain view and operate a motor vehicle in such a manner to avoid colliding with an object within the operator's range of vision. Failure to fulfill such requirement was negligence as a matter of law. See *O'Conner v. Kientz*, 184 Neb. 554, 168 N.W.2d 703 (1969). See, also, *Newkirk v. Kovanda*, 184 Neb. 127, 165 N.W.2d 576 (1969).

> "The basis of the foregoing general rule is that the driver of an automobile is *legally and mandatorily obligated* to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him."

(Emphasis supplied.) *Stanley v. Ebmeier*, 166 Neb. 716, 729, 90

N.W.2d 290, 298 (1958).

When the dual duties of Nebraska's lookout-control rule are applied in this case, vehicular malfunction is essential to the majority's position. A postaccident inspection disclosed that the brakes on Kohl's car were "all right." Nothing indicated that the brakes were inadequate to halt the automobile or overcome the engine's action. Further, there was no competent evidence of accelerator malfunction in Kohl's car. Even the indefinite testimony about an absent "little cog" causing the accelerator to "stick" sheds no light on the cause of the accelerator's self-activation increasing the car's speed from 5 or 10 miles per hour to an unspecified speed at impact. Nevertheless, according to the majority, existence of accelerator malfunction is established by a pseudosyllogism: Kohl says so; therefore, it is. Thus, Kohl's uncorroborated statement about the self-activated accelerator is elevated to the stature of sufficient proof of an unforeseeable malfunction requiring Kohl's reactive efforts in addition to applying brakes to stop her automobile such as, the majority surmises, "turning off the racing engine or shifting the automobile out of gear." In reality, the rather ordinary and basic measure of applying appropriate pressure on the pedal for properly functioning brakes was all the situation demanded. Evaluating reasonableness of responsive action to a malfunctioning accelerator, where there was no competent evidence of a malfunction or any additional preventive efforts taken by Kohl, injects an illusory issue as the result of a phantom fact. Discrediting or disproving what has not occurred may be somewhat difficult.

In automotive annals the phenomenon of the self-activated accelerator on Kohl's car will mystify mechanics for years to come, perhaps forever. In the meantime, in Nebraska's automobile negligence law, the more fantastic and imaginative a motorist's excuse for not avoiding a collision with an observed or observable object, the less mandatory the duty regarding plain view and control.

Kohl was negligent as a matter of law in operating her automobile, and a directed verdict in favor of Kahrhoff on the issue of liability was required under the circumstances. The district court's action in this regard should have been affirmed.

BENNIE WILLIAMS, APPELLANT AND CROSS-APPELLEE, V. THE GOODYEAR TIRE & RUBBER COMPANY, APPELLEE AND CROSS-APPELLANT.

366 N.W.2d 132

Filed April 19, 1985. No. 84-229.

1. **Equal Opportunity Commission: Appeal and Error.** On an appeal from the district court of a review of an order of the Nebraska Equal Opportunity Commission, the Supreme Court will not disturb the district court's findings of fact if they are supported by substantial evidence. This court will, however, reach independent conclusions with respect to questions of law.
2. **Trial: Evidence: Appeal and Error.** Substantial evidence requires this court to ask whether the district court could have fairly and reasonably found facts as it did.
3. **Equal Opportunity Commission: Fair Employment Practice Act: Discrimination: Proof.** A party pursuing a claim before the Nebraska Equal Opportunity Commission is required to establish by a preponderance of the evidence a prima facie case of disparate treatment. To accomplish this it must be shown (1) that the claimant is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1984); (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected for that position; and (4) that after he was rejected the job remained open.
4. _____: _____: _____: _____. A prima facie case of disparate treatment must be shown by a preponderance of the evidence before the employer must come forth and show the legitimacy of its actions.
5. **Fair Employment Practice Act: Attorney Fees.** Although the awarding of attorney fees to the successful party, as provided for by Neb. Rev. Stat. § 48-1120(6) (Reissue 1984) of the Nebraska Fair Employment Practice Act, is discretionary on the part of the district court, generally, absent special circumstances, the failure to award such fees is an abuse of discretion.

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

R. Kent Radke of Badami and Radke, for appellant.

Paul M. Schudel of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee.

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

HASTINGS, J.

The plaintiff, a former employee of The Goodyear Tire & Rubber Company, filed a charge of discrimination under the

Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1984), specifically § 48-1118.

Following a hearing before the Nebraska Equal Opportunity Commission (NEOC) that the employer was not guilty of any employment discrimination, the plaintiff appealed to the district court, which affirmed the action of the commission, and Williams now appeals to this court. He assigns as errors the findings of the district court that plaintiff was not a member of a protected class and had not proved a prima facie case of employment discrimination and that the employer's requirement of an unrestricted release from medical care was a bona fide occupational qualification within the terms of § 48-1108.

The employer has cross-appealed from the order of the district court in not allowing an attorney fee to Goodyear under the provisions of § 48-1120(6). We affirm as to the denial of benefits to the plaintiff and reverse as to the denial of attorney fees to the employer.

Williams had been employed as a pipefitter by Goodyear at its Lincoln plant since December 6, 1976. On November 2, 1978, while on the job, he injured his left wrist, knee, and ankle. Portions of the record of the proceedings before the Nebraska Workmen's Compensation Court were introduced in these proceedings. The compensation court found Williams to have been temporarily totally disabled during several periods of time, including from May 3, 1979, to and including October 27, 1980. Williams was also determined to have suffered from a 17 1/2-percent permanent partial loss of use of the left foot.

In spite of those findings by the compensation court, the plaintiff's orthopedic surgeon released him to return to work on January 21, 1980, although the testimony is conflicting as to whether that release was received by Goodyear.

Williams did present a release from his attending physician, Dr. Arthur Weaver, to the personnel manager at Goodyear on January 31, 1980, which stated: "Pt has been advised he can return to light duty work in one week. Recent surgery (L) ankle."

Williams reported for work on February 7, 1980, and was told he needed a preemployment physical by the company's

physician, Dr. R.A. Hillyer, as required by union contract. That same day Williams reported to Dr. Hillyer, who discussed with him the terms of Dr. Weaver's release and briefly examined plaintiff. Dr. Hillyer then forwarded a report to Goodyear's personnel manager, Tom Booth, who discussed the report with Dr. Hillyer and then with Williams.

The report found that Williams could return to work as Dr. Weaver had suggested, and stated that he should be on light duty and away from dust and noxious fumes, presumably because of a known asthmatic condition. It further stated that he should not do any heavy servicing, should not do heavy lifting, pushing, or pulling, and, although he could stand and use his arms and hands freely, he should limit his lifting to 15 pounds often repeated, and 35 pounds occasionally. According to Dr. Hillyer, the lifting restriction was as a result of his interpretation of the term "light duty" based on some 40 years of experience in industrial medicine.

As a result of that report, Williams was informed that he was not capable of returning to his former position as a pipefitter and that an alternative replacement must be found. However, when Williams insisted that he was capable of doing the pipefitter job, he was told by Booth that he would have to get a clarification of the "light duty" restriction from Dr. Weaver, which Williams agreed to do.

A report dated February 21, 1980, from Dr. Weaver, characterized as an interpretation of the term "light duty," simply reiterated that restriction in the same terms. Williams was informed that the report was not satisfactory and that a clarification must be obtained. No such clarification was ever furnished to Goodyear.

In the meantime, Williams had received, on February 21, a letter from Goodyear terminating his employment because of failure to report to work for the alternative position for 7 scheduled working days without proper notice to the company. However, Williams was given another opportunity to obtain the clarification letter from Dr. Weaver, as indicated above; and when it was not forthcoming, Williams received, on March 3, a second termination notice based on his failure to present adequate information accounting for his absence from work.

Later, both Williams and Booth met with union representatives on March 13 and 14, at which time Goodyear confirmed its position of considering Williams' employment terminated. The complaint in this case was then filed.

With respect to the plaintiff's assignments on appeal of a review by the district court of an order of the NEOC, this court will not disturb the district court's findings of fact if they are supported by substantial evidence. The court will, however, reach independent conclusions with respect to questions of law. *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984); *Nebraska P.P. Dist. v. Lacy*, 215 Neb. 462, 339 N.W.2d 286 (1983).

Substantial evidence requires this court to ask whether the district court could have fairly and reasonably found facts as it did. See *Beatrice Manor v. Department of Health, ante* p. 141, 362 N.W.2d 45 (1985).

Turning, then, to the first assignment, plaintiff Williams was required to establish by a preponderance of the evidence a prima facie case of disparate treatment. He must establish (1) that he is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, §§ 48-1101 et seq.; (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected for that position; and (4) that after he was rejected the job remained open. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, *Airport Inn, supra; Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984). This prima facie case must be shown by a preponderance of the evidence before the defendant must come forth and show the legitimacy of its actions. *Lacy, supra.*

The plaintiff claimed he was "disabled" under the statute. Section 48-1102(8) defines "disability" as follows:

> Disability shall mean any physical or mental condition, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness, including epilepsy or seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment,

> deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide, wheelchair, or other remedial appliance or device and shall also mean the physical or mental condition of a person which constitutes a substantial handicap, as determined by a physician, but is unrelated to such person's ability to engage in a particular occupation.

We believe it to be extremely doubtful that it was the intention of the Legislature to include one in the position of plaintiff as having a disability under the Fair Employment Practice Act or that plaintiff fulfills in fact the requirements of the foregoing section. However, because we conclude that he failed to meet his burden of proving that he was physically qualified to perform the duties of the position sought, as we shall now explain, it is not necessary to consider any other of the plaintiff's assignments of error.

Dr. Weaver's release placed light duty restrictions on Williams. No clarification was ever received from Dr. Weaver which provided that Dr. Hillyer's interpretation of "light duty" was erroneous or that Williams was sufficiently recovered to perform all the duties of a pipefitter.

Williams, in his own testimony before the Workmen's Compensation Court and the NEOC hearing officer, admitted he could only do the job if accommodations were made. He also admitted that the job involved lifting up to 75 pounds individually or 150 pounds jointly at a given time. These amounts exceed Dr. Hillyer's interpretation of Williams' light duty restrictions.

Williams also admitted the job involved quite a bit of walking, standing, and moving with heavy equipment. He estimated two-thirds of his day is spent walking and standing up, and he must squat from time to time and flex his ankles due to the condensed space of the working area. These assertions tend to be corroborated by the company's job description of a pipefitter.

Performing these duties would do nothing but aggravate Williams' condition in light of his complaints made before the compensation court on June 16, 1980, that his ankle still gives him pain at the end of the day and that he cannot remain on his

feet for an entire day due to swelling.

Finally, at the very time Williams sought to return to employment as a pipefitter, he was considered 17 1/2-percent permanently partially disabled by the compensation court. As the hearing officer said:

> The Compensation Court has found (on Complainant's urging I might add) that the Complainant was totally disabled on the very date Complainant says he was willing to go back to work for Goodyear, i.e. February 7, 1980. As mentioned above, the Complainant cannot have it both ways. To find the Complainant now able to work on February 7, 1980, albeit with a "disability", would make a sham out of the previous Workmen's Compensation Court hearings. This I am unwilling to do.

Clearly, Williams was not medically or physically qualified for the job at the time in question, and he has failed to meet his burden of establishing a prima facie case. It is unnecessary to consider further his appeal. The district court was correct in rejecting his claim.

As to the defendant's cross-appeal, in *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984), although we recognized that the awarding of attorney fees to the successful party was discretionary on the part of the district court, we held that absent special circumstances, the failure to award such fees generally was an abuse of discretion. Section 48-1120(6), which provides for attorney fees, refers to the prevailing party and recognizes no distinction between employer or employee.

In this case we believe the employer did everything required of it to comply with the rules and the law, and treated the employee fairly in that regard. The plaintiff's insistence in pursuing a claim under the circumstances of this case, as outlined above, constitutes conduct which is as unwarranted as that of an employer who denies a claim on a similar foundation. The defendant is awarded an attorney fee of $250 for its defense of this claim by the plaintiff. To that extent the judgment of the district court is modified.

AFFIRMED AS MODIFIED.

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

I concur in that portion of the majority opinion which holds that judgment should be entered in favor of the appellee, The Goodyear Tire & Rubber Company. I dissent, however, from that portion of the opinion which finds that we are compelled to award an attorney fee in favor of Goodyear Tire & Rubber and against the appellant, Williams.

Neb. Rev. Stat. § 48-1120(6) (Reissue 1984) does not require a court to enter an attorney fee. Rather, it provides that the trial court "in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." While I recognize that in the case of *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984), we held that absent special circumstances, the failure to award such fees generally is an abuse of discretion, I believe in the instant case there are special circumstances which the district court apparently took into account and which we on appeal are disregarding.

While the financial size of a litigant is not generally to be considered by a court in resolving the *merits* of the case, I do believe that when exercising discretion with regard to the allowance of attorney fees in cases brought under acts intended to eliminate discrimination, it is an appropriate consideration. By our decision today we have notified all persons who may claim to be the subject of discrimination that should it be determined, even in a close case, that no violation of the Nebraska Fair Employment Practice Act occurred, the individual bringing the charges will be required to pay attorney fees to the prevailing employer. This rule seems to apply without regard to whether house counsel or outside counsel is employed. That simply does not square with the purpose of the act as set out in Neb. Rev. Stat. § 48-1101 (Reissue 1984). Section 48-1101 reads in part as follows:

> It is the policy of this state to foster the employment of all employable persons in the state on the basis of merit regardless of their race, color, religion, sex, disability, or national origin, and to safeguard their right to obtain and hold employment without discrimination because of their race, color, religion, sex, disability, or national origin. Denying equal opportunity for employment because of

> race, color, religion, sex, disability, or national origin is contrary to the principles of freedom and is a burden on the objectives of the public policy of this state.

Furthermore, as one reads the act, it is clear that the purpose of the act is to afford individuals who do not stand on equal footing with employers an opportunity to be heard. By imposing an attorney fee in every case in which the individual "loses," we will effectively "chill" the individual's right to file suit by reason of the fear that not only will the individual be unemployed but will also be required to pay attorney fees. Certainly, there may be instances where the individual and the prospective employer are equals. In that case the allowance of an attorney fee may be appropriate. Not so in the instant case. While at first blush it may seem appropriate to treat a large corporate employer in the same manner as an individual, yet on further reflection it occurs to me that the whole purpose of the Nebraska Fair Employment Practice Act is to grant a benefit to individuals seeking employment. Most often, employees who are compelled to seek redress under this act are individuals for whom the payment of an attorney fee to a corporate employer poses a nearly impossible burden and would discourage them from seeking redress in the courts. This runs contrary to the social purposes for enacting the legislation in the first place. While courts must do everything they can to discourage frivolous suits, they should not, in their desire to control dockets, impose burdens upon individuals of such a nature that they will be fearful to seek redress to which they may be lawfully entitled. I would not have interpreted § 48-1120(6) to "require" us to impose an attorney fee in this case.

CITY OF BEATRICE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. WAVA D. GOODENKAUF ET AL., APPELLANTS.

366 N.W.2d 411

Filed April 26, 1985. No. 83-953.

1. **Ordinances: Injunction: Equity.** An action to enjoin enforcement of a city ordinance is one in equity.
2. **Ordinances: Zoning.** Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
3. _____: _____. Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
4. **Animals: Livestock: Words and Phrases.** Dogs are not livestock, and the care or production of dogs is not included in the term "animal husbandry."
5. **Ordinances: Zoning: Words and Phrases.** An accessory use is defined as a subordinate use, clearly incidental and related to the principal structure, building, or use of the land, and located on the same lot as that of the principal structure, building, or use.
6. _____: _____: _____. Whether a use is customary is not to be determined merely by a mathematical count; but numbers are a factor which must be considered.
7. **Equity: Pleadings.** An action in equity vests the trial court with broad powers authorizing any judgment under the pleadings.

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

Patrick W. Healey of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellants.

Rhonda L. Haney, Beatrice City Attorney, for appellee, and, on brief, Nancy J. Ludden.

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

WHITE, J.

The appellants, Wava D. Goodenkauf and Dale D. Goodenkauf, were boarding 120 dogs on their 6.9 acres of real estate at the time of trial. Appellants' real estate is located

outside the corporate limits of Beatrice but within the city's 2-mile zoning jurisdiction. The property is located in an A-1 Agricultural District as defined by Beatrice Ordinance No. 79-42 § 501 (July 2, 1979). Permitted principal uses in this district include raising of crops, animal husbandry, and single-family dwellings. Accessory uses "normally appurtenant to the permitted uses" are allowed. Commercial kennels are allowed only with a special-use exception permit granted by the Beatrice Planning and Zoning Commission.

Appellants take in stray and unwanted dogs and find homes for them. They operate the kennel under the name of Animal Lovers of America, Inc., a nonprofit corporation. A "placement fee" of $20 per dog is a suggested donation to persons receiving dogs. It was stipulated that $20 is not sufficient to cover the cost of feed and veterinary services and that appellants make no profit from this venture.

The dogs are given to the appellants for the express purpose of locating new owners. They are of no particular breed, are not registered animals or purebreds, and are not raised from birth by the appellants. The dogs are housed in individual kennels scattered about the premises. At one time the appellants had as many as 180 dogs. Since October or November of 1981, approximately 315 dogs have been placed in new homes.

Appellants received a conditional special-use permit for 1 year from the Beatrice Planning and Zoning Commission. This permit allowed them to keep the dogs on their property. The application for an extension of the permit was withdrawn. The special-use permit terminated on January 18, 1983.

The district court granted the appellee's request for an injunction to restrain the appellants from violating the zoning ordinance. The court ordered the appellants to dispose of all dogs on their property within 60 days and not to receive any dogs for the purpose of housing or placing of stray or unwanted animals. We agree with the district court and affirm.

An action to enjoin enforcement of a city ordinance is one in equity. Therefore, in addressing the issues presented here we review the record de novo. *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984).

The primary question before us is whether appellants' use of

the premises in keeping stray and unwanted dogs is a permitted or accessory use of an A-1 Agricultural District as defined by the Beatrice ordinance. Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole. *Beckman v. City of Grand Island*, 182 Neb. 840, 157 N.W.2d 769 (1968). Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. *City of Omaha v. Gsantner*, 162 Neb. 839, 77 N.W.2d 663 (1956).

Appellants argue that the caring for dogs is a form of animal husbandry and is therefore a permitted use under the ordinance. We do not agree. Our interpretation of the term "animal husbandry" as used in the ordinance does not include the operation of a dog kennel for stray and unwanted dogs. Animal husbandry is defined by Webster's Third New International Dictionary, Unabridged 85 (1968) as "a branch of agriculture concerned with the production and care of domestic animals." Webster's definition of agriculture is "the science or art of cultivating the soil, harvesting crops, and raising livestock." *Id.* at 44. According to these two definitions, animal husbandry is a branch of agriculture and therefore concerned only with the raising of livestock. Neb. Rev. Stat. § 54-101(15) (Reissue 1984) defines livestock as "any domestic cattle, horses, mules, donkeys, sheep, or swine." In *Gsantner, supra*, we declined to hold that a dog kennel operation is a "commercial livestock farm operation." We hold that dogs are not livestock, and the care or production of dogs cannot be included in the term "animal husbandry." Thus, the keeping of dogs would not be a permitted use of an A-1 Agricultural District, according to the Beatrice ordinance.

The appellants contend that the dog kennel operation is an accessory use as provided by the ordinance. The ordinance is

clear in that only accessory uses "normally appurtenant to the permitted uses and structures" are allowed. The appellants are in error. In *Kitrell v. Board of Adjustment*, 201 Neb. 130, 266 N.W.2d 724 (1978), we described an accessory use as a recognized incidental use of property. In 3 R. Anderson, American Law of Zoning § 16.11 at 31 (2d ed. 1977), accessory use is defined as "a subordinate use, clearly incidental and related to the principal structure, building or use of land, and located on the same lot as that of the principal structure, building or use." We cannot see how 120 or more dogs and an equal number of doghouses on a small piece of real estate could be anything but a principal use. Whether a use is customary is not to be determined merely by a mathematical count; but numbers are a factor which must be considered. *Kitrell, supra.*

In this case the number of dogs is a major factor. Clearly, the keeping of a few dogs on a farm is an accessory use and is permitted, but caring for 120 dogs on a small piece of land is not a subordinate use or a recognized incidental use of land. The appellants' dog operation is clearly not an accessory use.

Since appellants' use of the property is not a permitted use or an accessory use in accordance with ordinance 79.42, § 501, they would need a special-use exception permit to continue their dog kennel operation. The appellants do not have such a permit, and therefore we find that they are in violation of the ordinance.

The appellants argue that the district court granted relief broader than that prayed for and not warranted by the facts pleaded and the evidence adduced. The court ordered in part:

> 1. That subject to the terms and provisions hereinafter set forth, defendants and each of them are hereby permanently enjoined from operating upon the real estate hereinafter described or using said premises in any type of operation *for the care, maintenance, or placement of stray and unwanted dogs* whether in conjunction with the American Lovers of Animals, Inc., or otherwise.
>
> . . . .
>
> 3. That defendants are given 60 days from this date to place or make other disposition of the present dogs in their care and possession, they to receive no others *for such*

> *purposes as above described*, or otherwise obtain such permit or other action from plaintiff City within said 60-day period as would authorize the activity herein enjoined.

(Emphasis supplied.)

An action in equity vests the trial court with broad powers authorizing any judgment under the pleadings. *Ludwig v. Matter*, 210 Neb. 87, 313 N.W.2d 234 (1981). The pleadings in the instant case generally alleged that the appellants were in violation of the zoning ordinance by keeping over 120 stray or unwanted dogs for the purpose of placement. We find that the district court's order was consistent with the pleadings and the prayer for general relief. We disagree with appellants' argument that the order bars them from having any dogs whatever on their property. The order only bars them from receiving dogs "for such purposes as above described," which means "for the care, maintenance, or placement of stray and unwanted dogs."

The order of the district court is affirmed.

AFFIRMED.

VENETTE S. CREAGER, APPELLEE, V. ROBERT E. CREAGER, APPELLANT.

366 N.W.2d 414

Filed April 26, 1985. No. 83-967.

1. **Alimony: Modification of Decree.** Unless amounts have accrued prior to the date of the service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown.
2. **Good Cause: Words and Phrases.** Good cause means a material and substantial change in circumstances and depends upon the circumstances of the individual case.
3. **Alimony: Modification of Decree: Appeal and Error.** In a proceeding to modify an alimony award, Neb. Rev. Stat. § 42-365 (Reissue 1984), that matter is initially entrusted to the sound discretion of the trial judge, which matter, 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.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

William A. Wieland of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellant.

Con M. Keating of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

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

COLWELL, D.J., Retired.

This is an appeal in a modification of alimony proceeding. The dissolution decree of August 17, 1979, divided the property, directed the parties to sell their residence, and ordered Robert E. Creager, respondent-appellant, to pay as alimony to Venette S. Creager, petitioner-appellee, $500 per month for 36 months, and, thereafter, $300 per month for 60 months. The trial court credited Robert's alimony arrears with $4,350.54 and denied his application to modify the alimony payments. Robert appeals. We affirm.

On January 10, 1980, Robert filed a motion for credit, as alimony, for the payments that he was making on the residence not sold as decreed.

On August 29, 1980, he filed a petition to modify the alimony award, alleging a change of circumstances in the employment and earnings of the parties and a change in his health that would require surgery; the prayer was for a suspension or modification of alimony. Pluries summons was served on Venette on July 31, 1981.

No amendments were made to these pleadings, and Venette filed no responses. Trial was had on September 1, 1983; the trial delay is not explained. Without objection, the evidence related to both alimony credits and modification from the decree up to the trial.

"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 . . . ." Neb. Rev.

Stat. § 42-365 (Reissue 1984). Good cause means a material and substantial change in circumstances and depends upon the circumstances of the individual case. *Roth v. Roth*, 218 Neb. 417, 355 N.W.2d 516 (1984).

At dissolution Robert was a retired Air Force officer, 58 years old, receiving $10,000 per year in military retirement benefits, projected to increase about 6 percent a year. From 1977 to April 1980 he was employed as a chief pilot in private industry, earning $17,000 to $25,000 per year. During the last 2 years, he was paid irregularly, and he quit, describing his employer as a "shabby organization." In September 1980 he had corrective open heart surgery; recovery was complete in November 1981. His pilot's license was canceled because of this health problem. In November 1980 he moved into the parties' residence in Lincoln, Nebraska, occupying it until August 1983, when it was sold; during this occupancy, other family members sometimes stayed there. Since the surgery, Robert's income is a $173 monthly VA disability pension and his military retirement pension, which has increased from $14,000 to about $16,400 in 1982. He has investments and other assets valued at $59,000.

Since the dissolution, Venette has increased her income from $8,900 as a part-time real estate agent in Lincoln to $17,500 as a secretary and part-time real estate agent in Washington, D.C. She has assets valued at $10,600 and a small condominium having a net value of $22,000.

Robert had paid $6,500 in alimony through November 1980, when he voluntarily stopped making payments. With his modification petition he paid $15,100 of the $15,400 owed in back alimony to the clerk to cover the arrears and to comply with § 42-365.

Robert claims that since his surgery he has been unable to find work, although he circulated "hundreds" of inquiries within the aviation industry. He contends that he can perform only aviation-related jobs and that because of his age, health, and limited skills he is not otherwise employable. His search for nonaviation-type employment was limited. The trial judge found him employable.

Robert assigns five errors that are consolidated as follows: (1) The failure of the court to find a material change in

circumstances; and (2) Failure to credit his alimony arrears with an amount equal to one-half of the house payments that he paid.

In a proceeding to modify an alimony award, § 42-365, that matter is initially entrusted to the sound discretion of the trial judge, which matter, 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. *Cooper v. Cooper, ante* p. 64, 361 N.W.2d 202 (1985).

Concerning the first error, Robert is interested only in aviation-related employment, disregarding other possibilities and relying on his health, age, and lack of nonaviation work experience. In *Sifers v. Sifers*, 544 S.W.2d 269 (Mo. App. 1976), the Missouri Court of Appeals was faced with similar facts. The court refused to reduce the ex-husband's alimony obligation in spite of his undergoing surgery for removal of a malignant kidney and subsequently losing his job. The court found that simply because the ex-husband could not find a job in his area of expertise as a chocolatier did not mean he was physically unable to work. He was employable.

Further, Robert's pension income, together with disability benefits, has increased each year, which is a circumstance that may be considered. *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984). See, also, *Dorey v. Dorey*, 412 So. 2d 808 (Ala. Civ. App. 1982).

The record shows that after Robert suspended making alimony payments in November 1980, he gave his adult daughter $2,500 and his adult son approximately $500.

Venette's increase in income is a circumstance to be considered; however, the evidence shows that her living expenses in Washington, D.C., also increased proportionately, requiring her to work at two jobs. Further, there is evidence in the record that her change to full-time employment and increase in income was within the reasonable contemplation of the parties at the time of the dissolution. *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983).

Considering all of the circumstances present, including the alimony credits next discussed, the trial judge did not abuse his discretion in denying Robert's application to either reduce or suspend the ordered alimony award.

The court gave Robert credit on the alimony judgment as follows: $1,920 for mortgage principal payments; $478.90 for insurance premiums paid on the house; one-half of two income tax refunds received by Venette, totaling $1,546.64; and $405 for 3 months that Venette occupied the house. Out of the $15,100 held by the clerk, the court ordered $4,050.54 credited to Robert and $11,049.46 paid to Venette. Robert argues that instead of the $1,920, he should receive credit for $5,008, that being one-half of the total mortgage payments paid.

Both parties treat Robert's claim for credits as a modification of an alimony order, § 42-365, although some alimony payments had accrued when process was served and the court found no good cause was shown. Without deciding that issue we assume the court's authority to grant credits and to distribute alimony funds is found in Neb. Rev. Stat. § 42-369(4) (Reissue 1984), "the clerk shall disburse all payments received as directed by the court," and the court's inherent power to continue its jurisdiction over alimony judgments to avoid inequitable results. See, *Ziegenbein v. Ziegenbein*, 138 Neb. 320, 292 N.W. 921 (1940); *Wolter v. Wolter*, 183 Neb. 160, 158 N.W.2d 616 (1968).

Contrary to the dissolution decree, the parties privately agreed to withhold the residence from the market, with Robert occupying it most of the time and refusing to rent it. Although he paid all of the regular house maintenance costs including mortgage principal and interest, this arrangement was an advantage to him, providing his own living quarters. The $1,920 credit allowance under the circumstances was equitable and reasonable, falling far short of an abuse of discretion, particularly in view of the other credits allowed and the extended period of time that he was in default of alimony payments.

AFFIRMED.

MARGARET CHARLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERT CHARLEY, APPELLANT, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLEE.

366 N.W.2d 417

Filed April 26, 1985. No. 84-013.

1. **Insurance.** Where there is a conflict between the typed and printed portions of an insurance policy, the typed portions control over the printed portions.
2. **Insurance: Motor Vehicles.** Neb. Rev. Stat. § 60-509.01 (Reissue 1984) neither requires nor prohibits the aggregation, or "stacking," of multiple uninsured motorist coverages.
3. _____: _____. Whether multiple uninsured motorist coverages are to be aggregated depends upon the policy language.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Noyes W. Rogers of Leininger, Grant, Rogers & Maul, for appellee.

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

CAPORALE, J.

On September 19, 1980, Albert Charley was struck and killed by an uninsured motorist. His widow and personal representative, Margaret Charley, brought a contract action against Farmers Mutual Insurance Company of Nebraska, which, through a single automobile liability insurance policy issued to the Charleys, provided uninsured motorist coverage on each of the two automobiles owned by them. The jury found the death to have been the proximate result of the uninsured motorist's negligence and returned a verdict in favor of Margaret Charley for $125,000. She then moved for judgment on the verdict against Farmers Mutual for the aggregate amount of the uninsured motorist coverage on each of the two automobiles, $30,000, and a reasonable attorney fee. The trial court determined the two coverages could not be aggregated, or "stacked," and entered judgment in the maximum amount of the coverage on one automobile for the death of one person,

$15,000, and an attorney fee of $11,818.30. We affirm.

The typed policy declarations state the limit of the uninsured motorist coverage on each of the two automobiles to be $15,000 for each person injured, up to a maximum of $30,000 for each occurrence. Farmers Mutual charged a separate premium of $9.10 for the combined uninsured motorist and bodily injury liability coverages on each of the two vehicles. The declarations also reflect that a "second car credit," or discount, was given with respect to each premium. The uninsured motorist agreement includes the following printed language:

> The company's limit of liability shall not exceed $10,000 for all damages, including damages for care and loss of services arising out of bodily injury sustained by one person in any one accident and subject to this provision $20,000 for all such damages for bodily injury sustained by two or more persons in any one accident.

There is no dispute but that the limits of liability specified in the typed policy declarations control over the lesser limits printed in the foregoing policy provision. Neb. Rev. Stat. § 25-1216 (Reissue 1979); *Spencer-O'Neill House, Inc. v. Denbeck*, 196 Neb. 456, 243 N.W.2d 767 (1976).

At the relevant time Neb. Rev. Stat. § 60-509.01 (Reissue 1984) provided in pertinent part, as it does now:

> No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state . . . unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 60-509, under provisions approved by the Director of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; *Provided*, that the named insured shall have the right to reject such coverage . . . .

Neb. Rev. Stat. § 60-509 (Reissue 1978) then required liability coverage of not less than $15,000 for bodily injury to or

the death of one person in any one accident and, subject to said limit for one person in any one accident, coverage of not less than $30,000 for bodily injury or death of two or more persons in any one accident.

We have been presented with several opportunities to interpret and apply § 60-509.01. In *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968), the insurer sought, among other things, to reduce its uninsured motorist coverage by setting off against that coverage the amount it had paid under the medical payments coverage of the policy. This court reasoned that the policy behind the statute was to give one injured by an uninsured motorist the same protection he would have had if injured by one covered by a standard automobile liability policy. Holding that the statute was to be liberally construed, the court unanimously concluded that the provision permitting the setoff was void and against public policy, as it would have the effect of reducing the minimum coverage of uninsured motorist protection required by the statute.

The court again looked at the statute in *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970). Therein, Protective Fire provided uninsured motorist coverage to Woten, who was injured by an uninsured motorist while a guest passenger in an automobile owned by one Turner. Turner's insurer paid the full extent of its uninsured motorist coverage, equal to the statutorily required minimum, to Woten, the value of whose injuries exceeded the amount of Turner's coverage. The Protective Fire policy provided that if Woten were injured while occupying a nonowned automobile, it would apply only as excess insurance over other available similar insurance and, further, that with respect to its uninsured motorist coverage, Protective Fire would not be liable for a greater proportion of the loss than the applicable limit its liability bore "to the total applicable limits of liability of all valid and collectible insurance against such loss." *Id.* at 214, 181 N.W.2d at 836. Among other arguments, Protective Fire urged that under the foregoing "excess-escape" clause it had no liability to Woten, as the payment by Turner's insurer had placed Woten in the same position as if he had been injured by one carrying the standard automobile liability policy. This

court, one judge dissenting, rejected Protective Fire's argument and held that the excess-escape clause was prohibited by § 60-509.01, again characterizing the statute as an enactment for the benefit of the public and thus to be liberally construed. The dissenting judge pointed out that the result reached by the majority could be justified only if it were required by the language of § 60-509.01 but that in fact the statute made no such requirement.

Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N.W.2d 839 (1970), decided unanimously the same day as *Protective Fire, supra*, held that the uninsured motorist coverages contained in two separate policies issued by the same insurer, each covering a different vehicle owned by the same insured, could be aggregated. Both policies contained clauses which provided that in the event there was other similar insurance coverage, the insurer's liability under the subject policy would be prorated in accordance with the relationship the insurer's limit of coverage bore to the total insurance available. The court concluded that the proration clauses would "defeat the spirit" of § 60-509.01 and were therefore unenforceable, placing at least some reliance on the fact that a separate premium had been paid for the uninsured motorist coverage embodied in each policy.

In *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976), separate premiums had been paid for the uninsured motorist coverages provided under a single policy on two vehicles. A four-member majority of this court held that such coverages could not be aggregated in the face of a clause which provided that "[r]egardless of the number of automobiles to which this policy applies . . . [t]he limit of liability for [uninsured motorist coverage] stated in the declarations as applicable to 'each person' is the limit of [the insurer's] liability for all damages . . . sustained by one person as the result of any one accident . . . ." *Id.* at 715, 240 N.W.2d at 346. One dissenting judge, joined by the then Chief Justice and one other judge, who also dissented separately, was of the opinion that § 60-509.01 required aggregation of the coverages and interpreted the majority opinion to make the amount of statutorily required uninsured motorist coverage depend upon the number of policies issued

instead of the number of vehicles insured. The separately dissenting judge was also of the opinion the issue was controlled to the contrary by *Bose, supra.*

Eich v. State Farm Mut. Automobile Ins. Co., 208 Neb. 714, 305 N.W.2d 621 (1981), *overruled on other grounds* 209 Neb. 396, 308 N.W.2d 503, presented policy language which defined an owned motor vehicle as the one "described in the declarations" and excluded coverage for injury "TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE*." *Id.* at 720-21, 305 N.W.2d at 625. The insured owned three vehicles, each of which was insured by a separate State Farm policy. Since only the vehicle insured by each policy was described in that policy's declarations, there was but one "owned" vehicle per policy. While driving a vehicle covered under one of the State Farm policies, the insured was injured in an accident involving an uninsured motorist. This court, with the present Chief Justice concurring on an unrelated point and two judges concurring without opinion, held the aforedescribed exclusion did not prevent aggregation of the coverages under all three policies, stating that the situation was controlled by *Bose v. American Family Mut. Ins. Co., supra*, and *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970). The *Eich* majority expressed the view that *Pettid* was logically irreconcilable with *Bose* and *Protective Fire.*

With that background Margaret Charley asks us either to overrule *Pettid* as unsound or to distinguish it from the instant case, on the basis that the language of the subject policy differs from that of the *Pettid* policy.

We adhere to *Pettid*, for its reasoning is not unsound. It was correctly decided, not because two vehicles were insured under a single policy, but because of the clarity of the policy language limiting the amount of uninsured motorist coverage available to the insured.

Section 60-509.01 neither requires nor prohibits the aggregation of multiple uninsured motorist coverages. The

statute requires only that an insurer offer uninsured motorist coverage on any automobile it insures for bodily injury liability. There is no language which requires that multiple uninsured motorist coverages, once provided, be aggregated no matter what the policy says with respect to the matter. Neither is there language which prohibits the aggregation of the uninsured motorist coverages provided. Once it is determined the statute neither requires nor prohibits the aggregation of multiple uninsured motorist coverages, the problem becomes one of determining what the contract of insurance in question provides.

The rules applicable to such an analysis are that a policy of insurance is to be construed as any other contract, so as to give effect to the intent of the parties at the time it was made. That intent is to be determined objectively, that is, by what a reasonable person would have understood the words to mean. If the policy is ambiguous, it is to be construed against the party drawing it, the insurer. *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984).

The policy in *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976), stated in intelligible and unambiguous language that regardless of the number of automobiles insured, the declared limit of the insurer's liability to "each person" would be the limit of its liability for all damages sustained by any one person in any one accident with an uninsured motorist. That language logically compelled the *Pettid* holding.

Illustrative of cases taking the view that whether multiple uninsured motorist coverages are to be aggregated depends upon the policy language are *Goodville Mut. v. Borror*, 221 Va. 967, 275 S.E.2d 625 (1981), and *Hampton v. Allstate Ins. Co.*, 126 Ariz. 403, 616 P.2d 78 (1980). *Goodville* held language similar to that of the *Pettid* policy prohibited aggregation of coverages on two automobiles under a single policy, notwithstanding the collection of two separate premiums. *Hampton* held that a policy provision which limited the amount of uninsured motorist coverage available to one person to the amount stated in the declarations as applicable to "each person" prevented the aggregation of the coverages provided on three vehicles insured under a single policy, notwithstanding

the fact that three premiums had been charged.

To be sure, cases can be found which permit aggregation of multiple coverages on the basis of the number of premiums charged. For example, *Gov. Emp. Ins. Co. v. Brown*, 446 So. 2d 1002 (Miss. 1984); *Gambrell v. Travelers Insurance*, 280 S.C. 69, 310 S.E.2d 814 (1983). However, we reject the reasoning of those cases as unsound.

Any argument that to disallow the aggregation of multiple uninsured motorist coverages gives the insurer a windfall overlooks the fact that the nature and extent of the protections sold by the insurer and purchased by the insured, and the charges made for them, are determined by the policy language. As explained in *Grimes v. Concord Gen'l Mut. Ins. Co.*, 120 N.H. 718, 422 A.2d 1312 (1980), holding that the multiple uninsured motorist coverages provided by a single policy could not be aggregated:

> When an insured owns two vehicles that are constantly available for use not only by him, but by members of his family and others, the risk that someone operating one of those vehicles will be involved in an accident with an uninsured motorist is obviously greater than if only one vehicle were available for use. Consequently, an insurance carrier's exposure to that risk may be enhanced. . . .
>
> We also reject the proposition that, as a matter of law, the payment of a double premium represents a windfall to the insurance carrier. To conclude otherwise would require that we overlook the fact that the setting of insurance rates is a "highly technical and complex" process . . . .

Id. at 721-22, 422 A.2d at 1315. Accord, *Hampton v. Allstate Ins. Co., supra.*

Having concluded that *Pettid* is not to be overruled, the question becomes one of determining whether the language of the policy under consideration demands a different result. It does not.

The clear meaning of the pertinent policy language is that Farmers Mutual would be liable for no more than $15,000 for all damages sustained by one person as the result of one accident with an uninsured motorist. The policy language in the instant case is remarkably similar to that found in *Hampton v.*

Allstate Ins. Co., supra, leading the *Hampton* court to a like result.

Our decision in *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968), has no application to questions involving the aggregation of multiple uninsured motorist coverages, for *Stephens* attempted to offset the recovery had under one coverage against the recovery to be had from another unrelated coverage.

Whether the holdings or all of the reasoning found in *Protective Fire, Bose*, and *Eich* can be harmonized with an approach which requires an analysis of the policy language involved is a matter which is not presently before us and therefore need not be, and is not, addressed.

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

AFFIRMED.

WHITE, J., dissenting.

The majority's conclusion that the result reached in this case is compelled by the clear and unambiguous policy language at issue carves an anomaly into Nebraska law by disallowing the "stacking" of multivehicle uninsured motorist coverage contained in a single policy and by disregarding previous decisions of this court which allow an insured to stack such coverage when holding two or more separate policies.

The term "stacking" refers to an insured's attempt to recover damages under more than one policy, endorsement, or coverage " 'by placing one policy, endorsement, or coverage, etc. upon another and recovering from each in succession until either all of his damages are satisfied or until the total limits of all policies, endorsements, coverages, etc. are exhausted, even though the insured has not been fully indemnified.' " (Citation omitted.) *Lopez v. Foundation Reserve Ins. Co., Inc.*, 98 N.M. 166, 168-69, 646 P.2d 1230, 1232-33 (1982).

In relying on this court's decision in *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976), and the so-called "clarity of the policy language," the majority misses the crucial question presented in this case. That question is not whether multiple vehicles are insured under one policy or several but whether the insured has paid one premium or several for the particular uninsured motorist coverage sought to be stacked. This court

has previously allowed injured insureds to stack uninsured motorist coverage when there are two or more separate policies with such coverage in each. *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970). Therefore, it seems truly inconsistent to permit stacking in cases like *Bose* and deny it in cases where all the automobiles are insured under one policy but the *same* additional premiums are charged as would be charged if they were covered under multiple policies.

Other jurisdictions facing this issue and having statutes similar in all relevant aspects to Neb. Rev. Stat. § 60-509.01 (Reissue 1984) have not allowed the insurer to circumvent the intent of the uninsured motorist statute and deny the insured full coverage of the policy through the use of "limits of liability" clauses. In *Chaffee v. United States Fidelity & Guaranty Co.*, 181 Mont. 1, 591 P.2d 1102 (1979), the insured sought to combine the policy limits of his insurance based on the number of premiums paid on several vehicles insured under one policy of insurance. The appellant, Chaffee, had purchased automobile liability insurance from the appellee insurance company, which policy included a provision for uninsured motorist coverage in the amount of $10,000 for one person in any one accident. All three of the automobiles owned by the appellant were covered by the same policy, and separate, equal premiums were charged and paid for uninsured motorist coverage for each of the vehicles. The appellant's son, who was an insured by definition under the policy, was injured while riding in an uninsured vehicle owned and operated by a third party. Appellant's son died as a result of his injuries, and the appellant subsequently obtained a $304,000 judgment in a wrongful death action against the third party. Based on the adjudicated liability of the negligent third party, the appellant attempted to collect on his uninsured motorist coverage, contending that since he had paid premiums for uninsured motorist coverage on three vehicles, he was entitled to combine the policy limits to recover a total of $30,000.

The Supreme Court of Montana held that the appellant was entitled to combine the policy limits for uninsured motorist coverage based upon the number of vehicles for which he had paid premiums under one policy. The court refuted the "faulty

logic" and reasoning of the "lack of windfall" argument proffered by the insurance carrier as follows:

> There are no added risks to justify the full premium paid on the second and third vehicles. The risk in each case should be the same but becomes *less, not more*, when the coverage on the second and third vehicles is *reduced to coverage only while the insureds occupy the second and third vehicles.*

(Emphasis in original.) *Chaffee, supra* at 5, 591 P.2d at 1104. The court further found the uninsured motorist coverage on the first vehicle to be within the state's statute mandating the offering of such coverage, while the coverage on the second and third vehicles was found to be in violation of that statute. The court added that

> [t]he concept of uninsured motorist coverage although issued with the liability policy is not dependent on insured's negligence or *that the insured occupy a vehicle named in the insured's policy to recover for the insured loss. Federated American Insurance Co. v. Raynes*, 563 P.2d at 820. An attempted reduction of coverage of this kind simply takes the heart out of the policy and erodes the coverage to a point of no value simply because the policy on the first vehicle becomes the only *full* coverage.

(Emphasis in original.) *Chaffee, supra* at 6, 591 P.2d at 1104. Similar rationale was expressed by the dissenters of our own court in *Pettid* and is equally applicable to the present case.

The opinion cited with approval by the *Chaffee* court above is from the Washington Supreme Court. In *Federated American Ins. v. Raynes*, 88 Wash. 2d 439, 563 P.2d 815 (1977), even when the premium paid for uninsured motorist coverage on the second vehicle was slightly reduced, the court held that the insured could combine coverages under his policy with the carrier, and found the "limits of liability" clause in the policy to be in conflict with the statutory policy providing uninsured motorist coverage. In its opinion the *Raynes* court reasoned that the insured had paid two premiums for uninsured motorist coverage and was entitled to the full protection which he purchased, noting that form of protection should not control the limits of liability. The "limits of liability" provision in the

case was, in the estimation of the court, "an attempt to erode the amount of uninsured motorist coverage to which respondent is entitled." *Raynes, supra* at 448, 563 P.2d at 820.

In order to allow the "stacking" of multivehicle uninsured motorist coverages in a single policy, other courts have found that "limits of liability" clauses when read in conjunction with "separability" clauses create an ambiguity, and construed the policy in favor of the insured. See, e.g., *Blocker v. Aetna Casualty*, 232 Pa. Super. 111, 332 A.2d 476 (1975); *Gov. Emp. Ins. Co. v. Brown*, 446 So. 2d 1002 (Miss. 1984).

I believe, however, that it is unnecessary to search the corners of a policy for ambiguity. As the Alabama Supreme Court has stated, "Cases should not . . . turn on how well the insurer drafts a limiting clause because the law does not permit insurers to collect a premium for certain coverage, then take that coverage away by such a clause no matter how clear or unambiguous it may be." *Great Central Insurance Company v. Edge*, 292 Ala. 613, 617, 298 So. 2d 607, 610 (1974).

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

DARRELL D. AND TONJA L. WENDT ET AL., APPELLANTS, V. BEARDMORE SUBURBAN CHEVROLET, INC., APPELLEE.

366 N.W.2d 424

Filed April 26, 1985. No. 84-044.

1. **Uniform Commercial Code: Sales: Revocation: Breach of Warranty.** Revocation of acceptance and breach of warranty of accepted goods are separate remedies, and a buyer may pursue either remedy or both.
2. **Uniform Commercial Code: Sales: Revocation.** A buyer who elects to exercise his right to revoke acceptance has a duty to not exercise ownership over the goods.
3. **Uniform Commercial Code: Sales: Revocation: Waiver.** Use of the goods by the buyer may waive any right to revoke acceptance.
4. **Uniform Commercial Code: Sales: Warranty: Breach of Warranty.** An express warranty must have been made a part of the basis of the bargain. In order to recover for breach of an express warranty, a buyer must prove there was reliance upon the warranty.

5. **Uniform Commercial Code: Sales: Warranty.** A warranty is express when the seller makes an affirmation with respect to the article to be sold upon which it is intended that the buyer shall rely in making the purchase.

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

David B. Latenser, for appellants.

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

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

BOSLAUGH, J.

This case arose out of a controversy concerning an automobile sold by the defendant, Beardmore Suburban Chevrolet, Inc., to the plaintiffs, Darrell D. and Tonja L. Wendt, husband and wife, and Dwayne L. Arehart.

The plaintiffs' amended petition, filed in the county court for Sarpy County, Nebraska, alleged that on or about May 27, 1982, plaintiffs purchased a 1981 Chevrolet Citation from the defendant for $6,475 in reliance on express oral statements by the defendant that the vehicle (1) was in new condition; (2) had been used only as a new car demonstrator; (3) had been neither damaged nor involved in a collision; (4) was under a new car warranty; (5) had been titled only in the name of a new car Chevrolet dealership or General Motors Acceptance Corporation and had not been otherwise titled out; (6) was qualified as a new car demonstrator for new car low interest financing, for which used cars did not qualify; and (7) was safe to drive. Plaintiffs further alleged that after delivery of the vehicle plaintiffs discovered that in May 1981 the title had been transferred to the Ashland-Greenwood Public Schools in Ashland, Nebraska; that the automobile had been used as a high school driver training vehicle; and that it had been rolled in an accident and, as a result, was seriously damaged. The petition also alleged that on June 7, 1982, plaintiffs notified defendant of the "true condition" of the vehicle and demanded return of the purchase price and that defendant refused to refund any portion of the purchase price or to accept return of the vehicle. The petition prayed for damages in the amount of

$4,445, the difference between the alleged value of the automobile and the contract price, and for other damages in the amount of $555.

After a trial to the court, the county court found against the plaintiffs on both theories of recovery and dismissed their petition. Upon appeal to the district court, the judgment was affirmed. The plaintiffs have now appealed to this court.

Although the plaintiffs' petition alleged a number of express warranties and prayed for damages, the plaintiffs insisted several times during the trial in the county court that the case was being tried solely on a theory of revocation of acceptance. Their brief filed in this court states that the action was for revocation of acceptance under Neb. U.C.C. § 2-608 (Reissue 1980) and that the district court erred in finding that the plaintiffs had waived their right of revocation.

Since this was an action at law, the finding by the trial court was the equivalent of a jury verdict and may not be set aside unless clearly wrong. *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982). The plaintiffs cannot succeed on this appeal unless the evidence compelled a finding in their favor as a matter of law.

The record shows that in April 1982 General Motors Acceptance Corporation (GMAC) repossessed a number of vehicles, including the car purchased by plaintiffs, from Gaebel Chevrolet, Inc., an automobile dealer in Ashland, Nebraska. When GMAC solicited bids for their resale, the used car sales manager for the defendant looked at some of the vehicles and purchased the 1981 Chevrolet Citation, the car in question here, for $5,451.

Although it is undisputed that the title to the car had been transferred to the Ashland-Greenwood Public Schools and that the car had been used as a high school driver training vehicle and involved in an accident, GMAC did not disclose those facts to the defendant. The defendant first became aware of those facts when informed of them by the plaintiffs after the sale.

The plaintiffs purchased the Citation from the defendant for $6,475. At that time the odometer showed a mileage of 3,901 miles. Prior to the purchase, the plaintiffs test-drove the vehicle and had it inspected by a mechanic. On one occasion Tonja

Wendt noticed some broken glass in the back seat of the car. When she "jokingly" asked one of the defendant's employees if the car had been wrecked, he replied that "to his knowledge he didn't think so." Instead, the salesman suggested that the broken glass might be from a pop bottle. On another occasion Darrell Wendt noted that there was an area on the car where the paint did not match, and the salesman conjectured that it could have been painted twice at the factory. It is not controverted that the defendant's salesmen referred to the car as a demonstrator.

The plaintiff Arehart, the father of Tonja Wendt, cosigned the plaintiffs Wendts' loan for the car. In order for him to read the necessary documents prior to signing them, the Wendts brought the documents to his residence in Kearney, Nebraska, over the 1982 Memorial Day weekend. The Wendts drove the Citation on this trip.

While using the car on a rainy day that weekend, Arehart noticed that the windshield leaked, and there were other problems leading him to suspect that the car had been wrecked.

Arehart testified that when he turned the first corner, water ran in around the upper right corner of the windshield. He then noticed there was an excessive "gap" between the post and windshield—close to an inch wide—that had been puttied in with sealer. Later, he noticed the truck lid alignment was off by a half to three-quarters of an inch on one side, and almost touching on the other. He then "suspicioned very highly that it had probably been in a pretty good wreck to get that much damage, especially on the front post and that much on the back." Nevertheless, Arehart and the Wendts signed the papers necessary for the purchase of the car. All such documents referred to the car as "used" and that it was being sold "as is."

Approximately 1 week after purchasing the car, plaintiffs learned of its use as a high school driver training vehicle and its having been wrecked. On June 7, 1982, the plaintiffs notified the defendant by letter that they were revoking acceptance of the car. The plaintiffs, however, retained possession of the automobile and continued to make monthly payments on the car.

Furthermore, Darrell Wendt testified that although they

borrowed a car in August and September, they drove the Citation for the remainder of time after the revocation of acceptance. At the time of trial they had driven the automobile 11,000 miles since it had been purchased.

In *Ford Motor Credit Co. v. Harper*, 671 F. 2d 1117, 1121-22 (8th Cir. 1982), the court of appeals held:

> Under the Code, once goods are accepted buyer is entitled to cancel the contract and recover so much as has been paid only upon establishing that he has justifiably revoked his acceptance. [Citation omitted.] The Code also provides that buyer may recover damages in a suit for breach of warranty in regard to accepted goods. [Citation omitted.] The two options are nonalternative in character and buyer may pursue either remedy or both. [Citation omitted.] They are, however, separate remedies treated in entirely different sections of the Code and they offer separate forms of relief.

Previously, *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981), considered the appeal of an action based on, among other things, both breach of warranty and revocation of acceptance.

Considering, first, the theory of revocation of acceptance, other jurisdictions have noted that a buyer's revocation of acceptance is subject to the provision that he "has the same rights and duties with regard to the goods involved as if he had rejected them." § 2-608(3). One of these duties is to not exercise ownership. Neb. U.C.C. § 2-602(2)(a) and (c) (Reissue 1980). "Apparently the test is one of reasonableness and is a question of fact." *Charney v. Ocean Pontiac, Inc.*, 17 U.C.C. Rep. Serv. (Callaghan) 982, 985 (N.D. Mass. App. Div. Sept. 3, 1975).

In *Charney* the question before the court was whether a plaintiff had exercised ownership rights over an automobile when she drove it from Massachusetts to her new residence in California. Citing numerous decisions holding that "continued use of an automobile is enough to defeat a buyer's revocation," *id.*, the court found that there was no special circumstance present in the case such that would warrant an exception to this general rule.

In *Waltz v. Chevrolet Motor Division*, 307 A.2d 815 (Del.

Super. 1973), the defendant argued that the buyer plaintiff could not simultaneously revoke acceptance of a car and continue to use it. The court reasoned: "Logically, then, the Code requires that Plaintiffs' continued use of the automobile after their attempted rejection invalidates the revocation of acceptance." *Id.* at 816. Without elaborating upon the facts of the case, the court concluded: "Accordingly, while a buyer may conditionally accept goods on the assumption that defects will be cured, § 2-607(2), he cannot revoke an acceptance after attempts to cure have failed while continuing to hold and enjoy the goods." *Id.* See, also, *Cardwell v. International Housing, Inc.*, 282 Pa. Super. 498, 423 A.2d 355 (1980), where, considering a buyer's use of a mobile home after revocation of acceptance, the court concluded:

> When, however, appellees continued to live in the home and continued to make their monthly payments to appellant, they acted inconsistently with their claimed revocation and lulled appellant into a false belief that appellees would continue to retain and accept the home. . . . Thus, we believe that appellees failed to display the requisite good faith required in a commercial transaction and by these actions clearly indicated that they would continue to accept the mobile home despite their earlier revocation.

423 A.2d at 366.

The evidence in this case was clearly sufficient to support the finding that the use of the automobile by the plaintiffs waived any right of revocation of acceptance that they may have had.

With respect to a theory of warranty, the plaintiffs, during the trial, attempted to establish two different express warranties as having been made at the time of the purchase of the automobile: (1) That the automobile was a new car demonstrator; and (2) That it had not been wrecked.

Neb. U.C.C. § 2-313(1)(b) (Reissue 1980) provides: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Since an express warranty must have been "made part of the basis of the bargain," it is essential that the plaintiffs prove reliance upon the warranty. See,

Scaringe v. Holstein, 38 U.C.C. Rep. Serv. (Callaghan) 1595 (N.Y.A.D. July 5, 1984); *Royal Business Machines v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980); *Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286 (6th Cir. 1982).

As to the alleged warranty that the automobile was a new car demonstrator, the plaintiffs presented no evidence concerning the value of the car as a former demonstrator as opposed to the value of a car which had been used as a former high school driver training vehicle.

Damages in a breach of warranty action are governed by Neb. U.C.C. § 2-714(2) (Reissue 1980), which provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." See, e.g., *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 199 Neb. 489, 260 N.W.2d 193 (1977).

Since there was no evidence as to difference in value between a new car which has been used as a demonstrator and an automobile used as a driver training vehicle, there was no evidence upon which an award could be based for breach of that warranty.

As to the alleged warranty that the automobile had not been wrecked, there was an issue of fact as to whether such a warranty had been made and, if made, whether there had been reliance upon it.

The evidence is that the defendant did not know the automobile had been damaged in an accident until after the plaintiffs had purchased the automobile.

When Tonja Wendt discovered broken glass in the back seat of the automobile and "jokingly" inquired as to the possibility that the automobile had been involved in an accident, the salesman responded only to the extent of his knowledge. In *England v. Leithoff*, 212 Neb. 462, 468, 323 N.W.2d 98, 101 (1982), this court stated:

> "One of the primary tests of whether a given representation is a warranty or a mere expression of opinion is whether the seller assumed to assert a fact of

which the buyer was ignorant or whether the seller merely expressed a judgment about a matter as to which each party could be expected to have an opinion." Annot., 94 A.L.R.3d 729, 730 (1979).

" 'It is the general rule of law that a warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase.' " *Naaf v. Griffitts*, 201 Kan. 64, 66, 439 P.2d 83, 85 (1968).

Here, the salesmen did nothing more than offer an opinion concerning the existence of broken glass in the car and the mismatched paint on the car. The trial court could find that the defendant did not warrant that the car had not been wrecked; rather, only that it did not know that it had been involved in one. Furthermore, in light of the plaintiffs' own mechanic's inspection of the car and plaintiff Arehart's suspicion that it had been "in a pretty good wreck," it cannot be said as a matter of law that such statements became the basis of the bargain.

The record does not show that the findings of the district court were clearly wrong. The judgment must, therefore, be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JO HELEN ROBERTSON, APPELLANT.

366 N.W.2d 429

Filed April 26, 1985. No. 84-046.

1. **Confessions: Evidence.** Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution.
2. _____: _____. To be admissible an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been extracted by any direct or implied promise or inducement, no matter how slight.
3. **Confessions.** A promise to inform a prosecuting authority about a declarant's cooperation is not an improper inducement producing involuntariness.
4. **Rules of Evidence: Evidence.** Rule 402 of the Nebraska Evidence Rules (Neb.

Rev. Stat. § 27-402 (Reissue 1979)) permits the admission of relevant evidence only.

5. **Criminal Law: Evidence.** Where two or more persons are charged with the same criminal offense but are tried separately, the fact that one defendant has pleaded guilty or has been convicted is inadmissible against the other defendant.

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

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

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

SHANAHAN, J.

A Douglas County jury found Jo Helen Robertson guilty of the first degree murder of Laura LaPointe, a prostitute. Robertson was sentenced to life imprisonment and appealed her conviction.

In the early morning of April 11, 1983, a passer-by discovered the nude, brutally beaten body of Laura LaPointe in a roadside ditch located in a heavily wooded area near Hummel Park north of Omaha. Close to LaPointe's body was an empty brandy bottle and a "stick," apparently a tree limb 6 to 7 feet long with a 3-inch diameter.

Investigation in the LaPointe murder focused on three Omaha prostitutes—Geraldine "Dee" Carr, Loray "Rachael" Smith (also known as Laura (Larie) "Baby Girl" Johns), and Carol Joy. On June 24 Jo Helen Robertson was being held on warrants for undisclosed misdemeanors and asked to talk to someone about the LaPointe homicide, although Robertson was not then a suspect in the killing. Philip Butler, a Douglas County deputy sheriff, was summoned and informed Robertson of the *Miranda* warnings. After the deputy read the *Miranda* warnings, Robertson asked whether she might be released on bond if she provided information about the LaPointe homicide. The deputy responded "No," but told Robertson

> we will check it [the information] out and if we find it accurate we will go to the City Prosecutor's office and I will tell him that you are assisting us in a homicide investigation.
>
> . . . .
>
> . . . I don't know what the City Prosecutor would do. Perhaps in the interest of justice he would take care of the cases, but I don't know if that would happen.

Robertson gave a tape-recorded interview in which she denied being in the Hummel Park area where LaPointe's body was found. However, Robertson told the deputy that in the late evening of April 10 Geraldine Carr, Loray Smith, Carol Joy, and Robertson were driving in downtown Omaha with four pimps. According to Robertson, the four pimps decided to "teach LaPointe a lesson," but Robertson asked to leave the car because she did not want "to teach anybody a lesson." The next day, April 11, Carol Joy told Robertson that two of the pimps had beaten LaPointe to death with a baseball bat in a park. Throughout her tape-recorded interview, Robertson made numerous contradictory statements about the occupants of the car in which she had been riding and about the identity of the individuals who went to the park where LaPointe was murdered.

The homicide investigation shifted to a 1977 Ford LTD located at Geraldine Carr's residence. Equipped with a search warrant, law enforcement officers searched the Ford LTD and looked for a razor blade, baseball bat, bloodstained clothes, and blood in the car's interior. As a result of their vacuum "sweeping" and search of the LTD, officers found strands of hair, fibers, a gold pendant necklace, and a softball bat. Officers tried but failed to obtain "readable" fingerprints from the LTD and the objects removed from that automobile.

On June 28 the police arrested Geraldine Carr, Carol Joy, and Robertson. Deputy Butler again questioned Robertson after informing her of the *Miranda* warnings. Robertson denied any involvement in the LaPointe murder.

Officers had obtained hair samples from Carol Joy and Robertson. These samples and a sample of LaPointe's hair were

microscopically analyzed by the Federal Bureau of Investigation at its Washington, D.C., laboratory. Hair embedded in the "stick" found at the scene of the crime was identified as LaPointe's. Hair taken from the softball bat was identified as Joy's. No hair sample was identified as belonging to Robertson.

In a pretrial motion Robertson moved to suppress her tape-recorded statement obtained on June 24. The district court overruled Robertson's motion, and the taped interview was later heard by the jury in Robertson's trial.

Robertson's jury trial commenced on December 5. In the course of the State's case, a pathologist testified that LaPointe's death was caused by injuries inflicted with blunt instruments. The pathologist identified the "stick," or tree branch, and softball bat as instruments capable of inflicting the wounds and injuries sustained by LaPointe.

The State called Geraldine Carr as a witness. Carr testified concerning the unspeakably cruel treatment of prostitutes at the hands of pimps, including physical violence and beatings. When questioning was directed to the LaPointe homicide, on instruction from her attorney Carr invoked her privilege against self-incrimination. As authorized by Neb. Rev. Stat. § 29-2011.02 (Cum. Supp. 1984), the prosecutor asked and received immunity for Carr, and questioning continued. Carr testified that in the late evening of April 10 she and three other prostitutes, Loray Smith, Carol Joy, and Robertson, were in a Ford LTD driven by Carr. This foursome obtained and drank a bottle of brandy. After drinking the brandy one of the four suggested robbing a "trick," that is, "flag down" a prospective male and "sneak up and take his money." Shortly afterward, the four saw LaPointe on the street and invited her to the car. In the back seat of the LTD was a softball bat which Carr used for "protection." In place of a male victim the four had decided to rob LaPointe. LaPointe entered the car and the five drove to an alley in north Omaha, where Robertson, in the back seat with Carol Joy and LaPointe, told LaPointe to "give up" her money. After LaPointe was forced to disrobe, Carol Joy and Robertson searched LaPointe's clothing and purse but found

only $25. Disappointed by that small amount of money, Joy gave a "straight-edge razor" to Robertson, who began cutting LaPointe's hair. Robertson tore a gold pendant necklace from LaPointe and inflicted a minor cut with the razor on LaPointe. Intending to find a "trick" for LaPointe so she could obtain some money, the five drove around Omaha and eventually went to Hanscom Park, where LaPointe was forced to have oral sex with Carol Joy. During this episode, Robertson "popped" LaPointe in the head with the razor. Sometime after midnight, Robertson suggested going to Hummel Park. At that park LaPointe, Carol Joy, and Robertson got out of the car. Although Carr did not recall who had taken the softball bat from the LTD, Carr testified that Robertson beat LaPointe with the ball bat while Joy struck the victim with the "stick." The four left LaPointe's body in a ditch and returned to Omaha, where they threw LaPointe's clothes into a trash receptacle.

Carr further testified that there were "no deals" for her testimony on behalf of the State; rather, she testified because "I want the truth to be told." At the time of Robertson's trial Carr had not been brought to trial.

The State then called Carol Joy to testify. After asking the witness' name, and as his second question in direct examination, the prosecutor asked Joy: "Carol, you have been convicted of first degree murder in this particular case; is that correct?" Robertson objected; the court overruled Robertson's objection; and Joy answered, "Yes, I have," and then referred to testifying in her previous jury trial. (On August 10, 1984, or approximately 8 months after Robertson's trial, this court reversed Joy's conviction and remanded for a new trial. See *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).)

Joy continued her testimony and stated that on April 10, before meeting the other prostitutes and LaPointe, she had a "couple of shots of heroin" and some Valium, and had consumed a considerable quantity of alcoholic beverage. Joy corroborated the testimony given by Carr regarding the meeting with LaPointe and decision to rob her. According to Joy, the five prostitutes drove to Hanscom Park, where Joy gave Robertson a razor. At the park Robertson began

"clunking her," that is, hitting LaPointe with the end of the ball bat. Robertson told LaPointe to disrobe, and finding no money in LaPointe's clothes, Robertson started cutting LaPointe's hair with the razor. Joy reluctantly engaged in oral sex with LaPointe. Later, the five drove to north Omaha, where they obtained a bottle of brandy and went to Hummel Park. At Hummel Park Joy removed $25 from LaPointe's jeans and got out of the car with LaPointe and Robertson. A short distance from the car, Robertson hit LaPointe with the ball bat, but no one struck LaPointe with the "stick." Joy testified that Robertson and she took turns hitting LaPointe with the ball bat until Joy said "that was enough." Joy determined that LaPointe was dead, and the foursome returned to Omaha.

Although Robertson did not testify, she offered medical testimony about her mental condition on April 11, 1983. A psychiatrist testifying for Robertson could not express an opinion that Robertson was unable to distinguish right from wrong on April 11.

In her appeal Robertson claims two errors, namely, (1) her tape-recorded interview should have been suppressed because such statement was involuntary due to a promise made by the deputy sheriff when he recorded the interview and (2) prejudice by allowing Joy to testify that she had been convicted for the same offense charged against Robertson, the LaPointe murder.

Recently, in *State v. Bodtke, ante* p. 504, 363 N.W.2d 917 (1985), we held that voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution. In *State v. Crisp, ante* p. 265, 361 N.W.2d 544 (1985), we stated that, to be admissible, an accused's statement, admission, or confession must have been freely and voluntarily made, and must not have been extracted by any direct or implied promise or inducement, no matter how slight. See, also, *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984). Whether a statement, admission, or confession has been freely and voluntarily made depends upon "the totality of the circumstances," and a finding by the trial court regarding voluntariness will not be set aside unless such finding is clearly erroneous. See *State v. Crisp, supra*.

Robertson argues that her statement was induced by the

deputy sheriff's promise to obtain her release on bail for misdemeanor charges. The record does not support Robertson's claim. Deputy Butler promised only that "we will check it [Robertson's information] out and if we find it accurate we will go to the City Prosecutor's office and I will tell them that you are assisting us in a homicide investigation." Was such statement by the deputy the type of promise rendering Robertson's statement involuntary and, therefore, inadmissible?

We have considered circumstances similar to the case at hand and have addressed this very question by answering that a promise to inform a prosecuting authority about a declarant's cooperation is not an improper inducement producing involuntariness. See *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983). See, also, *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977); *United States v. Glasgow*, 451 F.2d 557 (9th Cir. 1971); *United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970). "A simple representation . . . that the fact of his cooperation will be made known to prosecuting authorities is insufficient to render a confession involuntary." *United States v. Curtis, supra* at 1154. Under the circumstances the deputy's statement or remark to Robertson that her cooperation in the investigation would be made known to a prosecutor did not in and of itself render Robertson's statement involuntary. The district court was correct in overruling Robertson's motion to suppress and allowing the tape-recorded statement into evidence.

Robertson's second assignment of error relates to the propriety of the prosecutor's asking Carol Joy whether she had been convicted of the first degree murder of LaPointe—the same charge on which Robertson was being tried. At the outset we emphasize that the prosecutor's question was whether Joy had been *convicted*, not whether she admitted participating in the homicide. Was Joy's conviction of the LaPointe murder admissible evidence against Robertson in a trial for the same homicide?

Perhaps a constitutional question is presented on account of the prosecution's use of Joy's conviction as evidence in Robertson's trial. In *Bruton v. United States*, 391 U.S. 123, 134-35, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (citing and

quoting from *People v. Fisher*, 249 N.Y. 419, 164 N.E. 336 (1928), Lehman, J., dissenting), the U.S. Supreme Court criticized the proposition that juries could be counted on to disregard inadmissible evidence and acknowledged,

> "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them . . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."

Although *Bruton* involved use of a codefendant's incriminating extrajudicial statement in determining a defendant's guilt, the U.S. Supreme Court has recognized the importance of a defendant's right to confrontation secured by the sixth amendment to the U.S. Constitution. See, also, Neb. Const. art. I, § 11, an accused's right "to meet the witnesses against him face to face." Whether reference to Joy's conviction for the LaPointe murder deprived Robertson of the right to test the witnesses and evidence in her trial need not be resolved in the present case, for we may dispose of Robertson's assignment of error without considering the possible constitutional question.

Only relevant evidence is admissible, and evidence which is not relevant is not admissible. See Rule 402, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-402 (Reissue 1979)). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-401 (Reissue 1979)). How evidence of a different jury's verdict finding a codefendant guilty of the same charge, but based on esoteric evidence of some nature and perhaps quite dissimilar, has probative value of a defendant's guilt in a present prosecution makes the mind boggle due to infinite improbabilities. With all the variables and unknown quantities entering another jury's verdict, any connection

between Joy's conviction and Robertson's guilt is reduced to a possibility, not the rational relationship based on likelihood required for relevant evidence. See *United States v. Vandetti*, 623 F.2d 1144 (6th Cir. 1980) (codefendant's conviction "has no tendency to make the existence [of defendant's guilt] more probable or less probable than it would be without the evidence"). *Id.* at 1147. See, also, *United States v. King*, 505 F.2d 602 (5th Cir. 1974) ("One person's guilty plea or conviction may not be used as substantive evidence of the guilt of another."). *Id.* at 607. Joy's conviction of the LaPointe murder was not relevant to prove Robertson's guilt of the same homicide. It was error for the district court to permit the State to introduce irrelevant evidence of Joy's conviction.

We must next consider whether admitting evidence of Joy's conviction was prejudicial or reversible error rather than harmless error. Rule 103(1) of the Nebraska Evidence Rules provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Neb. Rev. Stat. § 27-103(1) (Reissue 1979). Further, in considering whether admission of Joy's conviction was harmless error, we must conclude "the error was harmless beyond a reasonable doubt." *State v. Sims*, 213 Neb. 708, 714, 331 N.W.2d 255, 259 (1983).

The clear weight of authority in this country is that where two or more persons are charged with the same criminal offense but are tried separately, the fact that one defendant has pleaded guilty or has been convicted is inadmissible against the other defendant. A lengthy annotation is found in Annot., Prejudicial effect of prosecuting attorney's argument or disclosure during trial that another defendant has been convicted or has pleaded guilty, 48 A.L.R.2d 1016 et seq. (1956). See, also, *State v. McDonald*, 117 Ariz. 159, 571 P.2d 656 (1977) (by the "overwhelming weight of authority in this country," disposition of the same charge against a codefendant is inadmissible in the trial of the other defendant), *id.* at 161, 571 P.2d at 658; *State v. Pikul*, 150 Conn. 195, 187 A.2d 442 (1962) (State's evidence on direct examination disclosing that a codefendant had been convicted of the same charge against the defendant "not only was improper but was highly prejudicial.

[Admitting such evidence] was erroneous and harmful and necessitates a new trial."), *id.* at 199, 187 A.2d at 444.

In condemning a prosecutor's use of a codefendant's conviction of the same charge against the defendant on trial, the Supreme Court of Mississippi in *Ivy v. State*, 301 So. 2d 292, 293 (Miss. 1974), stated:

> The jury thus had before it evidence of the co-indictee's conviction and sentence from which it could very likely conclude that Ivy was guilty because his associate and co-indictee was convicted and sentenced, or more modernly put, the jury could find that he was guilty by association.
>
> We have consistently held evidence of this nature to be inimical to a fair trial.

Accord, *State v. Redden*, 71 Wash. 2d 147, 426 P.2d 854 (1967); *People v. Aubrey*, 25 A.D.2d 604, 267 N.Y.S.2d 654 (1966). Our system of criminal justice does not recognize mere association as a premise for guilt.

Beyond guilt by association there are still other reasons that evidence of a codefendant's conviction on the same charge has no place in the State's case in chief against a defendant. Fortunately, we are still in a time when juries attach significance to courtroom proceedings. A previous jury's verdict that a codefendant is guilty of the same charge is probably very impressive on a jury in a defendant's subsequent trial. Bolstered by another jury's verdict, a jury might use a codefendant's conviction as a springboard to hurdle reasonable doubt in the present trial of a defendant. Circumvention of the State's duty to produce evidence of guilt beyond a reasonable doubt affects a defendant's substantial right to a fair trial and results in unfair prejudice defying description.

Further, in using another jury's verdict as evidence, there is the insidious invitation to trust and substitute another jury's judgment rather than fairly deliberate evidence in a present prosecution. The fact remains in our criminal justice system that a defendant has a right to have guilt determined upon the evidence against him or her, not by evidence presented and disposition made in a criminal prosecution against someone else. See, *United States v. Fleetwood*, 528 F.2d 528 (5th Cir.

1976); *State v. Felton*, 131 N.J. Super. 344, 330 A.2d 23 (1974).

In the case against Robertson there was no physical evidence connecting Robertson with the LaPointe murder. Also, Robertson never admitted any involvement in that homicide. To convict Robertson the State relied heavily on the testimony of Geraldine Carr and Carol Joy. Under the circumstances the Robertson jury may have considered Joy's conviction, later reversed by this court, as corroboration for Carr's testimony. Additionally, Joy's conviction, although subsequently vacated in this court, could be seen by the jury as validation of Joy's testimony itself. Upon the entire record we cannot conclude beyond a reasonable doubt that evidence of Joy's conviction could not and did not undermine fairness in Robertson's trial and improperly influence the jury in determining Robertson's guilt in the LaPointe murder. Admission of Joy's conviction as evidence against Robertson was reversible error. Therefore, the conviction and sentence of Robertson are vacated, and this cause is remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

Evidence that another person has been convicted of the same crime for which the defendant is on trial is not admissible as proof of the guilt of the defendant. The same evidence, however, may be admissible for many other reasons.

It is generally held that the State may show that its witness has been convicted of a felony instead of waiting for the defendant to develop that point on cross-examination. See, *United States v. Del Purgatorio*, 411 F.2d 84 (2d Cir. 1969); *United States v. King*, 505 F.2d 602 (5th Cir. 1974).

Evidence relating to bias is relevant because certain relationships and circumstances may impair the impartiality of the witness. For this reason evidence relating to the underlying relationships, circumstances, and influences operating on the witness should be disclosed to the jury. The fact that a witness had not only participated in the same crime but had been convicted of that crime is such a circumstance.

In *State v. Cole*, 252 Or. 146, 448 P.2d 523 (1968), such evidence was held admissible as proof of the facts and circumstances of the crime, the circumstances under which the

witness was testifying, his status with regard to the charge, and as a matter affecting the credibility of the witness.

In *Dye v. State*, 77 Ga. App. 517, 48 S.E.2d 742 (1948), such evidence was held admissible to show the status or relationship of the parties.

Evidence as to the prior conviction of the witness in this case was admissible, not as proof of the defendant's guilt, but to show her prior conviction of a felony and establish the relationship between the witness and the crime for which the defendant was on trial.

I would affirm the judgment.

HASTINGS, J., joins in this dissent.

MARLYS J. MOORE, APPELLANT, V. AMERICAN CHARTER FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLEE.

366 N.W.2d 436

Filed April 26, 1985. No. 84-148.

1. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
2. _____. The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Records: Appeal and Error.** In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of pleadings to support judgment.

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

Stephen Speicher, for appellant.

Paul Korslund of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellee.

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

PER CURIAM.

The appellant, Marlys J. Moore, appeals from an order entered by the district court for Lancaster County, Nebraska, sustaining a motion for summary judgment in favor of the appellee, American Charter Federal Savings and Loan Association (American Charter), and against Moore. In sustaining the appellee's motion for summary judgment, the district court dismissed Moore's petition. We affirm.

Pursuant to the provisions of Neb. Rev. Stat. § 25-1332 (Reissue 1979), a motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We have examined that statute on a number of occasions and held that the primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. See, *Witherspoon v. Sides Constr. Co., ante* p. 117, 362 N.W.2d 35 (1985); *Gilbreath v. Ridgeway*, 218 Neb. 822, 360 N.W.2d 474 (1984); *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984). Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. See, *Witherspoon v. Sides Constr. Co., supra; Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984). If a genuine issue of fact exists, summary judgment may not properly be entered. See *Dennis v. Berens*, 156 Neb. 41, 54 N.W.2d 259 (1952).

When filing her notice of appeal, Moore did not request the preparation of a bill of exceptions, although the judgment of the district court recites that evidence was adduced at the hearing on American Charter's motion for summary judgment. This was Moore's responsibility. See Neb. Ct. R. 5C(5) (Rev. 1983). There is therefore nothing for us to review except the petition filed by Moore and the answer filed by American Charter.

In this regard we said in *Snyder v. Nelson*, 213 Neb. 605, 606-07, 331 N.W.2d 252, 253 (1983):

> "In order to receive consideration on appeal, any affidavits used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. . . ."
>
> We are limited, therefore, to an examination of the pleadings; if they are sufficient to support the judgment, we will not reverse the trial court. *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979); *Hubbell v. Farmers Ins. Group, supra*. Moreover, where there is no bill of exceptions, it will be presumed on appeal that the evidence supports the trial court's judgment. *Tedco Development Corp. v. Overland Hills, Inc.*, 205 Neb. 194, 287 N.W.2d 49 (1980); *Schroeder v. Homestead Corp.*, 171 Neb. 792, 107 N.W.2d 750 (1961), *cert. denied* 368 U.S. 32, 82 S. Ct. 146, 7 L. Ed. 2d 90.

And in *Nimmer v. Nimmer*, 203 Neb. 503, 506, 279 N.W.2d 156, 158 (1979), we said:

> Where there is no bill of exceptions, this court shall examine the pleadings and if the same will support the judgment of the court, this court shall not reverse. In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of pleadings to support judgment. Rhodes v. Johnstone, 191 Neb. 552, 216 N.W.2d 168.

See, also, *Hubbell v. Farmers Ins. Group*, 200 Neb. 472, 263 N.W.2d 863 (1978).

With these basic rules in mind, we then examine the pleadings to determine if they support the judgment. Appellant's petition alleges that American Charter is a federally

chartered savings and loan association with its principal place of business in Lincoln, Nebraska. The petition then alleges that on January 8, 1963, appellant and her then husband purchased as joint tenants certain real property located in Beatrice, Nebraska, on which they subsequently and continuously resided with their two minor children until 1974.

The petition then goes on to allege that on February 6, 1975, the marriage of the parties was dissolved and that appellant's husband conveyed his interest in the property to appellant by deed dated April 22, 1975. Appellant next alleges that from and after the divorce decree she continued to reside on the property until January 1982, when the property was sold.

The critical paragraph in the petition is paragraph 5, which alleges:

> 5. On or about April 12, 1979, Plaintiff conveyed title to the Property to her son, Kevin Moore, *in exchange for a life estate* in the Property and certain other consideration. A true and accurate copy of the deed evidencing the transfer of title from Plaintiff to Kevin Moore is attached as Exhibit 3 and is incorporated by reference.

(Emphasis supplied.) The petition then describes how appellant's son later obtained a loan from appellee and gave as security for the loan a mortgage on the property previously conveyed by appellant.

The petition further alleges that there was a default and a subsequent foreclosure. Appellant concludes by alleging that she retained a homestead interest in the property sold to satisfy the debt owed to American Charter and is therefore entitled to receive $5,500 from appellee, the balance due her on her homestead interest.

To this petition the appellee filed an answer in which it generally admitted appellant's petition but denied that appellant continued to reside on the property until January of 1982 or that in conveying title to the property she retained a life estate. The motion for summary judgment was decided essentially on the basis of the pleadings, including the documents attached to the pleadings by Moore.

Of particular significance is the deed attached to Moore's petition and described in paragraph 5. The deed is a standard

form of warranty deed commonly used in this state. It is dated April 12, 1979, and is signed by Moore before a notary public. The deed recites that the appellant, as a single person, conveys to Kevin C. Moore the property involved herein by warranty deed. The deed contains no reservations, nor does it make any reference to a life estate.

The pleadings support the judgment. The judgment is affirmed.

AFFIRMED.

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

STATE OF NEBRASKA, APPELLEE, V. LARUE D. SOE, APPELLANT.

366 N.W.2d 439

Filed April 26, 1985. No. 84-507.

Prior Convictions: Right to Counsel: Waiver. For enhancement purposes the burden on the State to prove valid prior convictions is only to show that the defendant had, or waived, counsel at the time of such prior convictions.

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

George A. Sutera, 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.

GRANT, J.

This is an appeal from the district court for Sarpy County where defendant's appeal from the county court from two convictions of second offense driving while intoxicated was affirmed. We affirm the decision of the district court.

The record shows that the defendant, LaRue D. Soe, was charged in a complaint filed September 16, 1983, with driving while intoxicated on September 8, 1983, in violation of Neb.

Rev. Stat. § 39-699.07 (Reissue 1984), a Class W misdemeanor. The complaint further alleged that defendant had been convicted at least twice of driving while intoxicated on previous occasions. Defendant pled not guilty and the case was set for trial on January 17, 1984. The trial was continued at defendant's request. A second complaint charging the defendant with driving while intoxicated on November 26, 1983, was filed on December 9, 1983. The signed complaint also alleged that defendant had been convicted at least twice previously of driving while intoxicated.

Both matters came on for hearing on March 19, 1984, and the defendant, with his counsel present, pled no contest to both driving charges after the trial court fully explained the defendant's constitutional rights in each case, as required by *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). After the court found there was a factual basis for the pleas, the court accepted the pleas and found the defendant guilty of both offenses.

Defendant then requested that the court proceed immediately with the enhancement hearing. The State presented four exhibits, to which defendant objected. The trial court, finding exhibits 1, 2, and 3 were not proper for enhancement purposes, enhanced both convictions to second offense based on exhibit 4, which was a court record of a guilty plea and 1977 conviction of second offense driving while intoxicated. On April 27, 1984, the trial court sentenced the defendant to 30 days in prison, 1 year suspension of driving privileges, and a $500 fine, plus costs, on each conviction; the jail sentences and suspensions to run consecutively. The defendant appealed to the Sarpy County District Court, claiming the convictions were improperly enhanced and that the sentences were excessive. The district court affirmed the convictions on May 31, 1984, and the defendant timely appealed to this court.

Defendant assigns two errors: (1) That the county and district courts improperly enhanced the convictions to driving while intoxicated second offense; and (2) That the sentences imposed were an abuse of discretion. We affirm.

The defendant contends that exhibit 4, described above, was

improperly used to enhance the offense because it did not specifically show that the defendant was advised of his right to a jury trial, his right to confront witnesses against him, and the privilege against self-incrimination, although it showed the defendant had counsel present. Defense counsel argues that *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), requires the State to prove that the record of a prior conviction used for enhancement purposes must affirmatively show that all the defendant's constitutional rights were explained to him and that the record establishes a factual basis for a plea of guilty. *Ziemba* does not place such a burden upon the State. In *Ziemba* we explained the difference between the evidence necessary to prove a valid plea of guilty for a conviction on direct appeal and the evidence necessary to prove a valid plea of guilty in a conviction used for enhancement purposes:

> In addition to satisfying the requirements set out in *State v. Tweedy, supra*, in regard to accepting pleas of guilty in misdemeanor cases, the enhancement proceeding must satisfy the requirements set out in § 39-699.07 and *State v. Smith, supra. State v. Prichard, supra.* The transcript of a judgment used to prove a prior conviction must show that at the time of the conviction the defendant was represented by counsel or waived his right to counsel.

Ziemba at 619, 346 N.W.2d at 213-14.

For enhancement purposes the burden on the State to prove valid prior convictions is only to show that the defendant had, or waived, counsel at the time of such prior convictions. Defendant's 1977 conviction was appropriately used for enhancement purposes. The record of it clearly showed that the defendant was represented by counsel at the time of the conviction. It is also clear that the defendant at the March 19, 1984, enhancement hearing was given the opportunity " 'to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions,' " as required by *Ziemba, supra* at 619-20, 346 N.W.2d at 214, and § 39-669.07(3). Defendant made no objection to the validity of the earlier conviction.

The defendant's second assignment of error is that the trial

court abused its discretion in imposing sentence. The sentences imposed were the statutory mandatory sentences for this class of misdemeanor. In view of defendant's prior record the trial court was clearly within its discretion not to place defendant on probation. We find the trial court did not abuse its discretion.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WALTER W. ROLLING, APPELLANT.

366 N.W.2d 441

Filed April 26, 1985. No. 84-757.

Courts: Appeal and Error. On remand the district court has no alternative except to obey and perform the mandate of the Supreme Court.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Walter W. Rolling, pro se.

Vincent Valentino, York County Attorney, and Charles W. Campbell, for appellee.

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

KRIVOSHA, C.J.

This is the fourth appearance of this matter in this court. Initially, the appellant, Walter W. Rolling, was charged in a five-count information and convicted. The facts are more fully set out in *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981) (*Rolling I*), where we affirmed the convictions, and need not be repeated here. In *Rolling I* we noted plain error in that the sentences imposed by the district court were contrary to the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1979) and therefore invalid. We set aside the sentences and remanded the cause to the district court with instructions to impose proper sentences. Upon remand the district court once again failed to

impose the sentences minimally required by the provisions of § 29-2221. Rolling elected not to file a direct appeal but, instead, sought post conviction relief pursuant to the provisions of Neb. Rev. Stat. § 29-3001 (Reissue 1979). The district court denied Rolling's petition, and on appeal to this court we affirmed without opinion under Neb. Ct. R. 7B(2) (Rev. 1983) (*Rolling II*). Dissatisfied with that result, Rolling filed a second petition seeking post conviction relief, and once again the district court dismissed his petition. On appeal to this court we reviewed Rolling's claim in detail and determined that the sentences imposed by the district court failed to conform to the requirements of § 29-2221. (See *State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984) (*Rolling III*).) We therefore vacated the sentences and once again remanded the cause to the district court with directions to impose proper sentences. Upon receiving the mandate in *Rolling III*, the district court entered judgment on the mandate and sentenced Rolling in accordance with the provisions of § 29-2221. It is from the judgment on the mandate that Rolling once again appeals to this court, assigning a number of errors, none of which go to the district court's action in entering the judgment on the mandate. For reasons more particularly set out hereinafter, we affirm the action of the district court in imposing sentences in accordance with our previous mandate.

An examination of the sentences imposed discloses, without question, that the district court has now sentenced Rolling consistent with the requirements of § 29-2221 and our opinion in *Rolling III*. There is therefore nothing before this court to be reviewed. It has long been the rule in this jurisdiction that there must be an end to the litigation of a particular cause, and an alleged litigant may not have de novo trial after trial, ad infinitum, simply on the basis that he is dissatisfied with the final results. See, *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982); *Jurgensen v. Ainscow*, 160 Neb. 208, 69 N.W.2d 856 (1955).

It is a fundamental principle of law that on remand the district court has no alternative except to obey and perform the mandate of the Supreme Court. *Jameson v. Nelson*, 216 Neb. 26, 341 N.W.2d 596 (1983); *Muller Enterprises, Inc. v. Gerber*,

180 Neb. 318, 142 N.W.2d 593 (1966). In *Jurgensen, supra* at 211, 69 N.W.2d at 858, we said:

> "When a particular judgment is directed by the appellate court, the lower court is not acting of its own motion, but in obedience to the order of its superior. What that superior says it shall do, it must do, and that alone. Public interests require that an end shall be put to litigation, and when a given cause has received the consideration of this court, its merits determined, and then remanded with specific directions, the court to which such mandate is directed has no power to do anything but to obey the mandate; otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of that authority over inferior tribunals with which it is invested by our fundamental law. . . ."

Rolling does not contend that the sentences imposed by the district court do not conform to our opinion in *Rolling III*. Rather, he raises for the first time issues concerning alleged violations of his constitutional rights. Specifically, Rolling argues that the imposition of the lawful sentences imposed by the district court pursuant to our mandate violates his fifth, eighth, and fourteenth amendment rights guaranteed by the Constitution of the United States. In effect, Rolling is appealing this court's decision in *Rolling III* and not the judgment on the mandate. This, of course, he cannot do. Much of the confusion is caused because the district court permitted Rolling to file what he termed a "supplemental petition" at the hearing at which he was to be resentenced pursuant to our mandate. No authority is cited which would authorize this procedure, and we are unable to find any such authority. The district court's apparent indifference to procedure at the sentencing hearing is in part responsible for the confusion which followed.

In view of the fact that the sentences imposed by the district court are in accordance with our opinion in *Rolling III* and the mandate issued by this court, there is nothing more for us to review. The judgment of the district court in imposing such sentences is affirmed.

AFFIRMED.

FRANK GUTCHEWSKY, APPELLEE, V. READY MIXED CONCRETE COMPANY, A NEBRASKA CORPORATION, APPELLANT.

366 N.W.2d 751

Filed May 3, 1985. No. 83-721.

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

Joe P. Cashen and Neil B. Danberg, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Warren C. Schrempp, Peter J. Hoagland, and Stephen L. Gerdes of Schrempp, Hoagland and Gray, for appellee.

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

SHANAHAN, J.

On November 9, 1979, Ready Mixed Concrete Co., a Nebraska corporation (Ready Mixed), sold and delivered concrete to Frank Gutchewsky in Council Bluffs, Iowa, for use in Gutchewsky's new home. Gutchewsky sustained chemical burns as a result of his contact with the concrete from Ready Mixed. On January 25, 1980, Gutchewsky filed an action in the district court for Douglas County, Nebraska, based on a claim of product liability regarding the Ready Mixed concrete. Iowa's statute of limitations regarding such actions is 2 years.

On account of Ready Mixed's motion, Gutchewsky filed an amended petition on April 25, 1980. Ready Mixed filed its answer on May 9. The depositions of Gutchewsky and two other witnesses were scheduled for August 16.

According to the district court's records, there was no activity in Gutchewsky's case during 1981. On January 22, 1982, Gutchewsky's case was placed on the district court's dismissal docket. By written response filed on February 11, Gutchewsky stated that additional time was required to complete discovery and that such discovery would be completed within 90 days. The district court removed Gutchewsky's case from the dismissal docket on February 16, but court records show no activity in the case for the remainder of 1982.

The district court again placed Gutchewsky's case on the dismissal docket on March 30, 1983, and, pursuant to rule of court, required a written response showing why the case should not be dismissed for want of prosecution. On April 29 Gutchewsky filed his response showing that "discovery has been proceeding; that a Certificate of Readiness for Trial will be forthcoming; that it would be a great injustice to have the matter dismissed at this particular time." On June 1, without an evidentiary hearing, the district court refused to remove Gutchewsky's case from the dismissal docket. The presiding judge of the district court dismissed Gutchewsky's case on June 13. Gutchewsky filed a motion for new trial on June 17, alleging that the district court abused its discretion in allowing the case to remain on the dismissal docket. Gutchewsky submitted his motion without evidence, and on June 21 the district court overruled Gutchewsky's motion for new trial.

On July 1 Gutchewsky filed a "Motion to Reconsider." This motion to reconsider was heard on July 8, when Gutchewsky offered evidence in an effort to have the June 13 order of dismissal set aside. In the hearing held on July 8, Gutchewsky, in support of his motion to reconsider, showed the district court that seven depositions had been taken and medical information obtained concerning Gutchewsky's injuries. Core samples of the concrete in question were obtained for analysis and had been sent to laboratories. By the time the motion for reconsideration was heard, Gutchewsky had expended $1,124.40 for research and discovery concerning his claim. The only step remaining for trial was obtaining an expert witness.

As a result of the July 8 hearing, the district court rendered the following decision:

> [T]hat for good cause shown and for substantial justice being best served the motion for reconsideration should be sustained, and the Court finds that plaintiff's motion for new trial should be granted and that this cause should be reinstated on the trial docket and that the order of the Court dismissing the action should be vacated and set aside and the cause reinstated on the trial docket.

The reinstatement ordered by the district court occurred during the same term at which dismissal had been previously

ordered. Ready Mixed appeals the order reinstating Gutchewsky's case and contends the district court abused its discretion by reinstatement of the proceedings.

The district court has inherent power to vacate or modify its own judgment at any time during the term in which the judgment was rendered. See *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982). This inherent power rests in the sound discretion of the trial court. However, this discretion must be exercised reasonably and not arbitrarily, depending upon the facts and circumstances in each case as shown by the record. *A. Hirsh, Inc. v. National Hair Co., supra; In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981); *Urwin v. Dickerson*, 185 Neb. 86, 173 N.W.2d 874 (1970). There is no doubt that the district court has the inherent power to dismiss a case for failure to prosecute with due diligence. *A. Hirsh, Inc. v. National Hair Co., supra; Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978). As we noted in *Schaeffer* at 223, 263 N.W.2d at 104: "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial courts."

Thus, the question before this court is whether the trial court abused its discretion in vacating its previous order to dismiss. *A. Hirsh, Inc. v. National Hair Co., supra.*

In *Pettegrew v. Pettegrew*, 128 Neb. 783, 788, 260 N.W. 287, 289 (1935), we defined abuse of discretion: " 'If the reasons given by the court for its action are clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, if clearly against justice or conscience, reason and evidence, it has abused its discretion.' "

Ready Mixed relies upon our holding in *A. Hirsh, Inc. v. National Hair Co., supra*, but in *Hirsh* we noted that "[t]here is no bill of exceptions, and the record consists of the pleadings and docket entries." 210 Neb. at 397, 315 N.W.2d at 237. Therefore, in *Hirsh*, we were left to consider whether the record supported the judgment of the trial court and had no choice but to reverse the district court's order vacating its previous order of dismissal for want of prosecution. See *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981). In Gutchewsky's case,

however, there is a bill of exceptions containing information presented to the district court. Because there is a bill of exceptions, we can review the information presented to the district court and determine whether the district court abused its discretion.

Undoubtedly the district court considered the discovery undertaken by Gutchewsky and Ready Mixed and the fact that obtaining an expert witness was all that remained before setting the case for trial. The information provided the district court in conjunction with Gutchewsky's motion to reconsider shows there was activity toward trial of Gutchewsky's claim, a fact not immediately disclosed by the court records alone. More than 2 years have elapsed since Gutchewsky sustained the injury alleged in his petition. As a consequence, the Iowa statute of limitations bars Gutchewsky's filing another action, that is, refiling his case, if the present action is dismissed. As we stated in *Schaeffer v. Hunter, supra* at 224, 263 N.W.2d at 104, the "fact that a new suit would be barred is an important consideration . . . ." Also, we stated in *Schaeffer*:

> Under the foregoing authorities, other factors such as the length of delay, excuses therefor, and whether dismissals for want of prosecution have been entered previously, and then rescinded, are also important considerations. Each case must be looked at with regard to its own peculiar procedural history, and the situation at the time of dismissal.

Id.

Under the circumstances and in view of the information presented to the district court, we cannot conclude that there has been abuse of discretion on the part of the district court in reinstating Gutchewsky's case. Therefore, we affirm the action of the district court. However, all costs of this appeal, including an attorney fee of $500 to Ready Mixed's attorney for services before this court, are taxed to Gutchewsky. See *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975).

AFFIRMED.

C. NORRIS BUCKINGHAM, APPELLEE, V. JOHN C. WRAY II, APPELLANT.

366 N.W.2d 753

Filed May 3, 1985. No. 83-933.

1. **Courts: Records: Appeal and Error.** An appellate court will not consider or review a ruling of a trial court when the questioned ruling is not a part of the trial record. The Supreme Court will not speculate about proceedings in a trial court but must rely upon the record presented for review.
2. **Contracts: Consideration: Words and Phrases.** Consideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Valuable consideration to support a contract need not be one translatable into dollars and cents. Compensation and consideration are neither identical nor synonymous.
3. **Statutes.** In the absence of evidence to the contrary, we presume that the common law or statutes of another jurisdiction are the same as the law of the State of Nebraska.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

John C. Wray II, pro se.

Robert C. Wester of Schirber Law Offices, P.C., for appellee.

BOSLAUGH, WHITE, SHANAHAN, and GRANT, JJ., and HOWARD, D.J.

SHANAHAN, J.

John C. Wray II appeals a money judgment obtained by C. Norris Buckingham as a result of a bench trial of a contract action in the district court for Sarpy County. We affirm.

In November 1979 the parties entered a written contract wherein Wray agreed to stock and maintain an inventory for an auto parts store, K-B Standard Auto, Inc. (K-B Auto), owned by Buckingham, in Carson, Iowa. Wray owned three auto parts stores in the metro-Omaha area and agreed to purchase K-B Auto's inventory on hand 1 year after Wray entered the contract with Buckingham. The contract required Wray's purchase of the inventory at 90 percent of the original cost of such inventory.

The contract also stated Wray would be reimbursed for his

travel to and from Buckingham's Iowa store but would not receive any compensation for his services to K-B Auto.

In connection with the Buckingham-Wray contract, Wray received discounts from wholesale suppliers on purchases of inventory for K-B Auto, as well as overall enhancement of his business reputation resulting from substantial purchases of parts for stores serviced by Wray. Wray purchased a large inventory for K-B Auto. However, by midsummer of 1980 it was obvious that K-B Auto was not doing well, and in December Buckingham closed his store.

In late October or early November of 1980, Buckingham sought performance of the contract provision for Wray's purchase of the K-B Auto inventory. Buckingham tried to contact Wray through inquiries at Wray's former parts stores, which had been sold sometime after Wray entered the contract with Buckingham. Buckingham made several calls to Omaha parts wholesalers who had dealt with Wray and asked the whereabouts of Wray. Attempting to establish contact at Wray's residence, Buckingham referred to an Omaha telephone directory, although the telephone book was 1 year out of date. Also, based on a lead from one of the warehouses which had done business with Wray, Buckingham called Kansas State University on belief that Wray had enrolled in law school at that university. Buckingham was unsuccessful in his efforts to locate Wray. Buckingham attempted to mitigate damages by returning K-B Auto's inventory to the original wholesalers. Buckingham, unable to resell a substantial part of the inventory purchased by Wray, brought suit against Wray concerning the inventory which Buckingham could not liquidate.

At trial, without objection, Buckingham testified that Wray had said he would be compensated for his services to K-B Auto by large quantities of parts ordered by Buckingham and cash payments for such parts delivered. These cash transactions with Buckingham contributed to increased discounts received by Wray from wholesale suppliers for inventories acquired by Wray's various auto parts stores. The trial court found a breach of contract by Wray and awarded damages to Buckingham for the unliquidated inventory.

Wray assigns the following errors on the part of the district

court: (1) Denial of Wray's motion for dismissal of the proceedings on the basis of forum non conveniens, inasmuch as Wray claims the proper forum should have been in Iowa; (2) Admitting testimony prohibited by the parol evidence rule; (3) Finding a valid contract supported by consideration; (4) Finding that Buckingham used reasonable efforts to notify Wray and request purchase of the inventory; and (5) Awarding prejudgment interest generally, and specifically in utilizing the law of Nebraska instead of the law of Iowa concerning prejudgment interest.

With regard to Wray's first assignment of error, involving forum non conveniens, the record does not contain Wray's motion or any disposition made by the district court. Consequently, such absence eliminates any necessity that we consider Wray's first assignment of error. In the absence of extraordinary circumstances, an appellate court will not consider or review a ruling of a trial court when the questioned ruling is not a part of the trial record. We will not speculate about proceedings in a trial court but must rely upon the record presented for review. Cf. *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984).

Regarding Wray's question about consideration supporting the Buckingham contract, we held in *Abraham v. Abraham*, 203 Neb. 384, 279 N.W.2d 85 (1979), that consideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract. Ordinarily, a contract will not be held invalid for inadequacy of consideration alone, unless inadequacy is so great as to furnish of itself evidence of fraud. See *West Gate Bank v. Eberhardt*, 202 Neb. 762, 277 N.W.2d 104 (1979).

The contract before us does not negate consideration, although the agreement does dictate that Wray shall not receive any compensation for services rendered to K-B Auto. As far as the Buckingham-Wray contract is concerned, compensation and consideration are neither identical nor synonymous.

Valuable consideration to support a contract need not be one translatable into dollars and cents. If consideration consists of performance or promise of performance, which the promisor treats and considers as having value to the promisor, there is sufficient consideration for a contract. See *Asmus v. Longenecker*, 131 Neb. 608, 269 N.W. 117 (1936). Sufficient consideration for the Buckingham-Wray contract exists in the promises of the parties. Furthermore, Wray was able to obtain increased discounts on purchases for his own auto parts stores as a result of increased wholesale purchases made possible in part by Buckingham's purchases. Such discounts to Wray were benefits recognized in law as consideration adequate to support the Buckingham-Wray contract.

A suit brought to recover damages for breach of contract is a law action. Findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983). It is Wray's burden to show that the trial court was clearly wrong in its determination of any factual issue presented during the trial.

Whether Buckingham acted reasonably in his attempts to notify Wray for the purpose of demanding performance of the contractual provision requiring Wray to purchase the inventory was a question of fact and was determined adversely to Wray. Cf. *Fink v. Denbeck*, 206 Neb. 462, 293 N.W.2d 398 (1980) (a demand for performance is not necessary unless required by the terms of the contract or its peculiar nature). Cf., also, *Monson v. Fischer*, 118 Cal. App. 503, 5 P.2d 628 (1931) (when necessary, demand for performance of a contractual provision must be alleged and proved). Under the circumstances of this case the evidence sustains the trial court's determination that Buckingham acted reasonably in his attempts to locate Wray.

In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), we held that an award of prejudgment interest is proper where the amount of the claim is liquidated.

> "Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. 'A claim is liquidated if the evidence furnishes data which, if believed, makes it

possible to compute the amount with exactness, without reliance upon opinion or discretion.' "

First Data Resources, Inc. v. Omaha Steaks Int., Inc., 209 Neb. 327, 335, 307 N.W.2d 790, 794 (1981).

Buckingham's claim can be computed with the necessary degree of exactness. Wray did not question the amount realized by Buckingham on liquidation of inventory, and under the circumstances there was no reasonable controversy concerning Buckingham's right to recover. Wray agreed to pay for Buckingham's retained inventory at 90 percent of the original price for that inventory. The original prices for the inventory were before the court. The computation with exactness which is envisioned in *First Data Resources, supra*, exists in the case before us. The award of prejudgment interest is correct. See *Ellis & Guy Advg. v. Cohen, ante* p. 340, 363 N.W.2d 180 (1985).

Wray's claim that Iowa prejudgment interest rates should have been utilized, rather than Nebraska rates, is without merit. No evidence was introduced on the applicable interest rates in Iowa. Therefore, it must be assumed that interest rates in Iowa, pertinent to a situation as exists in the present case, are identical to interest rates in the State of Nebraska. In the absence of evidence to the contrary, we presume that the common law or statutes of another jurisdiction are the same as the law of the State of Nebraska. See *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956).

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

AFFIRMED.

MAXINE V. STURZENEGGER, APPELLANT, V. ERNEST L. STURZENEGGER, APPELLEE.

366 N.W.2d 757

Filed May 3, 1985. No. 84-012.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Joseph J. Cariotto, for appellant.

Susan Jacobs of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellee.

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

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.

FRED GLOVER, APPELLEE, V. C.A. WURTELE, APPELLANT.

367 N.W.2d 121

Filed May 3, 1985. No. 84-085.

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

Otto H. Wellensiek and Max J. Kelch of Wellensiek, Rehmeier & Kelch, for appellant.

John F. Steinheider of Hoch & Steinheider, for appellee.

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

PER CURIAM.

Fred Glover sued to recover on C.A. Wurtele's promissory note given to pay a balance due on an agreement between Glover and Wurtele for purchase of Glover's shares of capital stock issued by Mid-America Express, Inc. Wurtele answered Glover's petition, prayed for certain setoffs, and counterclaimed, seeking reformation of the agreement on the ground of mutual mistake.

Since this case is an action in equity, we review this matter de novo on the record without reference to findings of fact made by the trial court. In this case, however, our findings of fact and conclusions coincide with those of the trial court.

There are no distinctive facts or features in this case. The applicable law has long been established in Nebraska. We conclude that there is no basis for reformation of the agreement and affirm the trial court's dismissal of Wurtele's counterclaim. We also concluded that the evidence supports the judgment entered in favor of Glover on the promissory note. The judgment in favor of Glover is, therefore, affirmed.

This case is such that a discussion of applicable principles of law would provide no precedential value. Accordingly, we offer no discussion.

AFFIRMED.

HARLAN SCHNAKENBERG AND MERLEN SCHNAKENBERG, APPELLEES AND CROSS-APPELLANTS, V. KENNETH SCHROEDER, APPELLANT AND CROSS-APPELLEE.

367 N.W.2d 692

Filed May 3, 1985. No. 84-219.

1. **Property: Boundaries.** At common law a landowner could not be compelled to build a partition fence. A party, therefore, by the erection of such fence, acquires no right of action for contribution from the owner of lands adjoining.
2. _____: _____. While Neb. Rev. Stat. §§ 34-101 to 34-115 (Reissue 1984) provide a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, such statutes are not

exclusive, but coterminous proprietors may by contract adjust their respective rights and obligations regarding a division fence.

3. _____: _____. Neb. Rev. Stat. §§ 34-101 to 34-115 (Reissue 1984) provide a method of allocating and assigning to adjoining landowners responsibility for maintaining specific parts of a division fence where there is no agreement for such maintenance.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Kenneth Schroeder, pro se.

Frank J. Daley, Jr., of Germer, Koenig, Murray, Johnson & Daley, for appellees.

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

SHANAHAN, J.

This case brings to light infrequently invoked statutes, as well as a dearth of decisions dictating disposition of the issue raised in the district court for Thayer County, and focuses on a division fence between agricultural tracts.

The two parcels involved in these proceedings are the northwest quarter of Section 23, Township 3 North, Range 4 West of the 6th P.M., and the east half of the southwest quarter of Section 23, Township 2 North, Range 3 West of the 6th P.M., in Thayer County, Nebraska. Harlan and Merlen Schnakenberg hold an equitable interest in a quarter section (northern tract) adjoining 80 acres which Kenneth Schroeder holds an interest in (southern tract). There is no recorded document regarding a division fence between the tracts.

Since 1927, the two tracts have been divided by an east-west division fence of four-strand barbed wire. When Schnakenbergs' grandfather acquired the northern tract in 1927, a "right-hand rule" apparently existed for maintenance of a division fence. Under such right-hand rule a landowner, standing on his tract while facing the division fence and the owner of the adjoining tract, placed his right hand on the division fence and was thereby obligated to maintain all the fence located at his right. Correspondingly, the rule required the adjoining landowner to maintain all the division fence located

at such owner's right. For some undisclosed but ultimately beneficial reason, Schnakenbergs' grandfather reversed the rule so that he, as owner of the northern tract, maintained the fence to the east (left) rather than to the west (right).

In 1954 Roy Getz acquired the northern tract, which he cultivated and never used as pasture for cattle. Schroeder acquired the southern tract in 1962 from one John Rossmiller and devoted the land to pasture for cattle. Neither Rossmiller nor Getz mentioned maintenance of a division fence to Schroeder.

Toward the west side of Schroeder's tract was a waterway or "water hole" running from north to south as a conduit for high water from a river. In 1963 a flood and accompanying debris demolished the division fence at the waterway. Because he had cattle on the southern tract, Schroeder replaced the four-wire fence, but high water repeatedly washed out the division fence. Schroeder felt that a one-strand electric fence would not collect and impede debris floating down the waterway in high water. Consequently, in 1964 Schroeder constructed an electric fence approximately 2 to 4 feet south of the division fence and has continuously restrained his cattle by such fence since its installation.

After installation of the electric fence, the four-strand wire fence had no function for Schroeder except a demarcation between the northern and southern tracts. Getz on occasion repaired the division fence at the waterway.

After their purchase of the northern tract from Getz in 1975, Schnakenbergs have used their tract to winter cattle. Schnakenbergs admit there has never been any agreement between Schroeder and them regarding a division fence. During May and July 1982, the division fence at the waterway was "pushed down by the weight of the flood and wood and debris" so that the division fence came in contact with Schroeder's electric fence, causing a short.

With his tractor Schroeder pushed the debris away from his electric fence. Later, Schnakenbergs, by written notice, demanded that Schroeder repair the four-strand fence. Schroeder refused. Schnakenbergs repaired the division fence at a cost of $170. Schroeder removed the repaired division

fence. Schnakenbergs replaced the division fence at a cost of $265 and brought suit against Schroeder.

In their petition Schnakenbergs alleged fear of Schroeder's prospective interference with the division fence and requested an injunction. Also, Schnakenbergs sought damages from Schroeder on account of repair and replacement of the division fence. For their cause of action to recover damages, Schnakenbergs relied on Neb. Rev. Stat. §§ 34-101 to 34-115 (Reissue 1984), relating to a division fence, and especially § 34-113.

The district court granted Schnakenbergs a temporary restraining order enjoining Schroeder's interference with the replaced division fence. The temporary restraining order was dissolved by the district court on the day of trial. As a result of the trial, the district court awarded damages of $435 to Schnakenbergs and ordered that Schroeder was "responsible for maintaining the West half of the fence" between the northern and southern tracts.

Schroeder has appealed and contends there was no agreement for maintenance of a division fence; §§ 34-101 to 34-115 are inapplicable as a basis for damages under the circumstances; and the order for fence maintenance is improper. Schnakenbergs have cross-appealed and complain that the district court should have required Schroeder to maintain the division fence for a specific distance, namely, westward from a point 660 feet west of the southeast corner of Schnakenbergs' tract.

"As at common law a land owner could not be compelled to build a partition fence, a party, therefore, by the erection of such fence acquires no right of action for contribution from the owner of lands adjoining." *Burr v. Hamer*, 12 Neb. 483, 487, 11 N.W. 741, 742-43 (1882).

Therefore, the Legislature enacted certain laws pertaining to division fences. See §§ 34-101 to 34-115.

> When two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them; *Provided, however*, this shall not be construed to compel the erection and maintenance of a division fence where neither of the

adjoining landowners desires such division fence. Unless the owners of such lands adjoining shall have agreed otherwise, such fence shall be a lawful fence, as defined in section 34-115.

§ 34-102.

The value of such fence, and the proportion thereof to be paid by each adjoining landowner and the proportion of the division fence to be made and maintained by each adjoining landowner shall be determined by fence viewers as hereinafter provided for.

§ 34-104.

If disputes arise between the owners of adjoining lands concerning the proportion of fence to be made or maintained by either of them, such disputes shall be settled by fence viewers. In such case it shall be the duty of the fence viewers to distinctly mark and define the proportion of the fence to be made or maintained by each.

§ 34-105.

Section 34-106 prescribes the qualifications of and selection process for fence viewers. The powers of the fence viewers and the requirement of their written decision are described in §§ 34-107 to 34-109.

Whenever a division fence shall be injured or destroyed by fire, floods, or other casualty, the person bound to make and repair such fence, or any part thereof, shall make or repair the same, or his just proportion thereof, within ten days after he shall be thereto requested by any person interested therein, such requisition to be in writing and signed by the party making the same.

§ 34-112.

If such person shall neglect or refuse to make or repair his proportion of such fence for a period of ten days after such request, the party injured may make or repair the same at the expense of the party so refusing or neglecting, to be recovered with cost of suit.

§ 34-113.

Damages accruing to any person or persons under the provisions of sections 34-102 to 34-114 may be recovered in a civil action in any court of this state.

§ 34-114.

Because Schnakenbergs brought suit for equitable relief, we review this matter de novo on the record without reference to findings of fact made by the trial court. *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982); *Krafka v. Brase*, 218 Neb. 335, 353 N.W.2d 276 (1984).

Rights and duties regarding maintenance of a division fence are fixed either by agreement of parties as adjoining landowners or by statute. In *Meyer v. Perkins*, 89 Neb. 59, 62, 130 N.W. 986, 987 (1911), this court stated: "While the statute provides a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, it is not exclusive, but they [coterminous proprietors] may by contract adjust their respective rights and obligations." *Meyer v. Perkins, supra*, informs us that an oral agreement regarding the maintenance and construction of a division fence executed and observed for more than 10 years is binding upon parties as well as their successors who have notice of such agreement for a division fence.

All the evidence in this case categorically negates any agreement entered by any owner of the northern tract and Schroeder regarding a division fence. Furthermore, the facts do not warrant an inference that Schroeder had notice of any agreement involving his predecessors and any division fence. During the 20 years Schroeder has owned the southern tract before suit by Schnakenbergs, no one, not even Schnakenbergs, mentioned a division fence agreement to Schroeder. During the 13 years when he was a contemporaneous adjoining landowner with Schroeder, Getz never requested that Schroeder repair the fence line, which had obviously fallen into some state of disrepair. In fact, Getz on occasion repaired the division fence at the waterway. Getz' conduct is inconsistent with any agreement imposing a maintenance duty on the owner of the southern tract. Schroeder's activity regarding the fences does not necessarily indicate his notice or adoption of a division fence agreement. Rather than being prompted by a duty to maintain a division fence, any work done by Schroeder on the division fence was motivated by a desire to avoid liability for damages caused by Schroeder's cattle on cultivated land north

of the fence. See Neb. Rev. Stat. § 54-401 (Reissue 1984) (owner's liability for damages caused by owner's cattle on cultivated land). "Under the statutes, as under the common law, the burden of restraining domestic animals is placed squarely upon the owner, and ordinarily no excuse for failure to restrain them is recognized." *Fiene v. Robertson*, 184 Neb. 668, 670, 171 N.W.2d 179, 181 (1969). Consequently, we conclude the conduct of Schroeder, as circumstantial evidence, does not warrant an inference that Schroeder had notice of an agreement for maintenance of the fence between the northern and southern tracts.

If the evidence has failed to establish an agreement by Schroeder or notice to Schroeder that predecessors had an agreement for the division fence, do the statutes pertaining to the division fence afford Schnakenbergs a remedy under the circumstances? The answer, in a word, is "No."

A dispute by adjoining landowners over a division fence "shall be settled by fence viewers." See § 34-105. In order to settle the dispute by adjoining landowners, the fence viewers must have determined the specific proportion or part of the division fence to be maintained by each adjoining landowner. See §§ 34-104 and 34-108. Without fence viewers' determination of what proportion of the division fence is the responsibility of which adjoining landowner, it is impossible to determine when an adjoining landowner has neglected or refused to "make or repair his proportion" of the division fence. See § 34-113. The obvious objective of the mentioned statutes is a method of allocating and assigning to adjoining landowners responsibility for maintaining specific parts of a division fence where there is no agreement for such maintenance. Because the statutory compensation for a fence viewer is $3 per day, one suspects there is not a multitude of anxious fence viewers waiting in the wings to spring into action. See § 34-110. Compulsory service as a fence viewer, even if not offensive to the constitutional prohibition against involuntary servitude, is not authorized by Nebraska statutes. Nevertheless, it is a fact of life in division fences—no fence viewers, no remedy in the absence of a division fence agreement. As we expressed in *Burr v. Hamer*, 12 Neb. 483, 487, 11 N.W. 741, 742

(1882):

> As the whole proceeding is statutory the mode of procedure therein provided must be followed. This requires the fence viewers, where the parties are unable to agree, to apportion to each the portion of fence to be made and maintained by him. When this is done, each party will own and have charge of a specific portion of the fence, and must keep the same in repair, and if he fail to do so the law provides a remedy.

Without a fence viewers' determination allocating to the adjoining landowners their respective proportions or parts of the division fence, the district court in this case had no jurisdiction to award damages for Schroeder's refusal or neglect concerning installation or maintenance of a division fence. For the same reason, that is, in the absence of a determination by fence viewers, the district court was without power to order Schroeder to maintain any part of the division fence. In the present case the district court trespassed into the realm of the fence viewer. The judgment of the district court in awarding damages and requiring Schroeder to maintain the fence is incorrect and is, therefore, reversed, and this matter is remanded to the district court with direction to dismiss Schnakenbergs' petition. On account of the disposition we have directed, we need not address Schnakenbergs' cross-appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

JUDITH NEIL, APPELLANT AND CROSS-APPELLEE, V. ROGER J. NEIL, APPELLEE AND CROSS-APPELLANT.

367 N.W.2d 121

Filed May 3, 1985. No. 84-304.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Susan Jacobs of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellant.

William J. Ross of Ross, Schroeder & Fritzler, for appellee.

KRIVOSHA, C.J., WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

PER CURIAM.

The instant appeal involves a domestic relations matter in which each of the parties questions the division of property and the amount of alimony and attorney fees awarded to the wife.

Upon de novo review we conclude that the record fails to show an abuse of discretion with respect to any of those issues. The judgment is therefore affirmed.

Each party shall pay his and her own costs and attorney fees in this court.

AFFIRMED.

JOE S. RAYMOND, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

366 N.W.2d 758

Filed May 3, 1985. No. 84-458.

1. **Records: Appeal and Error.** The Supreme Court can only decide issues based on the record before it.
2. **Administrative Law: Criminal Law: Actions.** Acquittal on a criminal charge is no bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceedings were based.
3. **Implied Consent Law: Blood, Breath, and Urine Tests.** Under the Nebraska implied consent law, Neb. Rev. Stat. §§ 39-669.08 et seq. (Reissue 1984), an officer may provide more than one opportunity to acquire a sufficient breath sample, even though only one chance is necessary.
4. _____: _____. Compliance by the officer administering a breath test with the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1984) may affect the admissibility of the test results, but does not go to the question of whether a person was justified in refusing to take the test.

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

Richard Douglas McClain, for appellant.

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

KRIVOSHA, C.J., WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

HASTINGS, J.

The petitioner, Joe S. Raymond, has appealed from an order of the district court which affirmed the order of the Department of Motor Vehicles revoking his license for a period of 1 year for failure to provide an adequate breath sample for an Intoxilyzer test.

He assigns as errors that (1) the trial court failed to recognize and apply the defense of double jeopardy and res judicata; (2) the court held that petitioner violated the test refusal law on the first attempt, whereas the officer did not arrest him until the fifth failure; and (3) there was no probable cause for the arresting officer to believe that petitioner was driving under the influence so as to permit the request of an Intoxilyzer test. We affirm.

Raymond was stopped on Interstate 180 after the arresting officer clocked him driving 60 m.p.h. in a 55 m.p.h. zone and observed him driving without taillights and allowing the car to drift to the shoulder and back to the center of the highway three times.

Inside the police cruiser the officer observed Raymond to manifest deliberate and unsteady actions and to have watery, bloodshot eyes and a strong odor of alcohol on his breath. A preliminary breath test was requested by the officer, but after being given four opportunities, Raymond did not give an adequate sample. Raymond was then placed under arrest for driving while intoxicated and taken to the police station.

At the station the implied consent form was read to Raymond, and he was instructed to give a breath test. The officer gave him five opportunities to furnish a sample, but Raymond failed, without any justification, to give an adequate sample. Proceedings for administrative revocation of his driver's license, as provided for by Neb. Rev. Stat. §§ 39-669.15 to 39-669.17 (Reissue 1984), then followed.

The assignments of error relating to double jeopardy and res

judicata may be considered together. There is no *competent* evidence in the record to support Raymond's claim that he was acquitted by the municipal court of failure to give a breath sample. This court can only decide issues based on the record before it. *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982). In any event, acquittal on a criminal charge is no bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceedings were based. *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982).

Raymond's second assignment of error seems to be that the trial court ruled that he violated the test refusal on the first attempt, whereas he was not arrested for such refusal, but for the following refusals, including the fifth, when statutorily mandated procedures, such as purging the machine each time, were not followed.

In the first place there is nothing in the record to indicate this holding by the trial court. Had it done so, such action was justified in that an officer may provide more than one opportunity to acquire a sufficient breath sample, even though only one chance is necessary. *Stender v. Sullivan*, 196 Neb. 810, 246 N.W.2d 643 (1976).

However, even if the revocation was based on the fifth attempt at a time when the machine had not been purged, that fact would not have established a reasonable excuse for Raymond to refuse to furnish the breath sample. The purging of the machine would go only to the admissibility of the test and not to the question of whether a person would be justified in refusing the test request. See *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980).

As to the final assignment of error, the testimony of the arresting officer fully supported his conclusion that he had reason to believe the petitioner was operating a vehicle while under the influence of alcohol. See Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984).

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

AFFIRMED.

JOANN FLEMING, APPELLANT, V. GLEN D. GOOSEY AND JANENE R. GOOSEY, APPELLEES.

367 N.W.2d 122

Filed May 3, 1985. No. 84-462.

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

Stanley D. Cohen, for appellant.

Vincent M. Powers, for appellees.

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

PER CURIAM.

This is an appeal in an equity suit to rescind a house sale contract and to recover the downpayment. The court has reviewed the record in this matter de novo and agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

ALAN BAYER, PLAINTIFF, V. FATHER FLANAGAN'S BOYS' HOME, DEFENDANT.

366 N.W.2d 760

Filed May 3, 1985. No. 84-526.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Robert A. Green of McGrath, North, O'Malley & Kratz, P.C., for plaintiff.

Robert D. Mullin of Boland, Mullin & Walsh, and F. Vinson Roach, for defendant.

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

PER CURIAM.

This matter comes before us pursuant to Neb. Rev. Stat. § 24-219 (Cum. Supp. 1984) as two certified questions of law from the U.S. District Court for the District of Nebraska. The main thrust of those questions is a request that we interpret Neb. Rev. Stat. § 44-1633 (Reissue 1984).

The pertinent portion of § 44-1633 reads as follows:

> An employer . . . group policy . . . delivered . . . in this state which provides hospital, surgical, or major medical coverage . . . shall provide that an employee whose hospital, surgical, or major medical coverage under the group policy . . . would otherwise be terminated because of the involuntary termination of employment of such employee, for reasons other than misconduct . . . shall be entitled to continue such coverage subject to the provisions of the group policy . . . and the following conditions:
>
> (1) Such coverage shall be continued on a monthly renewal basis until the earliest of the following dates:
>
> (a) The date of expiration of a period of six months following the date the coverage of the terminated employee would otherwise be terminated;
>
> (b) The date the terminated employee becomes eligible for other group hospital, surgical, or medical coverage . . . .

The relevant facts are set forth in the request for certification provided by the U.S. District Court.

Plaintiff, Alan Bayer, was employed by the defendant, Father Flanagan's Boys' Home, and in the latter part of the year 1981 was notified that his employment would terminate as of September 1, 1982. He then accepted an employment offer with Virginia Polytechnic Institute (VPI), to commence on or about September 1, 1982. Sometime thereafter, the defendant agreed to continue plaintiff's employment through September 30, 1982, because of accumulated vacation time.

While working for the defendant, the plaintiff and his dependents were covered under a group medical and hospital plan to which the employer and employee each made

contributions. In May of 1982 one of plaintiff's dependent daughters was diagnosed as suffering from anorexia nervosa and was hospitalized for approximately 3 weeks. She was again hospitalized for treatment of the same illness in August of 1982. All of these bills were paid by defendant's group policy.

On September 1, 1982, plaintiff became eligible for and enrolled himself and his dependents in VPI's group hospital, surgical, or medical plan for full-time staff members.

The defendant, on September 20, 1982, without knowledge that plaintiff had enrolled in this other group medical plan, furnished plaintiff with written notice of his right to elect for continued group coverage pursuant to the provisions of Neb. Rev. Stat. §§ 44-1633 and 44-1634 (Reissue 1984). Plaintiff notified defendant of his election to remain in that group and paid the first two monthly premiums.

Following his termination from the Boys' Home employment, but during the 6-month statutory period in late October of 1982, plaintiff's daughter was again hospitalized for the same condition as before, and incurred medical and hospital expenses of $31,458.52. He submitted that claim to defendant's group plan. On the advice of that plan's administrator, the claim was denied, and defendant returned to plaintiff, or tendered the return of, the premiums paid. The basis of this rejection was subsection (1)(b) of § 44-1633, i.e., at the time these expenses were incurred the plaintiff had become eligible for, and in fact had obtained, "other group hospital, surgical, or medical coverage."

Plaintiff's problem, of course, is that the VPI group policy, as do most such policies, contained a waiting period which effectively denied or prohibited coverage for the October hospitalization. He therefore urges that his coverage continue for the full 6 months under defendant's group policy.

The U.S. District Court certified the following questions to this court for decision:

> Under the provisions of [Neb. Rev. Stat. § 44-1633(1)(a) and (b) (Reissue 1984)]:
>
> 1) Is an employee who is to be involuntarily terminated August 31, 1982 (subsequently extended to September 30, 1982), eligible to obtain statutory continued coverage at

time of termination when he is, in fact, already eligible for and enrolled in a new employer's "other group hospital, surgical or medical coverage" plans for part-time employees as of May 1, 1982, and for full-time employees as of September 1, 1982?

2) Does the statutory phrase "becomes eligible for other group hospital, surgical or medical coverage" become nugatory, at least as the same pertains to coverage of a pre-existing illness, if a new employer's group health plan for which the employee is eligible does not immediately make available all of the coverage which was available under the former employer's plan? (Please assume that the new employer's group health plan contains a usual waiting period — twelve months in this instance — before claims for hospital and medical expenses for a pre-existing condition will be paid.)

These questions pose for us a problem of statutory interpretation, i.e., do the words "becomes eligible for other group . . . coverage," as used in § 44-1633, mean "becomes eligible for other *identical* coverage" as urged by Bayer, or do they mean "becomes eligible for other group coverage *of some type*" as suggested by the Boys' Home? The statement of the rules which we are required to apply in accomplishing this task is quite simple; their application in this instance is somewhat more complicated.

Although several states have statutes similar to § 44-1633, neither counsel nor this court has been able to find any cases interpreting these or similar sections. Therefore, we are left pretty much to our own devices, guided by accepted rules of statutory construction.

It is helpful to restate the section by eliminating a number of the insignificant phrases, so as to try to ascertain just what the Legislature stated. It would then appear as follows: "[A]n employee whose hospital, surgical, or major medical coverage under the group policy . . . would otherwise be terminated . . . shall be entitled to continue *such* coverage . . . [until] [t]he date the terminated employee becomes eligible for other group hospital, surgical, or medical coverage." (Emphasis supplied.)

Bayer insists that, to make any sense, "other coverage" must

mean the same as "such coverage" as the insured formerly enjoyed. The Boys' Home contends that "other" means "different" and that if the Legislature intended to have said "identical coverage," it could have done so.

A statute is not to be read as if open to construction as a matter of course. *County of Douglas v. Board of Regents*, 210 Neb. 573, 316 N.W.2d 62 (1982). However, in the consideration and application of a statute, it is the obligation of the court to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof, considered in its plain, ordinary, and popular sense. *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983).

A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *Miller v. Peterson*, 208 Neb. 658, 305 N.W.2d 364 (1981).

"It is a fundamental rule of construction that in construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results." *Adkisson, supra* at 134, 333 N.W.2d at 665.

We believe the intent of the Legislature in drafting this statute to have been that an employee was entitled to continue the coverage that he had until he was able to replace "such coverage." To hold otherwise would make the benefit illusory. Paraphrasing from *Moore v. John Hancock Mutual Life Insurance Co.*, 436 F.2d 823 (5th Cir. 1971), indeed, there would be no reason for the insertion of the right to continue such coverage in a policy of insurance if the insured could thereby get nothing more than what would have been available had there been no right of continuance of coverage and the insured had simply made application for a new policy with no relation to the coverage provided by the prior policy.

Our answer to the first question is "Yes," under the facts and circumstances in this case.

Considering the conclusion we have reached, we find it unnecessary to address the second question.

Judgment is entered accordingly.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN G. HURLEY, APPELLANT.

366 N.W.2d 763

Filed May 3, 1985. No. 84-554.

1. **Effectiveness of Counsel.** The test for determining whether an attorney has effectively served a criminal defendant is twofold. Firstly, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Secondly, counsel must conscientiously protect his client's interests.
2. **Post Conviction: Appeal and Error.** One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous.
3. **Effectiveness of Counsel: Witnesses.** Prejudice is not established by the alleged failure to call witnesses in the absence of showing the uncalled witnesses' expected testimony or to constantly consult with one's client in the absence of showing what additional consultation would have changed.

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

H. Jerome Kinney, for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Steven G. Hurley, appeals from the denial by the district court of his motion for post conviction relief filed pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). He assigns as error the lower court's failure to find he was denied effective assistance of trial counsel because counsel failed to interview and call his father as a witness, failed to interview other witnesses, and failed to properly consult with defendant in preparation for trial. The record fails to sustain defendant's claims, and we therefore affirm the judgment of the district court.

Defendant was charged and tried on one count of robbery and one count of using a knife to commit a felony. The jury returned a verdict of guilty as to the robbery charge and not guilty as to the second charge. He was sentenced to

incarceration in the Nebraska Penal and Correctional Complex for a period of 13 to 20 years.

Donald Hurley, defendant's father and coperpetrator, was represented by another attorney and was scheduled to go to trial with defendant. However, due to medical problems, the father was unable to proceed to trial at that time. He later, in May or June of 1983, pled guilty to a charge of theft.

At defendant's trial the victim testified that defendant and his father assaulted him in the latter's apartment, located in the basement of the victim's home. The Hurleys beat the victim and threatened him with a knife. They then escorted him upstairs into his home, where defendant held the victim while Donald Hurley loaded the victim's motorcycle into a van. The Hurleys then drove the van away, leaving the victim in his home. The victim never saw his motorcycle again.

The defense presented three witnesses who testified that they were with the defendant at the time of the incident, thereby providing him with an alibi which the jury obviously and understandably did not believe.

In order for the claim of ineffectiveness of counsel to succeed, there must be a showing of a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. The test for determining whether an attorney has effectively served a criminal defendant is twofold. Firstly, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Secondly, counsel must conscientiously protect his client's interests. *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984). Moreover, one seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984).

We consider first the claimed failures of trial counsel, Mr. Ivory Griggs, then of the Douglas County public defender's office, to interview witnesses other than the father and to "properly" consult with defendant, for they are resolved quickly. Even if the record were to support those claims, and it does not, nowhere does the record establish either the testimony

expected from the uninterviewed witnesses or what additional consultation with defendant would have changed. In the absence of such a record, defendant can show no prejudice by the claimed failures; consequently, to the extent his allegation of ineffective counsel rests upon those claims, it fails. *State v. Hill*, 214 Neb. 865, 336 N.W.2d 325 (1983) (holding that prejudice was not established by the alleged failure to call witnesses in the absence of showing what the witnesses' expected testimony would be or to investigate identification procedures in the absence of showing a defect in the procedures).

This leaves only defendant's complaint that Griggs failed both to interview and to call Donald Hurley as an alibi witness at trial.

Griggs met with defendant on three occasions between March 18, 1983, when defendant was arraigned, and April 4, 1983, when defendant's trial began. Griggs' testimony at defendant's post conviction hearing was that at their first meeting defendant demanded to see the police reports of the incident and informed Griggs that he wanted to use an alibi defense. At that time Griggs asked defendant who the witnesses were. Defendant told Griggs that he would be told when he needed to know.

At their second meeting, according to Griggs, he and defendant discussed a motion to sever defendant's trial from that of his father; Griggs was concerned about what the father might say at a joint trial, since defendant said he did not know. Even on this occasion, defendant refused to give Griggs the names of his alibi witnesses and did not mention his father as such a witness.

Although defendant's testimony contradicted Griggs' recitation of what occurred at their second meeting with respect to the identification of witnesses, defendant did admit that he did not tell Griggs what his father's testimony would be, as he had not talked with him. Defendant also testified he thought that he called Griggs sometime between March 31 and April 4, 1983, to tell him that his father wanted to testify that defendant had not been involved in the crime. However, on cross-examination, defendant said that he had learned what his father would say approximately 10 days to 2 weeks prior to

March 31, 1983. This statement contradicts defendant's earlier statement that he did not tell Griggs the content of his father's expected testimony at their second meeting because he did not know what his father would say.

At trial defendant himself made a number of motions concerning the calling of witnesses, and made complaints about Griggs' conduct of the trial. On none of these occasions did defendant mention his father as one of the witnesses who should be called.

Griggs did not interview Donald Hurley, but had made an unsuccessful attempt to reach him at the hospital where he was a patient, not because defendant asked it, but because Griggs wanted to learn what Donald Hurley's testimony would be. In Griggs' opinion self-defense was defendant's best argument; he was hoping the father could support that defense and could also help convince defendant to give up his alibi defense. In counsel's professional judgment an alibi defense was not a good one in light of the fact that the victim knew both defendant and the father, having seen both on a number of occasions.

From his unsuccessful effort Griggs surmised that Donald Hurley's attorney did not want the latter to testify at defendant's trial because, in order to do so, Donald Hurley could jeopardize his own case. Donald Hurley did testify by deposition at defendant's post conviction hearing that had he been called as a trial witness, he would have testified that defendant was not present at the time the crime was committed and that he (Donald Hurley) alone was involved in the robbery of the motorcycle. However, in a presentence investigation report dated June 15, 1983, Donald Hurley, after defendant's trial and after Donald Hurley had pled guilty, stated that both he and defendant took the victim's motorcycle and that defendant assaulted and beat the victim. Later, on July 6, 1983, Donald Hurley telephoned the police, saying he wanted to change his earlier statement, and went on to claim at that time that he had taken the motorcycle by himself and that defendant had not been with him. On July 27 he submitted a written statement to the same effect.

Under these circumstances we conclude that Griggs was not ineffective by not interviewing and not calling Donald Hurley

as a witness at defendant's trial. It appears that Donald Hurley was not about to say anything, true or otherwise, to attempt to extricate defendant until his own fate had been determined. Moreover, Donald Hurley's testimony, if such were forthcoming, would only have been cumulative to that of the other three alibi witnesses and would have had even less probative value than the testimony of those not involved in the crime and who presumably had not made earlier inconsistent statements. Griggs more than met the standard imposed upon him. Indeed, the fact that he was able to convince the jury to acquit defendant on the charge of using a knife to commit a felony itself convinces us that counsel performed as well as one with ordinary criminal law skill and training is expected to perform anywhere and that he conscientiously protected defendant's interests.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS R. SCHWARTZ, APPELLANT.

366 N.W.2d 766

Filed May 3, 1985. No. 84-623.

1. **Criminal Law: Evidence: Jury Instructions: Lesser-Included Offenses.** Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense.
2. _____: _____: _____: _____. Evidence sufficient to controvert the State's evidence as to an essential element of a crime, and sufficient to require the giving of an instruction as to a lesser-included offense, may be in the form of evidence offered by defendant, evidence developed in cross-examination of the State's witnesses, or evidence adduced from other witnesses.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Arthur C. Toogood of Toogood and McGath, for appellant.

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

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

GRANT, J.

Defendant-appellant, Thomas R. Schwartz, was charged in the district court for Adams County with second degree sexual assault, first degree false imprisonment, and two counts of theft of property valued at less than $100. He pleaded guilty to one count of theft and was convicted after a jury trial on the three remaining counts. He was sentenced to 6 to 10 years on the assault charge, 20 months to 5 years on the false imprisonment charge, and 6 months on each of the theft counts; all sentences to be served consecutively. We affirm in part and in part reverse and remand for a new trial.

The theft charge to which defendant pleaded guilty stemmed from an incident occurring at a lounge in Hastings, Nebraska, on December 3, 1983, shortly before the other incidents set out hereinafter. The charge as to which the plea of guilty was entered involves the theft of Barbara Johnson's purse. The other incidents involved a person other than Barbara Johnson. The defendant sat next to and conversed with Barbara Johnson from 7:30 to 8:30 on the evening of December 3, 1983, in the lounge. At approximately 8:30 p.m. Johnson got up to go to the restroom. When she returned, defendant and her purse were gone. After his plea of guilty on this charge, defendant was sentenced at the same time as he was sentenced on the other charges. Defendant's notice of appeal includes an appeal from the conviction and sentence of the crime of stealing Barbara Johnson's purse, but no error is assigned or discussed with regard to this conviction, and defendant's conviction of the theft of Barbara Johnson's purse as set out in count III is therefore affirmed.

Defendant's appeal is primarily directed to defendant's jury convictions on the other three counts against him. In the trial on those counts evidence was adduced before the jury which, if believed by the jury, established the following facts. Shortly before 9 p.m. on the same evening, December 3, 1983, the

victim (a female employee at the Woolworth store in the Imperial Mall in Hastings, Nebraska) was walking from her place of employment across the parking lot to her car to go home. The store at which she was employed is located in the same shopping center as the lounge at which defendant had been drinking and where defendant admitted stealing the purse of Barbara Johnson. The victim got into her car and started it. While she was waiting for the car to warm up, defendant opened the door and forced his way into the car. He held a knife at her throat, telling her not to scream. He then forced the victim to slide over into the passenger's seat and then drove her car to a different area of the parking lot, where he fondled the victim but did not have sexual intercourse with her. The victim's purse had been beside her in the car but could not be found after defendant left.

One week after the assault, while at work, the victim recognized defendant, who appeared to be staring at her in the store at which the victim was employed. She told her manager, who notified police. Defendant was apprehended a short time later. During a search of defendant's truck, done with defendant's written consent, police found two necklaces which were identified by the victim as having been in her purse on the evening of December 3, 1983.

We first address defendant's assignment of error that the trial court erred in finding that the appeal was frivolous, and in therefore denying defendant the right to proceed in forma pauperis. Defendant's position is correct. The statute upon which the denial was based, Neb. Rev. Stat. § 25-2308 (Reissue 1979), should not be used by a district court to deny a defendant his constitutional right to appeal in a felony case. Neb. Const. art. I, § 23. The constitutionality of § 25-2308 is not before us. In this case the trial court erred in denying defendant the right to proceed in forma pauperis. However, as the case is now before us, we hold that the error is harmless.

We next turn to defendant's contention that the trial court erred in failing to instruct the jury on the lesser-included offenses of sexual assault in the third degree and false imprisonment in the second degree, although defendant had requested such instructions. Defendant's argument as to the

former is persuasive. An instruction should have been given on the offense of third degree sexual assault as a lesser-included offense of the offense of second degree sexual assault.

Subsection (1) of Neb. Rev. Stat. § 28-320 (Reissue 1979) provides in part: "Any person who subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in either the second degree or third degree." Subsection (2) provides that the sexual assault is in the second degree "if the actor shall have caused serious personal injury to the victim," while subsection (3) provides that it is in the third degree "if the actor shall not have caused serious personal injury to the victim." Serious personal injury is defined in Neb. Rev. Stat. § 28-318(3) (Reissue 1979) as meaning "great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." The jury was so instructed.

In *State v. Tamburano*, 201 Neb. 703, 705, 271 N.W.2d 472, 474 (1978), we defined a lesser-included offense as "one which must be committed if the greater offense is committed or, put slightly different, is one which is fully embraced in the higher offense."

The applicable statute defines the crimes of sexual assault in the second degree and in the third degree in exactly the same words—indeed, in the same definition. The only differentiating factor between the two crimes is the causing of "serious personal injury" in the one case, and the lack of causing such injury in the lesser crime. Thus, third degree sexual assault is fully embraced within the statutory definition of second degree sexual assault, with only the additional factor of the inflicting of "serious personal injury" making some conduct a greater crime and the same conduct, without inflicting such "serious personal injury," a lesser crime. It is the addition of one element—the inflicting of serious personal injury—that determines the level of culpability of a defendant's conduct.

Defendant is entitled to have the jury instructed on the lesser offense "if, under a 'different but reasonable' view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element

included in the greater offense but not the lesser." *State v. Beasley*, 214 Neb. 918, 923, 336 N.W.2d 601, 604 (1983). It is the application of this principle that presents the difficulty in this case. We have said, "Evidence which requires the submission of a lesser-included offense is necessarily left to a case-by-case basis. It is sufficient to say that that evidence does not rise to that required level by speculating that an essential element uncontroverted in the evidence may be disbelieved by the jury." 201 Neb. at 708, 271 N.W.2d at 475.

In the instant case the jury could have concluded, under a "different but reasonable view" of the evidence, that the victim did not suffer serious personal injury. The personal injury constituting the additional element of the greater offense is the mental trauma suffered by the victim. She testified that she had trouble sleeping at night. The psychiatrist testified that, in his opinion, she suffered mental trauma and extreme mental anguish. On cross-examination he acknowledged that any woman subjected to a sexual assault would experience mental trauma and that the extent of the trauma was based on the nature of the act. He also related that while the victim suffered recurring fears that affected her social life, she had worked at two jobs after the assault, up through the Christmas shopping season. He also testified that the victim sought no treatment from any psychiatrist until she was asked to see the testifying psychiatrist by the county attorney, 5 weeks after the incident. The witness' treatment of the victim consisted of four monthly interviews. The psychiatrist also testifed in cross-examination as follows:

> Q. And, so, if someone was subjected to some type of sexual assault and as a result thereof required to be in an institution, would you say that that would be extreme mental trauma?
> A. I would think so, yes, Sir.
> Q. But [the victim's] case was not that severe; is that right?
> A. She was able to stay out of the hospital, yes.

As was stated in *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978), the question of whether instruction on a lesser-included offense should be given must necessarily be left to a case-by-case basis. Further, as was stated above,

Tamburano requires that submission of a lesser offense not be based on mere speculation that the jury will disbelieve the evidence. The evidence in this particular case required submission of the third degree sexual assault instruction. The cross-examination of the psychiatrist put before the jury additional facts concerning the degree of injury inflicted and weakened his direct testimony enough to allow a jury to find that there was no serious personal injury. This goes beyond the "mere speculation" disapproved of in *Tamburano*.

While the particular facts in *State v. Beasley, supra*, required the defendant to offer some evidence directly disputing the additional element, if there is evidence in some form (whether it be evidence offered by defendant, evidence developed in cross-examination of the State's witnesses, or evidence adduced from other witnesses) before the jury, which directly disputes the additional element differentiating the same conduct as to degree, an instruction on the lesser-included offense is proper. Serious personal injury is a matter of degree and, except in extreme circumstances, must be left to the jury to determine whether serious personal injury occurred. Defendant was entitled to have the lesser offense submitted to the jury.

Defendant's argument that the jury should have been instructed on false imprisonment in the second degree is without merit. False imprisonment in the first degree is differentiated from false imprisonment in the second degree by the requirement of the former that the victim be restrained "under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury." Neb. Rev. Stat. § 28-314 (Reissue 1979). There was no evidence contradicting the fact that a knife was held against the victim's throat during the entire time defendant was transporting her, and no evidence contradicting the fact that such conduct exposed the victim to the risk of serious bodily injury, and that such conduct constituted "terrorizing circumstances." Under *Tamburano, supra*, submission of a lesser-included offense cannot be premised on mere speculation. The trial judge properly refused the instruction as to false imprisonment in the second degree.

Defendant's next assignment of error is that imposition of

consecutive sentences on the false imprisonment and sexual assault charges violates the double jeopardy clause. Since defendant's conviction on the sexual assault charge has been reversed and remanded for a new trial, it is inappropriate to consider this assignment at this time, since consecutive sentences on the challenged charges are not before us. Similarly, in view of the fact of the remand for new trial on one count, it is inappropriate to consider defendant's allegation that his sentences, imposed consecutively, result in an excessive sentence.

Defendant's final assignment of error is that the trial court's decision is not supported by sufficient evidence. This contention, though assigned as error, was not addressed in the brief. This court limits its consideration of assignments of error to those which are discussed in the brief. *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). In ruling on defendant's other assignments of error, however, we have examined the entire record, and the evidence before the jury (portions of which are discussed above) is more than sufficient to establish defendant's guilt as to each charge.

The convictions and sentences on the false imprisonment and theft counts are affirmed. The conviction and sentence on the sexual assault (count I) are vacated, and the cause is remanded for a new trial as to that count.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., dissenting in part.

The victim of a brutal sexual assault was not required to be hospitalized. From that weak twig the majority builds a tree. No evidence was offered to dispute the psychiatrist's view that the victim suffered severe personal injury, i.e., mental trauma.

The majority has severely weakened the doctrine announced in *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978), and expanded in *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983). No facts were adduced to dispute the assertion that serious personal injury occurred. The jury was faced only with the choice of belief or disbelief. Therefore, appellant was not entitled to the requested instruction.

I would affirm.

STATE OF NEBRASKA, APPELLEE, V. JERRY G. OHLER, APPELLANT.

366 N.W.2d 771

Filed May 3, 1985. No. 84-683.

1. **Post Conviction.** Generally, a defendant may bring a second proceeding for post conviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion.
2. **Constitutional Law: Effectiveness of Counsel: Trial.** Trial strategy adopted by counsel without prior consultation with the accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances.
3. **Expert Witnesses: Effectiveness of Counsel: Proof.** Generally, expert testimony is not admissible as proof that the assistance of counsel in a criminal case was ineffective.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellant.

Vincent Valentino, York County Attorney, and Charles W. Campbell, for appellee.

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

BOSLAUGH, J.

The defendant, Jerry G. Ohler, appeals from the order of the district court for York County, Nebraska, entered on August 16, 1984, denying his motion for post conviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979).

In 1980 the defendant was convicted of possession of stolen property and possession of burglary tools and was found to be a habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979). The defendant was fined $500 and sentenced to 15 years' imprisonment. The judgment was affirmed in *State v. Ohler*, 208 Neb. 742, 305 N.W.2d 637 (1981), *cert. denied* 454 U.S. 967, 102 S. Ct. 510, 70 L. Ed. 2d 383 (*Ohler I*).

In 1981 the defendant commenced a proceeding for post conviction relief in which the trial court denied relief without an evidentiary hearing. While an appeal was pending, defendant's original counsel was granted leave to withdraw, and George

Brugh was appointed to represent the defendant. That appeal was dismissed on the defendant's motion filed pro se.

On January 20, 1983, the defendant filed another motion for post conviction relief pro se. That motion alleged that the defendant had received ineffective assistance of counsel at the trial, on the appeal, and at the first post conviction proceeding. Again, relief was denied without an evidentiary hearing.

On the appeal from that order we held:

> [A] defendant is entitled to bring a second proceeding for post conviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion. A review of the motion filed in the present case reveals that the only ground which was not capable of being raised at the time of the first hearing is the claim defendant's counsel failed to provide effective assistance during the course of the first motion for post conviction relief. All other grounds can not be raised in a second post conviction motion. See *Sims v. State*, 295 N.W.2d 420 (Iowa 1980).
>
> The order overruling the defendant's second motion for post conviction relief filed January 20, 1983, is reversed and the cause remanded for further proceedings in conformity with this opinion.

State v. Ohler, 215 Neb. 401, 405, 338 N.W.2d 776, 779 (1983) (*Ohler II*).

After the trial on remand the district court found that the defendant had failed to prove that his counsel did not provide effective assistance during the course of the first motion for post conviction relief, and further concluded that the defendant had suffered no denial or infringement of his constitutional rights. It is from that order that the defendant has now appealed.

On this appeal we consider only matters pertaining to the defendant's contention that he did not have effective assistance of counsel on his first motion for post conviction relief. However, because the defendant's alleged denial of effective assistance of counsel at his first post conviction proceeding concerns that counsel's failure to raise the issue of his own ineffective assistance of counsel at the hearing on the motion to

suppress and at the enhancement proceeding, it is necessary to determine if the latter were proper grounds for post conviction relief. The review is not unlike that which was made in *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984), where the defendant contended that the issue of a constitutional denial of effective assistance of counsel could not have been raised in his first post conviction proceeding because in that proceeding he was represented by the same attorneys whose assistance he assailed. Similarly, in *Jones v. Scurr*, 316 N.W.2d 905, 911 (Iowa 1982), the Iowa Supreme Court reasoned:

> Jones was represented at trial, on direct appeal, and in district court in this postconviction proceeding, by the same attorney. Defense counsel, understandably, did not raise an ineffective assistance of counsel claim against himself. Jones raised the issue in a *pro se* motion for new trial filed after the court denied his application for postconviction relief. We find that due to the fact that the same attorney represented Jones through all prior stages of this case, although not in this postconviction appeal, there was "sufficient reason" for the failure to previously raise the issue of ineffective assistance of counsel. § 663A.8. Jones is entitled to raise this issue in a new application for postconviction relief.

The defendant's claim of ineffective assistance of counsel in the first post conviction proceeding stems from two separate matters which relate to the original trial. First, the defendant contends that in the first post conviction proceeding his counsel failed to allege as error the fact that his trial counsel prevented him from testifying at the hearing on the motion to suppress. The defendant argues that if he had been allowed to testify at that hearing, he would have demonstrated that he did not consent to the search preceding his arrest. Apparently, the conclusion of this argument is that if the defendant had been allowed to testify, he would not have been convicted. The facts surrounding the search referred to are fully set out in *Ohler I*.

Secondly, the defendant contends that the certified copy of the record of his prior conviction in Greeley County, Nebraska, which was received at the enhancement hearing, failed to disclose whether he was represented by counsel. The defendant

argues that reasonably competent counsel would have used this fact to successfully challenge the sufficiency of the evidence to support the habitual criminal conviction.

The general rules regarding a claim of ineffective assistance of counsel were set forth at length in *State v. Robinson*, 218 Neb. 156, 352 N.W.2d 879 (1984). The issue was even more recently discussed in *State v. Harper*, 218 Neb. 870, 874, 359 N.W.2d 806, 809-10 (1984). Therein it was quoted:

> "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).

The defendant's first claim is that he received ineffective assistance of counsel because his counsel failed to allow the defendant to testify at the suppression hearing. At the trial on remand the defendant testified that he told his attorney that he did not consent to the search preceding his arrest; that he and his attorney subsequently discussed whether the defendant should testify at the suppression hearing; and that although his attorney said that he would either take the defendant's deposition or have the defendant testify, neither was done. This testimony was contradicted by the defendant's original attorney, whose deposition was received in evidence at the trial on remand. His attorney further testified that the defendant never said that he wanted to testify. In *State v. Fowler*, 201 Neb. 647, 656-57, 271 N.W.2d 341, 347 (1978), we held:

> The defendant next complains that his attorney did not

> call him to testify in his own behalf. Although there is conflicting evidence as to defendant's desire to testify at his trial, we believe the court correctly found from the testimony at the post conviction hearing that the defendant's trial counsel had discussed this issue with the defendant and that the defendant had acquiesced in his counsel's advice not to testify. It is clear that defendant's testimony at the preliminary hearing could have been used to impeach the defendant's credibility at the trial, and his past criminal record would have been brought to the jury's attention. We concur in the finding of the District Court in the post conviction hearing that: "Under these circumstances a decision of legal counsel advising the defendant not to take the witness stand is a matter of reasonable trial strategy and not evidence of a lack of effective assistance of counsel." We have held that trial strategy adopted by counsel without prior consultation with accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances. State v. Haynes, 186 Neb. 238, 182 N.W.2d 199 (1970).

Even if counsel's alleged failure to allow the defendant to testify had not been a matter of reasonable trial strategy which was not evidence of a lack of effective assistance of counsel, see, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (Burger, C.J., concurring at 93 n.1), this did not prejudice the defendant. As set forth in the concurring opinion in *Ohler I*, there was no reasonable expectation of privacy in the unsealed and partially opened cardboard box.

The defendant's second contention is that his counsel was ineffective at the enhancement proceeding. At the hearing on remand the defendant testified that in the Greeley County case he was sentenced immediately after the jury verdict was returned and that he was not represented by an attorney at that time. The record in the Greeley County case was received in evidence, and it shows the defendant was sentenced some days later than he claims.

The deposition of the defendant's lawyer in the Greeley County case was also received into evidence. This lawyer

testified that he represented the defendant at all critical stages of the Greeley County conviction. Furthermore, the defendant's attorney whose effectiveness is now challenged testified that the defendant told him that he, the defendant, had been represented by counsel in the Greeley County case.

Since the defendant was in fact represented by counsel in the Greeley County case, any failure to object to the offer of the certified copy of the record of that conviction at the enhancement proceeding was not prejudicial. The State is not limited to proof of a prior conviction by the use of a certified copy of the record. Under the circumstances in this case, the failure to object will not support a claim of ineffective assistance of counsel.

Since neither the defendant's claim of ineffective assistance of counsel at the suppression hearing nor his claim of ineffective assistance of counsel at the enhancement proceeding is a ground for post conviction relief, his counsel was not ineffective for failing to allege them as error in the first post conviction proceeding.

The defendant has also assigned as error the lower court's refusal to permit expert testimony regarding what a "reasonably prudent criminal trial attorney would have done." Brief for Appellant at 10. In *Sasich v. City of Omaha*, 216 Neb. 864, 873, 347 N.W.2d 93, 99 (1984), discussing the general matter of permitting expert testimony on the status of the law, we said:

> While our rules of evidence allow for expert testimony, that testimony must be such as to assist the trier of fact to understand the evidence or to determine a fact issue. Neb. Rev. Stat. § 27-702 (Reissue 1979). Expert testimony concerning the status of the law generally accomplishes neither of these goals.

Generally, expert testimony is not admissible as proof that the assistance of counsel in a criminal case was ineffective. The last assignment of error concerns the exclusion of "documentary evidence" of the Greeley County conviction by the district court. Apparently, this material was offered in the hope that it might disclose "numerous trial errors" and "significant discrepancies" at the trial, which were not issues in

this case under the pleadings which had been filed. The evidence was not relevant to the issues then being tried, and the ruling prejudiced no substantial right of the defendant.

The judgment is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. INEZ GONZALES, APPELLANT.

366 N.W.2d 775

Filed May 3, 1985. No. 84-692.

1. **Sexual Assault: Words and Phrases.** The act of fellatio constitutes a sexual penetration within the meaning of Neb. Rev. Stat. § 28-318(5) (Reissue 1979).
2. **Criminal Law: Evidence: Jury Instructions: Lesser-Included Offenses.** Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense.
3. **Trial: Hearsay: Evidence.** Statements of a 13-year-old boy, a victim of a sexual assault, made to his mother a short time after he was sexually assaulted, relating to the sexual assault, qualify as excited utterances and are admissible as an exception to the hearsay rule.

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

Charles F. Fitzke, for appellant.

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

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

GRANT, J.

Defendant-appellant, Inez Gonzales, a male person over the age of 19 years, was charged in an information with the crime of sexual assault in the first degree in that he did "subject a child of less than sixteen years of age to sexual penetration" on or about May 13, 1984, in Scotts Bluff County, Nebraska. Defendant pled not guilty to the charge. After jury trial defendant was

convicted of the charged crime and sentenced to 4 to 8 years in the penal complex. Defendant timely appealed, alleging as error that the trial court incorrectly instructed on the elements of the crime; that the trial court erred in failing to instruct on the allegedly lesser-included offense of sexual assault in the third degree; that the trial court erred "in admitting inadmissable [sic] hearsay testimony" before the jury; and that the trial court erred in refusing to direct a verdict in favor of defendant and dismiss the case because the State failed to prove the allegations of the information against defendant. We affirm.

Evidence before the jury included facts which, if believed by the jury, established that on the evening of May 12, 1984, and in the early morning hours of the next day, the victim of defendant's acts, a young boy 13 years old, was babysitting at the home of the boy's Aunt Melva. Defendant lived with the aunt and was the father of three of her four children. At approximately 2 a.m. on May 13, 1984, defendant returned alone to the house where the victim was babysitting. In a room separate from where the younger children were sleeping, defendant removed the victim's undershorts and placed the victim's penis into defendant's mouth. Later, defendant pushed the victim into a different room, knocked the victim onto the floor, and pushed defendant's penis into the victim's mouth. When defendant left the victim, the victim dressed quickly, went outside the house, and ran to his home, about one-half mile from the house where he had been babysitting. On his way to his home, running in the darkness, the victim was startled by the sound of a whistle, and thought he heard footsteps. The victim reached home and told his mother what had happened to him. His mother took the victim to the police station about 2:30 a.m., where the incident was reported to a police officer. The police officer saw that the victim was "on the verge of breaking down and crying several times" and that the victim was "[e]xtremely upset and disturbed."

At the trial the victim testified as to the actions of defendant as set out above. The police officer testified as to the victim's appearance at the police station. The victim's mother testified as to what her son, the victim, had told her. The mother's testimony was admitted in evidence, over defendant's

objection, as the relating of an excited utterance. Defendant's counsel cross-examined all but one of the State's witnesses. Defendant did not testify nor adduce any evidence.

Defendant's first and fourth assignments of error are based on defendant's contention, at 17 in his brief, that the State wishes "to believe that fellatio performed upon an 'actor' by a servient 'victim' amounts to a violation of Section 28-319, R.R.S. 1943 by the 'actor' . . . . [T]he statute under which the defendant herein was charged, does not criminalize the act of fellatio under those particular circumstances." Defendant's argument rests on the facts of the case showing that defendant forced his penis into the victim's mouth and that defendant forced the victim's penis into the defendant's mouth, and that in either event there has been no "sexual penetration," as defined in Neb. Rev. Stat. § 28-318(5) (Reissue 1979), because there was no "intrusion, however slight, of any part of the actor's body . . . into the genital or anal openings of the victim's body . . . ."

In taking that position defendant ignores the legislative definition of "sexual penetration," which, as set out in § 28-318(5), defines that term 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 . . . ." (Emphasis supplied.) The term "sexual penetration," as defined by the Legislature for the purpose of proscribing the crime of sexual assault in the first degree, means more than actions constituting a penetration, as that term is ordinarily defined. For criminal purposes the crimes of sexual assault in the first degree and sexual assault in the third degree are clearly differentiated. "Sexual penetration," as defined above, is necessary for the crime of sexual assault in the first degree, while "sexual contact," as defined in § 28-318(4), is necessary for the crime of sexual assault in the third degree. The act of fellatio is a form of sexual penetration, by statutory definition, whether the victim's "intimate parts" (defined in § 28-318(2) as "the genital area, groin, inner thighs, buttocks, or breasts") are touched or not. In this case, where defendant has engaged the victim's mouth with the defendant's penis, the defendant has committed

fellatio and has thus been guilty of "sexual penetration."

Insofar as defendant alleges that the trial court did not correctly define the appropriate terms, the court's instructions told the jury that "[f]ellatio shall mean oral stimulation of the penis." The last five words of the definition are set out verbatim in Webster's Third New International Dictionary, Unabridged 836 (1968) in the definition of the term, preceded by the words "the practice of obtaining sexual satisfaction by . . . ." The court's definition is accurate. Even in this age, the court need not go into further and precise urogenital detail. Defendant's first and fourth assignments of error are without merit.

Defendant's second assignment of error is that the trial court erred in refusing to instruct the jury on the lesser-included offense of sexual assault in the third degree. This is another case where the State has offered uncontroverted evidence on an essential element of the crime. That evidence was not controverted in any way by the defendant's evidence nor evidence offered by any other witnesses (see *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983)), nor was it weakened in any way by defendant's cross-examination (see *State v. Schwartz, ante* p. 833, 366 N.W.2d 766 (1985)). Any lesser offense, under the testimony in this case, could only be determined by pure speculation of the jury as to what occurred other than the facts testified to. That speculation, not supported by any evidence, is not sufficient to require instructions on a lesser-included offense. *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978). The trial court was correct in refusing to instruct on a lesser offense.

Defendant's third assignment of error is that the trial court erred "in admitting inadmissable [sic] hearsay testimony" before the jury. As stated above, the victim's mother testified as to what the 13-year-old victim told her after running home after defendant sexually assaulted him. The victim's statement to his mother was admitted by the trial court as an excited utterance. It is clear that the victim's statements to his mother are hearsay as defined in Neb. Rev. Stat. § 27-801(3) (Reissue 1979) and ordinarily inadmissible under Neb. Rev. Stat. § 27-802 (Reissue 1979). Such hearsay statements, however, are admissible as exceptions to the general hearsay rule, as set out in Neb. Rev.

Stat. § 27-803 (Reissue 1979). Among the exceptions named is "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 27-803(1). In this case defendant contends that when the victim made the statement, the victim was under the exciting influence of fear caused by hearing a whistle in the dark—and not the excitement and fear of what defendant had just done to him. Such a contention is without any merit. Our society has not become so jaded as to believe that the startling event of what defendant had done to the victim had been erased from the victim's mind and replaced by the fear and excitement of a whistle in the dark. In *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980), we held that the statement made by a young girl to police officers a short time after she was assaulted, relating to a sexual assault, qualified as an excited utterance. Similarly, in this case a statement made by a young boy to his mother, shortly after a sexual assault, is an excited utterance and admissible in evidence.

The judgment of the trial court, in all the challenged respects, was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVIN E. HUNTER, APPELLANT.

367 N.W.2d 122

Filed May 3, 1985. No. 84-746.

Constitutional Law: Appeal and Error. A constitutional question not raised at the initial trial in the municipal court forecloses the appellant from raising such question in the district court or this court.

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

Anthony S. Troia, for appellant.

A. Eugene Crump, Deputy Attorney General, and Jill Gradwohl, for appellee.

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

HASTINGS, J.

Following a plea of no contest, the municipal court of the city of Omaha found defendant guilty of third offense driving while intoxicated. A sentence of 90 days in jail, a $500 fine, and a lifetime suspension of defendant's driving privileges was imposed.

Immediately following the sentencing, defendant's counsel, by way of an oral motion to reconsider, attacked the penalty statute, Neb. Rev. Stat. § 39-669.07(3) (Reissue 1984), as being unconstitutional as a violation of the due process clause and the equal protection clause. Upon the overruling of the motion, defendant appealed to the district court.

In the district court defendant reiterated his contentions as to due process and equal protection, and added a claim that the sentence of a lifetime suspension of driving privileges constituted cruel and unusual punishment. The district court affirmed. On appeal to this court defendant assigns as his sole error the claim that the sentence constituted cruel and unusual punishment. We affirm.

A constitutional question not raised at the initial trial in the municipal court forecloses the appellant from raising such question in the district court or this court. *State v. Kaiser*, 218 Neb. 556, 356 N.W.2d 890 (1984); *State v. Mercer*, 217 Neb. 164, 347 N.W.2d 868 (1984); *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984); *State v. Olson*, 217 Neb. 130, 347 N.W.2d 862 (1984).

There is no issue for this court to decide. The judgment of the district court is affirmed.

AFFIRMED.

CHUCK R. PATTESON, APPELLEE AND CROSS-APPELLANT, v. RAY A.C. JOHNSON, APPELLANT AND CROSS-APPELLEE.

367 N.W.2d 123

Filed May 3, 1985. No. 84-876.

1. **Constitutional Law: Actions: Statutes.** Neb. Rev. Stat. § 20-148 (Reissue 1983) does not constitute a waiver of sovereign immunity by the State of Nebraska for actions brought in federal court under 42 U.S.C. § 1983 (1982).
2. _____: _____: _____. *Todd v. Board of Educational Lands and Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951), does not interpret any enactment of the Nebraska Legislature as constituting a waiver of this state's sovereign immunity for actions brought in federal court pursuant to contract.
3. _____: _____: _____. The provision of Neb. Const. art. V, § 22, which states, "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," is not self-executing. Legislative action is necessary to make it available.
4. **Supreme Court: Statutes: Appeal and Error.** The Nebraska Supreme Court is the final arbiter in matters of Nebraska law; as such, it must make its own analysis and reach its own conclusions with respect to questions of Nebraska law.
5. **Courts: Constitutional Law.** State courts have as great a constitutional obligation to uphold and protect the federal Constitution and law as do the federal courts.

Certified Questions from the U.S. Court of Appeals for the Eighth Circuit. Judgment entered.

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

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellee.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Nebraska State Education Association.

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

CAPORALE, J.

This court, pursuant to the provisions of Neb. Rev. Stat. § 24-219 (Cum. Supp. 1984), accepted two questions of law certified to it by the U.S. Court of Appeals for the Eighth Circuit. In response thereto we reaffirm our earlier

determination that Neb. Rev. Stat. § 20-148 (Reissue 1983) does not constitute a waiver of sovereign immunity by the State of Nebraska for actions brought in federal court under 42 U.S.C. § 1983 (1982). We also answer that our decision in *Todd v. Board of Educational Lands and Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951), does not constitute a waiver of the State of Nebraska's sovereign immunity for actions brought in federal court pursuant to a contract.

BACKGROUND

The questions certified to us arise in an action commenced in the U.S. District Court for the District of Nebraska by Chuck R. Patteson against Ray A.C. Johnson. Case No. CV81-L-217 (D. Neb. 1981). Since we do not resolve the matter, we find it unnecessary to set forth all the facts surrounding the dispute; the circumstances under which the case and controversy arose may be found in the opinion of the circuit court in *Patteson v. Johnson*, 721 F.2d 228 (8th Cir. 1983).

It is sufficient for our purposes to note that for a time Patteson was the deputy auditor for this state, having been so appointed by Johnson, the State Auditor. During his tenure as such, Patteson refused to sign an audit because he considered it to be deficient. He also gave certain legislative testimony concerning that audit and another matter. As a consequence, the relationship between Johnson and Patteson deteriorated, and Johnson terminated Patteson's employment with the state.

The district court, Chief Judge Warren K. Urbom, initially dismissed Patteson's civil rights and state law claims against Johnson. Upon remand by the circuit court, *Patteson v. Johnson, supra*, the district court found that reinstatement of Patteson's employment was in order. That court further observed, however, that because of the nature of the relationship between Patteson and Johnson, the chances were "excellent that he [Patteson] would not remain in place for more than a few months and perhaps less and would furnish virtually no useful service as Johnson's deputy." Accordingly, that court offered Johnson, as coextensive relief to Patteson in both the civil rights and state claims presented by the latter's complaint, the alternatives of either reinstating Patteson or paying him the sum of $10,800. The amount to be paid, were

that the alternative selected, was characterized by the district court as representing the salary and other benefits Patteson would accrue if he were to be reinstated for the period he reasonably could be expected to remain. The district court specifically stated the sum was not damages but, rather, was an equitable substitute for a "fruitless and ill-fated reinstatement." See *Patteson v. Johnson*, No. CV81-L-217, slip op. at 5 and 6 (D. Neb. Feb. 24, 1984).

FIRST QUESTION

The first question certified reads as follows: "Does Neb. Rev. Stat. § 20-148 (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)?"

The question arises by virtue of the 1977 enactment of § 20-148, now found in the 1983 Reissue of the Revised Statutes of Nebraska, which provides:

> (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.

This court, subsequent to certification of the question, decided *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984). That decision analyzed the issue and answers the question in the negative. Further discussion of that question and the rationale for our answer is, therefore, unnecessary.

SECOND QUESTION

The second question reads: "Does the decision of the Nebraska Supreme Court in *Todd v. Board of Educational Lands & Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951), constitute

a waiver of the State of Nebraska's sovereign immunity for actions brought in federal court pursuant to a contract?"

Applicable Federal Principles

While it is not within our province to rule upon questions of federal law in this inquiry, and we do not undertake to do so, we review briefly certain federal principles relating to the issue of sovereign immunity in order to provide a setting for our analysis of the applicable Nebraska law.

The eleventh amendment to the U.S. Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." However, the notion of sovereign immunity antedates eleventh amendment immunity and is a separate and distinct concept. "A finding respecting either the waiver or the applicability of one does not necessarily mandate the same result as to the other." *Karpovs v. State of Miss.*, 663 F.2d 640, 645 (5th Cir. 1981).

The U.S. Supreme Court, in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 907, 79 L. Ed. 2d 67 (1984), stated that "the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III."

The Court went on to say:

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given*: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Ex parte State of New York No. 1*, 256 U.S. 490, 497, 41 S.Ct. 588, 589, 65 L.Ed. 1057 (1921) (emphasis added).

104 S. Ct. at 907.

In construing the scope of this immunity, the U.S. Supreme Court has held that, generally, suits against a state for prospective injunctive relief are permitted in limited circumstances, *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), but that suits against the state treasury are barred. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). In *Pennhurst, supra*, the Court explained that "when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." 104 S. Ct. at 909. Where the action is one for the recovery of money, the immunity extends beyond the state and includes state officials and employees because " 'the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' " *Karpovs v. State of Miss., supra* at 643, quoting *Ford Co. v. Dept. of Treasury*, 323 U.S. 459, 65 S. Ct. 347, 89 L. Ed. 389 (1945).

Although a state may waive its eleventh amendment immunity from suit in the federal courts, such a waiver will only be found where stated by the most express language or by such overwhelming implication from the text as leaves no room for any other construction. *Pennhurst, supra; Edelman v. Jordan, supra; Murray v. Wilson Distilling Co.*, 213 U.S. 151, 29 S. Ct. 458, 53 L. Ed. 742 (1909).

While Congress has the power to abrogate the eleventh amendment immunity with respect to fourteenth amendment rights, such must be done with an unequivocal expression of the intent to overturn the constitutionally guaranteed immunity of the several states. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) (holding that 42 U.S.C. § 1983 does not override a state's eleventh amendment immunity).

It is well established that 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; Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1959).

Finally, the U.S. Supreme Court stated in *Pennhurst, supra*, that "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued" (emphasis in original), 104 S. Ct. at 907, and went on to explain in a footnote that "a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." 104 S. Ct. at 907 n.9. See, also, *Petty v. Tennessee-Missouri Comm'n, supra*.

Nebraska Law Other Than *Todd*

Neb. Const. art. V, § 22, 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."

In *Gentry v. State*, 174 Neb. 515, 517-18, 118 N.W.2d 643, 645 (1962), we stated: "This provision permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. This provision of the Constitution is not self-executing. Legislative action is necessary to make it available." It is this principle which was applied in *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984).

The Nebraska Legislature has enacted statutes which allow the state to be sued in its own courts. In addition to the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), and the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981), the Legislature has authorized the bringing of suit against the state in its several district courts upon a variety of other claims. Neb. Rev. Stat. § 24-319 (Reissue 1979).

Neb. Rev. Stat. § 24-324 (Reissue 1979) further provides in part: "The state may be sued in the district court of the county wherein the Capital is situated in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state." It also specifies certain pleading and service requirements.

We have considered these statutes, or their forerunners, and have held that the procedures contained therein are jurisdictional and must be complied with in order to sue the state. *Pickus v. State*, 115 Neb. 869, 215 N.W. 129 (1927);

McNeel v. State, 120 Neb. 674, 234 N.W. 786 (1931).

Effect of *Todd*

With that background in mind we turn to the question at hand. Since waiver of this state's sovereign immunity from suit in the federal courts rests with the Legislature, a more accurate phrasing of the question is whether *Todd v. Board of Educational Lands and Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951), interprets any enactment of the Nebraska Legislature as constituting a waiver of this state's sovereign immunity for actions brought in federal court pursuant to contract. In *Todd* the plaintiffs brought an action asking for a declaration of their rights. Specifically, they wanted to know whether the assignment provisions in a school land lease could be modified by subsequent legislation. Todd assigned his school land lease to another. When Todd and his assignee applied to the Board of Educational Lands and Funds for approval of the assignment, they were ordered to comply with a new provision enacted by the Legislature subsequent to the creation of Todd's original lease. Todd and the assignee then brought an action in the district court for Lancaster County, Nebraska, alleging that the subsequently enacted law was not applicable to the lease and that if the Legislature intended the law to apply retrospectively, it was invalid and unconstitutional because it would violate both federal and state constitutional mandates and prohibitions. The district court sustained the board's demurrer and dismissed the case.

We reversed the district court's judgment, holding that the new legislation did not apply to Todd's lease. In doing so we reasoned:

> The quoted provision of the statute existed from 1899 to 1947 without change. Laws 1899, c. 69, § 18, p. 310, appearing as § 72-241, R.S. 1943. There was during that period no statutory prohibition and no other condition of an assignment of a school land lease. In the absence of statutory or contractual restrictions, a lease for a definite term may be assigned by the lessee without the consent of the lessor. Towle v. Morrell, 129 Neb. 398, 261 N.W. 827; Annotation, 70 A.L.R. 486; Annotation, 23 A.L.R. 135; 32 Am. Jur., Landlord and Tenant, § 319, p. 293.

This is true of a lease made by the state. It, by entering into a contract, abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does when he makes a contract. The state may not impair any of the substantial rights secured by its contract to a citizen with whom it contracts. Poindexter v. Greenhow, 114 U.S. 270, 29 L. Ed. 185, 5 S. Ct. 903; Carr v. State ex rel. Coetlosquet, 127 Ind. 204, 26 N.E. 778, 11 L.R.A. 370, 22 Am. S.R. 624; Woodruff v. Trapnall, 10 Howard 190, 13 L. Ed. 383; 12 Am. Jur., Constitutional Law, § 400, p. 32.

The insertion in the act of 1947 of the provisions that "No lease shall be sublet or assigned without the written approval of the board" (§ 72-233, R.R.S. 1943) and "* * * that the lessee shall not sublease or otherwise dispose of said lands without the written consent of the board * * *" (§ 72-234, R.R.S. 1943) directly and strongly supports the meaning ascribed herein to the provision concerning the assignment of a school land lease as it was before that act was passed.

The Board of Educational Lands and Funds in leasing school land is limited by the authority granted it by the Legislature. It has no other power. The law on the subject in force at the time of the execution of a lease is a part thereof and determines the rights of the lessee. A lease made in compliance with the direction and permission of the Legislature between the state and the lessee is a contract and is property. The rights resulting from the contract vest on its execution and delivery. The state may not subsequently by legislation deprive the lessee of any substantial right secured to him by the lease. Constitutional guaranties and prohibitions safeguard it. These include the mandate that no state shall deprive any person of property without due process of law; no state shall enact any law impairing the obligations of a contract; and the property of no person shall be taken or damaged for public use without compensation. State v. Platte Valley Public Power & Irrigation Dist., 147 Neb. 289, 23 N.W.2d 300, 166 A.L.R. 1196; Reavis v. State, 140 Neb.

> 442, 300 N.W. 344; Stanser v. Cather, 85 Neb. 305, 123 N.W. 316; Hile v. Troupe, *supra*; State ex rel. Patterson v. Wenzel, 55 Neb. 210, 75 N.W. 579; State ex rel. Beer v. Thayer, 46 Neb. 137, 64 N.W. 700; State ex rel. Brown v. McPeak, 31 Neb. 139, 47 N.W. 691.

154 Neb. at 610-11, 48 N.W.2d at 710.

Patteson claims that our statements in *Todd* indicate that the state has waived its immunity from suit, both in the state and federal courts, on claims arising out of contracts. To support his assertion he refers us to *Smith v. Hanlon*, No. CV81-L-273 (D. Neb. Dec. 17, 1982), *rev'd on other grounds, Smith v. Sorensen*, 748 F.2d 427 (8th Cir. 1984), which held, among other things, that *Todd* did waive the state's immunity from suit in federal court in a contract action.

In *Smith*, employees of CETA, a division of the Department of Labor of the State of Nebraska, brought an action challenging attempted layoffs as violations of their civil rights under 42 U.S.C. § 1983 (1982) and 28 U.S.C. § 1343(3) (1982). The State of Nebraska, the Department of Labor, and the Joint Merit System were named as defendants. The defendants claimed immunity from suit under the eleventh amendment. In denying those claims Chief Judge Warren K. Urbom reasoned:

> While it is true that states and state agencies such as those mentioned are immune from suit, see *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), that immunity may be waived in certain instances. In cases where an action is founded on contract, the Supreme Court of Nebraska has held that the state "by entering into a contract, abandons its attribute of sovereignty and binds itself, to the extent of its powers to contract, substantially as an individual does when he makes a contract." *Todd v. Board of Ed. Lands*, 154 Neb. 606, 610, 48 N.W.2d 706, 710 (1951).
>
> It is true that the *Todd* case involved a lawsuit in Nebraska state court. As such, it may be argued that the waiver in the case does not extend to a federal court, as it is not a clear manifestation of intent to waive immunity. See *Kennecott Copper Corp. v. State Tax Commissioner*, 327 U.S. 573, 577 (1946); *Riggle v. State of California*, 577

> F.2d 579, 585 (C.A. 9th Cir. 1978). The language of *Todd*, however, is extremely broad in terms of the courts in which the waiver is effective. I do not believe that the waiver always need name federal courts to be effective therein; it is enough that the state is permitted as any individual to sue or be sued, when it is a contracting party. I also note that the court in *Todd* cited *Poindexter v. Greenhow*, 114 U.S. 270 (1884). *Poindexter*, held that Eleventh Amendment concerns do not erect an immunity for cases in federal court based on an alleged unconstitutional impairment of contract by a state when the state is one of the contracting parties. 114 U.S. at 286. It would be anomalous not to extend the reasoning in the *Todd* court used in citing *Poindexter* for the constitutional prohibition on impairment of contracts to a claim under the Fourteenth Amendment based on an unconstitutional deprivation of contractural [sic] rights, when the state is one of the contracting parties. To do otherwise would dictate contrary results for identical contract suits based on different parts of the Constitution. Accordingly, I shall not dismiss the State of Nebraska, the Department of Labor, and the Joint Merit System as defendants, as I do not believe they possess sovereign immunity in this court on these claims.

Smith v. Hanlon, supra, slip op. at 12.

Although the members of this court have the greatest respect for the learned Judge Urbom, the fact remains that it is this court which is the final arbiter in matters of Nebraska law. This court must, therefore, make its own analysis and reach its own conclusion with respect to the question presented. *Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 61 S. Ct. 418, 85 L. Ed. 577 (1941); *Neal v. School Dist. of York*, 205 Neb. 558, 288 N.W.2d 725 (1980).

This court finds it cannot agree with Chief Judge Urbom's analysis of *Todd v. Board of Educational Lands and Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951).

It is noted, first of all, that *Todd* was not interpreting a legislative enactment concerning whether the state *could* be sued; that issue was not present. Rather, *Todd* was concerned

with whether a legislative enactment could be applied so as to hinder or impair a preexisting contract. Thus, this court's observations about the application of constitutional contract principles to the state must be read in that context. See *Yoder v. Nu-Enamel Corporation*, 140 Neb. 585, 300 N.W. 840 (1941).

Todd was brought in the district court for the county in which the state's capital is located to determine the plaintiffs' rights with respect to a school land lease obtained from the Board of Educational Lands and Funds. Such an action is permitted by § 24-319(5), both as it existed then and as it exists now. Section 24-324 (Reissue 1948) provided then, as it does today, that the state may be sued in the district court of the county where the capital is located in matters of contract.

The *Todd* discussion of an individual's constitutional rights with respect to contracts and the limitations on the state to impair those rights is aimed at pointing out the reasons that the legislation at issue therein could not be applied retroactively. As noted earlier in our discussion concerning the applicable federal principles, it does not follow from a state's consent to be sued in its own courts that it has waived its immunity to be sued in federal court. *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984).

Neither does the *Todd* discussion of a citizen's federal constitutional rights in any sense imply a waiver of the state's immunity from suit in the federal courts. State courts, after all, have as great a constitutional obligation to uphold and protect the federal Constitution and law as do the federal courts. See *Hathorn v. Lovorn*, 457 U.S. 255, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1982), *reh'g denied* 458 U.S. 1131, 103 S. Ct. 15, 73 L. Ed. 2d 1401. See, also, *State v. Jones*, 209 Neb. 296, 307 N.W.2d 126 (1981). It was that obligation, among others, which *Todd* fulfilled.

There is nothing in *Todd* which holds that any enactment of the Nebraska Legislature contains an unequivocal expression of the state's consent to waive its sovereign immunity from suit in the federal courts pursuant to a contract. Accordingly, we answer the second question in the negative.

JUDGMENT ENTERED.

LAVERNE J. BISH AND JEROME J. MILDER, DOING BUSINESS AS C & F COMPANY, APPELLEES, V. MAUREEN FLETCHER ET AL., APPELLANTS.

366 N.W.2d 778

Filed May 3, 1985. No. 84-897.

1. **Tax Sale: Redemption: Time.** The time for redeeming property from a tax sale under the provisions of Neb. Rev. Stat. § 77-1837 (Reissue 1981) expires after 3 years plus 90 days from the date of the original sale.
2. **Foreclosure: Liens: Tax Sale: Redemption: Time.** Under Neb. Rev. Stat. § 77-1902 (Reissue 1981), a petition for the foreclosure of a tax lien must be brought within 90 days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based, as provided for in Neb. Rev. Stat. § 77-1837 (Reissue 1981).

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

Ronald Rosenberg and Stanley Gushard of Rosenberg Law Offices, for appellants.

Rex R. Schultze of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellees.

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

PER CURIAM.

Defendants have appealed from an order of the district court which sustained plaintiffs' motion for summary judgment and entered a decree of foreclosure of a county treasurer's certificate of tax sale. Although the defendants specify three assignments of error, the entire issue is whether the action for foreclosure was brought within the time limits prescribed by statute. We affirm.

Both parties filed motions for summary judgment. The facts are not in dispute, as reflected by the briefs of both parties. Lot 6, Block 5, Williams Subdivision, Lincoln, Lancaster County, Nebraska, had been owned by the defendants' decedent and was purchased by the county of Lancaster for delinquent taxes. A certificate of purchase was issued. Neb. Rev. Stat. § 77-1809 (Reissue 1981).

Thereafter, and on November 4, 1982, the certificate was

assigned to the plaintiffs, who also paid all of the subsequent taxes and special assessments up to and including the date of the assignment. Neb. Rev. Stat. § 77-1822 (Reissue 1981). The certificate matured and the plaintiffs were entitled to apply for a tax deed on August 23, 1983. Neb. Rev. Stat. § 77-1837 (Reissue 1981).

Rather than demanding a deed, the plaintiffs filed a petition in the district court on February 3, 1984, to foreclose the lien of their tax certificate. Neb. Rev. Stat. § 77-1902 (Reissue 1981). That section provides in part that "such action shall only be brought within ninety days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based."

Defendants cite the following from § 77-1837: "[A]t any time within ninety days after the expiration of three years from the date of sale of any real estate for taxes . . . if the same shall not have been redeemed, the county treasurer, on request . . . shall execute and deliver to the purchaser . . . a deed of conveyance . . . ."

From that section defendants reason that the time for redemption therefore expires after 3 years from the date of sale, and according to § 77-1902 the foreclosure action must be brought within 90 days of that date, or, in this case, November 21, 1983; the action was not brought until February 3, 1984, and under the provisions of Neb. Rev. Stat. § 77-1856 (Reissue 1981), the tax sale certificate was no longer a valid lien. We do not agree.

The definition of the term "time for redemption" may be deduced from Neb. Rev. Stat. § 77-1824 (Reissue 1981): "The owner or occupant of any land sold for taxes . . . may redeem the same at *any time before the delivery of tax deed* by the county treasurer . . . ." (Emphasis supplied.)

In *Mack v. Luebben*, 215 Neb. 832, 836, 341 N.W.2d 335, 338 (1983), we said: "The evidence shows that Sohn redeemed the property before the tax deed was delivered to Mack. . . . Proof of such redemption defeats any title conveyed by the tax deed."

Defendants overlook pertinent language from the very statutory provision they cite, § 77-1837. That section provides

in part that the county treasurer, on request of the holder of the certificate, shall deliver a deed of conveyance "at any time within ninety days after the expiration of three years from the date of sale . . . *if the same shall not have been redeemed.*" (Emphasis supplied.)

We read that section as plainly stating that a holder of a tax certificate may request a deed at any time after 3 years from the date of sale and up until 90 days thereafter, and because § 77-1824 allows the owner to redeem at any time before delivery of a tax deed, it would be possible for the period of redemption to cover at least 3 years and 90 days. The time for redemption would finally expire in this case on November 21, 1983. The action to foreclose had to be brought within 90 days of that date, which it was.

Defendants also argue that plaintiffs did not comply with the notice provisions of Neb. Rev. Stat. § 77-1831 (Reissue 1981). That section requires a purchaser of a tax certificate, before being entitled to a deed, to serve notice of the intended application for such deed at least 3 months before doing so.

The defendants overlook the fact that there are two separate and distinct methods for the handling of delinquent taxes; i.e., the treasurer's deed method provided for in Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 1981), and the sheriff's deed following a traditional foreclosure, as stated in Neb. Rev. Stat. §§ 77-1901 to 77-1941 (Reissue 1981). *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983). Plaintiffs chose the latter method and were not required to comply with the notice provisions of § 77-1831.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. BARBARA PETERSON, APPELLEE.

366 N.W.2d 780

Filed May 3, 1985. No. 85-070.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Appeal dismissed.

Charles W. Campbell and Vincent Valentino, York Deputy City Attorneys, for appellant.

Kent Jacobs of Blevens, Blevens & Jacobs, for appellee.

HASTINGS, J.

The State has appealed, pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Cum. Supp. 1984), from an order of the Honorable Bryce Bartu, a judge of the district court for York County. That order suppressed "[a]ll evidence seized or secured by the officers while in the defendant's home [February 25, 1984], including the seizure of the defendant . . . as the product of an illegal search and seizure."

Initially, the county court had overruled defendant's motion to suppress. Trial was then had on the complaint, which was for violation of a York city ordinance prohibiting driving while intoxicated, and resulted in a finding of guilty. On appeal to the district court the suppression order was entered, and the cause was reversed and remanded for a new trial.

At the outset the court is faced with a procedural problem which at first was thought to be inconsequential. Barbara Peterson, the defendant, filed a motion to dismiss the appeal because it was prosecuted by Vincent Valentino as county attorney. She argues that the appeal was under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1984), which provisions do not extend to city attorneys nor to prosecutions involving violations of city ordinances, and a county attorney has no authority to prosecute an appeal involving a city ordinance violation. *State v. Linn*, 192 Neb. 798, 224 N.W.2d 539 (1974).

The State's response, through Mr. Valentino who furnished no brief on this issue, is that this was in fact an application for review of an order of suppression under § 29-824. He further

states that he is both the county attorney for York County and a deputy city attorney of York and that he inadvertently signed the notice of appeal in his capacity as county attorney rather than as deputy city attorney.

The first impulse of the court was to consider this as a mere technicality and irregularity and to disregard the objection. However, it now appears that this cannot be done. Section 29-824 provides in substance that the State has the right to appeal any order suppressing evidence upon application of the Attorney General, or of the county attorney or prosecuting officer with the consent of the Attorney General. "Prosecuting officer" is not defined. However, Neb. Rev. Stat. § 29-116 (Cum. Supp. 1984), in similar language, gives the State the right to appeal from an order suppressing statements upon application of the Attorney General, or of the county attorney or prosecuting officer with the consent of the Attorney General.

Neb. Rev. Stat. § 29-104 (Reissue 1979) defines the term prosecuting attorney as any county attorney, and "shall also mean any city attorney or assistant city attorney in a *city of the metropolitan class* when such attorney is prosecuting any violation designated as a misdemeanor or traffic infraction." (Emphasis supplied.)

In order to take advantage of the appeal provisions of § 29-824, the officer prosecuting such appeal must be either a county attorney or a city attorney of a city of the metropolitan class.

This court therefore lacks jurisdiction of this purported appeal, and the same is ordered dismissed.

APPEAL DISMISSED.

VIDEO CONSULTANTS OF NEBRASKA, INC., A NEBRASKA CORPORATION, APPELLEE, V. PAUL L. DOUGLAS, ATTORNEY GENERAL, STATE OF NEBRASKA, AND DONALD KNOWLES, COUNTY ATTORNEY, COUNTY OF DOUGLAS, NEBRASKA, APPELLANTS, IGT NEBRASKA, INC., A NEBRASKA CORPORATION, AND CITY OF BELLEVUE, NEBRASKA, A MUNICIPAL CORPORATION, INTERVENORS-APPELLEES.

367 N.W.2d 697

Filed May 10, 1985. No. 84-092.

1. **Gaming: Lotteries.** Under Neb. Rev. Stat. § 28-1101(6) (Supp. 1983), a lottery is a game of chance in which the winner is determined by mere luck, not by skill, and contains the elements of consideration, a prize, and chance.
2. **Statutes.** Generally, statutory language will be given its plain and ordinary meaning, and a statute is open to construction only if it is ambiguous.
3. _____. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Gaming: Lotteries.** An essential element of a lottery is awarding a prize by chance, but the exact method adopted for application of chance to the distribution of a prize is immaterial.

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

Paul L. Douglas, Attorney General, and Mel Kammerlohr, and Donald L. Knowles, Douglas County Attorney, for appellants.

Warren S. Zweiback and Richard A. DeWitt of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellee.

William R. Johnson of Kennedy, Holland, DeLacy & Svoboda, for intervenor-appellee IGT Nebraska.

John E. Rice, for intervenor-appellee city of Bellevue.

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

PER CURIAM.

Raised in this case is the question whether an electronic gaming machine, such as a video computer, is a form of lottery permitted under statutes enacted by the Nebraska Legislature in

1983 relative to gambling. At the outset we note that the Legislature, in 1984, amended the statute defining "lottery" and specified devices which do not qualify as a "lottery." The 1984 amendment states: "Lottery shall not include any gambling scheme which uses any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding monetary prizes, free games redeemable for monetary prizes, or tickets or stubs redeemable for monetary prizes." Neb. Rev. Stat. § 28-1101(6) (Cum. Supp. 1984).

Nevertheless, because activities have likely occurred involving the 1983 statutes, and liabilities, civil or criminal, may be unresolved due to the uncertainty concerning the legality of activities under the questioned statutes, we are compelled to dispose of the question raised.

Video Consultants of Nebraska, Inc., and IGT Nebraska, Inc., supply video lottery equipment, consultation, and services to nonprofit organizations and political subdivisions authorized to operate lotteries. See Neb. Rev. Stat. §§ 28-1115 to 28-1116.01 (Supp. 1983). The city of Bellevue (Bellevue) is a municipal corporation whose electors have authorized that city to operate a lottery. See § 28-1116. Defendants in this case are the Attorney General of the State of Nebraska and the Douglas County attorney (hereinafter called the "State"), who are charged with enforcing the Nebraska laws prohibiting gambling.

Video Consultants and IGT entered contracts with Bellevue to provide video lottery equipment, consultation, and services in conducting a lottery. In a November 7, 1983, letter to the mayor of Bellevue, the Attorney General stated that the video lottery conducted by Bellevue violated Nebraska's gambling laws, and directed Bellevue to cease operation of its video lottery. According to the Attorney General's letter, failure to remove the video lottery would result in proceedings commenced by the State for an injunction prohibiting Bellevue's further operation of a video lottery.

Video Consultants filed a petition in the district court for Douglas County, seeking a permanent injunction to prevent the State from interfering with operation of video lotteries in

Bellevue and asking the district court to declare video lotteries permissible under Nebraska law. IGT and Bellevue filed petitions to intervene and requested relief substantially similar to that requested by Video Consultants.

For the purpose of trial the State stipulated with Video Consultants and IGT regarding a video lottery.

Video Consultants and the State stipulated:

> The video lottery equipment . . . consists of computer-based video machines which are activated by a participant inserting one or more coins. The machine is equipped with an eighty-number pad from which the participant may select from one to ten numbers. Upon selection of his numbers, the participant activates the machine which selects, purely at random, twenty (20) numbers from the total base of eighty (80) numbers. The participant's winnings, if any, are determined by matching the numbers selected by the participant with the random numbers selected by the machine.
>
> . . . Each machine is equipped with a computer-driven ticket printer which has the capability of printing whatever information is desired. The machine is capable of printing a ticket at the start of each play which reflects the numbers selected by the participant, and another ticket at the conclusion of each play which reflects the winning numbers selected by the machine at random together with the amount which the participant has won, if any. However, for convenience and in order to eliminate the use of excessive paper, the machines, as presently provided by Plaintiff to Sponsors, are programmed to allow a participant to accumulate credits on the machine and, upon activation by the participant at the termination of the participant's use of the machine, to print a single ticket which states the cumulative amount which the participant has won. Each ticket issued in the lottery conducted by Sponsors has the name of the Sponsor clearly printed on each ticket, each ticket bears a number, which numbers are in sequence and each Sponsor keeps a record of all locations where its tickets are issued. Tickets are redeemable for the amount of the prizes awarded by the

Sponsor, Plaintiff or authorized agents. As presently provided by Plaintiff to Sponsors, tickets issued by the machines reflect the amount of winnings and are required to be presented in order for the participant to receive a prize, but the tickets do not have a functional role in determining whether a participant wins or the amount of the winnings.

IGT and the State stipulated:

The video lottery equipment . . . consists of computer-based video machines described as follows:

(a) Each location consists of one or more lottery game terminals connected to an agent terminal. . . . Individuals play the game terminals and can accumulate their winnings on the video meter. If the player leaves without having accumulated any winnings, no losing ticket is printed. However, if the play [sic] accumulates winnings and desires to "cash out," he presses the button on his game terminal labeled "collect winnings." This causes his lottery game terminal to inform the agent terminal which, in turn, causes a winning ticket to be printed by the game terminal. On this ticket is printed a random validation code assigned by the agent terminal, and a copy of the ticket is simultaneously printed on the agent terminal. The player then takes his ticket to the agent for validation and payment.

(b) Daily a central site system dials up each agent terminal to obtain a summary data for that day's play at that location. This data is stored for report distribution and subsequent processing.

(c) The IGT video lottery game uses color graphics, animation, on-screen instructions and sound effects to instruct and inform players. The audio-visual components instruct and inform players. The audio-visual components add greatly to the realism, player involvement and enjoyment of video lottery games. . . . Players will interact with the game through use of a light pen and push buttons.

(d) The game is activated by the insertion of a coin (presently .25¢) but the amount may be changed by owner option.

> (e) The game's random program does not involve any player skill, and will, on average, return approximately 85 percent of the dollar amount played in the form of various size prizes. . . .

On January 16, 1984, the district court held the challenged video lotteries of Video Consultants, IGT, and Bellevue were "lawful and legal conduct of a lottery under the provisions of Neb. Rev. Stat. Sec. 28-1115, 28-1116 and 28-1116.01 (Supp. 1983)."

A series of interrelated gambling statutes applicable to the issue in this case are set forth in pertinent part:

> (5) Gambling device shall mean any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Bingo supplies and equipment as defined in section 9-129, pickle cards as defined in section 9-140.01, pickle card units as defined in section 9-140.05, and tickets, cards, and other items used in the playing phases of schemes defined in sections 28-1113 to 28-1116.01, are not gambling devices within this definition;
>
> (6) Lottery shall mean a gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones, (b) the winning chances are to be determined by a drawing or by some other method based on an element of chance, and (c) the holders of the winning chances are to receive something of value.

§ 28-1101 (Supp. 1983).

> Any county, city, or village may establish and conduct lotteries when the proceeds of such lotteries are used for community betterment purposes and the awarding of prizes to participants.

§ 28-1116.

> Each county, city, or village conducting a lottery shall have its name clearly printed on each lottery ticket used in such

> lottery. No such ticket shall be sold unless such name is so printed thereon. Each county, city, or village conducting a lottery shall keep a record of all locations where its lottery tickets are sold. All tickets shall bear a number, which numbers shall be in sequence.

§ 28-1116.01.

In *CONtact, Inc. v. State*, 212 Neb. 584, 324 N.W.2d 804 (1982), this court held that a lottery is a game of chance in which the winner is determined by mere luck, not by skill, and acknowledged the three elements prescribed by statute for a lottery—consideration, a prize, and chance. See § 28-1101(6).

On appeal the State concedes that the activity produced by the video gaming device is a lottery, but presents two arguments to advance the contention that the video and computerized activity is illegal. First, the State contends a video or electronic machine is a gambling device, because the machine does not qualify for the statutory exemption describing nongambling devices in § 28-1101(5). Second, sale of a ticket used in the "playing phase" of a lottery is indispensable to a statutorily permissible lottery, but the ticket involved in the present case is actually a receipt for or evidence of winning a lottery. Therefore, in the absence of a purchased ticket as a basis for the element of "chance" essential to a lottery, there is no lottery authorized by statute.

The real question before us is one of statutory construction.

In *CONtact, Inc. v. State, supra*, we held that sale of pickle cards by a nonprofit organization was a permissible lottery and stated: "Generally, statutory language will be given its plain and ordinary meaning and a statute is open to construction only if it is ambiguous." *Id.* at 587, 324 N.W.2d at 806.

The State contends that the exemptive phrase "other items," as used in § 28-1101(5), refers to objects having the essential characteristics of tickets or cards used for a lottery, or which are associated with tickets and cards as paraphernalia used to conduct or participate in a lottery, for example, a tumbler or box where tickets are mixed before selection through chance.

Obviously, video and electronic machines are being used in production of a lottery. In its regulation of gambling, had the Legislature intended to exclude a machine, especially an

electronic or video gaming device, as an object proscribed in a permissible lottery, such exclusion was not an impossible statutory feat. Yet, the Legislature employed unrestrictive, generic terms in describing the means to conduct a permissible lottery so that any article or any method was available in the "playing phase" of a legal lottery. This court cannot now insert into the statute an exclusion or restriction which the Legislature might have included when enacting § 28-1101(5) and (6) in 1983. We cannot assume that the Legislature intended to exclude electronic gaming devices from "other items used in the playing phases" of a lottery authorized by statute. As expressed in *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 523, 294 N.W.2d 330, 334 (1980):

> The lack of clarity cannot be corrected by administrative or judicial construction. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

See, also, *Wendt v. Cavalier Ins. Corp.*, 197 Neb. 622, 250 N.W.2d 243 (1977). We conclude that the electronic gaming devices involved in this case are not "gambling devices" as such phrase and description are used in § 28-1101(5).

Regarding the State's contention that a ticket or card must be included as an indispensable part of a lottery, in *CONtact, Inc. v. State, supra*, we cited and quoted with approval the language of *Forte v. United States*, 83 F.2d 612, 615 (D.C. Cir. 1936): "One of the essential elements of a lottery is the awarding of a prize by chance, but the exact method adopted for the application of chance to the distribution of prizes is immaterial." This court cannot rewrite § 28-1101(5) and (6)(b), as well as § 28-1116, to the effect that "winning chances are to be determined by drawing a purchased ticket as the only basis for the element of chance." Purchase of a ticket is not the only means of participating in a lottery otherwise permissible under Nebraska's gambling statutes.

AFFIRMED.

MELANIE HINZMAN, APPELLANT, V. RICHMAN GORDMAN STORES, INC., A NEBRASKA CORPORATION, APPELLEE.

367 N.W.2d 131

Filed May 10, 1985. No. 84-114.

1. **Equal Opportunity Commission: Appeal and Error.** Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo upon the record.
2. _____: _____. On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings if they are supported by substantial evidence.

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

Tom F. Wilson of Rosenberg & Taute, for appellant.

James C. Zalewski and Mark M. Schorr of Alaniz, Bruckner & Sykes, for appellee.

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and WOLF, D.J.

WOLF, D.J.

This is an appeal from an order of the district court for Lancaster County, Nebraska, reversing, vacating, and setting aside the final order of the Nebraska Equal Opportunity Commission.

Appellant, Melanie Hinzman, commenced employment for the appellee on March 28, 1979, as a security officer or loss prevention officer. Her duties were the detection of and apprehension of shoplifters and employee surveillance. At the time of her initial employment, she was single. On August 2, 1980, she was married. Sometime prior to October 1980, she advised her supervisor that she thought she might be pregnant. This was confirmed by her physician, and her physician gave her written authority to continue her employment during pregnancy. The appellant was terminated as an employee on January 8, 1981, resulting in the appellant's filing a complaint with the Nebraska Equal Opportunity Commission alleging sex discrimination.

Hearing was held before a hearing examiner on December 9,

1982. The hearing examiner filed his recommended order and decision with the Nebraska Equal Opportunity Commission on April 18, 1983, finding that the appellant had "satisfactorily proved" that the reasons for her termination were in fact pretextual for terminating her employment with the appellee solely on the grounds of her pregnancy and that such conduct on the part of the employer was intentional. The hearing examiner recommended an order and finding by the Nebraska Equal Opportunity Commission that the appellant recover from the employer wages in the amount of $19,256.24, less $35 interim earnings.

On June 10, 1983, after reviewing the recommended order and decision of the hearing examiner, the Nebraska Equal Opportunity Commission issued a final order accepting in total the recommended order and decision of the hearing examiner, and issued said recommended order as the final order of the commission.

Appeal from that final order to the district court for Lancaster County resulted in an order of that court dated January 10, 1984, reversing, vacating, and setting aside the order and judgment of the Nebraska Equal Opportunity Commission.

A review of the evidence presented to the hearing examiner discloses that the employer based its termination of the appellant upon her violation of published policies or procedures and instructions of her supervisors. The evidence strongly supports a finding that the three-step process requiring, first, an oral warning, followed by a separate written warning, followed by a termination, was adhered to by the employer. Appellant received oral warning on October 27, 1980, for being in the office doing paperwork when she had been instructed to be on the floor for surveillance. She received a written warning on December 15, 1980, for leaving $30,000 worth of jewelry unattended on top of a desk. The termination on January 8, 1981, was based on her continuing failure to punch out on the timeclock for lunch break, despite several prior reminders. The violations are not disputed by the appellant, but the appellant suggests that her treatment by the employer and the attitude toward her after pregnancy was

different than prior to her pregnancy. The evidence does not support those theories, nor does it give any support to the charge raised by the appellant that she was harassed by her supervisors or fellow employees.

The appellant, in her brief to this court, raises as her sole assignment of error "The Court erred in determining that the findings of the Nebraska Equal Opportunity Commission were not supported by a preponderance of the evidence."

The appellant is mistaken as to the standard of review of decisions of the Nebraska Equal Opportunity Commission. Neb. Rev. Stat. § 48-1120 (Reissue 1984) relates to an appeal by a party to the district court from an order of the commission, and reads in part as follows:

> (3) The evidence presented before the commission as reported by its official stenographer and reduced to writing, shall be duly certified to by the stenographer and the chairperson of the commission as the true bill of exceptions, which, together with the pleadings and filings duly certified in the case under the seal of the commission, shall constitute the complete record and the evidence upon which the case shall be presented to the district court. The determination of the case by the district court shall extend to all questions of law and fact presented by the entire record before it. The commission's orders shall not be vacated, modified, or set aside unless: (a) Such order is prohibited by the provisions of sections 48-1101 to 48-1125, or in violation of constitutional rights, or otherwise contrary to law; or (b) The findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence.

This court has previously determined that the standard of review by the district court is by trial de novo upon the record. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984); *Snygg v. City of Scottsbluff Police Dept.*, 201 Neb. 16, 266 N.W.2d 76 (1978).

Similarly, this court has previously determined that on appeal of review by the district court of an order of the

Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings if they are supported by substantial evidence. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm., supra; Snygg v. City of Scottsbluff Police Dept., supra.*

From the record we find that there is substantial evidence in support of the findings and order of the district court. The appellant had not met her burden to prove by a preponderance of the evidence that the reasons for termination as articulated by the employer were pretextual in nature. The record does not support a finding that the employer engaged in discriminatory practices against the appellant or subjected her to disparate treatment for any reason relating to her sex, her pregnancy, or her decision not to take voluntary maternity leave.

Simply stated, the fact of her pregnancy does not suspend the appellant from usual nondiscriminatory employment policies and procedures.

The order of the district court is affirmed.

AFFIRMED.

LILA H. ELSE, APPELLEE, V. DELMER L. ELSE, APPELLANT.

367 N.W.2d 701

Filed May 10, 1985. No. 84-173.

1. **Divorce: Legislature: Constitutional Law.** Nonexistent at common law, divorce is a matter within the exclusive and supreme province of the Legislature, subject to limitations imposed by the Constitutions, state and federal.
2. **Divorce: Jurisdiction: Alimony: Statutes.** Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.
3. **Divorce: Alimony.** In a system of "no fault" divorce, spousal misconduct alone or fault by itself does not determine whether a spouse is entitled to alimony.
4. **Divorce: Alimony: Modification of Decree.** Cohabitation, together with a showing that such arrangement improved a former spouse's overall financial condition, might warrant a modification of alimony.

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

Andrew J. McMullen, for appellant.

John E. Dier, for appellee.

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

SHANAHAN, J.

Delmer L. Else appeals the decree of dissolution entered in the district court for Phelps County regarding his marriage with Lila H. Else. We affirm the district court's decree as modified.

After a trial the district court entered its decree containing a finding that the marriage of Lila and Delmer Else was irretrievably broken and provisions for a division of property and alimony.

The decree required Lila to pay Delmer alimony of $50,000 in annual installments of $5,000 for 10 years, "subject however, to the limiation [sic] that the said alimony shall terminate on the death of either the petitioner or the respondent, upon the remarriage of the respondent, or upon the co-habitation of the respondent with a women [sic] other than the petitioner out of wedlock."

Delmer complains that the division of property and the amount of alimony are incorrect. Additionally, Delmer contends the district court was incorrect in decreeing that alimony payable to Delmer would terminate upon Delmer's cohabitation with a woman other than Lila but unmarried to such other woman.

Although Delmer complains about the division of property and amount of alimony ordered by the district court, there is no bill of exceptions. Consequently, we review the record to determine whether the pleadings support the judgment entered by the trial court. See *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981).

The question of law presented is actually one of statutory construction, whether Nebraska statutes concerning dissolution of marriage authorize a court to insert into a decree a condition for termination of alimony upon the recipient's

cohabiting with one of the opposite sex to whom the alimony recipient is not married.

Nonexistent at common law, divorce is a matter within the exclusive and supreme province of the Legislature, subject to limitations imposed by the Constitutions, state and federal. See, *Larsen v. Erickson*, 222 Minn. 363, 24 N.W.2d 711 (1946); *Moran v. Moran*, 173 So. 2d 916 (Miss. 1965); *Young v. Young*, 207 Ark. 36, 178 S.W.2d 994 (1944); *The People ex rel. Doty v. Connell*, 9 Ill. 2d 390, 137 N.E.2d 849 (1956). In *O'Neill v. O'Neill*, 164 Neb. 674, 678-79, 83 N.W.2d 92, 95 (1957), this court stated: "[T]he legislative authority of the state has full control over the mode, manner, time and place of the proceedings for divorce and generally of the procedure in actions for divorce."

In order to ascertain the intent of the Nebraska Legislature regarding alimony in terms of the question raised in this appeal, we must place current statutes in their historical perspective. Before the present statutes, Nebraska's divorce laws specified grounds which included adultery, physical incompetence, imprisonment for 3 years or life, willful abandonment, habitual drunkenness, incurable insanity, and extreme cruelty. See Neb. Rev. Stat. §§ 42-301 and 42-302 (Reissue 1968). Further, except in the case of an adulterous wife, a court was empowered to order alimony as suitable support of a wife. See Neb. Rev. Stat. § 42-318 (Reissue 1968).

In 1972 the Nebraska Legislature made sweeping and fundamental changes in statutes governing divorce. In order to reduce guilt and conflict as incidents of divorce, as well as minimize bitterness resulting from attempts to place blame for an unsuccessful marriage with either husband or wife, the Nebraska Legislature enacted legislation eliminating the entire conceptual structure of fault as a requisite for a divorce. Under the new law adopted in 1972, a spouse is no longer required to make specific complaint about the other spouse's misconduct; instead, the allegation that a marriage is "irretrievably broken" is the sole allegation necessary for dissolution of a marriage. See Neb. Rev. Stat. § 42-353 (Reissue 1984). To dissolve a marriage a court need only find that a marriage is "irretrievably broken." See Neb. Rev. Stat. § 42-361 (Reissue 1984). In this

manner a divorce is granted to both husband and wife without any finding or allocation of fault on the part of either party.

The law revised in 1972 also provided:

> 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. . . . [O]rders for alimony may be modified or revoked for good cause shown . . . . 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.
>
> . . . 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.

(Emphasis supplied.) Neb. Rev. Stat. § 42-365 (Reissue 1984).

" ' "Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." . . .' " *Detter v. Erpelding*, 176 Neb. 600, 614, 126 N.W.2d 827, 834 (1964); *Sosso v. Sosso*, 196 Neb. 242, 242 N.W.2d 621 (1976).

When enacting § 42-365 in 1972, the Legislature had ample opportunity to retain misconduct of a spouse or former spouse as a factor to be considered in determining whether to allow or continue alimony. However, misconduct as a bar to alimony, before or after divorce, was not retained by the Legislature. Rather, receipt of alimony depends on "economic circumstances" described in the statute adopted in 1972.

> Alimony is not awarded as a reward to the receiving spouse or as punishment of the spouse against whom it is

> charged. It is an effort, insofar as is reasonably possible, to rectify the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife. Its continuation is not dependent on the good conduct of either spouse.

Drummond v. Drummond, 267 Ark. 449, 453, 590 S.W.2d 658, 661 (1979). The Legislature has dictated that financial issues between the parties, such as alimony, shall be disposed on the basis of economic needs of a spouse or former spouse. Were § 42-365 to be interpreted in such a manner that misconduct by itself was determinative of spousal support, such interpretation would reinsert fault as a factor or criterion regarding alimony, in derogation of the clearly indicated legislative intent to the contrary. In a system of "no fault" divorce, spousal misconduct alone or fault by itself does not determine whether a spouse is entitled to alimony. See, *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973); *Dixon v. Dixon*, 107 Wis. 2d 492, 319 N.W.2d 846 (1982); *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972); *Vann and Vann*, 24 Or. App. 31, 544 P.2d 175 (1976); *Boyd v. Boyd*, 421 A.2d 1356 (Me. 1980).

However, cohabitation, together with a showing that such arrangement improved a former spouse's overall financial condition, might warrant a modification of alimony. *Roth v. Roth*, 218 Neb. 417, 355 N.W.2d 516 (1984).

We note that legislatures of some states have enacted statutes which make cohabitation in and of itself a bar to a former spouse's continued receipt of alimony. See, Ala. Code § 30-2-55 (repl. 1983) ("living openly or cohabiting with a member of the opposite sex"); Cal. Civ. Code § 4801.5 (West 1983) ("cohabiting with a person of the opposite sex"); Conn. Gen. Stat. Ann. § 46b-86 (West Supp. 1984) (cohabitation); Ga. Code Ann. § 19-6-19 (1982) (voluntary cohabitation continuously and openly in a "meretricious relationship with a person of the opposite sex").

"Public policy concerning divorce and its incidents is a matter for the Legislature, not the courts, to decide." *Weber v. Weber*, 200 Neb. 659, 664, 265 N.W.2d 436, 440 (1978). " 'Divorce and its incidents are matters of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the

courts. . . .' " *Detter v. Erpelding, supra* at 614, 126 N.W.2d at 834.

Unquestionably, the matter of divorce is a legislative prerogative. The Legislature is the appropriate forum for resolution of questions concerning public policy. With respect to questions about a statute, our role is limited to interpretation and application of statutes, irrespective of our personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute. Our role involving legislation is akin to that of another brigade, ". . . not to make reply . . . not to reason why." However, we hope for a fate better than that which befell the other brigade.

The condition for termination of alimony upon Delmer's cohabitation, as ordered by the district court, is incorrect and is deleted from the judgment entered by the district court. With such modification the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

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

ANDREA YORK, APPELLANT, V. LESLIE YORK, JR., APPELLEE.

367 N.W.2d 133

Filed May 10, 1985. No. 84-236.

1. **Divorce: Due Process: Jurisdiction.** As a general rule, it is not inconsistent with due process to allow a court in personam jurisdiction over a nonresident party to a domestic relations action when the forum state was the place of last marital domicile, assuming the wording of the so-called long arm statute is broad enough to embrace such action.
2. **Divorce: Jurisdiction.** The establishment of a marital relationship in this state from which a nonresident has left is sufficient minimum contact with this state under the provisions of Neb. Rev. Stat. § 25-536 (Cum. Supp. 1984) to permit a court of this state to exercise in personam jurisdiction over the nonresident in an action to dissolve that marriage.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded for further proceedings.

Kevin Ruser, for appellant.

No appearance for appellee.

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

HASTINGS, J.

This is an appeal from a holding by the district court that it had not acquired personal jurisdiction of respondent in a marriage dissolution case under the provisions of Neb. Rev. Stat. § 25-536 (Cum. Supp. 1984). We reverse and remand.

Petitioner, a resident of Scotts Bluff County for 38 years, brought this action for dissolution of marriage against her husband, the respondent. At the time this action was filed in October of 1983, respondent was, and since December of 1982 had been, absent from the state. He was served personally with summons in Fruitland, Idaho. Respondent neither answered nor appeared in any of the proceedings.

According to the testimony of the petitioner, she and the respondent were married in Nebraska in November of 1965 and lived together in Nebraska until he left in 1982. Five children, ranging in age from 4 to 19 years, were born of that marriage. The parties own a house located in Melbeta, Nebraska, which is worth $15,000, or approximately what is owed on it. There is no evidence that respondent has been making any payments on the house or for the support of his family.

Section 25-536 provides in part: "A court may exercise personal jurisdiction over a person: . . . (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States."

The narrow question presented is whether § 25-536 provides for in personam jurisdiction over a presently nonresident party to a marriage dissolution action when Nebraska was the last place of marital domicile and the former spouse and all children still reside in Nebraska.

It is quite apparent from the language of the section, "to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States," that it was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents.

The relevant restriction on a state's power to obtain in personam jurisdiction is twofold: (1) That the defendant be given adequate notice; and (2) That the defendant be subject to the personal jurisdiction of the court. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

In the present case there is no question of adequate notice, as the defendant was personally served at his place of employment in Idaho. The remaining question is whether the defendant maintained sufficient "minimum contacts" with the State of Nebraska so as to subject himself to the jurisdiction of its courts. See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

In *World-Wide Volkswagen, supra*, the U.S. Supreme Court divided the concept of minimum contact into two distinguishable functions: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292. In a more recent case, *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982), the Court relaxed its reliance on the federalism argument and stated:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.

Id. at 703 n.10.

As a result, the focus is on the defendant and whether it is fair to require him to litigate in a state that is not his residence. "Thus the test for personal jurisdiction requires that 'the

maintenance of the suit . . . not offend "traditional notions of fair play and substantial justice." ' "*Insurance Corp., supra* at 702-03, quoting *Internat. Shoe, supra.*

A number of jurisdictions have decided this issue. The majority have found that it *is* consistent with due process to allow a court in personam jurisdiction over a nonresident party to a divorce action when the forum state was the place of last marital domicile. See, *Plucker v. Plucker*, 338 N.W.2d 842 (S.D. 1983); *Varney v. Varney*, 222 Kan. 700, 567 P.2d 876 (1977); *Bunker v. Bunker*, 261 Ark. 851, 552 S.W.2d 641 (1977); *Crofton v. Crofton*, 106 Misc. 2d 546, 434 N.Y.S.2d 116 (1980); *Ex parte Brislawn*, 443 So. 2d 32 (Ala. 1983); *Robinson v. Robinson*, 56 N.C. App. 737, 289 S.E.2d 612 (1982). See, also, R. Casad, Jurisdiction in Civil Actions ¶ 9.02[4][a] (1983).

The U.S. Supreme Court made it clear in *Kulko v. California Superior Court*, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978), that the mere presence of one party in a state along with the children of the parties is not enough to obtain in personam jurisdiction over the nonresident party.

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . . ."

Id. at 93-94, quoting *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

In *Kulko*, New York was the marital residence of the parties. It had been such for some 13 years. The parties separated and the wife moved to California. The children remained with the father in New York until some 2 to 4 years later, when the children voluntarily moved to California. The wife maintained an action in California relating to divorce proceedings. The California courts rejected the husband's objection to jurisdiction. In reversing, in addition to the language earlier quoted, the U.S. Supreme Court made the following interesting comment:

> Finally, basic considerations of fairness point decisively in favor of appellant's [husband's] State of domicile as the

> proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent.

Id. at 97.

In the instant case there is no unilateral, arbitrary action by the plaintiff. Rather, it is the unilateral action of the defendant, by moving to another state and leaving behind his five children and his wife of 17 years, that causes the problem. The parties resided together as husband and wife for 17 years in the State of Nebraska. That would seem to be a privilege of which Mr. York availed himself and, as determined by most jurisdictions, is substantial enough to be a minimum contact with the state once he has departed.

The court did acquire in personam jurisdiction of the respondent, and the cause is reversed and remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A UNITED STATES CORPORATION, APPELLANT, V. CAL-NEB LAND CO., A PARTNERSHIP, ET AL., APPELLEES.

367 N.W.2d 136

Filed May 10, 1985. Nos. 84-248, 84-285.

Foreclosure: Taxes: Words and Phrases. 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.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

R. Kent Radke of Badami & Radke, for appellant.

Wright & Sorensen, for appellees.

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

BOSLAUGH, J.

This appeal arises out of an action by the plaintiff-appellant, First Federal Savings and Loan Association of Lincoln (First Federal), to foreclose its mortgage on property of the defendant-appellee Cal-Neb Land Co. (Cal-Neb).

On April 21, 1980, Cal-Neb mortgaged property in Box Butte County, Nebraska, to First Federal for $390,000. The mortgage, insofar as is relevant here, provided in paragraph 20, entitled "Assignment of Rents; Appointment of Receiver; Lender in Possession":

> Upon acceleration under paragraph 18 hereof or abandonment of the Property, Lender, in person, by agent or by judicially appointed receiver shall be entitled to enter upon, take possession of and manage the Property and to collect the rents of the Property, including those past due. *All rents collected by Lender or the receiver shall be applied first to payment of the costs of management of the Property* and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and reasonable attorney's fees, and then to the sums secured by this Mortgage Lender and the receiver shall be liable to account only for those rents actually received.

(Emphasis supplied.)

After Cal-Neb became in default, First Federal commenced the foreclosure proceedings. First Federal filed an application for receiver stating, inter alia, "that it is necessary that a receiver be appointed . . . to collect the rents, issues and profits therefrom, and to apply the same upon unpaid taxes and upon said mortgage indebtedness, as set forth in the assignment of rents embodied in the mortgage . . . ." On May 19, 1983, the trial court appointed a receiver. Although the order was silent as to the payment of taxes, the receiver was required "[t]o pay all normal recurring monthly bills, including, but not limited to utilities and other obligations that would be the normal landlord's obligation."

On October 24, 1983, the district court found that there was

due and owing First Federal upon the mortgage $436,918.27 with interest thereon at the rate of $147.96 per day from October 1, 1983, and $83 advanced by First Federal for abstracting expenses and its costs. The property was ordered sold to satisfy the lien. The decree further provided that the "[d]efendants are entitled to credit for the amounts collected by the receiver appointed in these proceedings which amount less approved expenses of the receiver and the receiver's fees, shall be determined at the time of confirmation of sale herein . . . ."

The property was sold at the sheriff's sale on January 4, 1984, to First Federal for $450,000. First Federal filed a motion to confirm the sale on January 19, 1984. Among the allegations therein First Federal stated that "the sale herein should be confirmed subject to adjustments for the amounts held by the receiver." An accounting filed by the receiver at the same time disclosed that there was in his possession $20,372.55 after the collection of rents and profits on the property, less expenses not including the payment of taxes. On February 10, 1984, the sale was confirmed.

On February 21, 1984, First Federal filed a motion for a new trial on the basis that the funds held by the receiver should be applied to pay the delinquent real estate taxes. This motion was overruled. On March 16, 1984, First Federal filed a motion for an order authorizing the receiver to pay the real estate taxes. The motion was also overruled. First Federal then appealed from each of these orders.

The separate appeals have been consolidated in this court, and the sole issue is whether the excess funds in the hands of the receiver shall be used to pay the delinquent real estate taxes.

An action to foreclose a real estate mortgage is an action in equity which is reviewed de novo on appeal. *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (1984).

The disposition of this appeal is controlled by our decision in *Conservative Sav. & Loan Assn. v. Karp*, 218 Neb. 217, 352 N.W.2d 900 (1984). In *Karp* the lender brought an action to foreclose a deed of trust. The district court thereafter entered an order allowing the lender to take possession of the property and collect the rents from the property. The decree of foreclosure provided that the rents collected should be applied

to reduce the amounts due the lender.

At the sheriff's sale the property was bought by Arlo Hanson. When Hanson purchased the property, half of the taxes were unpaid and delinquent. Hanson paid the taxes and then intervened in the foreclosure proceedings to collect the taxes he had paid. We held that the lender was in the position of a mortgagee in possession of the premises as a receiver and, as such, had a contractual duty imposed by the deed of trust to apply the rents collected "first to payment of the costs of management of the Property . . . ." *Id.* at 220, 352 N.W.2d at 902. We further held that "the phrase 'costs of management,' as used in the deed of trust in this case, includes all expenses necessary to perpetuate the actual commercial use of real estate, including the payment of real estate taxes." *Id.* at 221, 352 N.W.2d at 903.

In this case the mortgage contained identical provisions. Specifically, the parties contracted that a judicially appointed receiver "shall be entitled to . . . collect the rents of the Property" and that all rents collected "shall be applied first to payment of the costs of management of the Property." Pursuant to *Karp*, the rents collected by the receiver should have been applied to the payment of the delinquent real estate taxes.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HASTINGS, J., not participating.

JUDY L. NEMEC, APPELLEE, V. RICHARD J. NEMEC, APPELLANT.

367 N.W.2d 705

Filed May 10, 1985. No. 84-390.

1. **Divorce: Child Support: Jurisdiction.** Full and complete general jurisdiction over the entire marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of a marriage is properly filed.
2. **Divorce: Modification of Decree.** An application to modify the terms of a decree of divorce is not an independent proceeding.
3. **Judgments: Jurisdiction: Appeal and Error.** A judgment is a matter of record, and can only be changed, set aside, or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment.
4. **Divorce: Child Support: Jurisdiction: Venue.** A court which has jurisdiction in a divorce action does not lose its continuing jurisdiction over child support matters when a support order in the action is transcribed and filed with the clerk of the district court in another county.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

James S. Watson of McHenry and Watson, for appellant.

Tom Dawson of Landis & Dawson, for appellee.

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

BOSLAUGH, J.

The marriage between the petitioner, Judy L. Nemec, and the respondent, Richard J. Nemec, was dissolved by the district court for Dodge County, Nebraska, on June 19, 1974. Sometime thereafter, both parties became residents of Lancaster County, Nebraska. The Dodge County decree was filed in the district court for Lancaster County on September 13, 1983.

On October 10, 1983, the respondent filed an application in the district court for Lancaster County for modification of the Dodge County decree. The district court for Lancaster County entered an order modifying the decree on March 29, 1984. That order was set aside on that court's own motion on April 9, 1984. The record indicates that the trial court found that it was without jurisdiction. The respondent has appealed and

contends that the district court for Lancaster County erred in finding that it did not have jurisdiction to modify the Dodge County decree. The issue presented is whether the district court for Lancaster County has jurisdiction to modify the judgment in a dissolution proceeding which was commenced in Dodge County, Nebraska.

Neb. Rev. Stat. § 42-351(1) (Reissue 1984) provides that in divorce actions

> the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorneys' fees.

Concerning issues related to an application to change physical custody of minor children, this court said in *Nimmer v. Nimmer*, 203 Neb. 503, 505, 279 N.W.2d 156, 158 (1979), "once the original decree was entered the court had continuing jurisdiction until all the children were of legal age or emancipated." And in an even more recent consideration of the scope of § 42-351, this court stated: "It is clear that by this statute full and complete general jurisdiction over the entire marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of a marriage is properly filed." *Robbins v. Robbins, ante* p. 151, 154, 361 N.W.2d 519, 521 (1985).

An application to modify the terms of a decree of divorce is not an independent proceeding. *Ruehle v. Ruehle*, 161 Neb. 691, 74 N.W.2d 689 (1956). As this court explained in *Ruehle*, such an application is simply a proceeding supplementary or auxiliary to an action in which certain matters theretofore determined are by the very terms of the statute subject to modification.

The court below was correct in finding that it did not have jurisdiction to modify the Dodge County decree. That finding is supported by our decision in *Rasmussen v. Rasmussen*, 131

Neb. 724, 269 N.W. 818 (1936). That case involved the jurisdiction of the district court for Douglas County to vacate a decree of adoption rendered in the county court for Douglas County therein. This court stated:

> "A judgment is a matter of record, and can only be changed, set aside or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment. If this were not so, chaos would result. . . ."

Id. at 726, 269 N.W. at 819.

The basic question raised in this case is the same as that considered by the North Dakota Supreme Court in *Nygord v. Dietz*, 332 N.W.2d 708 (N.D. 1983). There, the appellant argued that the district court of Grand Forks County did not have jurisdiction under a statute providing for enforcement of support orders to modify the child support payments ordered in a decree rendered by the district court of Cass County. Finding that the district court of Grand Forks County did in fact lack such jurisdiction, the court said:

> A court in this State which has jurisdiction to hear a divorce action continues to have jurisdiction over matters pertaining to the custody, care, and education of the children of the marriage and may vacate or modify any decree as is deemed appropriate in the best interests of the children. . . . However, a court which has jurisdiction in a divorce action does not lose its continuing jurisdiction over child-support matters when a support order in the action is transcribed and filed with the clerk of the district court in another county in accordance with Section 14-08-07(2), N.D.C.C.
>
> . . . This section gives the district court of the county to which the support order is transcribed the authority to enforce the support order by issuing a citation for contempt of court against the person who has failed to make the payments. Sec. 14-08-07(1), N.D.C.C. It does not confer upon that court jurisdiction to modify or alter a support order previously issued by the district court of the county which granted the divorce and which has continuing jurisdiction over matters of child custody, care,

> and support.
>
> A distinction must be made between the jurisdiction to enforce a transcribed judgment and the jurisdiction to modify such a judgment. An order by one district judge cannot be circumvented by commencing a second action on the same facts in a different county.

Id. at 709-10.

Since both of the parties are now residents of Lancaster County, an application could be made to the district court for Dodge County, Nebraska, to transfer the action to the district court for Lancaster County, under the provisions of Neb. Rev. Stat. § 25-410 (Reissue 1979).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALAN L. LICHTI, APPELLANT.

367 N.W.2d 138

Filed May 10, 1985. No. 84-437.

1. **Drunk Driving: Appeal and Error.** In drunk driving cases 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Drunk Driving: Evidence: Proof.** Either a law enforcement officer's observations of defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages.
3. **Criminal Law: Motor Vehicles: Police Officers and Sheriffs.** One who drives in response to the lawful order of a law enforcement officer engages in privileged conduct and may not be punished for so doing.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with the direction to dismiss.

Jeffrey H. Jacobsen, Buffalo County Public Defender, for appellant.

A. Eugene Crump, Deputy Attorney General, and Timothy E. Divis, for appellee.

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

CAPORALE, J.

Defendant, Alan L. Lichti, was charged in the county court with second offense driving while under the influence of alcohol. He pled not guilty but was convicted following a bench trial. He was thereupon sentenced to jail for a period of 30 days, fined $500, had his driver's license suspended for 1 year, and was assessed costs. The conviction and sentence were thereafter affirmed by the district court. Lichti assigns as error to the district court (1) the failure to find the evidence insufficient to support the conviction; (2) the failure to find he was legally justified in driving, since he was doing so at the behest of a law enforcement officer; and (3) the failure to find that the trial court erred in not advising him of his rights under Neb. Rev. Stat. § 39-669.07(3) (Reissue 1984). Although we find the evidence sufficient to support the finding that Lichti was driving while under the influence of alcohol, we agree with his contention that the conviction and sentence cannot stand, as his driving was, under the circumstances, privileged. In view of that determination we do not consider his third assignment of error. The cause is reversed and remanded with the direction that the charge be dismissed.

In the early morning hours of July 27, 1983, Officer Larsen of the Kearney Police Department responded to a call reporting an unwanted person at the home of Lichti's brother, located on East 47th Street. When Larsen arrived, he found Lichti standing beside his car, which was parked, possibly with the motor running, on the south side of 47th Street, facing west, near his brother's residence.

Larsen testified that he talked with Lichti for approximately 3 to 4 minutes from a distance of 3 to 4 feet and, although he could recall no odor of alcohol, concluded that Lichti had been drinking because his speech was slurred and he did not always make sense, although not making sense did not appear to Larsen to be unusual for Lichti.

Larsen did not believe Lichti to be intoxicated to the point that his driving ability was impaired, and administered no field sobriety tests. Larsen testified on direct examination that he told Lichti he was not welcome at his brother's house and "requested that he leave and go straight home." On cross-examination Larsen answered affirmatively to the question "And you requested that he get into his car and drive home?"

Lichti thereupon drove west of 47th Street to a cul-de-sac, turned around and went east to Avenue N, made a U-turn, drove past his brother's house, and made another U-turn at Avenue L. At this point Officer Colling, who had been called as support for Larsen, stopped Lichti because he had seen Lichti drive over the street curb twice while traveling as described above.

Colling testified that Lichti had slurred speech, swayed when he walked, had a flushed face, and had an odor of alcohol on his breath. Colling asked Lichti to perform a number of field sobriety tests. Lichti was asked to touch the tip of his nose with both his right and left index fingers, but instead touched the side or bottom of his nose. Next, Lichti was asked to take five steps forward, touching the heel of one foot to the toe of the other, then turn around and take six steps back in the same manner. Lichti had difficulty maintaining his balance with this test, staggering and stopping periodically to regain his balance. Lichti's explanation at trial was that he was wearing cowboy boots at the time, which had pointed toes and slanted heels, causing him to do poorly on this particular test.

Lichti was also asked to pick up some keys from the pavement while standing on one leg and raising the other. When he bent over to pick up the keys, he lost his balance, fell to the left, spun around, and was not able to complete the test. Colling then asked Lichti for his driver's license and registration, but was handed some business cards instead.

Colling testified that in his opinion Lichti was driving while under the influence of alcohol, and consequently undertook to arrest him. Lichti resisted Colling's efforts to transport him to the sheriff's office, but with the assistance of two other officers, the arrest was completed.

A corrections officer who observed Lichti after the arrest testified that in his opinion Lichti was intoxicated.

Lichti testified that during a 4½-hour span on that evening, he had drunk four beers and a whiskey sour and had a six-pack of beer with him in the car.

As to the first assignment of error, Lichti contends that since the testimony of Larsen and Colling about his level of intoxication was not consistent, a reasonable doubt was raised about his guilt, and, therefore, there is insufficient evidence to sustain the conviction. This contention is without merit.

It is well established 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 trier 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. Morse*, 211 Neb. 448, 318 N.W.2d 893 (1982).

Colling's testimony supplies more than ample evidence to support the finding that Lichti was driving while under the influence of alcoholic liquor. Either a law enforcement officer's observations of defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages. *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984); *State v. Morse, supra; State v. Betts*, 210 Neb. 348, 314 N.W.2d 257 (1982); *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982).

The fact that Larsen concluded Lichti was not so under the influence of alcohol as to have impaired driving ability does not alter the fact that the evidence supports a contrary conclusion. As such, Lichti's first assignment of error must fail.

Lichti next argues that his conviction cannot stand, since he was driving at the direction of a police officer.

Neb. Rev. Stat. § 39-604(1) (Reissue 1984) provides: "Any person who knowingly fails or refuses to obey any lawful order of any law enforcement officer who is controlling or directing traffic shall be guilty of a traffic infraction."

We have said that "lawful" implies that the act in question is

" 'authorized, sanctioned, or at any rate not forbidden, by law.' " *State v. Reeves*, 199 Neb. 725, 728, 261 N.W.2d 110, 113 (1978).

To control is to dominate or rule. Webster's Third New International Dictionary, Unabridged 496 (1968). It is to exercise restraining or directing influence over another. Black's Law Dictionary 298 (5th ed. 1979).

State v. Brown, 107 Wis. 2d 44, 318 N.W.2d 370 (1982), presents a somewhat similar situation. Therein, Brown admitted that he had been traveling 72 miles per hour in a 55-mile-an-hour zone. He testified, however, that he had been traveling in the right-hand lane at the speed limit when he noticed a vehicle behind him swerving in a violent manner and traveling at a high rate of speed, coming within 10 feet of the rear of Brown's automobile. That vehicle then passed Brown's automobile and reentered Brown's traffic lane, slowing to a speed of approximately 15 to 25 miles an hour. When Brown attempted to pass the vehicle, it speeded up to match his speed and took a position in Brown's "blind spot." When Brown speeded up or slowed down, the vehicle matched Brown's speeds so as to maintain its position. That pattern of behavior continued until the vehicle displayed flashing red lights and signaled Brown to pull over. The trial court refused to give Brown's requested legal justification instruction. The Wisconsin Supreme Court reversed for a new trial, holding such an instruction should have been given. Although we do not accept all of that court's reasoning in reaching its result, we are persuaded that there are instances where the conduct of a law enforcement officer may excuse violation of the statute which prohibits driving while intoxicated. See, also, *People v. Jensen*, 37 Ill. App. 3d 1010, 347 N.E.2d 371 (1976).

The *Brown* facts are certainly more egregious than those presented here. We find no suggestion in the record that Larsen intended to have Lichti drive while intoxicated. On the contrary, the record leads us to conclude that Larsen simply misapprehended the extent of Lichti's intoxication. Nonetheless, irrespective of his intent, Larsen did command Lichti to drive. That command was a lawful order as contemplated by § 39-604(1). While it is true that to drive when

intoxicated is prohibited by law, the act of driving itself is not. Once Lichti was told to drive away, his choice was either to do as he was directed or to subject himself to the consequences of incurring a law enforcement officer's displeasure. He was effectively under Larsen's control. Under these circumstances we conclude Lichti's driving was privileged conduct for which he cannot be punished.

REVERSED AND REMANDED WITH THE DIRECTION TO DISMISS.

NEIL R. SALMON, APPELLEE, V. SUSAN K. SALMON, APPELLANT.

367 N.W.2d 142

Filed May 10, 1985. No. 84-508.

1. **Property Division: Appeal and Error.** The division of property in marriage dissolution cases is a matter which rests in the sound discretion of the trial judge. Although it is reviewed de novo on the record on appeal, the judgment will be affirmed in the absence of an abuse of discretion.
2. **Alimony.** In determining whether alimony should be awarded, the ultimate criterion is one of reasonableness.
3. **Child Support.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered.
4. **Alimony: Child Support: Property Division: Appeal and Error.** Alimony, child support, and property settlement issues must be considered together to determine whether a court has abused its discretion.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Affirmed as modified.

Michael H. Powell of Powell & Powell, for appellant.

Timothy J. Otto of Whitney, Newman, Mersch, Otto & Warren, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a

marriage.

The petitioner, Neil R. Salmon, and the respondent, Susan K. Salmon, were married on February 12, 1972. They have two children, Shad, age 10, and Annette, age 8. The parties separated in March of 1983. This action was commenced on May 19, 1983.

The trial court dissolved the marriage and granted custody of the children to the respondent. She was awarded $125 per child per month for child support.

The respondent was awarded the household goods in her possession, a 1977 Ford LTD, and the personal effects belonging to her and the children. The petitioner was awarded various farm implements and tools, including an IH tractor, the unsold property from the parties' former bar, and his personal effects. The parties were ordered to pay the debts on the personal property awarded to them individually. Additionally, the respondent was ordered to pay the indebtedness to Visa, MasterCard, Kissel's, J.C. Penney, and the First National Bank of Aurora (that is, home improvement loans totaling $4,334.24); whereas the petitioner was ordered to pay miscellaneous indebtedness remaining from the parties' bar venture, totaling $982.58, and personal property taxes. No alimony was awarded, and the parties were ordered to pay their own attorney fees.

The residence owned by the parties was awarded to the respondent, subject to a lien in favor of the petitioner in the amount of $15,000.

The respondent has appealed and has assigned as error: (1) The finding that the residence was not a gift to the respondent from her parents; (2) The award of $15,000 to the petitioner; (3) The failure to award the respondent alimony; (4) The failure to award the respondent attorney fees; and (5) The inadequacy of the award of child support.

Both parties were 37 years old at the time of the divorce. The petitioner has been a construction worker since October 31, 1983, with a monthly take-home pay of $600. For approximately 2 years prior to that time, he managed a bar owned by the parties, which produced little or no profit. During this time, the respondent supported the family with her income

as a self-employed beautician. At the time of the hearing, her monthly take-home pay was approximately $750.

In 1975 the parties purchased the respondent's childhood home from her parents for $10,000. The contract provided for an $800 downpayment and monthly payments of $102.14 over the following 10 years. On July 22, 1983, the respondent's parents notified the parties by letter that they were behind on their payments and demanded receipt of the same within 30 days. The petitioner then borrowed $2,485 from the bank and paid the balance due on the home.

Considering, first, the contention of the respondent that the home was a gift to her, we considered an analogous situation in *Anstine v. Anstine*, 214 Neb. 808, 336 N.W.2d 552 (1983). In *Anstine* the husband contended that his mother had intended to make a partial gift to him of certain real estate, and to that extent it should not be included in the marital estate. We held that the property should have been considered as a part of the marital estate. We said that any other finding "would be in direct conflict with the recorded legal title which conveyed the real estate to both parties jointly, and the parol evidence adduced was not of the type which is 'clear, unequivocal, and convincing,' to the extent that it would overcome the recitals in the deed." *Id.* at 812, 336 N.W.2d at 554.

The respondent's mother, Bertha Larson Davis, testified, "Well I thought that Susan and her children would always have a home and I just figured I was giving them a gift. I didn't tell them I was giving them a gift, but I figured I was." The petitioner testified that there was never any discussion that the residence was a gift. It is undisputed that a gift tax return was not filed in connection with the transaction; no gift was claimed or set forth on the transfer statement; no documentary evidence existed in support of any alleged gift; and the only evidence to support the claim of a gift consisted of the testimony of the respondent's mother. This evidence was not so clear, unequivocal, and convincing as to overcome the recitals in the deed which conveyed the property to the parties as joint tenants.

The respondent next contends that it was error for the trial court to award the petitioner a lien for $15,000 on the property.

It is clear from the record that this award was intended to be a part of the division of the marital estate. At the hearing on the motion for a new trial, the trial court stated, "It's simply a division of property that could not be divided in kind."

The respondent argues that it is "patently unfair" to require a payment of $15,000 to the petitioner, considering her income, because she would be forced to borrow the money. This would reduce her monthly income and her ability to maintain a home for herself and her children.

The division of property in marriage dissolution cases is a matter which rests in the sound discretion of the trial judge. Although it is reviewed de novo on the record on appeal, the judgment will be affirmed in the absence of an abuse of discretion. *Rockwood v. Rockwood, ante* p. 21, 360 N.W.2d 497 (1985). " '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.)" *Choat v. Choat,* 218 Neb. 875, 877, 359 N.W.2d 810, 812 (1984); *Applegate v. Applegate, ante* p. 532, 365 N.W.2d 394 (1985).

Considering the respondent's limited income and the fact that the only property of value in her possession is the home, it is unreasonable to assume that she could pay the petitioner $15,000 unless she borrowed it or sold the home. Either alternative would make it very difficult for her to provide the children with a home and the necessities of life.

Under the circumstances in this case we think the award of $15,000 to the petitioner as a lien on the residence was an abuse of discretion. A more reasonable award would be one that would permit the petitioner to receive a fair property settlement but not unduly burden the respondent's ability to care for the children. We conclude that the decree should be modified to award the petitioner $10,000; the same to be paid, without interest, in 10 years, or when the respondent remarries or sells the home, whichever occurs first. This modification will allow the respondent to maintain a home for the children during their minority but ensure that the petitioner receive some share in the property.

So far as the other assignments of error are concerned, we

find the award of child support to be reasonable and the refusal to award alimony or attorney fees reasonable, under the facts and circumstances.

As we stated in *Lainson v. Lainson, ante* p. 170, 174, 362 N.W.2d 53, 56 (1985):

> "[I]n determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account . . . ." That statement should be broadened to include that the circumstances referred to should be consideration of the financial condition of the parent making the child support payments.

The test of reasonableness applies in determining an award of attorney fees, *Choat, supra*, and in determining an award of alimony. As was quoted in *Gleason v. Gleason*, 218 Neb. 629, 632-33, 357 N.W.2d 465, 467 (1984):

> 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.

None of these matters can be considered in isolation in determining whether the trial court abused its discretion. See, e.g., *Van Cleave v. Van Cleave*, 201 Neb. 211, 214, 266 N.W.2d 900, 902 (1978) ("[A]limony, support, and property settlement issues must be considered together to determine whether a court has abused its discretion. . . . The crucial question in this case is whether the respondent can reasonably be expected to pay all the amounts required.").

As we view the record, there is no reasonable basis at this time for an increase in the award of child support, an award of

alimony, or an award of attorney fees. The judgment is, therefore, in all other respects affirmed.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF R.H., T.H., AND J.H., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. T. H., APPELLANT.

367 N.W.2d 145

Filed May 10, 1985. Nos. 84-557, 84-558.

Parental Rights. An order terminating parental rights must be supported by clear and convincing evidence.

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

Lisa C. Lewis of Byrne, Rothery, Borchers & Lewis, P.C., for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky, for appellee.

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

WHITE, J.

This is an appeal from the separate juvenile court of Douglas County. The court ordered the parental rights of the mother of the children terminated. We review the matter de novo upon the record to determine if the order is supported by clear and convincing evidence. *In re Interest of S.A.S., ante* p. 500, 363 N.W.2d 546 (1985).

The evidence discloses that R.H., a male child born July 1, 1977, T.H., a female child born December 9, 1980, and J.H., a male child born December 28, 1981, were born out of wedlock to the mother, T.H., and conceived through different fathers.

R.H. came into the juvenile system when temporary custody was awarded to the Douglas County Department of Social

Services at a hearing on March 3, 1982, for protective reasons. At a subsequent hearing, evidence was adduced that R.H., then 4 years of age, bore evidence of a severe beating at the hands of the mother's live-in boyfriend. On May 24, 1982, R.H. was adjudged to be a neglected child. Neb. Rev. Stat. § 43-202(2)(c) (Reissue 1978). Subsequent dispositional hearings placed the child in foster care, and a rehabilitative order was entered directing the mother to correct the circumstances leading to the adjudication and to provide R.H. with a wholesome and suitable environment.

T.H. and J.H. entered the juvenile system on October 5, 1982, as a result of another temporary order for protective custody, resulting from the mother's incarceration on a theft conviction. Subsequent adjudication of neglect followed, and T.H. and J.H. were placed in foster care.

The familiar litany of review hearings, counseling, and failure to comply, even minimally, with court-ordered rehabilitation plans followed, resulting in the final termination of parental rights on May 30, 1984. At the time of the termination hearing, the mother was an inmate in the Nebraska Center for Women in York, serving a term of 1 year for her third theft conviction, and was pregnant with her fourth child, father not revealed.

To detail the utter failure of the mother to even remotely effect a minimum rehabilitation is an exercise in judicial frustration. On July 8 and November 5, 1982, the court ordered that the mother shall:

a. Obtain adequate housing and furnishings to include at least a two bedroom and separate beds for each child;
b. Undergo a drug evaluation as arranged by the Child Protective Service Worker to include a urinalysis screening complete the day of the next Court hearing at Equilibrium, and she shall obtain adequate treatment as indicated by the evaluation;
c. Participate with the Visiting Nurses Association;
d. Participate in a parenting program through ENSHA to include the in home parenting instruction;
e. Obtain a source of legal income;

f. Participate in the financial program at Franklin Community Credit Union and allow them to become the protective payee of her checks and authorize them to pay her bills;
g. Dissassociate [sic] herself from [M.J.B., her former live-in boyfriend];
h. Cooperate with the workers involved in this case and make herself available to meetings with the workers;
i. Have reasonable rights of visitation as arranged by Douglas County Social Services;
j. Notify the Court within 24 hours of a change in residence.

The record discloses that the mother has had at least 16 different places of residence in the last 2 years, excluding correctional facilities. At a number of these residences court services officers assigned to the case were not permitted inside the residence, and frequently new addresses were withheld from these workers.

The mother successfully passed infrequent drug screenings, and court workers reported no indications that she was using drugs. However, she continued to live with persons using drugs on a continuing basis, in violation of the court's order. As the Visiting Nurses Association was denied access to her residences, the services of this group were discontinued. The mother's attendance at parenting classes was sporadic, and caseworkers found it difficult to assess her progress in the program due to infrequent contact.

As far as obtaining a legal source of income, the mother worked less than a total of 2 months and had been fired from at least two of the four jobs she did temporarily hold. Although ordered to disassociate herself from M.J.B., her former live-in boyfriend, the mother continued to have contact with this man until shortly before her last arrest in the fall of 1983. The record further reveals that the mother did exercise her visitation rights approximately two-thirds of the allotted times.

After over 2 years of social service, psychiatric and psychological counseling, CETA training, and home visits by the Visiting Nurses Association, the mother, pregnant, incarcerated, without a job and no promise of any, continuing

to associate with persons she was ordered not to associate with, now requests this court to grant yet another round of hearings while the children languish in foster care.

The law is not unmindful of a mother's love, of the crippling effects of a history of child abuse and alcoholic parents, and of the grinding effects of an inferior education and habitual poverty, but the law is also not so cruel that punishment for these apparently unchangeable conditions should be imposed on the children. If the only way to break the chain is termination, the law and this court will not flinch. The only hope for R.H., T.H., and J.H. is termination.

The judgment is affirmed.

AFFIRMED.

DONALD D. GRAHAM, APPELLANT, V. RONALD E. WAGGENER ET AL., APPELLEES.

367 N.W.2d 707

Filed May 10, 1985. No. 84-635.

1. **Res Judicata: Causes of Action.** The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts. If so, the same cause of action has been alleged, even if different theories of recovery are relied upon.
2. **Res Judicata: Judgments: Causes of Action.** Res judicata rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
3. **Res Judicata: Actions.** While a party is entitled to an adjudication of his rights, a proliferation of actions in which the same issues are raised is not proper and will not be tolerated.

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

Monte Taylor of Taylor, Hornstein, Peters & Kluver, and J. Patrick Green, for appellant.

Lawrence I. Batt and Thomas P. Kenny of Batt & Brodkey, for appellees.

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

PER CURIAM.

Donald D. Graham, plaintiff-appellant, seeks to recover a contractual fee from certain investors, the defendants-appellees. The district court, finding that the issues raised by Graham's petition had been fully litigated and decided both by the trial court and this court, sustained the investors' motion for summary judgment, thereby dismissing Graham's petition. Graham appeals, assigning as error, in summary, the trial court's conclusion that he is precluded from maintaining this suit. We affirm and award the investors an attorney fee.

In 1974 Graham organized an investment group whereby the individual investors combined their money to purchase a block of stock in Freezer Services, Inc. Graham undertook to act as agent for the investment group and to provide them a variety of services. The various investors signed a letter agreement which provided that Graham was to be paid a percentage of all future dividends paid to the group on the Freezer Services, Inc., stock, together with a percentage of each investor's profit on his investment.

In 1978 certain of the investors filed a lawsuit against Graham and named the nonplaintiff investors as defendants. That litigation ultimately found its way to this court as *Beavers v. Graham*, 209 Neb. 556, 308 N.W.2d 826 (1981) (*Beavers I*). The suit sought, among other things, the removal of Graham as the group's agent, and an accounting. We adopted the trial court's orders and thereby mandated the removal of Graham as the investment group's agent, adjudicated the amount due him, and further decreed that he receive no future compensation. Graham's motion for rehearing was denied by this court on September 16, 1981.

After this court's decision the investors found it necessary to obtain from the trial court an order requiring Graham to comply with the *Beavers I* mandate so as to prevent him from interfering with their voting rights. Graham's appeal of that

order to this court resulted in its dismissal, without a published opinion, as frivolous. *Beavers v. Graham*, No. 81-861 (Feb. 2, 1982).

The investors then sold their stock in Freezer Services, Inc. Graham thereafter filed the present suit. Graham's petition does not refer to the prior suits, but does mention that he "has thus far been paid [a sum] per investment unit in partial payment of" his fee, and seeks to credit the investors with that payment.

Graham argues that neither the doctrine of res judicata nor that of collateral estoppel applies so as to preclude the maintenance of this present suit. The central thesis of his argument is that as he made no counterclaim for compensation in *Beavers I*, that issue has neither been fully litigated nor adjudicated.

That thesis overlooks several important facts. The first is that *Beavers I* removed Graham as the investment group's agent, thereby terminating his relationship with the investors. That event, coupled with the fact that *Beavers I* sought an accounting, necessarily means that the issue of compensation was addressed. As observed by Graham, there is authority which holds that as an accounting is by its very nature the setting off of credits and debits, affirmative relief may be granted a defendant whether he seeks it or not. *Miller v. Joannes*, 262 Wis. 425, 55 N.W.2d 375 (1952). Moreover, a review of the brief filed by Graham in *Beavers I* reveals that he did in fact address the issue of compensation. Graham's sixth assignment of error read: "The court erred in ordering that the defendant shall not be entitled to receive future compensation for his services on behalf of the investment group." Finally, and most importantly, *Beavers I* unambiguously denies Graham "any future compensation for services on behalf of the investment group . . . ." 209 Neb. at 558, 308 N.W.2d at 828.

The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts. If so, the same cause of action has been alleged, even if different theories of recovery are relied

upon. The doctrine rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Simpson v. City of North Platte*, 215 Neb. 351, 338 N.W.2d 450 (1983).

The adjudication by this court in *Beavers I* was a final judgment on the merits by a court of competent jurisdiction, all the parties in the present action were parties in *Beavers I*, and the cause of action in the present action is the same as that in *Beavers I*. Ergo, the doctrine of res judicata bars the present action.

Having so determined, it is unnecessary to consider whether the doctrine of collateral estoppel applies as well.

As there exists no genuine issue of material fact and the investors are entitled to judgment as a matter of law, the trial court correctly dismissed Graham's action by sustaining the investors' motion for summary judgment. *Yankton Prod. Credit Assn. v. Larsen, ante* p. 610, 365 N.W.2d 430 (1985).

We must now address the investors' request for an attorney fee for the services of counsel in this court.

The present suit was commenced in the district court on September 23, 1983. As of August 26, 1983, Neb. Rev. Stat. § 25-824 (Cum. Supp. 1984) was amended to provide as follows:

> A pleading shall not be used against a party in any criminal prosecution or action or proceeding for a penalty or forfeiture, as proof of a fact admitted or alleged in such pleading. Allegations or denials which are frivolous or made in bad faith shall subject the party or attorney pleading the same to the payment of such reasonable expenses, including reasonable attorney's fees, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such pleading. If a pleading is frivolous or made in bad faith, it may be stricken. The signature of a party or of an attorney on a pleading constitutes a certificate by him or her that he or she has read the pleading; that to the best of his or her knowledge, information, and belief there is good ground for the filing of the pleading; and that it is not interposed for delay.

The cleverly crafted, but nonetheless disingenuous, argument presented to us by Graham in this case does not conquer the overriding fact that he, and his attorneys, simply chose to ignore a fully binding adverse final judgment. While Graham was certainly entitled to an adjudication of his rights, a proliferation of actions in which the same issues are raised is not proper and will not be tolerated. *Stones v. Plattsmouth Airport Authority*, 193 Neb. 552, 228 N.W.2d 129 (1975). See, also, *Cedars Corp. v. Sun Valley Development Co.*, 213 Neb. 622, 330 N.W.2d 900 (1983). Such a tactic engenders disrespect for law and justice and unnecessarily adds to the caseload of an already overburdened judicial system.

Accordingly, we award the investors the sum of $1,000 to apply toward the services of their attorneys in this court, and tax the same to Graham. But for the fact that the amendment to § 25-824 permitting the assessment of reasonable expenses, including attorney fees, to attorneys is new, a portion of the attorney fee awarded to the investors would have been taxed to Graham's attorneys. This provides due warning for the future.

AFFIRMED.

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

367 N.W.2d 710

Filed May 10, 1985. No. 84-668.

1. **Juvenile Courts: Child Custody: Jurisdiction.** Failure to immediately take reasonable measures, as provided by Neb. Rev. Stat. § 43-250 (Reissue 1984), to notify a parent that temporary custody has been taken of a juvenile pursuant to the provisions of Neb. Rev. Stat. § 43-248 (Reissue 1984) does not deprive the juvenile court of jurisdiction.
2. **Juvenile Courts: Pleadings: Jurisdiction.** Failure to file a petition within 48 hours, as provided by Neb. Rev. Stat. § 43-275 (Reissue 1984), after a juvenile has been taken into custody pursuant to Neb. Rev. Stat. § 43-248 (Reissue 1984) does not deprive the juvenile court of jurisdiction.
3. **Trial: Evidence: Presumptions: Appeal and Error.** In a trial to the court the presumption is that the trial court considered only such evidence as is competent

and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.

4. **Evidence: Appeal and Error.** Where the review is de novo, evidence which should not have been admitted by the trial court will be disregarded by the reviewing court.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Laurice M. Margheim, for appellants.

M. Roger Schneekloth, Box Butte Deputy County Attorney, for appellee.

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

CAPORALE, J.

The county court, sitting as a juvenile court, placed temporary care and custody of S.S.L., a female child born on May 30, 1979, in and with the Nebraska Department of Social Services. The minor's parents appealed to the district court, which affirmed the placement. On appeal to this court the parents assign a number of errors which may be summarized as claiming that (1) the county court failed to acquire jurisdiction and (2) there exists insufficient evidence that the minor's status is such as to warrant the placement ordered. We find the assignments to be without merit and accordingly affirm.

This case began with the father's effort to remove the child from participation in the Head Start program because the child was becoming unmanageable. He suggested that if the child's behavior did not change, he would have to either tie or lock up the child. Having observed bruises on the child's face, a Head Start employee called the matter to the attention of the Department of Social Services. The mother admitted to the social worker that she was frustrated and nervous, could not control the child, had on more than one occasion struck the child hard enough to leave bruises, and feared that she might injure the child.

On that same day an ex parte hearing was had before the county judge, at which the foregoing information was

presented. The judge then ordered the issuance of a "pickup order," directing the sheriff to "deliver" the child to the custody of the "Department of Public Welfare."

The parents are correct in asserting that the statutes of this state do not provide for such a procedure. However, Neb. Rev. Stat. § 43-248 (Reissue 1984) empowers any peace officer to take temporary custody of a juvenile who, among other things, "is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection . . . ." Given the statements of the father, the admissions of the mother, and the presence of unexplained bruises, the sheriff would have had the authority under the foregoing statutory language to take and deliver the child to the Department of Social Services without intervention by the county judge. The fact that the county judge issued an order directing the sheriff to do what the sheriff could otherwise have done prejudiced the parents not at all.

It was not until October 21, 1983, that a sketchy petition was filed in the county court, alleging that the child lacked proper parental care by reason of the fault or habits of the parents, and praying that the child be cared for according to law and the duty of the state. Although the sheriff received the summons on the very day the petition was filed, he, for reasons which the record does not explain, did not serve the parents until October 27.

The parents again correctly assert that Neb. Rev. Stat. § 43-250 (Reissue 1984) requires an officer who has taken temporary custody of a child to "immediately take reasonable measures to notify the juvenile's parent . . . ." Further, the parents observe that under the provisions of Neb. Rev. Stat. § 43-275 (Reissue 1984), a petition was to have been filed within 48 hours after the child was taken into custody.

The time limits imposed by §§ 43-250 and 43-275 obviously were not met. While we do not condone what appears to be the cavalier disregard of the procedural statutes of this state, we cannot conclude, in the absence of direct statutory language to the contrary, that the county court failed to acquire, or somehow lost, jurisdiction of the matter. See *Cole v. M.L. Rawlings Ice Co.*, 139 Neb. 439, 297 N.W. 652 (1941), holding that the failure of the district court to conduct a hearing within

14 days after the filing of the bill of exceptions, as the statute provided, did not deprive the district court of jurisdiction to hear an appeal from the compensation court.

We move on, therefore, to the remaining assignment of error, the sufficiency of the evidence.

On December 20, 1983, an amended petition was filed, adding the allegations that the parents lacked the skills required to provide minimum nurturing and nutritional care and that they had physically abused the child between October 1 and 15, 1983. An adjudication hearing was had on January 12, 1984, at which the parents were represented by counsel, and the child by a guardian ad litem.

The evidence at that hearing established the events presented to the judge on October 14. The mother's complaints to the social worker about the child's behavior were that the child jumped on a bunk bed and knocked the texture off a ceiling.

The foster mother, with whom the Department of Social Services had placed the child, testified that when first placed with her, the child was "real nervous" and would shake, pinch, and scratch herself. She noticed that "[i]f I would pick up something she would duck and like cover her face." She related an incident when the child accidentally broke a ceramic turtle belonging to the foster mother:

> I was out of the room when it happened. She started screaming and crying and shaking — just went out of — I would say out of her head, but - - -
>
> Q- Kinda hysterical?
>
> A- Yes. A hysteric state of mind. I didn't know what was going on, so I came in the room. My husband was frightened to death because he didn't know how to handle the situation. I took her and just held her and talked to her. Finally she kinda got calmed down, but she was just so upset and things.

The foster mother also testified that when the child first came to live with her family, the child used many vulgar or "cuss words" but that at the time of the hearing there was "hardly any of that kind of talk." The foster mother reported that she had observed a change in the child's behavior since living with her family; the child was much calmer. "Like if you go to comb her

hair she don't duck now and frightened of you." The child was also getting along well with the foster mother's child.

The Head Start employee testified she noted bruises on several different occasions prior to the time the child was placed in the department's custody, but noticed only one after that time, which came from a bicycle fall.

It was also established that the child had been temporarily removed from her parents' home on an occasion prior to October 14, 1983, because of burns on the child's arms.

At a later dispositional hearing the court ordered the child committed to the custody of the Department of Social Services. The department was ordered to file a report within 30 days detailing a plan of care and services for the child and another report within 60 days detailing a plan for the parents, aimed at enabling them to recover custody of the child. The court also ordered visitations to continue 2 hours every other week, and set a date for a review of the case.

Neb. Rev. Stat. § 43-284 (Reissue 1984) provides that when a child is adjudged to fall within Neb. Rev. Stat. § 43-247(3) (Reissue 1984), the court may, among other options, commit the child to the "care and custody of the Department of Social Services." § 43-284(5). The question, then, is whether the evidence establishes that the child falls within § 43-247(3)(a), as alleged by the State. That statute provides in pertinent part that the juvenile court shall have jurisdiction over a juvenile "who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; . . . or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . ."

In arguing that the evidence is insufficient, the parents first complain that the social worker should not have been allowed to testify about the child's prior temporary removal from the parents' care.

In re Interest of Hollenbeck, 212 Neb. 253, 322 N.W.2d 635 (1982), disposes of this argument adversely to the parents. Therein, the appellant claimed that the trial court had erred in admitting evidence of a prior pattern of behavior at the adjudication hearing which led to the termination of her parental rights. We stated:

> As to considering evidence of past patterns of behavior in making the adjudication, Neb. Rev. Stat. § 43-206.03(2) (Reissue 1978) states: "The adjudication portion of hearings shall be conducted by the judge without a jury, applying the customary rules of evidence in use in trials without a jury." Section 27-404 is a part of the "customary rules of evidence," and thus it was not error for the trial court to receive such evidence at the adjudication hearing. . . . In this case, evidence of patterns of behavior were clearly relevant to the allegations against the appellant with reference to her notice of the father's actions. The assignment is without merit.

Id. at 261-62, 322 N.W.2d at 640.

Although the juvenile code has been renumbered in our statutes and modified in part, the provisions cited in *Hollenbeck* remain essentially the same today.

The parents next contend that the provision of Neb. Rev. Stat. § 43-279(2) (Reissue 1984) which states that "the court shall make a finding and adjudication . . . based on proof . . . by a *preponderance of the evidence* whether or not the juvenile is a person described by subdivision (3)(a) of section 43-247" deprives them of due process. (Emphasis supplied.)

We have held that an order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of S.A.S., ante* p. 500, 363 N.W.2d 546 (1985); *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). It appears, however, that we have not yet determined whether the federal or this state's Constitution, notwithstanding the lesser standard specified by § 43-279(2), requires that an order depriving a parent of the temporary care and custody of his or her child must also be supported by clear and convincing evidence. Neither do we decide the issue in this case, for we conclude from our independent review of the record, *In re Interest of Spradlin*, 210 Neb. 734, 317 N.W.2d 59 (1982), that the evidence clearly and convincingly establishes that the parents, by reason of their fault or habits, failed to provide proper parental care and thus placed the child in a situation injurious to her health.

The question raised by the parents as to visitation for Christmas past is moot and therefore is not discussed.

Discussion of the question as to the admission of the testimony claimed to be hearsay is also unnecessary, for the same evidence was otherwise adduced. As such, any hearsay testimony was cumulative and therefore harmless. *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 350 N.W.2d 541 (1984). Moreover, and perhaps more importantly, in a trial to the court the presumption is that the trial court considered only such evidence as is competent and relevant. The reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment. *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980). In addition, and perchance most importantly, where the review is de novo, evidence which should not have been admitted by the trial court will be disregarded by the reviewing court. *In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983).

These rules also dispose of the parents' claims that a witness was not qualified to express an opinion as to the age of certain bruises.

The evidence is sufficient, disregarding all of the questioned testimony.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS M. ROLF, APPELLANT.

367 N.W.2d 715

Filed May 10, 1985. No. 84-795.

Constitutional Law: Due Process: Blood, Breath, and Urine Tests: Trial. 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.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Vincent P. Sutera of Sutera & Sutera, for appellant.

A. Eugene Crump, Deputy Attorney General, and Jill Gradwohl, for appellee.

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

WHITE, J.

The issue presented to the court in this appeal is whether the due process rights of a person charged with operation of a motor vehicle while intoxicated are violated when the breath sample of the defendant is not preserved for examination by the defendant and presentation at trial.

While this matter was pending, this court ruled on that issue in *State v. Vernon*, 218 Neb. 539, 541-42, 356 N.W.2d 887, 889-90 (1984), where we said:

> 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 judgment of the district court is affirmed.

AFFIRMED.

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Abatement, Survival, and Revivor

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5. Neb. Rev. Stat. § 21-20,104 (Reissue 1983) is a survival statute which destroys the capacity of former shareholders of a dissolved corporation to sue or be sued on rights entirely dependent upon and existing solely as an outgrowth of the shareholder status except within 2 years after the corporation has been dissolved. The language in *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), which characterizes § 21-20,104 as a statute of limitations, is disapproved, as is any such suggestion which may be contained in *Barnes v. Hampton*, 198 Neb. 151, 252 N.W.2d 138 (1977).
   Van Pelt v. Greathouse 478

Accord and Satisfaction

1. The principal questions to be asked in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction? and (2) Does that performance constitute a sufficient consideration for a return promise or for a discharge?
   Rosenberg v. Lincoln Fed. Sav. & Loan Assn. 689
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   Rosenberg v. Lincoln Fed. Sav. & Loan Assn. 689

3. An accord and satisfaction of a claim or demand, whether liquidated or unliquidated, may be, and where the parties so intend or agree is, effected by the transfer and acceptance of property.
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Actions

1. A private individual, with standing, may bring suit in district court to enjoin an alleged violation of the zoning laws or ordinances.
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Beatrice Manor v. Department of Health 141
5. In cases where the Legislature has authorized suits against the State of Nebraska and has required that summons shall be served as in other cases, without detailed specification, the method of serving summons specified for use in any other type of action against the state constitutes service "as in other cases." To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), is in conflict with this rule, it is overruled.
Beatrice Manor v. Department of Health 141
6. When the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), conflicts with this holding, it is overruled.
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7. In an action to quiet title the plaintiff is required to recover based upon the strength of his own title and not upon any weakness in the title of his adversary.
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8. A landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain.
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9. A landowner has a right to join with an action for equitable relief a claim for temporary damages.
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10. Acquittal on a criminal charge is no bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceedings were based.
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11. Neb. Rev. Stat. § 20-148 (Reissue 1983) does not constitute a waiver of sovereign immunity by the State of Nebraska for actions brought in federal court under 42 U.S.C. § 1983 (1982).
Patteson v. Johnson 852
12. *Todd v. Board of Educational Lands and Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951), does not interpret any enactment of the Nebraska Legislature as constituting a waiver of this state's sovereign immunity for actions brought in federal court pursuant to contract.
Patteson v. Johnson 852
13. The provision of Neb. Const. art. V, § 22, which states, "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," is not self-executing. Legislative action is necessary to make it available.
Patteson v. Johnson 852
14. While a party is entitled to an adjudication of his rights, a proliferation of actions in which the same issues are raised is not proper and will not be tolerated.
Graham v. Waggener 907

Administrative Law

1. An administrative agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency.
Beatrice Manor v. Department of Health 141
2. In conducting a judicial review of an administrative agency's decision under Neb. Rev. Stat. § 84-917 (Reissue 1981), the reviewing court may reverse or modify such decision which may have prejudiced the substantial rights of a party because it was in excess of the statutory authority or jurisdiction of the agency. In such cases, in order to assess the validity of the agency's decision, the reviewing court is authorized to consider the validity of the

criterion employed by the agency.
Beatrice Manor v. Department of Health 141
3. An administrative agency may not employ its rule-making power to modify, alter, or enlarge the decision-making criteria provided for in the enabling legislation, such as Neb. Rev. Stat. §§ 71-5851 et seq. (Reissue 1981).
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4. On appeal from the review conducted by the district court, the Supreme Court's de novo review is limited to considering whether the agency decision was supported by substantial evidence and whether the proper rules of law, i.e., criteria, have been applied.
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5. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.
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6. In applying the substantial evidence standard, the reviewing court is not free to substitute its judgment for that of the administrative agency.
Beatrice Manor v. Department of Health 141
7. In construing Neb. Rev. Stat. § 71-5857 (Reissue 1981), which requires the Department of Health to distinguish between rural and urban areas, the remainder of the section, which declares that such distinction must be made only to the extent that variable standards between the two areas will benefit the development of the most appropriate health care system for the particular area, must also be considered.
Beatrice Manor v. Department of Health 141
8. The Nebraska State Personnel Board does not have authority to ignore the provisions of a union contract, approved by the Legislature, between employees and another state agency.
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9. The judgment or order of an administrative agency is rendered when the decision is announced upon the law and the facts.
Kizzier Chevrolet Co. v. General Motors Corp. 319
10. In order to perfect an appeal from an order of the Nebraska Motor Vehicle Industry Licensing Board, an appeal bond must be filed with the board within 10 days of the rendition of the order. Neb. Rev. Stat. § 60-1415 (Reissue 1984).
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11. Acquittal on a criminal charge is no bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceedings were based.
Raymond v. Department of Motor Vehicles 821

Adoption

Under the provisions of Neb. Rev. Stat. § 43-110 (Reissue 1984), an adopted child, in the absence of specific testamentary directions to the contrary, inherits from the antecedents of an adoptive parent to the same extent as do the adoptive parent's natural children. Section 43-110 negates *In re Estate of Clarke*, 125 Neb. 625, 251 N.W. 279 (1933).
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Aiding and Abetting

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
State v. Bennett 601

Alimony

1. In dissolution of marriage cases, actions for the modification of alimony will, on appeal, 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.
   Cooper v. Cooper 64
   Creager v. Creager 760
2. Good cause for altering alimony provisions in a divorce decree is demonstrated by a material and substantial change of circumstances.
   Cooper v. Cooper 64
3. An alimony recipient's obtaining employment after the date of the decree is a circumstance that permits the situation of the parties to be reexamined.
   Cooper v. Cooper 64
4. The ultimate test for division of marital property and an award of alimony is one of reasonableness.
   Applegate v. Applegate 532
5. The standard of review of the division of property and the award of alimony in marriage dissolution cases is that these matters are 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.
McCollister v. McCollister 711
6. 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, and a history of the contributions to the marriage by each party.
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McCollister v. McCollister 711
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Creager v. Creager 760
9. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.
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10. In a system of "no fault" divorce, spousal misconduct alone or fault by itself does not determine whether a spouse is entitled to alimony.
Else v. Else 878
11. Cohabitation, together with a showing that such arrangement improved a former spouse's overall financial condition, might warrant a modification of alimony.
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12. Alimony, child support, and property settlement issues must be considered together to determine whether a court has abused its discretion.
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1. Generally, a landlord has no duty to supervise the general maintenance of tenants' animals in the building.
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2. Dogs are not livestock, and the care or production of dogs is not included in the term "animal husbandry."
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Appeal and Error

1. The division of property in marriage dissolution cases is a matter initially entrusted to the sound discretion of the trial judge, which will be reviewed on appeal de novo on the record and affirmed in

the absence of an abuse of the trial judge's discretion.
Rockwood v. Rockwood 21
Salmon v. Salmon 899
2. Where the order of the Nebraska Public Service Commission is not based on any evidence in the record before the commission, the Supreme Court, on review, will reverse such order.
In re Petition of G. Kay, Inc. 24
3. The findings of the court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
Havelock Bank v. Woods 57
Schmode's, Inc. v. Wilkinson 209
4. In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.
Havelock Bank v. Woods 57
Armstrong v. Hartford Life Ins. Co. 128
5. In dissolution of marriage cases, actions for the modification of alimony will, on appeal, 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.
Cooper v. Cooper 64
Creager v. Creager 760
6. Equity actions on appeal to this court are triable de novo on the record, subject to the rules that 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 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.
Burgess v. Omahawks Radio Control Org. 100
Cline v. Franklin Pork, Inc. 234
7. Issues not properly raised in the pleadings nor litigated at trial will not generally be considered for the first time on appeal.
Armstrong v. Hartford Life Ins. Co. 128
8. An administrative agency which is charged with the responsibility of protecting the public interest, as distinguished from

determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency.
Beatrice Manor v. Department of Health 141
9. In conducting a judicial review of an administrative agency's decision under Neb. Rev. Stat. § 84-917 (Reissue 1981), the reviewing court may reverse or modify such decision which may have prejudiced the substantial rights of a party because it was in excess of the statutory authority or jurisdiction of the agency. In such cases, in order to assess the validity of the agency's decision, the reviewing court is authorized to consider the validity of the criterion employed by the agency.
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10. On appeal from the review conducted by the district court, the Supreme Court's de novo review is limited to considering whether the agency decision was supported by substantial evidence and whether the proper rules of law, i.e., criteria, have been applied.
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11. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.
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12. In applying the substantial evidence standard, the reviewing court is not free to substitute its judgment for that of the administrative agency.
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13. Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Nebraska Workmen's Compensation Court.
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14. Mere failure to comply with precise ceremonial or verbal formality in arraignment and entry of a plea is not so prejudicial as to require setting aside a defendant's guilty plea which is otherwise entered in accordance with statutory and constitutional requirements.
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15. The amount of child support ordered in a dissolution of marriage action is initially left to the sound discretion of the trial judge and is reviewed de novo on the record in this court and affirmed in the absence of an abuse of discretion.
Lainson v. Lainson 170
16. In reviewing the sufficiency of the evidence supporting a finding of guilt, 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. Smith 176
17. A jury verdict of guilty will not be overturned on appeal unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it.
State v. Smith 176
18. 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. Jones 184
19. In determining the sufficiency of 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 a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Goodon 186
State v. Bennett 601
State v. Fix 674
20. In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to the evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is an abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record.
Koch v. Koch 195
21. In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial.
Koch v. Koch 195
22. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
Mulder v. Minnesota Mining & Mfg. Co. 241
Allen v. IBP, Inc. 424
23. On appeal from an award of the Nebraska Workmen's Compensation Court, this court does not reweigh the facts but accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case; the findings will not be

set aside where they are supported by the evidence and are not clearly wrong.
McLaughlin v. Self-Insurance Servs. 260
Baumbach v. Standard Chem. Mfg. Co. 324
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24. A finding of the trial court that the statement of an accused was freely and voluntarily made will ordinarily not be set aside on appeal unless the finding is clearly erroneous.
State v. Crisp 265

25. Where there has been a clear abuse of discretion, the ruling of a trial court in receiving or excluding an expert's opinion will be reversed.
Priest v. McConnell 328

26. Generally, this court will not consider instructions not objected to.
Priest v. McConnell 328

27. The trial court is under a duty, on its own motion, to correctly instruct on the law. This court may take cognizance of plain error in instructions indicative of a probable miscarriage of justice.
Priest v. McConnell 328

28. While it is the duty of the trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence, failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice.
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29. A proper result will not be reversed merely because it was reached for the wrong reason.
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30. 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.
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31. Where a defendant or his attorney has actual notice of the entry of a sentencing order in a county court within 10 days of the entry of such order, an appeal to the district court must be perfected pursuant to the requirements of Neb. Rev. Stat. § 29-611 (Reissue 1979).
State v. Fiene 397

32. Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
State v. Brand 402
33. A defendant may raise on appeal for the first time that an information failed to set forth each essential element of the crime charged.
State v. Bargen 416
34. An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which the accused was convicted.
State v. Bargen 416
35. As a general rule, a sentence imposed within the statutory limits will not be disturbed on appeal unless the trial court abused its discretion.
State v. Bargen 416
State v. McKichan 560
State v. Fix 674
36. The Nebraska Supreme Court will not take judicial notice of a municipal ordinance which does not appear in the record.
State v. Austin 420
37. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.
Allen v. IBP, Inc. 424
38. The trial court's ruling considering the acceptance or rejection of evidence will not be reversed unless there is shown to be a clear abuse of discretion.
Tank v. Peterson 438
39. The purpose of a proceeding in error is to remove the record from an inferior to a superior tribunal so that the latter tribunal may determine if the judgment or final order of the inferior tribunal is in accordance with law.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
40. On appeal of teacher termination cases, this court must determine if the evidence presented at the hearing before the school board is sufficient as a matter of law to support the board's decision.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
41. Evidence is sufficient as a matter of law where the record is such that on the basis of all the testimony and exhibits, the board of education could fairly and reasonably find the facts as it did.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467

42. Evidence which does not appear in the record cannot be considered by this court on appeal.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
43. In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, the court must, on appeal, review de novo the trial court's determination with regard to whether a change of circumstances has occurred which justifies the modification of the earlier custody order.
Boll v. Boll 486
44. The discretion of the trial court in its determination as to whether to keep minor children within the jurisdiction of the court is subject to review, but its determination will not be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
Boll v. Boll 486
45. Jury instructions must be read as a whole. If they fairly present the law so that the jury could not be misled, there is no prejudicial error.
State v. Perkins 491
46. We review the matter de novo upon the record to determine if the order terminating parental rights is supported by clear and convincing evidence.
In re Interest of S.A.S. 500
47. An appellant cannot claim prejudice regarding an instruction favorable or beneficial to the appellant's theory on which a case is tried.
State v. Bodtke 504
48. A ruling on evidence of a collateral matter but intended to affect the credibility of a witness falls within the discretion of a trial court, and absent an abuse of discretion, a trial court's ruling on such evidence is not grounds for reversal.
State v. Williams 587
49. In reviewing a summary judgment the court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence.
Yankton Prod. Credit Assn. v. Larsen 610
50. In an action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), the findings of fact of the trial court will not be overturned unless clearly wrong.
Corbet, Inc. v. County of Pawnee 622
51. The Supreme Court will not consider a question not presented to the district court for disposition through a defendant's motion for post conviction relief.
State v. Casper 641
52. An application seeking an extension of time within which to retire

warrants, filed pursuant to Neb. Rev. Stat. § 31-755 (Reissue 1984), is an equitable proceeding reviewed by the Nebraska Supreme Court de novo on the record.
In re Application of S.I.D. No. 65 647
53. In appeals from the appointment of personal representatives in probate cases, the district court reviews the matter under Neb. Rev. Stat. §§ 24-541.01 et seq. (Cum. Supp. 1982), and this court reviews the matter under Neb. Rev. Stat. § 25-1911 (Reissue 1979); both such reviews being for error appearing on the record.
In re Estate of Casselman 653
54. Undue delay in ruling upon an appeal does not warrant dismissal of a criminal charge.
State v. Fix 674
55. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Fix 674
56. Generally, appellate jurisdiction of the Supreme Court is limited to a review of final orders and judgments.
State ex rel. Kandt v. North Platte Baptist Church 694
57. If a contempt is criminal, the judgment is final and a proper subject for an appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal.
State ex rel. Kandt v. North Platte Baptist Church 694
58. The standard of review of the division of property and the award of alimony in marriage dissolution cases is that these matters are 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.
McCollister v. McCollister 711
59. Determinations as to the custody of children in a marriage dissolution case 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.
Parsons v. Parsons 736
60. On an appeal from the district court of a review of an order of the Nebraska Equal Opportunity Commission, the Supreme Court will not disturb the district court's findings of fact if they are

supported by substantial evidence. This court will, however, reach independent conclusions with respect to questions of law.
Williams v. Goodyear Tire & Rubber Co. 748
Hinzman v. Richman Gordman 875
61. Substantial evidence requires this court to ask whether the district court could have fairly and reasonably found facts as it did.
Williams v. Goodyear Tire & Rubber Co. 748
62. In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of pleadings to support judgment.
Moore v. American Charter Fed. Sav. & Loan Assn. 793
63. On remand the district court has no alternative except to obey and perform the mandate of the Supreme Court.
State v. Rolling 800
64. An appellate court will not consider or review a ruling of a trial court when the questioned ruling is not a part of the trial record. The Supreme Court will not speculate about proceedings in a trial court but must rely upon the record presented for review.
Buckingham v. Wray 807
65. The Supreme Court can only decide issues based on the record before it.
Raymond v. Department of Motor Vehicles 821
66. One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous.
State v. Hurley 829
67. A constitutional question not raised at the initial trial in the municipal court forecloses the appellant from raising such question in the district court or this court.
State v. Hunter 850
68. The Nebraska Supreme Court is the final arbiter in matters of Nebraska law; as such, it must make its own analysis and reach its own conclusions with respect to questions of Nebraska law.
Patteson v. Johnson 852
69. Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo upon the record.
Hinzman v. Richman Gordman 875
70. A judgment is a matter of record, and can only be changed, set aside, or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment.
Nemec v. Nemec 891
71. In drunk driving cases 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. The verdict must be

sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Lichti 894
72. Alimony, child support, and property settlement issues must be considered together to determine whether a court has abused its discretion.
Salmon v. Salmon 899
73. In a trial to the court the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
In re Interest of S.S.L. 911
74. Where the review is de novo, evidence which should not have been admitted by the trial court will be disregarded by the reviewing court.
In re Interest of S.S.L. 911

Appeal Bonds

In order to perfect an appeal from an order of the Nebraska Motor Vehicle Industry Licensing Board, an appeal bond must be filed with the board within 10 days of the rendition of the order. Neb. Rev. Stat. § 60-1415 (Reissue 1984).
Kizzier Chevrolet Co. v. General Motors Corp. 319

Arrests

1. If probable cause to arrest without a warrant exists, a person may be arrested within such person's home, provided the officer's entry was lawful, such as for the purpose of executing a valid search warrant.
State v. Ware 594
2. The test of probable cause for a warrantless arrest is whether, at the moment of arrest, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the individual had committed or was committing an offense.
State v. Ware 594

Attorney and Client

1. In civil cases it is for the client to decide whether he will accept a settlement offer.
Smith v. Ganz 432
2. A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law.
Smith v. Ganz 432

3. In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own.
Smith v. Ganz 432
4. Failure to communicate an offer of settlement in a dissolution action cannot be made the basis of a claimed act of professional negligence absent evidence that the proposed settlement was not unconscionable and would therefore likely have been approved by the district court.
Smith v. Ganz 432
5. 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 2 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 2-year period, then the action may be commenced within 1 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. Neb. Rev. Stat. § 25-222 (Reissue 1979).
Smith v. Ganz 432

Attorney Fees

1. No attorney fee should be allowed on rehearing where the employer receives a reduction of the award on rehearing.
Mulder v. Minnesota Mining & Mfg. Co. 241
2. Where an award for permanent partial disability is made on rehearing, following an award for temporary total disability, the employee is entitled to an award of attorney fees on the rehearing.
Mulder v. Minnesota Mining & Mfg. Co. 241
3. The assessment of interest pursuant to Neb. Rev. Stat. § 48-125(2) (Reissue 1984), like the allowance of attorney fees, is a remedy affecting procedure only, and the same may be awarded on a claim that arose before 1983 Neb. Laws, L.B. 18, became law.
Allen v. IBP, Inc. 424
4. Although the awarding of attorney fees to the successful party, as provided for by Neb. Rev. Stat. § 48-1120(6) (Reissue 1984) of the Nebraska Fair Employment Practice Act, is discretionary on the part of the district court, generally, absent special circumstances, the failure to award such fees is an abuse of discretion.
Williams v. Goodyear Tire & Rubber Co. 748

Aviation

Violations of Federal Aviation Administration regulations do not constitute negligence per se, but are evidence of negligence which may be taken into consideration along with all other evidence.
Tank v. Peterson 438

Bail Bond

A deposit of cash in lieu of or in support of bail under Neb. Rev. Stat. § 29-901 (Reissue 1979) is for the purpose only of ensuring the defendant's appearance in court when required; and upon full compliance with any such court orders and release of bail, the statutory refund must be made.
State v. McKichan 560

Bankruptcy

A seller of goods may not reclaim such goods from one who has been adjudicated a bankrupt unless such seller demands in writing reclamation of such goods before 10 days after receipt of such goods by the bankrupt.
Prososki v. Commercial Nat. Bank 607

Banks and Banking

As a general rule, where a bank has given an honest opinion as to the financial worth and standing of a third party as to whether the third party was entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion would not make it liable for fraud and deceit. The positive assertion of fact, and not the mere expression of an opinion, is necessary to constitute an estoppel.
Circle 76 Fertilizer v. Nelsen 661

Blood, Breath, and Urine Tests

1. The authenticity of a sample of bodily fluid must be established before a chemical analysis of the sample may be admitted into evidence.
Priest v. McConnell 328
2. Under the Nebraska implied consent law, Neb. Rev. Stat. §§ 39-669.08 et seq. (Reissue 1984), an officer may provide more than one opportunity to acquire a sufficient breath sample, even though only one chance is necessary.
Raymond v. Department of Motor Vehicles 821
3. Compliance by the officer administering a breath test with the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1984) may affect the admissibility of the test results, but does not go to the question of whether a person was justified in refusing to take the test.
Raymond v. Department of Motor Vehicles 821
4. 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.
State v. Rolf 917

Boundaries

1. Neb. Rev. Stat. § 34-301 (Reissue 1984) provides that whenever one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court to have them ascertained and permanently established.
   State v. Jarchow 88
2. Neb. Rev. Stat. § 23-1908 (Reissue 1983) provides that the restoration of lines and corners of original government surveys shall be in accordance with the laws of the United States and the circular of instructions of the U.S. Department of the Interior, Bureau of Land Management.
   State v. Jarchow 88
3. The circular of instructions of the U.S. Department of the Interior provides that in restoring lines of a survey the purpose is not to correct the original survey, but to determine where the corner was established in the beginning; that an existent corner is one whose position can be located by an acceptable survey record, including testimony of witnesses who have a dependable knowledge of the original location; and that an obliterated corner's location may be recovered if proved beyond a reasonable doubt by unquestionable testimony.
   State v. Jarchow 88
4. A survey corner is not considered lost if its position can be recovered satisfactorily by means of the testimony of witnesses having positive knowledge of the precise location.
   State v. Jarchow 88
5. A lost corner is a point of a survey that cannot be determined beyond a reasonable doubt from acceptable evidence.
   State v. Jarchow 88
6. The rules for restoration of lost corners should not be employed until all original and collateral evidence has been developed.
   State v. Jarchow 88
7. In restoring lost corners a surveyor must utilize proportionate measurement unless outweighed by conclusive evidence of the original survey.
   State v. Jarchow 88
8. Proportionate measurement requires that any excess or deficiency between two existent corners shall be distributed equally among the intervals existing between such existent corners.
   State v. Jarchow 88
9. As a general rule, testimony of witnesses employed by a surveyor to recover an obliterated corner should be reduced to writing and be given under oath.
   State v. Jarchow 88
10. At common law a landowner could not be compelled to build a

partition fence. A party, therefore, by the erection of such fence, acquires no right of action for contribution from the owner of lands adjoining.
Schnakenberg v. Schroeder 813

11. While Neb. Rev. Stat. §§ 34-101 to 34-115 (Reissue 1984) provide a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, such statutes are not exclusive, but coterminous proprietors may by contract adjust their respective rights and obligations regarding a division fence.
Schnakenberg v. Schroeder 813

12. Neb. Rev. Stat. §§ 34-101 to 34-115 (Reissue 1984) provide a method of allocating and assigning to adjoining landowners responsibility for maintaining specific parts of a division fence where there is no agreement for such maintenance.
Schnakenberg v. Schroeder 813

Breach of Contract

1. An owner's action for a general contractor's failure to erect a structure in a workmanlike manner is one for breach of contract.
Witherspoon v. Sides Constr. Co. 117

2. In an action for breach of a contract, a wronged party may recover damages when, at entering a contract, a wrongdoer had reason to know the damages which would probably result from a breach or when damages are the kind which naturally follow a breach.
Birkel v. Hassebrook Farm Serv. 286

3. A wronged party in a contractual dispute may recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury.
Birkel v. Hassebrook Farm Serv. 286

4. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
Yankton Prod. Credit Assn. v. Larsen 610

Breach of Warranty

1. To establish a breach of implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury. In order for the goods to be merchantable under Neb. U.C.C. § 2-314 (Reissue 1980), they must be at least such as are fit for the ordinary purposes for which such goods are used.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303

2. In order for one to recover for a breach of an implied warranty of fitness, the purchaser must prove that (1) the seller had reason to know of the buyer's particular purpose, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
3. 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 2 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 2-year period, then the action may be commenced within 1 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. Neb. Rev. Stat. § 25-222 (Reissue 1979).
Smith v. Ganz 432
4. Revocation of acceptance and breach of warranty of accepted goods are separate remedies, and a buyer may pursue either remedy or both.
Wendt v. Beardmore Suburban Chevrolet 775
5. An express warranty must have been made a part of the basis of the bargain. In order to recover for breach of an express warranty, a buyer must prove there was reliance upon the warranty.
Wendt v. Beardmore Suburban Chevrolet 775

Bridges

1. Failure of a county to post a bridge load capacity may be negligence or evidence of negligence.
Corbet, Inc. v. County of Pawnee 622
2. It is incumbent upon the plaintiff to prove that the negligence of the county was the proximate cause of the bridge collapse before recovery may be had against the county.
Corbet, Inc. v. County of Pawnee 622

Brokers

1. It is an elementary principle of law that when a broker produces a purchaser ready, willing, and able to enter into the subject transaction, the broker is entitled to the promised commission.
Armstrong v. Hartford Life Ins. Co. 128
2. An agreement to pay a commission is binding on the principal despite the refusal or default on the part of the principal to complete the transaction based on the terms agreed to.
Armstrong v. Hartford Life Ins. Co. 128

Case Overruled

1. In cases where the Legislature has authorized suits against the State of Nebraska and has required that summons shall be served as in other cases, without detailed specification, the method of serving summons specified for use in any other type of action against the state constitutes service "as in other cases." To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), is in conflict with this rule, it is overruled.
   Beatrice Manor v. Department of Health 141
2. When the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), conflicts with this holding, it is overruled.
   Pointer v. State 315

Cases Disapproved

Neb. Rev. Stat. § 21-20,104 (Reissue 1983) is a survival statute which destroys the capacity of former shareholders of a dissolved corporation to sue or be sued on rights entirely dependent upon and existing solely as an outgrowth of the shareholder status except within 2 years after the corporation has been dissolved. The language in *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), which characterizes § 21-20,104 as a statute of limitations, is disapproved, as is any such suggestion which may be contained in *Barnes v. Hampton*, 198 Neb. 151, 252 N.W.2d 138 (1977).
Van Pelt v. Greathouse 478

Causes of Action

1. Causes of action for deceit or fraud survive notwithstanding the death of the person entitled to the same.
   Howsden v. Rolenc 16
2. The elements of a cause of action based upon the intentional infliction of emotional distress are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
   Gall v. Great Western Sugar Co. 354
3. If the injured employee does not have an independent cause of action, the injured employee's spouse cannot maintain an independent cause of action.
   Johnston v. State 457

4. It is not necessary that the constitutional provision relating to damage for a public use be set out or its existence alleged in the petition stating the cause of action. All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it.
Kula v. Prososki 626
5. The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts. If so, the same cause of action has been alleged, even if different theories of recovery are relied upon.
Graham v. Waggener 907
6. Res judicata rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
Graham v. Waggener 907

Child Custody

1. In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial.
Koch v. Koch 195
2. Where it is determined that an individual is the natural parent, even though one may initially deny paternity, and thereafter establishes a familial relationship with the children, both emotional and financial, the question of which parent should have custody of the children should be determined on the basis of the best interests of the children.
State ex rel. Laughlin v. Hugelman 254
3. Where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, and particularly in default cases, where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody.
State ex rel. Laughlin v. Hugelman 254
4. In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, the court must, on appeal, review de novo the trial court's determination with regard to whether a change of circumstances has occurred which justifies the modification of the earlier custody order.
Boll v. Boll 486
5. In a modification hearing to determine who should have custody

of the children, the paramount consideration is the best interests of the children.
Boll v. Boll 486
6. Orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action.
Boll v. Boll 486
7. The general rule in cases where a custodial parent desires to leave the jurisdiction for any legitimate reason is that the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent.
Boll v. Boll 486
8. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof, and this policy should yield to the best interests of the child.
Boll v. Boll 486
9. The discretion of the trial court in its determination as to whether to keep minor children within the jurisdiction of the court is subject to review, but its determination will not be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
Boll v. Boll 486
10. An award of custody to a parent should not be interpreted as a sentence of immobilization. A custodial parent will not be placed in a position of deciding between custody of one's child and a more successful career.
Boll v. Boll 486
11. Determinations as to the custody of children in a marriage dissolution case 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.
Parsons v. Parsons 736
12. Merely moving children out of the state of domicile does not ipso facto constitute a change of circumstances, but may be considered with other evidence to be a change of circumstances which will warrant a modification of the decree.
Parsons v. Parsons 736
13. Failure to immediately take reasonable measures, as provided by

Neb. Rev. Stat. § 43-250 (Reissue 1984), to notify a parent that temporary custody has been taken of a juvenile pursuant to the provisions of Neb. Rev. Stat. § 43-248 (Reissue 1984) does not deprive the juvenile court of jurisdiction.
In re Interest of S.S.L. 911

Child Support

1. Under Neb. Rev. Stat. § 42-351 (Reissue 1984), where dissolution of a marriage is sought, general jurisdiction over the marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of marriage is properly filed.
   Robbins v. Robbins 151
   Nemec v. Nemec 891
2. Child support orders entered under Neb. Rev. Stat. ch. 42 (Reissue 1984) must recognize and give effect to prior child support orders properly entered under Neb. Rev. Stat. § 43-512.04 (Reissue 1984), so long as such § 43-512.04 orders remain in effect.
   Robbins v. Robbins 151
3. In determining the amount of child support to be ordered, the trial court must take into consideration the status, character, and situation of the parties and attendant circumstances, including the financial condition of the party making the payments and estimated costs of support of the children.
   Lainson v. Lainson 170
   Salmon v. Salmon 899
4. The amount of child support ordered in a dissolution of marriage action is initially left to the sound discretion of the trial judge and is reviewed de novo on the record in this court and affirmed in the absence of an abuse of discretion.
   Lainson v. Lainson 170
5. Where the failure to pay child support is the result of intentional conduct, an application for modification may be denied on the basis of the equitable doctrine of clean hands.
   Voichoskie v. Voichoskie 670
6. A court which has jurisdiction in a divorce action does not lose its continuing jurisdiction over child support matters when a support order in the action is transcribed and filed with the clerk of the district court in another county.
   Nemec v. Nemec 891
7. Alimony, child support, and property settlement issues must be considered together to determine whether a court has abused its discretion.
   Salmon v. Salmon 899

Civil Service

1. A civil service commission may require that a list of witnesses and documents to be relied upon at a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983) be furnished to an employee by the appointing authority.
   States v. Anderson 545
2. At a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983), it is improper to receive unsworn statements and to receive sworn statements from persons not required to submit to cross-examination.
   States v. Anderson 545

Claims

A notice of a possible future "claim" against an irrigation district under Neb. Rev. Stat. § 46-160 (Reissue 1984) does not satisfy the requirements of Neb. Rev. Stat. § 23-2404 (Reissue 1983).
Peterson v. Gering Irr. Dist. 281

Commission of Industrial Relations

The Commission of Industrial Relations, pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984), does have jurisdiction, that is, authorized power, to resolve industrial disputes between agencies or departments of the State of Nebraska and their employees.
State Code Agencies Ed. Assn. v. Department of Pub. Insts. .. 555

Compromise and Settlement

1. In civil cases it is for the client to decide whether he will accept a settlement offer.
   Smith v. Ganz 432
2. Failure to communicate an offer of settlement in a dissolution action cannot be made the basis of a claimed act of professional negligence absent evidence that the proposed settlement was not unconscionable and would therefore likely have been approved by the district court.
   Smith v. Ganz 432

Confessions

1. In order to be admissible a statement or confession must have been freely and voluntarily made, and must not have been extracted by any direct or implied promise or inducement, no matter how slight.
   State v. Crisp 265
   State v. Robertson 782
2. The determination of whether a statement was freely and voluntarily made necessarily turns on the totality of circumstances in any particular case.
   State v. Crisp 265
3. A finding of the trial court that the statement of an accused was

freely and voluntarily made will ordinarily not be set aside on appeal unless the finding is clearly erroneous.
State v. Crisp 265
4. An interrogating police officer's promise to see what he could do for a suspect being questioned, who expressed a need for help because of his alcohol and drug addiction, is not such an inducement as to render the suspect's statements involuntary.
State v. Crisp 265
5. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.
State v. Perkins 491
6. A "sympathetic" approach in an interrogation does not amount to coercion.
State v. Perkins 491
7. Voluntariness is the ultimate test to use an accused's statement as evidence in a criminal prosecution.
State v. Bodtke 504
8. On questioned voluntariness, an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury.
State v. Bodtke 504
9. Generally, before one is a person in authority perhaps affecting voluntariness of an accused's statement or confession, the accused must reasonably believe that the person making a promise or inducement related to a statement or confession is one who has the capacity, directly or indirectly, to produce a represented material result in the prosecution or disposition of a matter in the criminal justice system.
State v. Bodtke 504
10. Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution.
State v. Robertson 782
11. A promise to inform a prosecuting authority about a declarant's cooperation is not an improper inducement producing involuntariness.
State v. Robertson 782

Consideration

1. A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry.
Mader v. Kallos 579
2. The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice.
Mader v. Kallos 579

3. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
Yankton Prod. Credit Assn. v. Larsen 610
4. Consideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Valuable consideration to support a contract need not be one translatable into dollars and cents. Compensation and consideration are neither identical nor synonymous.
Buckingham v. Wray 807

Constitutional Law

1. In criminal contempt proceedings the accused is entitled to due process of law and is presumed to be innocent, cannot be compelled to testify against himself or herself, and must be advised of the nature of the charges.
In re Contempt of Sileven 34
2. An accused is entitled to be represented by counsel in all critical stages of a criminal proceedings against him, but the right to counsel may be waived, if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel.
State v. Jost 162
3. A defendant has a constitutional right of self-representation and may proceed to defend himself without counsel, when he voluntarily, understandingly, and intelligently elects to do so.
State v. Jost 162
4. The record of a prior conviction used for enhancement purposes is not required to show a complete waiver of constitutional rights as required by *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).
State v. Jones 184
5. 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. Groves 382
6. The word "abuse" insofar as it includes verbal abuse is construed to include only those which have been described as "fighting" words, that is, those which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. As so construed, a statute or ordinance violates neither the first

amendment to the Constitution of the United States nor article I, § 5, of the Constitution of Nebraska.
State v. Groves 382
7. Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
State v. Brand 402
8. Factors to be considered in evaluating whether a sentence constitutes cruel and unusual punishment under the federal Constitution and Neb. Const. art. I, §§ 9 and 15, are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
State v. Brand 402
9. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.
State v. Brand 402
10. Enhancing a sentence because of a prior conviction is not cruel and unusual punishment.
State v. Brand 402
11. The sixth and fourteenth amendments to the U.S. Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.
State v. Austin 420
12. The fourth amendment prohibition against unreasonable searches and seizures is inapplicable to the conduct of private parties not acting as agents of law enforcement authorities.
State v. Ware 594
13. When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. art. I, § 21.
Kula v. Prososki 626
14. Neb. Const. art. I, § 21, is self-executing, and legislative action is not necessary to make the constitutional remedy available.
Kula v. Prososki 626
15. The fact that a landowner could have sued in tort under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), for damage caused to property for a public use does not preclude such landowner from proceeding in a direct action for damages under the Constitution.
Kula v. Prososki 626
16. Trial strategy adopted by counsel without prior consultation with

the accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances.
State v. Ohler 840
17. A constitutional question not raised at the initial trial in the municipal court forecloses the appellant from raising such question in the district court or this court.
State v. Hunter 850
18. Neb. Rev. Stat. § 20-148 (Reissue 1983) does not constitute a waiver of sovereign immunity by the State of Nebraska for actions brought in federal court under 42 U.S.C. § 1983 (1982).
Patteson v. Johnson 852
19. *Todd v. Board of Educational Lands and Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951), does not interpret any enactment of the Nebraska Legislature as constituting a waiver of this state's sovereign immunity for actions brought in federal court pursuant to contract.
Patteson v. Johnson 852
20. The provision of Neb. Const. art. V, § 22, which states, "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," is not self-executing. Legislative action is necessary to make it available.
Patteson v. Johnson 852
21. State courts have as great a constitutional obligation to uphold and protect the federal Constitution and law as do the federal courts.
Patteson v. Johnson 852
22. Nonexistent at common law, divorce is a matter within the exclusive and supreme province of the Legislature, subject to limitations imposed by the Constitutions, state and federal.
Else v. Else 878
23. 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.
State v. Rolf 917

Construction Contracts

1. An owner's action for a general contractor's failure to erect a structure in a workmanlike manner is one for breach of contract.
Witherspoon v. Sides Constr. Co. 117
2. The period of repose applicable to a general contractor is found in Neb. Rev. Stat. § 25-223 (Reissue 1979) and begins to run when construction of the structure is completed.
Witherspoon v. Sides Constr. Co. 117
3. The period of repose applicable to an architect who has a duty to inspect throughout construction is contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) and begins to run when construction is completed.
Witherspoon v. Sides Constr. Co. 117

4. The period of repose applicable to an engineer who has no duty other than to provide a design to an architect is contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) and begins to run when the design is delivered to the architect.
Witherspoon v. Sides Constr. Co. 117

Contempt

1. A coercive sanction arises out of a civil contempt, is not final in nature, and is not appealable.
In re Contempt of Sileven 34
2. A sentence in a contempt case which is limited to imprisonment for a definite period operates not as a remedy coercive in its nature but solely as punishment for the completed act of disobedience, and is appealable.
In re Contempt of Sileven 34
3. A sentence in a prosecution for contempt, except that committed in open court, which is wholly punitive, may properly be imposed only in proceedings instituted and tried as for criminal contempt.
In re Contempt of Sileven 34
4. In criminal contempt proceedings the accused is entitled to due process of law and is presumed to be innocent, cannot be compelled to testify against himself or herself, and must be advised of the nature of the charges.
In re Contempt of Sileven 34
5. A criminal sanction is invalid if imposed in a proceeding that is instituted and tried as a civil contempt.
In re Contempt of Sileven 34
6. In Neb. Rev. Stat. § 25-2121 (Reissue 1979), when referring to the willful disobedience of any lawful order of the court, the word "willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order.
In re Contempt of Sileven 34
7. If a contempt is criminal, the judgment is final and a proper subject for an appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal.
State ex rel. Kandt v. North Platte Baptist Church 694
8. A civil contempt order can be attacked by a party litigant only through a habeas corpus proceeding.
State ex rel. Kandt v. North Platte Baptist Church 694
9. Criminal contempt is a prosecution to preserve the power and vindicate the dignity of the court and to punish for disobedience of the court's orders.
State ex rel. Kandt v. North Platte Baptist Church 694
10. Civil contempt is an action brought by a party litigant to preserve and enforce his rights and compel obedience to orders and decrees adjudicated in his favor.
State ex rel. Kandt v. North Platte Baptist Church 694

11. The true character of a contempt proceeding lies in the procedures used in conducting the contempt hearing and the sentence imposed.
State ex rel. Kandt v. North Platte Baptist Church 694
12. Incarceration, standing alone, is not determinative of criminal contempt. If the imprisonment is not inflicted as punishment but is intended to be remedial by coercing the defendant to do what he has refused to do, the contempt is civil.
State ex rel. Kandt v. North Platte Baptist Church 694

Contractors and Subcontractors

1. An owner's action for a general contractor's failure to erect a structure in a workmanlike manner is one for breach of contract.
Witherspoon v. Sides Constr. Co. 117
2. The period of repose applicable to a general contractor is found in Neb. Rev. Stat. § 25-223 (Reissue 1979) and begins to run when construction of the structure is completed.
Witherspoon v. Sides Constr. Co. 117

Contracts

1. A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract.
Christopher v. Evans 51
2. It is an elementary principle of law that when a broker produces a purchaser ready, willing, and able to enter into the subject transaction, the broker is entitled to the promised commission.
Armstrong v. Hartford Life Ins. Co. 128
3. An agreement to pay a commission is binding on the principal despite the refusal or default on the part of the principal to complete the transaction based on the terms agreed to.
Armstrong v. Hartford Life Ins. Co. 128
4. In the absence of fraud one who signs an instrument without reading it, when he can read and has an opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
Smith v. Ganz 432
Mangan v. Landen 643
5. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
Yankton Prod. Credit Assn. v. Larsen 610

6. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
Yankton Prod. Credit Assn. v. Larsen 610
7. There is a good faith obligation in the performance or the enforcement of every contract or duty within the Nebraska Uniform Commercial Code. Neb. U.C.C. § 1-203 (Reissue 1980).
Yankton Prod. Credit Assn. v. Larsen 610
8. Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.
Mohrlang v. Draper 630
9. In an action for specific performance of a contract to sell real estate, generally, it is no defense that there is other available land as good as or even better than the land which is the subject of the contract to be performed.
Mohrlang v. Draper 630
10. Hardship equitably excusing specific performance of a contract may be a circumstance unforeseeable at entry into the contract. Hardship of such nature, however, cannot be self-inflicted or caused through inexcusable neglect on the part of the person seeking to be excused or exonerated from specific performance.
Mohrlang v. Draper 630
11. An imprudent or bad bargain in and of itself is not an excuse for nonperformance of a contract.
Mohrlang v. Draper 630
12. The provisions of Neb. Rev. Stat. § 67-318(a) (Reissue 1981) may be modified either by an agreement between the partners or by a course of dealing amounting to an agreement between the partners.
Smith v. Daub 698
13. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract, and ordinarily such construction of the contract should be enforced.
Smith v. Daub 698
14. Generally, a suit to declare a contract void, which if void was void at its inception, must be commenced within 4 years of the execution of the contract.
Lake v. Piper, Jaffray & Hopwood Inc. 731
15. Consideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Valuable consideration to support a contract need not be one translatable

into dollars and cents. Compensation and consideration are neither identical nor synonymous.
Buckingham v. Wray 807

Conversion

In an action for conversion the plaintiff must allege facts showing a right to immediate possession of the property at the time of the conversion.
Prososki v. Commercial Nat. Bank 607

Convictions

1. In reviewing the sufficiency of the evidence supporting a finding of guilt, 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. Smith 176
2. Where the jury has been properly instructed that the testimony of an accomplice should be scrutinized closely for possible motives of falsification, the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction.
State v. Smith 176
3. In determining the sufficiency of 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 a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Goodon 186
State v. Bennett 601
State v. Fix 674

Corporations

Neb. Rev. Stat. § 21-20,104 (Reissue 1983) is a survival statute which destroys the capacity of former shareholders of a dissolved corporation to sue or be sued on rights entirely dependent upon and existing solely as an outgrowth of the shareholder status except within 2 years after the corporation has been dissolved. The language in *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), which characterizes § 21-20,104 as a statute of limitations, is disapproved, as is any such suggestion which may be contained in *Barnes v. Hampton*, 198 Neb. 151, 252 N.W.2d 138 (1977).
Van Pelt v. Greathouse 478

Costs

It is within the discretion of a trial court to tax costs in certain proceedings as it "may think right and equitable." Neb. Rev. Stat. § 25-1711 (Reissue 1979).
States v. Anderson 545

Courts

1. Where a defendant or his attorney has actual notice of the entry of a sentencing order in a county court within 10 days of the entry of such order, an appeal to the district court must be perfected pursuant to the requirements of Neb. Rev. Stat. § 29-611 (Reissue 1979).
State v. Fiene 397
2. Where cases are interwoven and interdependent, and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
In re Estate of Casselman 653
3. On remand the district court has no alternative except to obey and perform the mandate of the Supreme Court.
State v. Rolling 800
4. An appellate court will not consider or review a ruling of a trial court when the questioned ruling is not a part of the trial record. The Supreme Court will not speculate about proceedings in a trial court but must rely upon the record presented for review.
Buckingham v. Wray 807
5. State courts have as great a constitutional obligation to uphold and protect the federal Constitution and law as do the federal courts.
Patteson v. Johnson 852

Criminal Law

1. Neither mandatory good time earned pursuant to Neb. Rev. Stat. § 83-1,107 (Reissue 1981) nor meritorious good time earned pursuant to Neb. Rev. Stat. § 83-1,107.01 (Reissue 1981) is automatically forfeited upon revocation of parole. Such forfeiture must occur upon either the recommendation of the chief executive officer of the facility to which the offender is entrusted or the parole administrator, depending upon who has custody at the time of revocation, subject to approval of the director of the Department of Correctional Services. Once forfeited or withheld, good time credits may be restored to the offender in like manner.
Malone v. Benson 28
2. Pursuant to Neb. Rev. Stat. §§ 83-1,107 and 83-1,107.01 (Reissue

1981), the Board of Parole merely has the right to make recommendation of forfeitures of good time when the offender is in the custody of the Board of Parole. The discretion referred to by statute vests solely in the chief executive officer of the facility when the offender is in the custody of the Department of Correctional Services and in the parole administrator when the offender is in the custody of the Board of Parole, in each instance subject to the approval of the director of the Department of Correctional Services.
Malone v. Benson 28

3. *Modus operandi* is a characteristic method employed by a defendant in the performance of repeated criminal acts, and means, literally, "method of working," and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.
State v. Craig 70

4. An accused is entitled to be represented by counsel in all critical stages of a criminal proceedings against him, but the right to counsel may be waived, if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel.
State v. Jost 162

5. A defendant has a constitutional right of self-representation and may proceed to defend himself without counsel, when he voluntarily, understandingly, and intelligently elects to do so.
State v. Jost 162

6. Where the jury has been properly instructed that the testimony of an accomplice should be scrutinized closely for possible motives of falsification, the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction.
State v. Smith 176

7. Factors to be considered in evaluating whether a sentence constitutes cruel and unusual punishment under the federal Constitution and Neb. Const. art. I, §§ 9 and 15, are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
State v. Brand 402

8. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.
State v. Brand 402

9. Enhancing a sentence because of a prior conviction is not cruel and unusual punishment.
State v. Brand 402

10. The sixth and fourteenth amendments to the U.S. Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.
State v. Austin 420
11. Undue delay in ruling upon an appeal does not warrant dismissal of a criminal charge.
State v. Fix 674
12. A preliminary hearing is not a criminal prosecution or a trial. Its purpose is to ascertain whether a crime has been committed and whether there is probable cause to believe the accused committed it.
State v. Wilkinson 685
13. A county judge sitting as an examining magistrate has no jurisdiction to dismiss a felony complaint with prejudice.
State v. Wilkinson 685
14. The jurisdiction of an examining magistrate is limited to discharging the defendant or holding him for trial by a court which has jurisdiction over the offense charged.
State v. Wilkinson 685
15. It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime.
State v. Bideaux 718
16. Where two or more persons are charged with the same criminal offense but are tried separately, the fact that one defendant has pleaded guilty or has been convicted is inadmissible against the other defendant.
State v. Robertson 782
17. Acquittal on a criminal charge is no bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceedings were based.
Raymond v. Department of Motor Vehicles 821
18. Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense.
State v. Schwartz 833
State v. Gonzales 846
19. Evidence sufficient to controvert the State's evidence as to an essential element of a crime, and sufficient to require the giving of an instruction as to a lesser-included offense, may be in the form of evidence offered by defendant, evidence developed in cross-examination of the State's witnesses, or evidence adduced from other witnesses.
State v. Schwartz 833
20. One who drives in response to the lawful order of a law

enforcement officer engages in privileged conduct and may not be punished for so doing.
State v. Lichti 894

Damages

1. In an action for breach of a contract, a wronged party may recover damages when, at entering a contract, a wrongdoer had reason to know the damages which would probably result from a breach or when damages are the kind which naturally follow a breach.
Birkel v. Hassebrook Farm Serv. 286
2. A wronged party in a contractual dispute may recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury.
Birkel v. Hassebrook Farm Serv. 286
3. 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 2 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 2-year period, then the action may be commenced within 1 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. Neb. Rev. Stat. § 25-222 (Reissue 1979).
Smith v. Ganz 432
4. When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. art. I, § 21.
Kula v. Prososki 626
5. Neb. Const. art. I, § 21, is self-executing, and legislative action is not necessary to make the constitutional remedy available.
Kula v. Prososki 626
6. The fact that a landowner could have sued in tort under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), for damage caused to property for a public use does not preclude such landowner from proceeding in a direct action for damages under the Constitution.
Kula v. Prososki 626
7. A landowner has a right to join with an action for equitable relief a claim for temporary damages.
Kula v. Prososki 626
8. It is not necessary that the constitutional provision relating to damage for a public use be set out or its existence alleged in the petition stating the cause of action. All that is necessary is that the litigant allege and prove facts constituting a cause of action

because of it.
Kula v. Prososki 626

Decedents' Estates

1. There is a strong public policy against allowing a person who commits a homicide to benefit in any way from the death of the victim.
   Howsden v. Rolenc 16
2. Where an ambiguity in a codicil appears on the face of the document, the resolution of such a patent ambiguity is a matter of law and properly the subject of a motion for summary judgment if there is no dispute as to any material fact.
   In re Estate of Casselman 516
3. Generally, where part of a codicil is invalid, the valid provisions of the codicil should be upheld unless to do so would defeat the testator's intent and interfere with his general scheme of distribution.
   In re Estate of Casselman 516
4. Formal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted before a judge, with notice to interested persons.
   In re Estate of Casselman 653
5. Informal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.
   In re Estate of Casselman 653
6. In appeals from the appointment of personal representatives in probate cases, the district court reviews the matter under Neb. Rev. Stat. §§ 24-541.01 et seq. (Cum. Supp. 1982), and this court reviews the matter under Neb. Rev. Stat. § 25-1911 (Reissue 1979); both such reviews being for error appearing on the record.
   In re Estate of Casselman 653
7. Notice of a formal hearing under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), must be given to all interested persons unless these persons waive notice.
   In re Estate of Casselman 653
8. Under the provisions of Neb. Rev. Stat. § 43-110 (Reissue 1984), an adopted child, in the absence of specific testamentary directions to the contrary, inherits from the antecedents of an adoptive parent to the same extent as do the adoptive parent's natural children. Section 43-110 negates *In re Estate of Clarke*, 125 Neb. 625, 251 N.W. 279 (1933).
   In re Trust Estate of Darling 705

Deeds

An action to reform a deed is equitable in nature.
Van Pelt v. Greathouse 478

Demurrer

Where a petition fails to plead actionable facts, it is subject to a general demurrer.
Prososki v. Commercial Nat. Bank 607

Directed Verdict

1. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the burden of proof is imposed.
Anderson v. Farm Bureau Ins. Co. 1
2. In a criminal case the trial court may properly direct a verdict of not guilty only where there is a total failure of competent proof 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.
State v. Smith 176
3. It is not error for the trial court to overrule a motion for a directed verdict where there is some evidence presenting a question for the jury.
Ellis & Guy Advg. v. Cohen 340
4. 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.
Tank v. Peterson 438
5. A directed verdict is proper only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion.
Tank v. Peterson 438
6. The party against whom a motion for dismissal or direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
Kahrhoff v. Kohl 742

Discrimination

1. A party pursuing a claim before the Nebraska Equal Opportunity Commission is required to establish by a preponderance of the evidence a prima facie case of disparate treatment. To accomplish

this it must be shown (1) that the claimant is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1984); (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected for that position; and (4) that after he was rejected the job remained open.
Williams v. Goodyear Tire & Rubber Co. 748

2. A prima facie case of disparate treatment must be shown by a preponderance of the evidence before the employer must come forth and show the legitimacy of its actions.
Williams v. Goodyear Tire & Rubber Co. 748

Divorce

1. The general rule is that an action for dissolution of a marriage abates upon the death of one of the parties and is not subject to revivor.
Howsden v. Rolenc 16
2. An action to vacate a decree of dissolution for fraud survives the death of a party whose death is the result of a homicide committed by the other party to the proceeding.
Howsden v. Rolenc 16
3. In dissolution of marriage cases one may in good faith make an occupational change even though that may reduce his ability to meet his financial obligation.
Cooper v. Cooper 64
4. Under Neb. Rev. Stat. § 42-351 (Reissue 1984), where dissolution of a marriage is sought, general jurisdiction over the marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of marriage is properly filed.
Robbins v. Robbins 151
Nemec v. Nemec 891
5. Failure to communicate an offer of settlement in a dissolution action cannot be made the basis of a claimed act of professional negligence absent evidence that the proposed settlement was not unconscionable and would therefore likely have been approved by the district court.
Smith v. Ganz 432
6. Nonexistent at common law, divorce is a matter within the exclusive and supreme province of the Legislature, subject to limitations imposed by the Constitutions, state and federal.
Else v. Else 878
7. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.
Else v. Else 878

8. In a system of "no fault" divorce, spousal misconduct alone or fault by itself does not determine whether a spouse is entitled to alimony.
Else v. Else 878
9. Cohabitation, together with a showing that such arrangement improved a former spouse's overall financial condition, might warrant a modification of alimony.
Else v. Else 878
10. As a general rule, it is not inconsistent with due process to allow a court in personam jurisdiction over a nonresident party to a domestic relations action when the forum state was the place of last marital domicile, assuming the wording of the so-called long arm statute is broad enough to embrace such action.
York v. York 883
11. The establishment of a marital relationship in this state from which a nonresident has left is sufficient minimum contact with this state under the provisions of Neb. Rev. Stat. § 25-536 (Cum. Supp. 1984) to permit a court of this state to exercise in personam jurisdiction over the nonresident in an action to dissolve that marriage.
York v. York 883
12. An application to modify the terms of a decree of divorce is not an independent proceeding.
Nemec v. Nemec 891
13. A court which has jurisdiction in a divorce action does not lose its continuing jurisdiction over child support matters when a support order in the action is transcribed and filed with the clerk of the district court in another county.
Nemec v. Nemec 891

Drunk Driving

1. In drunk driving cases 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Lichti 894
2. Either a law enforcement officer's observations of defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages.
State v. Lichti 894

Due Process

1. In the contested termination of a tenured teacher or tenured

administrator, minimum procedural due process requires that the employee (1) be advised of the cause or causes for the termination in sufficient detail to fairly enable the employee to prepare a defense, (2) be advised of the names and the nature of the testimony of witnesses who are to testify against the employee, and (3) be accorded a timely and meaningful opportunity to be heard in his or her own defense, and (4) that the hearing be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
Benton v. Board of Ed. of Sch. Dist. No. 17 134
Eshom v. Board of Ed. of Sch. Dist. No. 54 467

2. One who has obtained a property interest in his or her employment is entitled to notice which accords constitutional due process.
Benton v. Board of Ed. of Sch. Dist. No. 17 134

3. Constitutional due process requires notice which relates to the matter to be presented and which is suitable and fair in view of the circumstances and conditions existent at the time.
Benton v. Board of Ed. of Sch. Dist. No. 17 134

4. Procedural due process requires the following: notice reasonably calculated to inform one of the accusation levied; identification of the accuser; factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board.
States v. Anderson 545

5. As a general rule, it is not inconsistent with due process to allow a court in personam jurisdiction over a nonresident party to a domestic relations action when the forum state was the place of last marital domicile, assuming the wording of the so-called long arm statute is broad enough to embrace such action.
York v. York 883

6. 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.
State v. Rolf 917

Effectiveness of Counsel

1. Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
State v. Timm 687

2. In any ineffectiveness case a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
State v. Timm 687

3. The test for determining whether an attorney has effectively

served a criminal defendant is twofold. Firstly, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Secondly, counsel must conscientiously protect his client's interests.
State v. Hurley 829

4. Prejudice is not established by the alleged failure to call witnesses in the absence of showing the uncalled witnesses' expected testimony or to constantly consult with one's client in the absence of showing what additional consultation would have changed.
State v. Hurley 829

5. Trial strategy adopted by counsel without prior consultation with the accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances.
State v. Ohler 840

6. Generally, expert testimony is not admissible as proof that the assistance of counsel in a criminal case was ineffective.
State v. Ohler 840

Eminent Domain

A landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain.
Kula v. Prososki 626

Employer and Employee

Individuals who provide services for welfare recipients at the request of the Nebraska Department of Public Welfare, now Department of Social Services, pursuant to 42 U.S.C. § 1397 (1982) are independent contractors and not employees of the Department of Public Welfare.
State v. Saville 81

Employment Contracts

1. The device of discharging an employee and later reinstating the employee without backpay cannot be used to avoid employment provisions limiting employee suspensions without pay.
Drinkwine v. Flebbe 291

2. The Nebraska State Personnel Board does not have authority to ignore the provisions of a union contract, approved by the Legislature, between employees and another state agency.
Drinkwine v. Flebbe 291

Equal Opportunity Commission

1. On an appeal from the district court of a review of an order of the Nebraska Equal Opportunity Commission, the Supreme Court will not disturb the district court's findings of fact if they are

supported by substantial evidence. This court will, however, reach independent conclusions with respect to questions of law.
Williams v. Goodyear Tire & Rubber Co. 748
Hinzman v. Richman Gordman 875

2. A party pursuing a claim before the Nebraska Equal Opportunity Commission is required to establish by a preponderance of the evidence a prima facie case of disparate treatment. To accomplish this it must be shown (1) that the claimant is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1984); (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected for that position; and (4) that after he was rejected the job remained open.
Williams v. Goodyear Tire & Rubber Co. 748

3. A prima facie case of disparate treatment must be shown by a preponderance of the evidence before the employer must come forth and show the legitimacy of its actions.
Williams v. Goodyear Tire & Rubber Co. 748

4. Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo upon the record.
Hinzman v. Richman Gordman 875

Equity

1. The objection of laches is not tenable to defeat an equity cause where there has been no material change in the position of the party seeking to employ that doctrine.
State v. Jarchow 88

2. Equity actions on appeal to this court are triable de novo on the record, subject to the rules that 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 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.
Burgess v. Omahawks Radio Control Org. 100
Cline v. Franklin Pork, Inc. 234

3. An action to reform a deed is equitable in nature.
Van Pelt v. Greathouse 478

4. Although ordinarily one has a right to bring an action within the statutory period of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case; what constitutes laches is to be determined

in the light of the circumstances of the particular case.
Van Pelt v. Greathouse 478
5. A landowner has a right to join with an action for equitable relief a claim for temporary damages.
Kula v. Prososki 626
6. An application seeking an extension of time within which to retire warrants, filed pursuant to Neb. Rev. Stat. § 31-755 (Reissue 1984), is an equitable proceeding reviewed by the Nebraska Supreme Court de novo on the record.
In re Application of S.I.D. No. 65 647
7. Where the failure to pay child support is the result of intentional conduct, an application for modification may be denied on the basis of the equitable doctrine of clean hands.
Voichoskie v. Voichoskie 670
8. An action to enjoin enforcement of a city ordinance is one in equity.
City of Beatrice v. Goodenkauf 756
9. An action in equity vests the trial court with broad powers authorizing any judgment under the pleadings.
City of Beatrice v. Goodenkauf 756

Estoppel

1. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
Yankton Prod. Credit Assn. v. Larsen 610
2. The elements necessary to establish equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
Circle 76 Fertilizer v. Nelsen 661
3. As a general rule, where a bank has given an honest opinion as to the financial worth and standing of a third party as to whether the third party was entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion

would not make it liable for fraud and deceit. The positive assertion of fact, and not the mere expression of an opinion, is necessary to constitute an estoppel.
Circle 76 Fertilizer v. Nelsen 661

Evidence

1. Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.
Anderson v. Farm Bureau Ins. Co. 1
2. Sexual 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.
State v. Craig 70
3. In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the defendant, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses is corroborated; and the reasonableness or unreasonableness of the statements of the witnesses.
State v. Craig 70
4. On appeal from the review conducted by the district court, the Supreme Court's de novo review is limited to considering whether the agency decision was supported by substantial evidence and whether the proper rules of law, i.e., criteria, have been applied.
Beatrice Manor v. Department of Health 141
5. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.
Beatrice Manor v. Department of Health 141
6. In applying the substantial evidence standard, the reviewing court is not free to substitute its judgment for that of the administrative agency.
Beatrice Manor v. Department of Health 141
7. The burden of proof in a compensation case is upon the plaintiff to establish by a preponderance of the evidence that his disability was caused by an injury arising out of and in the course of his

employment.
Mulder v. Minnesota Mining & Mfg. Co. 241
8. Where the evidence is in conflict, the compensation court may find a percentage of disability within the range of the testimony.
Mulder v. Minnesota Mining & Mfg. Co. 241
9. In testing the sufficiency of the evidence in a workmen's compensation case, the successful party is entitled to have every controverted fact resolved in his favor and to receive the benefit of every inference which can be drawn from the evidence.
McLaughlin v. Self-Insurance Servs. 260
Baumbach v. Standard Chem. Mfg. Co. 324
10. In order to be admissible a statement or confession must have been freely and voluntarily made, and must not have been extracted by any direct or implied promise or inducement, no matter how slight.
State v. Crisp 265
State v. Robertson 782
11. The authenticity of a sample of bodily fluid must be established before a chemical analysis of the sample may be admitted into evidence.
Priest v. McConnell 328
12. Where an object passes through several hands before being produced in court, it is necessary to establish a complete chain of evidence which traces the possession of the article to the final custodian.
Priest v. McConnell 328
13. The trial court's ruling considering the acceptance or rejection of evidence will not be reversed unless there is shown to be a clear abuse of discretion.
Tank v. Peterson 438
14. Evidence is sufficient as a matter of law where the record is such that on the basis of all the testimony and exhibits, the board of education could fairly and reasonably find the facts as it did.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
15. Evidence is "substantial" or "sufficient as a matter of law," or constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict; it is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
16. Voluntariness is the ultimate test to use an accused's statement as evidence in a criminal prosecution.
State v. Bodtke 504
17. On questioned voluntariness, an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a

court for admissibility and as a fact ascertained by the jury.
State v. Bodtke 504
18. A ruling on evidence of a collateral matter but intended to affect the credibility of a witness falls within the discretion of a trial court, and absent an abuse of discretion, a trial court's ruling on such evidence is not grounds for reversal.
State v. Williams 587
19. Evidence which does not tend to impeach a witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.
State v. Williams 587
20. The test of whether a fact inquired of in cross-examination in criminal proceedings is collateral is, Would the cross-examining party be entitled to prove it as a part of the case tending to establish his plea?
State v. Williams 587
21. The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact.
Corbet, Inc. v. County of Pawnee 622
22. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Fix 674
23. It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime.
State v. Bideaux 718
24. Substantial evidence requires this court to ask whether the district court could have fairly and reasonably found facts as it did.
Williams v. Goodyear Tire & Rubber Co. 748
25. Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution.
State v. Robertson 782
26. Rule 402 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-402 (Reissue 1979)) permits the admission of relevant evidence only.
State v. Robertson 782
27. Where two or more persons are charged with the same criminal offense but are tried separately, the fact that one defendant has pleaded guilty or has been convicted is inadmissible against the other defendant.
State v. Robertson 782
28. Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense.
State v. Schwartz 833
State v. Gonzales 846

29. Evidence sufficient to controvert the State's evidence as to an essential element of a crime, and sufficient to require the giving of an instruction as to a lesser-included offense, may be in the form of evidence offered by defendant, evidence developed in cross-examination of the State's witnesses, or evidence adduced from other witnesses.
State v. Schwartz 833
30. Statements of a 13-year-old boy, a victim of a sexual assault, made to his mother a short time after he was sexually assaulted, relating to the sexual assault, qualify as excited utterances and are admissible as an exception to the hearsay rule.
State v. Gonzales 846
31. Either a law enforcement officer's observations of defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages.
State v. Lichti 894
32. In a trial to the court the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
In re Interest of S.S.L. 911
33. Where the review is de novo, evidence which should not have been admitted by the trial court will be disregarded by the reviewing court.
In re Interest of S.S.L. 911

Expert Witnesses

1. A conflict or contradiction of expert opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.
Zaleski v. Farmland Foods 157
Baumbach v. Standard Chem. Mfg. Co. 324
2. Triers of fact are not required to take the opinions of experts as binding upon them.
Mulder v. Minnesota Mining & Mfg. Co. 241
3. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury.
Priest v. McConnell 328
Tank v. Peterson 438

4. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken.
Priest v. McConnell 328
5. Where there has been a clear abuse of discretion, the ruling of a trial court in receiving or excluding an expert's opinion will be reversed.
Priest v. McConnell 328
6. The admission of opinion testimony of an expert is generally discretionary with the trial court, and the determination of its weight is largely a matter for the jury. A general objection as to foundation to a question requesting the opinion of a witness does not reach the issue of the qualification of the witness as an expert.
State v. Bideaux 718
7. Both the court and opposing counsel are entitled to know that an objection goes to the qualifications of the witness as an expert rather than to the factual foundation for the opinion.
State v. Bideaux 718
8. Generally, expert testimony is not admissible as proof that the assistance of counsel in a criminal case was ineffective.
State v. Ohler 840

Fair Employment Practice Act

1. A party pursuing a claim before the Nebraska Equal Opportunity Commission is required to establish by a preponderance of the evidence a prima facie case of disparate treatment. To accomplish this it must be shown (1) that the claimant is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1984); (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected for that position; and (4) that after he was rejected the job remained open.
Williams v. Goodyear Tire & Rubber Co. 748
2. A prima facie case of disparate treatment must be shown by a preponderance of the evidence before the employer must come forth and show the legitimacy of its actions.
Williams v. Goodyear Tire & Rubber Co. 748
3. Although the awarding of attorney fees to the successful party, as provided for by Neb. Rev. Stat. § 48-1120(6) (Reissue 1984) of the Nebraska Fair Employment Practice Act, is discretionary on the part of the district court, generally, absent special circumstances, the failure to award such fees is an abuse of discretion.
Williams v. Goodyear Tire & Rubber Co. 748

Final Orders

1. A coercive sanction arises out of a civil contempt, is not final in nature, and is not appealable.
In re Contempt of Sileven 34

2. A sentence in a contempt case which is limited to imprisonment for a definite period operates not as a remedy coercive in its nature but solely as punishment for the completed act of disobedience, and is appealable.
In re Contempt of Sileven 34
3. Generally, appellate jurisdiction of the Supreme Court is limited to a review of final orders and judgments.
State ex rel. Kandt v. North Platte Baptist Church 694
4. If a contempt is criminal, the judgment is final and a proper subject for an appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal.
State ex rel. Kandt v. North Platte Baptist Church 694

Forbearance

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
Yankton Prod. Credit Assn. v. Larsen 610

Foreclosure

1. Under Neb. Rev. Stat. § 77-1902 (Reissue 1981), a petition for the foreclosure of a tax lien must be brought within 90 days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based, as provided for in Neb. Rev. Stat. § 77-1837 (Reissue 1981).
Bish v. Fletcher 863
2. 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.
First Fed. Sav. & Loan Assn. v. Cal-Neb Land Co. 887

Fraud

1. Causes of action for deceit or fraud survive notwithstanding the death of the person entitled to the same.
Howsden v. Rolenc 16
2. An action to vacate a decree of dissolution for fraud survives the death of a party whose death is the result of a homicide committed by the other party to the proceeding.
Howsden v. Rolenc 16
3. A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract.
Christopher v. Evans 51

4. The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.
Havelock Bank v. Woods 57
5. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence.
Havelock Bank v. Woods 57
6. The fraud involved in the misrepresentation must relate to a present or preexisting fact, and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive.
Havelock Bank v. Woods 57
7. Fraudulent misrepresentation requires the plaintiff to prove (1) that a representation was made, (2) that the representation was false, (3) that when the representation was made it was known to be false or made recklessly without knowledge of its truth and as a positive assertion, (4) that it was made with the intention that the plaintiff should rely upon it, (5) that the plaintiff did rely upon it, and (6) that he suffered damage as a result.
Cummings v. Curtiss 106
8. In the absence of fraud one who signs an instrument without reading it, when he can read and has an opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
Smith v. Ganz 432
9. If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made.
Mangan v. Landen 643
10. As a general rule, where a bank has given an honest opinion as to the financial worth and standing of a third party as to whether the third party was entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion would not make it liable for fraud and deceit. The positive assertion of fact, and not the mere expression of an opinion, is necessary to constitute an estoppel.
Circle 76 Fertilizer v. Nelsen 661

Gaming

1. Under Neb. Rev. Stat. § 28-1101(6) (Supp. 1983), a lottery is a game of chance in which the winner is determined by mere luck, not by skill, and contains the elements of consideration, a prize, and chance.
Video Consultants v. Douglas 868

2. An essential element of a lottery is awarding a prize by chance, but the exact method adopted for application of chance to the distribution of a prize is immaterial.
Video Consultants v. Douglas 868

Garnishment

1. Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes.
NC + Hybrids v. Growers Seed Assn. 296
2. Through garnishment in aid of execution a garnishee becomes a "stakeholder" or custodian holding a fund, credit, or property belonging to one or the other of the parties to a lawsuit producing the judgment for which execution is sought.
NC + Hybrids v. Growers Seed Assn. 296
3. Garnishment in aid of execution is an incident to a judgment or an ancillary procedure whereby a judgment creditor seeks to collect a judgment by reaching a judgment debtor's property in the hands of a third party.
NC + Hybrids v. Growers Seed Assn. 296
4. If a garnisher is dissatisfied with a garnishee's answer but does not controvert or traverse the answer given, the garnishee's answer is the only filed pleading containing allegations or statements about property, funds, or credits of a judgment debtor, a solitary pleading which is taken as true and conclusive.
NC + Hybrids v. Growers Seed Assn. 296

Good Cause

Good cause means a material and substantial change in circumstances and depends upon the circumstances of the individual case.
Creager v. Creager 760

Hearsay

Statements of a 13-year-old boy, a victim of a sexual assault, made to his mother a short time after he was sexually assaulted, relating to the sexual assault, qualify as excited utterances and are admissible as an exception to the hearsay rule.
State v. Gonzales 846

Homicide

1. There is a strong public policy against allowing a person who commits a homicide to benefit in any way from the death of the victim.
Howsden v. Rolenc 16
2. An action to vacate a decree of dissolution for fraud survives the death of a party whose death is the result of a homicide committed

by the other party to the proceeding.
Howsden v. Rolenc 16
3. Proof of a purpose to kill is not required to establish felony murder because it is not an element of the crime. The only intent required is the intent to do the act which constitutes the felony during which the killing occurred.
State v. Smith 176
State v. Perkins 491
4. There need not be an intent to kill in felony murder, only an intent to commit the underlying felony.
State v. Perkins 491
5. Duress is not a defense to a charge of homicide.
State v. Perkins 491

Identification Procedures

Only those identification confrontations which occur after the defendant has been formally charged with the offense for which the identification testimony is sought require presence of counsel.
State v. Ellis 408

Implied Consent Law

1. Under the Nebraska implied consent law, Neb. Rev. Stat. §§ 39-669.08 et seq. (Reissue 1984), an officer may provide more than one opportunity to acquire a sufficient breath sample, even though only one chance is necessary.
Raymond v. Department of Motor Vehicles 821
2. Compliance by the officer administering a breath test with the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1984) may affect the admissibility of the test results, but does not go to the question of whether a person was justified in refusing to take the test.
Raymond v. Department of Motor Vehicles 821

Independent Contractor

Individuals who provide services for welfare recipients at the request of the Nebraska Department of Public Welfare, now Department of Social Services, pursuant to 42 U.S.C. § 1397 (1982) are independent contractors and not employees of the Department of Public Welfare.
State v. Saville 81

Indictments and Informations

1. Only those identification confrontations which occur after the defendant has been formally charged with the offense for which the identification testimony is sought require presence of counsel.
State v. Ellis 408
2. A defendant may raise on appeal for the first time that an information failed to set forth each essential element of the crime

charged.
State v. Bargen 416
3. An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which the accused was convicted.
State v. Bargen 416

Injunction

1. A private individual, with standing, may bring suit in district court to enjoin an alleged violation of the zoning laws or ordinances.
Burgess v. Omahawks Radio Control Org. 100
2. One seeking an injunction has the burden to establish by competent evidence every fact necessary to entitle that person to injunctive relief.
Shotkoski v. Prososki 213
3. An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on consideration of all the circumstances of each case.
Cline v. Franklin Pork, Inc. 234
4. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.
Cline v. Franklin Pork, Inc. 234
5. The operation of a legitimate business or certain aspects of the business which constitute a nuisance may be enjoined where it clearly appears there is no other complete remedy for the injury done.
Cline v. Franklin Pork, Inc. 234
6. An action to enjoin breach of restrictive use covenant is equitable in nature.
Egan v. Catholic Bishop 365
7. One's right to enjoin a nuisance is not defeated by the fact that he purchased his property after the nuisance came into existence.
Egan v. Catholic Bishop 365
8. A landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain.
Kula v. Prososki 626
9. An action to enjoin enforcement of a city ordinance is one in

equity.
City of Beatrice v. Goodenkauf 756

Insurance

1. Provisions in Blue Cross and Blue Shield of Nebraska medical insurance policies forbidding assignment of benefits are not void or unenforceable as a matter of public policy in Nebraska.
OB-GYN v. Blue Cross 199
2. The method of, and reasons for, canceling an automobile liability insurance policy of the type defined in Neb. Rev. Stat. § 44-514 (Reissue 1984) is exclusively controlled by Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984).
Glockel v. State Farm Mut. Auto. Ins. Co. 222
3. As a general statute, Neb. Rev. Stat. § 44-358 (Reissue 1984) does not control procedures for the specific types of policies defined in Neb. Rev. Stat. § 44-514 (Reissue 1984).
Glockel v. State Farm Mut. Auto. Ins. Co. 222
4. Where there is a conflict between the typed and printed portions of an insurance policy, the typed portions control over the printed portions.
Charley v. Farmers Mut. Ins. Co. 765
5. Neb. Rev. Stat. § 60-509.01 (Reissue 1984) neither requires nor prohibits the aggregation, or "stacking," of multiple uninsured motorist coverages.
Charley v. Farmers Mut. Ins. Co. 765
6. Whether multiple uninsured motorist coverages are to be aggregated depends upon the policy language.
Charley v. Farmers Mut. Ins. Co. 765

Intent

1. Proof of a purpose to kill is not required to establish felony murder because it is not an element of the crime. The only intent required is the intent to do the act which constitutes the felony during which the killing occurred.
State v. Smith 176
State v. Perkins 491
2. Other acts may be used as relevant evidence to counter a defendant's contention that at the time of the offense his action lacked the requisite criminal intent due to intoxication.
State v. Stewart 347
3. Duress is not a defense to a charge of homicide.
State v. Perkins 491

Interest

The assessment of interest pursuant to Neb. Rev. Stat. § 48-125(2) (Reissue 1984), like the allowance of attorney fees, is a remedy affecting procedure only, and the same may be awarded on a claim that arose before 1983 Neb. Laws, L.B. 18, became law.
Allen v. IBP, Inc. 424

Invitor-Invitee

An owner or occupant of real estate owes a duty to an invitee to use reasonable care to keep the premises safe for the use of the invitee, but such owner is not an insurer against an accident.
Neff v. Clark 521

Irrigation Districts

1. The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all landowners within the district upon fair and equitable terms and conditions.
Peterson v. Gering Irr. Dist. 275
2. In deciding what is just and equitable in determining water apportionment, the size of the tract, the elevations of possible points of delivery, the topography and the nature of the soil, the location and availability of alternative or additional sources of water supply, and the comparative advantages and disadvantages to the landowner and the irrigation district should all be considered.
Peterson v. Gering Irr. Dist. 275
3. An irrigation district properly organized under the statutes is a political subdivision.
Peterson v. Gering Irr. Dist. 281
4. Actions against an irrigation district are governed by the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
Peterson v. Gering Irr. Dist. 281
5. A notice of a possible future "claim" against an irrigation district under Neb. Rev. Stat. § 46-160 (Reissue 1984) does not satisfy the requirements of Neb. Rev. Stat. § 23-2404 (Reissue 1983).
Peterson v. Gering Irr. Dist. 281

Judges

1. A county judge sitting as an examining magistrate has no jurisdiction to dismiss a felony complaint with prejudice.
State v. Wilkinson 685
2. The jurisdiction of an examining magistrate is limited to discharging the defendant or holding him for trial by a court which has jurisdiction over the offense charged.
State v. Wilkinson 685
3. The trial court should refrain from making remarks prejudicial to a litigant or calculated to influence the minds of a jury.
State v. Bideaux 718

Judgments

1. Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with

a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law. Neb. Rev. Stat. § 25-1127 (Reissue 1979).
Havelock Bank v. Woods 57
2. A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.
Havelock Bank v. Woods 57
3. The findings of the court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
Havelock Bank v. Woods 57
Schmode's, Inc. v. Wilkinson 209
4. In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.
Havelock Bank v. Woods 57
5. In reviewing an appeal from a judgment in a law action, this court does not reweigh the facts. Instead, it examines the evidence to determine whether, under a view most favorable to the prevailing party, the facts support the trial court's judgment.
Armstrong v. Hartford Life Ins. Co. 128
6. If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them, as may appear to have been members of such company, association, or firm.
Security State Bank v. McCoy 132
7. 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. Jones 184
8. The judgment or order of an administrative agency is rendered when the decision is announced upon the law and the facts.
Kizzier Chevrolet Co. v. General Motors Corp. 319

9. A proper result will not be reversed merely because it was reached for the wrong reason.
Gall v. Great Western Sugar Co. 354
10. Where a defendant or his attorney has actual notice of the entry of a sentencing order in a county court within 10 days of the entry of such order, an appeal to the district court must be perfected pursuant to the requirements of Neb. Rev. Stat. § 29-611 (Reissue 1979).
State v. Fiene 397
11. Where cases are interwoven and interdependent, and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
In re Estate of Casselman 653
12. Generally, appellate jurisdiction of the Supreme Court is limited to a review of final orders and judgments.
State ex rel. Kandt v. North Platte Baptist Church 694
13. If a contempt is criminal, the judgment is final and a proper subject for an appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal.
State ex rel. Kandt v. North Platte Baptist Church 694
14. A judgment is a matter of record, and can only be changed, set aside, or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment.
Nemec v. Nemec 891
15. Res judicata rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
Graham v. Waggener 907

Judicial Notice

1. The Nebraska Supreme Court will not take judicial notice of a municipal ordinance which does not appear in the record.
State v. Austin 420
2. Where cases are interwoven and interdependent, and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
In re Estate of Casselman 653

Juries

1. In order to establish a prima facie violation of the fair cross

section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.
State v. Perkins 491

2. To show a group is distinct the defendant must show that (1) the group is limited by some factor, such as race or age, (2) the group has a basic similarity in attitudes, ideas, or experience, and (3) that there is a community of interest among members of the group requiring representation in the jury selection process.
State v. Perkins 491

3. The degree of underrepresentation on a jury panel cannot be measured by census data alone.
State v. Perkins 491

Jurisdiction

1. Under Neb. Rev. Stat. § 42-351 (Reissue 1984), where dissolution of a marriage is sought, general jurisdiction over the marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of marriage is properly filed.
Robbins v. Robbins 151
Nemec v. Nemec 891

2. When the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), conflicts with this holding, it is overruled.
Pointer v. State 315

3. The Commission of Industrial Relations, pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984), does have jurisdiction, that is, authorized power, to resolve industrial disputes between agencies or departments of the State of Nebraska and their employees.
State Code Agencies Ed. Assn. v. Department of Pub. Insts. .. 555

4. A county judge sitting as an examining magistrate has no jurisdiction to dismiss a felony complaint with prejudice.
State v. Wilkinson 685

5. The jurisdiction of an examining magistrate is limited to discharging the defendant or holding him for trial by a court which has jurisdiction over the offense charged.
State v. Wilkinson 685

6. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.
Else v. Else 878
7. As a general rule, it is not inconsistent with due process to allow a court in personam jurisdiction over a nonresident party to a domestic relations action when the forum state was the place of last marital domicile, assuming the wording of the so-called long arm statute is broad enough to embrace such action.
York v. York 883
8. The establishment of a marital relationship in this state from which a nonresident has left is sufficient minimum contact with this state under the provisions of Neb. Rev. Stat. § 25-536 (Cum. Supp. 1984) to permit a court of this state to exercise in personam jurisdiction over the nonresident in an action to dissolve that marriage.
York v. York 883
9. A judgment is a matter of record, and can only be changed, set aside, or modified by the court by whose authority the record is made, or by the direction of a court of higher jurisdiction in proceedings to review the judgment.
Nemec v. Nemec 891
10. A court which has jurisdiction in a divorce action does not lose its continuing jurisdiction over child support matters when a support order in the action is transcribed and filed with the clerk of the district court in another county.
Nemec v. Nemec 891
11. Failure to immediately take reasonable measures, as provided by Neb. Rev. Stat. § 43-250 (Reissue 1984), to notify a parent that temporary custody has been taken of a juvenile pursuant to the provisions of Neb. Rev. Stat. § 43-248 (Reissue 1984) does not deprive the juvenile court of jurisdiction.
In re Interest of S.S.L. 911
12. Failure to file a petition within 48 hours, as provided by Neb. Rev. Stat. § 43-275 (Reissue 1984), after a juvenile has been taken into custody pursuant to Neb. Rev. Stat. § 43-248 (Reissue 1984) does not deprive the juvenile court of jurisdiction.
In re Interest of S.S.L. 911

Jury Instructions

1. Where the jury has been properly instructed that the testimony of an accomplice should be scrutinized closely for possible motives of falsification, the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction.
State v. Smith 176

2. Generally, this court will not consider instructions not objected to.
Priest v. McConnell 328
3. The trial court is under a duty, on its own motion, to correctly instruct on the law. This court may take cognizance of plain error in instructions indicative of a probable miscarriage of justice.
Priest v. McConnell 328
4. While it is the duty of the trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence, failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice.
Ellis & Guy Advg. v. Cohen 340
5. Jury instructions must be read as a whole. If they fairly present the law so that the jury could not be misled, there is no prejudicial error.
State v. Perkins 491
6. An appellant cannot claim prejudice regarding an instruction favorable or beneficial to the appellant's theory on which a case is tried.
State v. Bodtke 504
7. Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense.
State v. Schwartz 833
State v. Gonzales 846
8. Evidence sufficient to controvert the State's evidence as to an essential element of a crime, and sufficient to require the giving of an instruction as to a lesser-included offense, may be in the form of evidence offered by defendant, evidence developed in cross-examination of the State's witnesses, or evidence adduced from other witnesses.
State v. Schwartz 833

Juvenile Courts

1. Failure to immediately take reasonable measures, as provided by Neb. Rev. Stat. § 43-250 (Reissue 1984), to notify a parent that temporary custody has been taken of a juvenile pursuant to the provisions of Neb. Rev. Stat. § 43-248 (Reissue 1984) does not deprive the juvenile court of jurisdiction.
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In re Interest of S.S.L. 911

Labor and Labor Relations

1. Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
   Larson v. Transit Auth. of Omaha 539
2. Where a union must negotiate meritorious but conflicting claims, and no clear showing has been made of bad faith in making a choice between two or more claims, it cannot be said that in making the choice it made, the union unfairly represented one group.
   Larson v. Transit Auth. of Omaha 539

Laches

1. As a general rule, the doctrine of laches cannot be applied against public rights. In other words, laches is not available against the government or state in a suit by it to enforce a public right or to protect a public interest.
   State v. Jarchow 88
2. The objection of laches is not tenable to defeat an equity cause where there has been no material change in the position of the party seeking to employ that doctrine.
   State v. Jarchow 88
3. Although ordinarily one has a right to bring an action within the statutory period of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case; what constitutes laches is to be determined in the light of the circumstances of the particular case.
   Van Pelt v. Greathouse 478
4. Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
   Van Pelt v. Greathouse 478

Landlord and Tenant

1. Generally, the open, notorious possession of real property by a tenant is notice of the owner's title.
   Mader v. Kallos 579
2. A stairway servicing only a tenant's second story apartment is not a common area under a landlord's control.
   Hiatt v. Tallmage 635
3. Generally, a landlord has no duty to supervise the general

maintenance of tenants' animals in the building.
Hiatt v. Tallmage 635

Legislature

1. Neb. Const. art. I, § 21, is self-executing, and legislative action is not necessary to make the constitutional remedy available.
Kula v. Prososki 626
2. Nonexistent at common law, divorce is a matter within the exclusive and supreme province of the Legislature, subject to limitations imposed by the Constitutions, state and federal.
Else v. Else 878

Lesser-Included Offenses

1. Where the State offers uncontroverted evidence on an essential element of a crime, mere speculation that the jury will disbelieve the evidence does not entitle the defendant to an instruction on a lesser-included offense.
State v. Schwartz 833
State v. Gonzales 846
2. Evidence sufficient to controvert the State's evidence as to an essential element of a crime, and sufficient to require the giving of an instruction as to a lesser-included offense, may be in the form of evidence offered by defendant, evidence developed in cross-examination of the State's witnesses, or evidence adduced from other witnesses.
State v. Schwartz 833

Liability

1. One has no liability where he has done no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.
Gall v. Great Western Sugar Co. 354
2. As a general rule, where a bank has given an honest opinion as to the financial worth and standing of a third party as to whether the third party was entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion would not make it liable for fraud and deceit. The positive assertion of fact, and not the mere expression of an opinion, is necessary to constitute an estoppel.
Circle 76 Fertilizer v. Nelsen 661

Licenses and Permits

The gravamen of or the misconduct prohibited by Neb. Rev. Stat. §§ 60-418 and 39-669.30 (Reissue 1984) is operation of a motor vehicle after judicial or administrative deprivation of the operator's privilege or license to operate a motor vehicle on the public highways of the State of Nebraska.
State v. Jost 162

Liens

Under Neb. Rev. Stat. § 77-1902 (Reissue 1981), a petition for the foreclosure of a tax lien must be brought within 90 days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based, as provided for in Neb. Rev. Stat. § 77-1837 (Reissue 1981).
Bish v. Fletcher 863

Limitations of Actions

1. The statute of repose applicable to the manufacturer of an allegedly defective product is contained in Neb. Rev. Stat. § 25-224 (Cum. Supp. 1984) and begins to run when possession of the product is first relinquished for ultimate use or consumption, not when it is first placed into the stream of commerce by the manufacturer.
Witherspoon v. Sides Constr. Co. 117
2. The period of repose applicable to a general contractor is found in Neb. Rev. Stat. § 25-223 (Reissue 1979) and begins to run when construction of the structure is completed.
Witherspoon v. Sides Constr. Co. 117
3. A statute of repose is a type of a statute of limitations.
Witherspoon v. Sides Constr. Co. 117
4. A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit, even though the nature and extent of the damages may not be known.
Witherspoon v. Sides Constr. Co. 117
5. Architects and engineers are professionals for purposes of Neb. Rev. Stat. § 25-222 (Reissue 1979).
Witherspoon v. Sides Constr. Co. 117
6. The period of repose applicable to an architect who has a duty to inspect throughout construction is contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) and begins to run when construction is completed.
Witherspoon v. Sides Constr. Co. 117
7. The period of repose applicable to an engineer who has no duty other than to provide a design to an architect is contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) and begins to run when the design is delivered to the architect.
Witherspoon v. Sides Constr. Co. 117
8. Where compensation has been commuted by agreement and paid in a lump sum without court approval, Neb. Rev. Stat. § 48-139 (Reissue 1984), such a payment is not final; it is nothing more than an advance payment; and the statute of limitations, Neb. Rev. Stat. § 48-137 (Reissue 1984), does not begin to run until the last periodic payment would have been paid, had payments been made in installments.
Allen v. IBP, Inc. 424

9. 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 2 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 2-year period, then the action may be commenced within 1 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. Neb. Rev. Stat. § 25-222 (Reissue 1979).
Smith v. Ganz 432
10. Although ordinarily one has a right to bring an action within the statutory period of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case; what constitutes laches is to be determined in the light of the circumstances of the particular case.
Van Pelt v. Greathouse 478
11. A statute of limitations is a period of repose designed, if asserted, to prevent recovery on stale claims; a survival statute gives life to a substantive right that but for the statute would have been destroyed.
Van Pelt v. Greathouse 478
12. Neb. Rev. Stat. § 21-20,104 (Reissue 1983) is a survival statute which destroys the capacity of former shareholders of a dissolved corporation to sue or be sued on rights entirely dependent upon and existing solely as an outgrowth of the shareholder status except within 2 years after the corporation has been dissolved. The language in *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), which characterizes § 21-20,104 as a statute of limitations, is disapproved, as is any such suggestion which may be contained in *Barnes v. Hampton*, 198 Neb. 151, 252 N.W.2d 138 (1977).
Van Pelt v. Greathouse 478
13. The point at which a statute of limitations commences to run must be determined from the facts of each case; 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, even though such plaintiff may be ignorant of the existence of the cause of action.
Mangan v. Landen 643
14. If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made.
Mangan v. Landen 643
15. The statute of limitations runs from the date the cause of action

first accrues. A cause of action accrues when the aggrieved party has the right to institute and maintain a suit.
Lake v. Piper, Jaffray & Hopwood Inc. 731
16. Generally, a suit to declare a contract void, which if void was void at its inception, must be commenced within 4 years of the execution of the contract.
Lake v. Piper, Jaffray & Hopwood Inc. 731

Livestock

Dogs are not livestock, and the care or production of dogs is not included in the term "animal husbandry."
City of Beatrice v. Goodenkauf 756

Lotteries

1. Under Neb. Rev. Stat. § 28-1101(6) (Supp. 1983), a lottery is a game of chance in which the winner is determined by mere luck, not by skill, and contains the elements of consideration, a prize, and chance.
Video Consultants v. Douglas 868
2. An essential element of a lottery is awarding a prize by chance, but the exact method adopted for application of chance to the distribution of a prize is immaterial.
Video Consultants v. Douglas 868

Mental Distress

1. The elements of a cause of action based upon the intentional infliction of emotional distress are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
Gall v. Great Western Sugar Co. 354
2. One has no liability where he has done no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.
Gall v. Great Western Sugar Co. 354

Miranda Rights

1. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.
State v. Perkins 491
2. In considering whether *Miranda* rights have been voluntarily waived, the court must look to the background, experience, and conduct of the accused.
State v. Perkins 491

3. The requirements and corresponding proscriptions of *Miranda* relate to governmental activity such as interrogation by law enforcement personnel. *Miranda* does not dictate rules governing the manner or efforts of private citizens enforcing their private property rights by private investigation or interrogation.
State v. Bodtke 504

Modification of Decree

1. In dissolution of marriage cases, actions for the modification of alimony will, on appeal, 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.
Cooper v. Cooper 64
2. Good cause for altering alimony provisions in a divorce decree is demonstrated by a material and substantial change of circumstances.
Cooper v. Cooper 64
3. An alimony recipient's obtaining employment after the date of the decree is a circumstance that permits the situation of the parties to be reexamined.
Cooper v. Cooper 64
4. Where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, and particularly in default cases, where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody.
State ex rel. Laughlin v. Hugelman 254
5. In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, the court must, on appeal, review de novo the trial court's determination with regard to whether a change of circumstances has occurred which justifies the modification of the earlier custody order.
Boll v. Boll 486
6. In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.
Boll v. Boll 486
7. Where the failure to pay child support is the result of intentional conduct, an application for modification may be denied on the basis of the equitable doctrine of clean hands.
Voichoskie v. Voichoskie 670

8. Merely moving children out of the state of domicile does not ipso facto constitute a change of circumstances, but may be considered with other evidence to be a change of circumstances which will warrant a modification of the decree.
Parsons v. Parsons 736
9. Unless amounts have accrued prior to the date of the service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown.
Creager v. Creager 760
10. In a proceeding to modify an alimony award, Neb. Rev. Stat. § 42-365 (Reissue 1984), that matter is initially entrusted to the sound discretion of the trial judge, which matter, 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.
Creager v. Creager 760
11. Cohabitation, together with a showing that such arrangement improved a former spouse's overall financial condition, might warrant a modification of alimony.
Else v. Else 878
12. An application to modify the terms of a decree of divorce is not an independent proceeding.
Nemec v. Nemec 891

Motions for Continuance

A motion for continuance of a trial is addressed to the sound discretion of the trial court.
State v. Denbeck 672

Motions for New Trial

1. A motion for a new trial based on the ground of newly discovered evidence 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. Bideaux 718
2. Newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.
State v. Bideaux 718

Motions to Dismiss

The party against whom a motion for dismissal or direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion

is made, the case may not be decided as a matter of law.
Kahrhoff v. Kohl 742

Motions to Vacate

An action to vacate a decree of dissolution for fraud survives the death of a party whose death is the result of a homicide committed by the other party to the proceeding.
Howsden v. Rolenc 16

Motor Vehicles

1. The gravamen of or the misconduct prohibited by Neb. Rev. Stat. §§ 60-418 and 39-669.30 (Reissue 1984) is operation of a motor vehicle after judicial or administrative deprivation of the operator's privilege or license to operate a motor vehicle on the public highways of the State of Nebraska.
State v. Jost 162
2. In order to perfect an appeal from an order of the Nebraska Motor Vehicle Industry Licensing Board, an appeal bond must be filed with the board within 10 days of the rendition of the order. Neb. Rev. Stat. § 60-1415 (Reissue 1984).
Kizzier Chevrolet Co. v. General Motors Corp. 319
3. The mere skidding of an automobile without more does not prove negligence.
Macfie v. Kaminski 524
4. Allegations that a motorist involved in an accident failed to apply brakes or turn aside are nothing more than descriptions of the manner in which he or she is alleged to have failed to keep the vehicle driven under reasonable control.
Kahrhoff v. Kohl 742
5. A motorist owes the duty to see what is in plain sight and to drive in such a manner that he or she is able to stop or turn aside in time to avoid a collision with an object within his or her range of vision.
Kahrhoff v. Kohl 742
6. Whether a motorist who experiences a previously unmanifested mechanical failure is negligent in controlling the vehicle driven depends upon the opportunity to use other mechanical equipment at his or her disposal.
Kahrhoff v. Kohl 742
7. Neb. Rev. Stat. § 60-509.01 (Reissue 1984) neither requires nor prohibits the aggregation, or "stacking," of multiple uninsured motorist coverages.
Charley v. Farmers Mut. Ins. Co. 765
8. Whether multiple uninsured motorist coverages are to be aggregated depends upon the policy language.
Charley v. Farmers Mut. Ins. Co. 765
9. One who drives in response to the lawful order of a law enforcement officer engages in privileged conduct and may not be

punished for so doing.
State v. Lichti 894

Municipal Corporations

1. Under the provisions of Neb. Rev. Stat. § 31-740 (Reissue 1984), the authority of the city council, in the first instance, and the mayor thereafter to approve or disapprove proposals for the construction of a recreational facility to be built by a sanitary and improvement district is limited to a determination of whether or not the proposals conform to the municipality's master plan and construction specifications and standards.
S.I.D. No. 95 v. City of Omaha 564
2. The furnishing by a city of water or sewer service to persons outside the corporate limits of the city is contractual and permissive and not a duty imposed upon the city by statute.
Bleick v. City of Papillion 574
3. Public utilities generally may discriminate, in respect to rates, between consumers within and those outside the municipalities primarily served.
Bleick v. City of Papillion 574
4. Although a municipal corporation is a body corporate and politic, not all bodies corporate and politic are municipal corporations.
In re Application of S.I.D. No. 65 647
5. In its strict and proper sense, a municipal corporation is a body corporate and politic constituted by the incorporation of the inhabitants of a city or town for the purposes of local government.
In re Application of S.I.D. No. 65 647
6. Bodies other than those within the strict and proper sense of the term "municipal corporations" are at times referred to as such for certain purposes; a sanitary and improvement district is a municipal corporation for the purposes of Neb. Rev. Stat. § 77-2201 (Reissue 1981).
In re Application of S.I.D. No. 65 647

Negligence

1. 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 2 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 2-year period, then the action may be commenced within 1 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. Neb. Rev. Stat. § 25-222 (Reissue 1979).
Smith v. Ganz 432

2. Violations of Federal Aviation Administration regulations do not constitute negligence per se, but are evidence of negligence which may be taken into consideration along with all other evidence.
Tank v. Peterson 438
3. Plaintiffs are not required to eliminate all possibilities of how an accident may have happened; they are required only to establish a factual basis from which to infer negligence on the part of the defendant.
Tank v. Peterson 438
4. An owner or occupant of real estate owes a duty to an invitee to use reasonable care to keep the premises safe for the use of the invitee, but such owner is not an insurer against an accident.
Neff v. Clark 521
5. Where the facts are not in dispute and admit only of the conclusion that the defendant was not guilty of any negligence proximately causing plaintiff's damages, summary judgment in favor of the defendant is proper.
Neff v. Clark 521
6. The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove it.
Macfie v. Kaminski 524
Himes v. Carter 734
7. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.
Macfie v. Kaminski 524
Himes v. Carter 734
Kahrhoff v. Kohl 742
8. The mere skidding of an automobile without more does not prove negligence.
Macfie v. Kaminski 524
9. Failure of a county to post a bridge load capacity may be negligence or evidence of negligence.
Corbet, Inc. v. County of Pawnee 622
10. It is incumbent upon the plaintiff to prove that the negligence of the county was the proximate cause of the bridge collapse before recovery may be had against the county.
Corbet, Inc. v. County of Pawnee 622
11. An efficient intervening cause consists of the intervening negligence of a third person who has full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
Corbet, Inc. v. County of Pawnee 622
12. A stairway servicing only a tenant's second story apartment is not a common area under a landlord's control.
Hiatt v. Tallmage 635

13. Generally, a landlord has no duty to supervise the general maintenance of tenants' animals in the building.
Hiatt v. Tallmage 635
14. Allegations that a motorist involved in an accident failed to apply brakes or turn aside are nothing more than descriptions of the manner in which he or she is alleged to have failed to keep the vehicle driven under reasonable control.
Kahrhoff v. Kohl 742
15. A motorist owes the duty to see what is in plain sight and to drive in such a manner that he or she is able to stop or turn aside in time to avoid a collision with an object within his or her range of vision.
Kahrhoff v. Kohl 742
16. Whether a motorist who experiences a previously unmanifested mechanical failure is negligent in controlling the vehicle driven depends upon the opportunity to use other mechanical equipment at his or her disposal.
Kahrhoff v. Kohl 742

Notice

1. One who has obtained a property interest in his or her employment is entitled to notice which accords constitutional due process.
Benton v. Board of Ed. of Sch. Dist. No. 17 134
2. Constitutional due process requires notice which relates to the matter to be presented and which is suitable and fair in view of the circumstances and conditions existent at the time.
Benton v. Board of Ed. of Sch. Dist. No. 17 134
3. Where a defendant or his attorney has actual notice of the entry of a sentencing order in a county court within 10 days of the entry of such order, an appeal to the district court must be perfected pursuant to the requirements of Neb. Rev. Stat. § 29-611 (Reissue 1979).
State v. Fiene 397
4. Procedural due process requires the following: notice reasonably calculated to inform one of the accusation levied; identification of the accuser; factual basis for the accusation; reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board.
States v. Anderson 545
5. A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry.
Mader v. Kallos 579
6. The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice.
Mader v. Kallos 579

7. A purchaser having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by want of notice in his vendor.
Mader v. Kallos 579
8. Generally, the open, notorious possession of real property by a tenant is notice of the owner's title.
Mader v. Kallos 579
9. Formal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted before a judge, with notice to interested persons.
In re Estate of Casselman 653
10. Informal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.
In re Estate of Casselman 653
11. Notice of a formal hearing under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), must be given to all interested persons unless these persons waive notice.
In re Estate of Casselman 653

Nuisances

1. Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation.
Burgess v. Omahawks Radio Control Org. 100
2. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness.
Burgess v. Omahawks Radio Control Org. 100
3. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
Burgess v. Omahawks Radio Control Org. 100
Cline v. Franklin Pork, Inc. 234
4. Ordinarily, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of operation.
Cline v. Franklin Pork, Inc. 234

5. The selection of a place of business is often a matter of both private and public concern and is not in all cases left to the owner alone.
Cline v. Franklin Pork, Inc. 234
6. A business which is lawful in itself may become a nuisance, either because of the locality in which it is carried on or because it is conducted in an improper manner.
Cline v. Franklin Pork, Inc. 234
7. The exercise of due care by the owners of a business in its operation is not a defense to an action to enjoin its operation as a nuisance.
Cline v. Franklin Pork, Inc. 234
8. An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on consideration of all the circumstances of each case.
Cline v. Franklin Pork, Inc. 234
9. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.
Cline v. Franklin Pork, Inc. 234
10. The operation of a legitimate business or certain aspects of the business which constitute a nuisance may be enjoined where it clearly appears there is no other complete remedy for the injury done.
Cline v. Franklin Pork, Inc. 234
11. One's right to enjoin a nuisance is not defeated by the fact that he purchased his property after the nuisance came into existence.
Egan v. Catholic Bishop 365
12. The essential ingredient of a nuisance is its unlawful or wrongful character.
Egan v. Catholic Bishop 365

Ordinances

1. A private individual, with standing, may bring suit in district court to enjoin an alleged violation of the zoning laws or ordinances.
Burgess v. Omahawks Radio Control Org. 100
2. The Nebraska Supreme Court will not take judicial notice of a municipal ordinance which does not appear in the record.
State v. Austin 420
3. An action to enjoin enforcement of a city ordinance is one in equity.
City of Beatrice v. Goodenkauf 756

4. Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
City of Beatrice v. Goodenkauf 756
5. Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
City of Beatrice v. Goodenkauf 756
6. An accessory use is defined as a subordinate use, clearly incidental and related to the principal structure, building, or use of the land, and located on the same lot as that of the principal structure, building, or use.
City of Beatrice v. Goodenkauf 756
7. Whether a use is customary is not to be determined merely by a mathematical count; but numbers are a factor which must be considered.
City of Beatrice v. Goodenkauf 756

Other Acts

1. Sexual 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.
State v. Craig 70
2. Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule, permitting as evidence the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character.
State v. Craig 70
3. The purposes set forth in Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) are illustrative only and not intended to be exhaustive or mutually exclusive.
State v. Craig 70
4. Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.
State v. Stewart 347

5. Proof of other acts admissible under Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) is not restricted to those acts occurring before the event for which a defendant is prosecuted. Proof of other acts may be admissible even if such acts occurred after the offense charged against the defendant.
State v. Stewart 347
6. Generally, other acts may be used to refute the accused's claim of self-defense.
State v. Stewart 347
7. Other acts may be used as relevant evidence to counter a defendant's contention that at the time of the offense his action lacked the requisite criminal intent due to intoxication.
State v. Stewart 347

Parental Rights

1. We review the matter de novo upon the record to determine if the order terminating parental rights is supported by clear and convincing evidence.
In re Interest of S.A.S. 500
2. An order terminating parental rights must be supported by clear and convincing evidence.
In re Interest of R.H., T.H., and J.H. 904

Parties

An administrative agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency.
Beatrice Manor v. Department of Health 141

Partnerships

1. If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them, as may appear to have been members of such company, association, or firm.
Security State Bank v. McCoy 132
2. The provisions of Neb. Rev. Stat. § 67-318(a) (Reissue 1981) may be modified either by an agreement between the partners or by a course of dealing amounting to an agreement between the partners.
Smith v. Daub 698

3. A partnership only terminates when the business of the partnership has been wound up.
Smith v. Daub 698
4. No partner is entitled to remuneration for acting in the partnership business.
Smith v. Daub 698

Paternity

Where it is determined that an individual is the natural parent, even though one may initially deny paternity, and thereafter establishes a familial relationship with the children, both emotional and financial, the question of which parent should have custody of the children should be determined on the basis of the best interests of the children.
State ex rel. Laughlin v. Hugelman 254

Pensions

The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties.
Rockwood v. Rockwood 21

Perpetuities

1. The rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth.
In re Trust Estate of Darling 705
2. The law looks with favor upon the early vesting of estates, and a remainder will not be held to be contingent if it can reasonably be held to be a vested remainder.
In re Trust Estate of Darling 705
3. The rule against perpetuities, by its terms, relates solely to the vesting of estates or interests and is not concerned with their possession or enjoyment.
In re Trust Estate of Darling 705

Pleadings

1. Issues not properly raised in the pleadings nor litigated at trial will not generally be considered for the first time on appeal.
Armstrong v. Hartford Life Ins. Co. 128
2. The answer shall contain a statement of any new matter constituting a defense, in ordinary and concise language. Neb. Rev. Stat. § 25-811 (Reissue 1979).
Armstrong v. Hartford Life Ins. Co. 128
3. If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof,

setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them, as may appear to have been members of such company, association, or firm.
Security State Bank v. McCoy 132
4. For the purpose of ruling on a motion for leave to intervene, the allegations of the petition in intervention are deemed to be true.
Basin Elec. Power Co-op v. Little Blue N.R.D. 372
5. A direct and immediate interest which will mandatorily require the granting of a motion for leave to intervene must be such a direct and immediate interest that one seeking to intervene will either lose or gain by the direct operation of the judgment.
Basin Elec. Power Co-op v. Little Blue N.R.D. 372
6. In an action for conversion the plaintiff must allege facts showing a right to immediate possession of the property at the time of the conversion.
Prososki v. Commercial Nat. Bank 607
7. Where a petition fails to plead actionable facts, it is subject to a general demurrer.
Prososki v. Commercial Nat. Bank 607
8. It is not necessary that the constitutional provision relating to damage for a public use be set out or its existence alleged in the petition stating the cause of action. All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it.
Kula v. Prososki 626
9. The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues will be limited to those pleaded.
Circle 76 Fertilizer v. Nelsen 661
10. Allegations that a motorist involved in an accident failed to apply brakes or turn aside are nothing more than descriptions of the manner in which he or she is alleged to have failed to keep the vehicle driven under reasonable control.
Kahrhoff v. Kohl 742
11. An action in equity vests the trial court with broad powers authorizing any judgment under the pleadings.
City of Beatrice v. Goodenkauf 756
12. Failure to file a petition within 48 hours, as provided by Neb. Rev. Stat. § 43-275 (Reissue 1984), after a juvenile has been taken into custody pursuant to Neb. Rev. Stat. § 43-248 (Reissue 1984) does not deprive the juvenile court of jurisdiction.
In re Interest of S.S.L. 911

Pleas

1. Mere failure to comply with precise ceremonial or verbal formality in arraignment and entry of a plea is not so prejudicial

as to require setting aside a defendant's guilty plea which is otherwise entered in accordance with statutory and constitutional requirements.
State v. Jost 162
2. A plea of guilty admits all facts alleged in the information and recited in open court by the State.
State v. Bargen 416
3. A factual basis for a plea of guilty may be established by inquiry of the prosecution, interrogation of the defendant, or examination of the presentence report.
State v. Bargen 416
4. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.
State v. Malek 680

Police Officers and Sheriffs

One who drives in response to the lawful order of a law enforcement officer engages in privileged conduct and may not be punished for so doing.
State v. Lichti 894

Political Subdivisions

1. An irrigation district properly organized under the statutes is a political subdivision.
Peterson v. Gering Irr. Dist. 281
2. Failure of a county to post a bridge load capacity may be negligence or evidence of negligence.
Corbet, Inc. v. County of Pawnee 622
3. It is incumbent upon the plaintiff to prove that the negligence of the county was the proximate cause of the bridge collapse before recovery may be had against the county.
Corbet, Inc. v. County of Pawnee 622

Political Subdivisions Tort Claims Act

1. Actions against an irrigation district are governed by the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
Peterson v. Gering Irr. Dist. 281
2. A notice of a possible future "claim" against an irrigation district under Neb. Rev. Stat. § 46-160 (Reissue 1984) does not satisfy the requirements of Neb. Rev. Stat. § 23-2404 (Reissue 1983).
Peterson v. Gering Irr. Dist. 281
3. In an action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), the findings of fact of the trial court will not be overturned unless clearly wrong.
Corbet, Inc. v. County of Pawnee 622
4. The fact that a landowner could have sued in tort under the

Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), for damage caused to property for a public use does not preclude such landowner from proceeding in a direct action for damages under the Constitution.
Kula v. Prososki 626

Post Conviction

1. The Supreme Court will not consider a question not presented to the district court for disposition through a defendant's motion for post conviction relief.
State v. Casper 641
2. 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.
State v. Malek 680
3. One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous.
State v. Hurley 829
4. Generally, a defendant may bring a second proceeding for post conviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion.
State v. Ohler 840

Prejudgment Interest

1. While there may be no reasonable controversy as to the amount of a claim nor as to plaintiff's right to recover from some defendant, if there is a reasonable controversy as to who is responsible for the claim, prejudgment interest should not be awarded.
Ellis & Guy Advg. v. Cohen 340
2. If no reasonable controversy exists as to a party's right to recover or as to the amount of such recovery, the claim is generally considered to be liquidated and prejudgment interest should be allowed.
Circle 76 Fertilizer v. Nelsen 661

Preliminary Hearings

A preliminary hearing is not a criminal prosecution or a trial. Its purpose is to ascertain whether a crime has been committed and whether there is probable cause to believe the accused committed it.
State v. Wilkinson 685

Presumptions

1. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary

sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
Burgess v. Omahawks Radio Control Org. 100
Cline v. Franklin Pork, Inc. 234
2. In the absence of a contrary intention, there is a presumption that a class will be determined upon the death of the testator.
In re Trust Estate of Darling 705
3. In a trial to the court the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
In re Interest of S.S.L. 911

Pretrial Conferences

Pretrial conferences are conducted in order to simplify and narrow the issues of the case and to avoid traps and surprises.
Priest v. McConnell 328

Pretrial Motions

1. The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery.
Priest v. McConnell 328
2. For the purpose of ruling on a motion for leave to intervene, the allegations of the petition in intervention are deemed to be true.
Basin Elec. Power Co-op v. Little Blue N.R.D. 372
3. A direct and immediate interest which will mandatorily require the granting of a motion for leave to intervene must be such a direct and immediate interest that one seeking to intervene will either lose or gain by the direct operation of the judgment.
Basin Elec. Power Co-op v. Little Blue N.R.D. 372

Prior Convictions

1. 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. Jones 184
2. The record of a prior conviction used for enhancement purposes is not required to show a complete waiver of constitutional rights as required by *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).
State v. Jones 184
3. Enhancing a sentence because of a prior conviction is not cruel and unusual punishment.
State v. Brand 402
4. For enhancement purposes the burden on the State to prove valid prior convictions is only to show that the defendant had, or

waived, counsel at the time of such prior convictions.
State v. Soe 797

Prisoners

1. Neither mandatory good time earned pursuant to Neb. Rev. Stat. § 83-1,107 (Reissue 1981) nor meritorious good time earned pursuant to Neb. Rev. Stat. § 83-1,107.01 (Reissue 1981) is automatically forfeited upon revocation of parole. Such forfeiture must occur upon either the recommendation of the chief executive officer of the facility to which the offender is entrusted or the parole administrator, depending upon who has custody at the time of revocation, subject to approval of the director of the Department of Correctional Services. Once forfeited or withheld, good time credits may be restored to the offender in like manner.
Malone v. Benson 28
2. Pursuant to Neb. Rev. Stat. §§ 83-1,107 and 83-1,107.01 (Reissue 1981), the Board of Parole merely has the right to make recommendation of forfeitures of good time when the offender is in the custody of the Board of Parole. The discretion referred to by statute vests solely in the chief executive officer of the facility when the offender is in the custody of the Department of Correctional Services and in the parole administrator when the offender is in the custody of the Board of Parole, in each instance subject to the approval of the director of the Department of Correctional Services.
Malone v. Benson 28

Probable Cause

1. If probable cause to arrest without a warrant exists, a person may be arrested within such person's home, provided the officer's entry was lawful, such as for the purpose of executing a valid search warrant.
State v. Ware 594
2. The test of probable cause for a warrantless arrest is whether, at the moment of arrest, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the individual had committed or was committing an offense.
State v. Ware 594

Probation and Parole

1. Neither mandatory good time earned pursuant to Neb. Rev. Stat. § 83-1,107 (Reissue 1981) nor meritorious good time earned pursuant to Neb. Rev. Stat. § 83-1,107.01 (Reissue 1981) is automatically forfeited upon revocation of parole. Such forfeiture must occur upon either the recommendation of the

chief executive officer of the facility to which the offender is entrusted or the parole administrator, depending upon who has custody at the time of revocation, subject to approval of the director of the Department of Correctional Services. Once forfeited or withheld, good time credits may be restored to the offender in like manner.
Malone v. Benson 28

2. Pursuant to Neb. Rev. Stat. §§ 83-1,107 and 83-1,107.01 (Reissue 1981), the Board of Parole merely has the right to make recommendation of forfeitures of good time when the offender is in the custody of the Board of Parole. The discretion referred to by statute vests solely in the chief executive officer of the facility when the offender is in the custody of the Department of Correctional Services and in the parole administrator when the offender is in the custody of the Board of Parole, in each instance subject to the approval of the director of the Department of Correctional Services.
Malone v. Benson 28

Products Liability

The statute of repose applicable to the manufacturer of an allegedly defective product is contained in Neb. Rev. Stat. § 25-224 (Cum. Supp. 1984) and begins to run when possession of the product is first relinquished for ultimate use or consumption, not when it is first placed into the stream of commerce by the manufacturer.
Witherspoon v. Sides Constr. Co. 117

Promissory Notes

In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
Yankton Prod. Credit Assn. v. Larsen 610

Proof

1. Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.
Anderson v. Farm Bureau Ins. Co. 1

2. Proof of a purpose to kill is not required to establish felony murder because it is not an element of the crime. The only intent required is the intent to do the act which constitutes the felony during which the killing occurred.
State v. Smith 176

3. The burden of proof in a compensation case is upon the plaintiff to establish by a preponderance of the evidence that his disability

was caused by an injury arising out of and in the course of his employment.
Mulder v. Minnesota Mining & Mfg. Co. 241
4. To establish a breach of implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury. In order for the goods to be merchantable under Neb. U.C.C. § 2-314 (Reissue 1980), they must be at least such as are fit for the ordinary purposes for which such goods are used.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
5. In order for one to recover for a breach of an implied warranty of fitness, the purchaser must prove that (1) the seller had reason to know of the buyer's particular purpose, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
6. The authenticity of a sample of bodily fluid must be established before a chemical analysis of the sample may be admitted into evidence.
Priest v. McConnell 328
7. Where an object passes through several hands before being produced in court, it is necessary to establish a complete chain of evidence which traces the possession of the article to the final custodian.
Priest v. McConnell 328
8. The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove it.
Macfie v. Kaminski 524
Himes v. Carter 734
9. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.
Macfie v. Kaminski 524
Himes v. Carter 734
10. The mere skidding of an automobile without more does not prove negligence.
Macfie v. Kaminski 524
11. The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice.
Mader v. Kallos 579
12. It is incumbent upon the plaintiff to prove that the negligence of the county was the proximate cause of the bridge collapse before recovery may be had against the county.
Corbet, Inc. v. County of Pawnee 622

13. It is not necessary that the constitutional provision relating to damage for a public use be set out or its existence alleged in the petition stating the cause of action. All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it.
Kula v. Prososki 626
14. A party pursuing a claim before the Nebraska Equal Opportunity Commission is required to establish by a preponderance of the evidence a prima facie case of disparate treatment. To accomplish this it must be shown (1) that the claimant is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1984); (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected for that position; and (4) that after he was rejected the job remained open.
Williams v. Goodyear Tire & Rubber Co. 748
15. A prima facie case of disparate treatment must be shown by a preponderance of the evidence before the employer must come forth and show the legitimacy of its actions.
Williams v. Goodyear Tire & Rubber Co. 748
16. Generally, expert testimony is not admissible as proof that the assistance of counsel in a criminal case was ineffective.
State v. Ohler 840
17. Either a law enforcement officer's observations of defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages.
State v. Lichti 894

Property

1. The selection of a place of business is often a matter of both private and public concern and is not in all cases left to the owner alone.
Cline v. Franklin Pork, Inc. 234
2. When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. art. I, § 21.
Kula v. Prososki 626
3. Neb. Const. art. I, § 21, is self-executing, and legislative action is not necessary to make the constitutional remedy available.
Kula v. Prososki 626
4. The fact that a landowner could have sued in tort under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), for damage caused to property for a public use does not preclude such landowner from

proceeding in a direct action for damages under the Constitution.
Kula v. Prososki 626
5. A landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain.
Kula v. Prososki 626
6. A landowner has a right to join with an action for equitable relief a claim for temporary damages.
Kula v. Prososki 626
7. It is not necessary that the constitutional provision relating to damage for a public use be set out or its existence alleged in the petition stating the cause of action. All that is necessary is that the litigant allege and prove facts constituting a cause of action because of it.
Kula v. Prososki 626
8. At common law a landowner could not be compelled to build a partition fence. A party, therefore, by the erection of such fence, acquires no right of action for contribution from the owner of lands adjoining.
Schnakenberg v. Schroeder 813
9. While Neb. Rev. Stat. §§ 34-101 to 34-115 (Reissue 1984) provide a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, such statutes are not exclusive, but coterminous proprietors may by contract adjust their respective rights and obligations regarding a division fence.
Schnakenberg v. Schroeder 813
10. Neb. Rev. Stat. §§ 34-101 to 34-115 (Reissue 1984) provide a method of allocating and assigning to adjoining landowners responsibility for maintaining specific parts of a division fence where there is no agreement for such maintenance.
Schnakenberg v. Schroeder 813

Property Division

1. The division of property in marriage dissolution cases is a matter initially entrusted to the sound discretion of the trial judge, which will be reviewed on appeal de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Rockwood v. Rockwood 21
Salmon v. Salmon 899
2. While there is no precise mathematical formula to be used in determining the fairness of a property division, generally speaking, awards in marriage dissolution proceedings vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular

case.
Rockwood v. Rockwood 21
Smith v. Ganz 432
McCollister v. McCollister 711
3. The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties.
Rockwood v. Rockwood 21
4. The ultimate test for division of marital property is one of reasonableness.
Rockwood v. Rockwood 21
5. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage.
Ross v. Ross 528
Applegate v. Applegate 532
6. How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved.
Applegate v. Applegate 532
7. The ultimate test for division of marital property and an award of alimony is one of reasonableness.
Applegate v. Applegate 532
8. The standard of review of the division of property and the award of alimony in marriage dissolution cases is that these matters are 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.
McCollister v. McCollister 711
9. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
McCollister v. McCollister 711
10. 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, and a history of the contributions to the marriage by each party.
McCollister v. McCollister 711
11. Alimony, child support, and property settlement issues must be considered together to determine whether a court has abused its discretion.
Salmon v. Salmon 899

Proximate Cause

1. The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact.
Corbet, Inc. v. County of Pawnee 622
2. Proximate cause is that cause which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
Corbet, Inc. v. County of Pawnee 622
3. An efficient intervening cause consists of the intervening negligence of a third person who has full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
Corbet, Inc. v. County of Pawnee 622

Public Health and Welfare

1. In construing Neb. Rev. Stat. § 71-5857 (Reissue 1981), which requires the Department of Health to distinguish between rural and urban areas, the remainder of the section, which declares that such distinction must be made only to the extent that variable standards between the two areas will benefit the development of the most appropriate health care system for the particular area, must also be considered.
Beatrice Manor v. Department of Health 141
2. "Need" for nursing beds as defined by the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. §§ 71-5801 et seq. (Reissue 1981), is not synonymous with "demand." "Need" focuses on long-range plans to provide required services to an entire population. It is a quantitative analysis. "Demand" connotes an immediate preference on the part of an individual to live in a particular nursing facility.
Beatrice Manor v. Department of Health 141
3. Under the enabling legislation and rules of the Department of Health promulgated thereunder, the implementation of alternate forms of care for the elderly, such as home nursing, day care, or "Meals on Wheels," are legitimate long-range efforts to minimize the need for nursing homes, so they are not to be considered the only method for caring for the elderly.
Beatrice Manor v. Department of Health 141

Public Lands

The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.
State v. Jarchow 88

Public Officers and Employees

1. A recall statute, or any other kind of election statute, must be liberally construed to effectuate the purpose for which the statute is intended. However, liberal construction of statutes governing recall of public, elected officials does not constitute a license to totally ignore the express requirements of recall statutes.
Quigley v. Lebsack 110
2. Indication of residence address specified in Neb. Rev. Stat. § 23-2010.02 (Cum. Supp. 1982) impliedly assures that only registered voters will participate in removal of an elected official by recall petition and supplies a convenient method of checking whether a signatory is ostensibly a qualified elector.
Quigley v. Lebsack 110
3. Neb. Rev. Stat. § 23-2010.02 (Cum. Supp. 1982) requires that the residence address of a signatory be placed on a recall petition by the signatory personally or with the signatory's authorization.
Quigley v. Lebsack 110
4. A civil service commission may require that a list of witnesses and documents to be relied upon at a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983) be furnished to an employee by the appointing authority.
States v. Anderson 545
5. At a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983), it is improper to receive unsworn statements and to receive sworn statements from persons not required to submit to cross-examination.
States v. Anderson 545
6. A landowner is not precluded from bringing an action for a mandatory injunction against public authorities to prevent damage to the owner's land caused by a public improvement when the public authorities have declined to exercise their right of eminent domain.
Kula v. Prososki 626

Public Policy

1. There is a strong public policy against allowing a person who commits a homicide to benefit in any way from the death of the victim.
Howsden v. Rolenc 16

2. Provisions in Blue Cross and Blue Shield of Nebraska medical insurance policies forbidding assignment of benefits are not void or unenforceable as a matter of public policy in Nebraska.
OB-GYN v. Blue Cross 199

Public Service Commission

Where the order of the Nebraska Public Service Commission is not based on any evidence in the record before the commission, the Supreme Court, on review, will reverse such order.
In re Petition of G. Kay, Inc. 24

Public Utilities

1. The furnishing by a city of water or sewer service to persons outside the corporate limits of the city is contractual and permissive and not a duty imposed upon the city by statute.
Bleick v. City of Papillion 574
2. Public utilities generally may discriminate, in respect to rates, between consumers within and those outside the municipalities primarily served.
Bleick v. City of Papillion 574

Quiet Title

In an action to quiet title the plaintiff is required to recover based upon the strength of his own title and not upon any weakness in the title of his adversary.
Mader v. Kallos 579

Real Estate

1. A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry.
Mader v. Kallos 579
2. The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice.
Mader v. Kallos 579
3. A purchaser having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by want of notice in his vendor.
Mader v. Kallos 579
4. Generally, the open, notorious possession of real property by a tenant is notice of the owner's title.
Mader v. Kallos 579
5. Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.
Mohrlang v. Draper 630

6. Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance.
Mohrlang v. Draper 630
7. In an action for specific performance of a contract to sell real estate, generally, it is no defense that there is other available land as good as or even better than the land which is the subject of the contract to be performed.
Mohrlang v. Draper 630

Recall Petitions

1. A recall statute, or any other kind of election statute, must be liberally construed to effectuate the purpose for which the statute is intended. However, liberal construction of statutes governing recall of public, elected officials does not constitute a license to totally ignore the express requirements of recall statutes.
Quigley v. Lebsack 110
2. Indication of residence address specified in Neb. Rev. Stat. § 23-2010.02 (Cum. Supp. 1982) impliedly assures that only registered voters will participate in removal of an elected official by recall petition and supplies a convenient method of checking whether a signatory is ostensibly a qualified elector.
Quigley v. Lebsack 110
3. Neb. Rev. Stat. § 23-2010.02 (Cum. Supp. 1982) requires that the residence address of a signatory be placed on a recall petition by the signatory personally or with the signatory's authorization.
Quigley v. Lebsack 110

Records

1. Evidence which does not appear in the record cannot be considered by this court on appeal.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
2. In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of pleadings to support judgment.
Moore v. American Charter Fed. Sav. & Loan Assn. 793
3. An appellate court will not consider or review a ruling of a trial court when the questioned ruling is not a part of the trial record. The Supreme Court will not speculate about proceedings in a trial court but must rely upon the record presented for review.
Buckingham v. Wray 807
4. The Supreme Court can only decide issues based on the record before it.
Raymond v. Department of Motor Vehicles 821

Redemption

1. The time for redeeming property from a tax sale under the provisions of Neb. Rev. Stat. § 77-1837 (Reissue 1981) expires after 3 years plus 90 days from the date of the original sale.
Bish v. Fletcher 863

2. Under Neb. Rev. Stat. § 77-1902 (Reissue 1981), a petition for the foreclosure of a tax lien must be brought within 90 days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based, as provided for in Neb. Rev. Stat. § 77-1837 (Reissue 1981).
Bish v. Fletcher 863

Reformation

An action to reform a deed is equitable in nature.
Van Pelt v. Greathouse 478

Res Judicata

1. Where cases are interwoven and interdependent, and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
In re Estate of Casselman 653
2. The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts. If so, the same cause of action has been alleged, even if different theories of recovery are relied upon.
Graham v. Waggener 907
3. Res judicata rests upon the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
Graham v. Waggener 907
4. While a party is entitled to an adjudication of his rights, a proliferation of actions in which the same issues are raised is not proper and will not be tolerated.
Graham v. Waggener 907

Restrictive Covenants

1. An action to enjoin breach of restrictive use covenant is equitable in nature.
Egan v. Catholic Bishop 365
2. The right to enforce a restrictive covenant may be waived by acquiescing in its violation, the circumstances of each case controlling whether there has been such a waiver.
Egan v. Catholic Bishop 365
3. Covenants restricting use of land are not favored in the law.
Egan v. Catholic Bishop 365

Revocation

1. The gravamen of or the misconduct prohibited by Neb. Rev. Stat. §§ 60-418 and 39-669.30 (Reissue 1984) is operation of a motor vehicle after judicial or administrative deprivation of the operator's privilege or license to operate a motor vehicle on the public highways of the State of Nebraska.
   State v. Jost 162
2. Revocation of acceptance and breach of warranty of accepted goods are separate remedies, and a buyer may pursue either remedy or both.
   Wendt v. Beardmore Suburban Chevrolet 775
3. A buyer who elects to exercise his right to revoke acceptance has a duty to not exercise ownership over the goods.
   Wendt v. Beardmore Suburban Chevrolet 775
4. Use of the goods by the buyer may waive any right to revoke acceptance.
   Wendt v. Beardmore Suburban Chevrolet 775

Right to Counsel

1. An accused is entitled to be represented by counsel in all critical stages of a criminal proceedings against him, but the right to counsel may be waived, if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel.
   State v. Jost 162
   State v. Denbeck 672
2. A defendant has a constitutional right of self-representation and may proceed to defend himself without counsel, when he voluntarily, understandingly, and intelligently elects to do so.
   State v. Jost 162
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. Jones 184
4. 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. Jones 184
5. Only those identification confrontations which occur after the defendant has been formally charged with the offense for which the identification testimony is sought require presence of counsel.
   State v. Ellis 408
6. The sixth and fourteenth amendments to the U.S. Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right

to assistance of appointed counsel in his defense.
State v. Austin 420
7. For enhancement purposes the burden on the State to prove valid prior convictions is only to show that the defendant had, or waived, counsel at the time of such prior convictions.
State v. Soe 797

Rules of Evidence

1. Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule, permitting as evidence the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character.
State v. Craig 70
2. The purposes set forth in Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) are illustrative only and not intended to be exhaustive or mutually exclusive.
State v. Craig 70
3. As used in Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)), *intent* is the state of mind operative at the time of an action.
State v. Craig 70
4. Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.
State v. Stewart 347
5. Proof of other acts admissible under Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) is not restricted to those acts occurring before the event for which a defendant is prosecuted. Proof of other acts may be admissible even if such acts occurred after the offense charged against the defendant.
State v. Stewart 347
6. Rule 402 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-402 (Reissue 1979)) permits the admission of relevant evidence only.
State v. Robertson 782

Sales

1. The test for inclusion in or exclusion from the sales provisions of Neb. U.C.C. art. 2 (Reissue 1980) is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably

stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
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.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
3. A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
4. A positive statement of a seller of the condition of personal property made during negotiations for its sale which indicates an intention to be bound by the truth thereof, and which was so understood and relied upon by the other party, is an express warranty.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
5. Revocation of acceptance and breach of warranty of accepted goods are separate remedies, and a buyer may pursue either remedy or both.
Wendt v. Beardmore Suburban Chevrolet 775
6. A buyer who elects to exercise his right to revoke acceptance has a duty to not exercise ownership over the goods.
Wendt v. Beardmore Suburban Chevrolet 775
7. Use of the goods by the buyer may waive any right to revoke acceptance.
Wendt v. Beardmore Suburban Chevrolet 775
8. An express warranty must have been made a part of the basis of the bargain. In order to recover for breach of an express warranty, a buyer must prove there was reliance upon the warranty.
Wendt v. Beardmore Suburban Chevrolet 775
9. A warranty is express when the seller makes an affirmation with respect to the article to be sold upon which it is intended that the buyer shall rely in making the purchase.
Wendt v. Beardmore Suburban Chevrolet 775

Sanitary and Improvement Districts

1. Under the provisions of Neb. Rev. Stat. § 31-740 (Reissue 1984), the authority of the city council, in the first instance, and the mayor thereafter to approve or disapprove proposals for the construction of a recreational facility to be built by a sanitary and improvement district is limited to a determination of whether or not the proposals conform to the municipality's master plan and construction specifications and standards.
S.I.D. No. 95 v. City of Omaha 564

2. An application seeking an extension of time within which to retire warrants, filed pursuant to Neb. Rev. Stat. § 31-755 (Reissue 1984), is an equitable proceeding reviewed by the Nebraska Supreme Court de novo on the record.
In re Application of S.I.D. No. 65 647
3. Bodies other than those within the strict and proper sense of the term "municipal corporations" are at times referred to as such for certain purposes; a sanitary and improvement district is a municipal corporation for the purposes of Neb. Rev. Stat. § 77-2201 (Reissue 1981).
In re Application of S.I.D. No. 65 647

Schools and School Districts

1. In the contested termination of a tenured teacher or tenured administrator, minimum procedural due process requires that the employee (1) be advised of the cause or causes for the termination in sufficient detail to fairly enable the employee to prepare a defense, (2) be advised of the names and the nature of the testimony of witnesses who are to testify against the employee, and (3) be accorded a timely and meaningful opportunity to be heard in his or her own defense, and (4) that the hearing be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
Benton v. Board of Ed. of Sch. Dist. No. 17 134
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
2. On appeal of teacher termination cases, this court must determine if the evidence presented at the hearing before the school board is sufficient as a matter of law to support the board's decision.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
3. Evidence is sufficient as a matter of law where the record is such that on the basis of all the testimony and exhibits, the board of education could fairly and reasonably find the facts as it did.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467

Search and Seizure

The fourth amendment prohibition against unreasonable searches and seizures is inapplicable to the conduct of private parties not acting as agents of law enforcement authorities.
State v. Ware 594

Secured Transactions

The use of collateral by a secured party for a period of nearly 3 years manifests an election under Neb. U.C.C. § 9-505(2) (Reissue 1980) to retain the collateral in satisfaction of the obligation.
Schmode's, Inc. v. Wilkinson 209

Self-Defense

Generally, other acts may be used to refute the accused's claim of self-defense.
State v. Stewart 347

Sentences

1. The good time provisions of 1975 Neb. Laws, L.B. 567, were not applicable to persons who started their sentences prior to the effective date of the act, absent approval of the Board of Pardons.
SapaNajin v. Johnson 40
2. Factors to be considered in evaluating whether a sentence constitutes cruel and unusual punishment under the federal Constitution and Neb. Const. art. I, §§ 9 and 15, are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
State v. Brand 402
3. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.
State v. Brand 402
4. Enhancing a sentence because of a prior conviction is not cruel and unusual punishment.
State v. Brand 402
5. As a general rule, a sentence imposed within the statutory limits will not be disturbed on appeal unless the trial court abused its discretion.
State v. Bargen 416
State v. McKichan 560
State v. Fix 674
6. A sentencing judge properly may consider information contained in a presentence report in imposing sentence. Such judge has broad discretion as to the source and type of information which may be used to assist in determining the kind and extent of punishment to be imposed.
State v. Bargen 416

Service of Process

1. In cases where the Legislature has authorized suits against the State of Nebraska and has required that summons shall be served as in other cases, without detailed specification, the method of serving summons specified for use in any other type of action against the state constitutes service "as in other cases." To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), is in conflict with this rule, it is overruled.
Beatrice Manor v. Department of Health 141

2. When the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), conflicts with this holding, it is overruled.
Pointer v. State 315

Sexual Assault

1. Sexual 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.
State v. Craig 70
2. The act of fellatio constitutes a sexual penetration within the meaning of Neb. Rev. Stat. § 28-318(5) (Reissue 1979).
State v. Gonzales 846

Specific Performance

1. Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.
Mohrlang v. Draper 630
2. Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance.
Mohrlang v. Draper 630
3. In an action for specific performance of a contract to sell real estate, generally, it is no defense that there is other available land as good as or even better than the land which is the subject of the contract to be performed.
Mohrlang v. Draper 630
4. Hardship equitably excusing specific performance of a contract may be a circumstance unforeseeable at entry into the contract. Hardship of such nature, however, cannot be self-inflicted or caused through inexcusable neglect on the part of the person seeking to be excused or exonerated from specific performance.
Mohrlang v. Draper 630

Speedy Trial

1. The unexplained delay between arrest and arraignment or preliminary hearing does not demonstrate a violation of the right of speedy trial in the absence of prejudice.
SapaNajin v. Johnson 40

2. An accused cannot generally take advantage of a delay in being brought to trial where he is responsible for the delay either by action or inaction.
State v. Craig 70
State v. Bennett 601
3. It is the State's burden to prove by a preponderance of the evidence that there has been compliance with Neb. Rev. Stat. § 29-1207 (Reissue 1979).
State v. Bennett 601

Standing

1. A private individual, with standing, may bring suit in district court to enjoin an alleged violation of the zoning laws or ordinances.
Burgess v. Omahawks Radio Control Org. 100
2. In order to have standing to challenge a vague statute or ordinance, one must not have engaged in conduct which is clearly proscribed by the statute or ordinance, and cannot complain of the vagueness of the law as applied to the conduct of others.
State v. Groves 382

States

1. Generally speaking, a suit against an agency of the state is a suit against the state itself.
Beatrice Manor v. Department of Health 141
2. When the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), conflicts with this holding, it is overruled.
Pointer v. State 315

Statutes

1. In Neb. Rev. Stat. § 25-2121 (Reissue 1979), when referring to the willful disobedience of any lawful order of the court, the word "willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order.
In re Contempt of Sileven 34
2. Neb. Rev. Stat. § 34-301 (Reissue 1984) provides that whenever one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court to have them ascertained and permanently established.
State v. Jarchow 88
3. Neb. Rev. Stat. § 23-1908 (Reissue 1983) provides that the restoration of lines and corners of original government surveys

shall be in accordance with the laws of the United States and the circular of instructions of the U.S. Department of the Interior, Bureau of Land Management.
State v. Jarchow 88
4. A recall statute, or any other kind of election statute, must be liberally construed to effectuate the purpose for which the statute is intended. However, liberal construction of statutes governing recall of public, elected officials does not constitute a license to totally ignore the express requirements of recall statutes.
Quigley v. Lebsack 110
5. In cases where the Legislature has authorized suits against the State of Nebraska and has required that summons shall be served as in other cases, without detailed specification, the method of serving summons specified for use in any other type of action against the state constitutes service "as in other cases." To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), is in conflict with this rule, it is overruled.
Beatrice Manor v. Department of Health 141
6. In conducting a judicial review of an administrative agency's decision under Neb. Rev. Stat. § 84-917 (Reissue 1981), the reviewing court may reverse or modify such decision which may have prejudiced the substantial rights of a party because it was in excess of the statutory authority or jurisdiction of the agency. In such cases, in order to assess the validity of the agency's decision, the reviewing court is authorized to consider the validity of the criterion employed by the agency.
Beatrice Manor v. Department of Health 141
7. An administrative agency may not employ its rule-making power to modify, alter, or enlarge the decision-making criteria provided for in the enabling legislation, such as Neb. Rev. Stat. §§ 71-5851 et seq. (Reissue 1981).
Beatrice Manor v. Department of Health 141
8. The rules of statutory construction require that all parts of a statute relating to the same subject should be construed together.
Beatrice Manor v. Department of Health 141
9. In construing Neb. Rev. Stat. § 71-5857 (Reissue 1981), which requires the Department of Health to distinguish between rural and urban areas, the remainder of the section, which declares that such distinction must be made only to the extent that variable standards between the two areas will benefit the development of the most appropriate health care system for the particular area, must also be considered.
Beatrice Manor v. Department of Health 141
10. The method of, and reasons for, canceling an automobile liability insurance policy of the type defined in Neb. Rev. Stat. § 44-514 (Reissue 1984) is exclusively controlled by Neb. Rev. Stat.

§§ 44-515 to 44-521 (Reissue 1984).
Glockel v. State Farm Mut. Auto. Ins. Co. 222
11. As a general statute, Neb. Rev. Stat. § 44-358 (Reissue 1984) does not control procedures for the specific types of policies defined in Neb. Rev. Stat. § 44-514 (Reissue 1984).
Glockel v. State Farm Mut. Auto. Ins. Co. 222
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. Groves 382
13. In order to have standing to challenge a vague statute or ordinance, one must not have engaged in conduct which is clearly proscribed by the statute or ordinance, and cannot complain of the vagueness of the law as applied to the conduct of others.
State v. Groves 382
14. Statutes in pari materia must be construed together in order to give meaning to the provisions of both.
State v. Bargen 416
15. The court will avoid constructions of statutes which lead to absurd or unjust results.
State v. Bargen 416
16. The assessment of interest pursuant to Neb. Rev. Stat. § 48-125(2) (Reissue 1984), like the allowance of attorney fees, is a remedy affecting procedure only, and the same may be awarded on a claim that arose before 1983 Neb. Laws, L.B. 18, became law.
Allen v. IBP, Inc. 424
17. The provisions of Neb. Rev. Stat. § 67-318(a) (Reissue 1981) may be modified either by an agreement between the partners or by a course of dealing amounting to an agreement between the partners.
Smith v. Daub 698
18. Where the language of a statute is plain and unambiguous, no interpretation is needed, and this court is without authority to change the language.
State v. Wiley 740
19. In the absence of evidence to the contrary, we presume that the common law or statutes of another jurisdiction are the same as the law of the State of Nebraska.
Buckingham v. Wray 807
20. Neb. Rev. Stat. § 20-148 (Reissue 1983) does not constitute a

waiver of sovereign immunity by the State of Nebraska for actions brought in federal court under 42 U.S.C. § 1983 (1982).
Patteson v. Johnson 852

21. *Todd v. Board of Educational Lands and Funds*, 154 Neb. 606, 48 N.W.2d 706 (1951), does not interpret any enactment of the Nebraska Legislature as constituting a waiver of this state's sovereign immunity for actions brought in federal court pursuant to contract.
Patteson v. Johnson 852

22. The provision of Neb. Const. art. V, § 22, which states, "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," is not self-executing. Legislative action is necessary to make it available.
Patteson v. Johnson 852

23. The Nebraska Supreme Court is the final arbiter in matters of Nebraska law; as such, it must make its own analysis and reach its own conclusions with respect to questions of Nebraska law.
Patteson v. Johnson 852

24. Generally, statutory language will be given its plain and ordinary meaning, and a statute is open to construction only if it is ambiguous.
Video Consultants v. Douglas 868

25. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
Video Consultants v. Douglas 868

26. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.
Else v. Else 878

Summary Judgment

1. The purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law.
Cummings v. Curtiss 106

2. The granting of summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.
Cummings v. Curtiss 106

3. The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve,

without the expense and delay of trial, those cases where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.
Witherspoon v. Sides Constr. Co. 117
Gall v. Great Western Sugar Co. 354
Moore v. American Charter Fed. Sav. & Loan Assn. 793

4. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
Witherspoon v. Sides Constr. Co. 117
Peterson v. Gering Irr. Dist. 281
Gall v. Great Western Sugar Co. 354
Yankton Prod. Credit Assn. v. Larsen 610

5. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
Witherspoon v. Sides Constr. Co. 117
Gall v. Great Western Sugar Co. 354

6. Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
Harrold v. Spaghetti Tree, Inc. 139
Peterson v. Gering Irr. Dist. 281

7. Where an ambiguity in a codicil appears on the face of the document, the resolution of such a patent ambiguity is a matter of law and properly the subject of a motion for summary judgment if there is no dispute as to any material fact.
In re Estate of Casselman 516

8. Where the facts are not in dispute and admit only of the conclusion that the defendant was not guilty of any negligence proximately causing plaintiff's damages, summary judgment in favor of the defendant is proper.
Neff v. Clark 521

9. A summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to a judgment as a matter of law.
Yankton Prod. Credit Assn. v. Larsen 610
Moore v. American Charter Fed. Sav. & Loan Assn. 793

10. In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of pleadings to support judgment.
Moore v. American Charter Fed. Sav. & Loan Assn. 793

Supreme Court

The Nebraska Supreme Court is the final arbiter in matters of Nebraska law; as such, it must make its own analysis and reach its own conclusions with respect to questions of Nebraska law.
Patteson v. Johnson 852

Tax Sale

1. The time for redeeming property from a tax sale under the provisions of Neb. Rev. Stat. § 77-1837 (Reissue 1981) expires after 3 years plus 90 days from the date of the original sale.
Bish v. Fletcher 863
2. Under Neb. Rev. Stat. § 77-1902 (Reissue 1981), a petition for the foreclosure of a tax lien must be brought within 90 days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based, as provided for in Neb. Rev. Stat. § 77-1837 (Reissue 1981).
Bish v. Fletcher 863

Taxes

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.
First Fed. Sav. & Loan Assn. v. Cal-Neb Land Co. 887

Teacher Contracts

1. In the contested termination of a tenured teacher or tenured administrator, minimum procedural due process requires that the employee (1) be advised of the cause or causes for the termination in sufficient detail to fairly enable the employee to prepare a defense, (2) be advised of the names and the nature of the testimony of witnesses who are to testify against the employee, and (3) be accorded a timely and meaningful opportunity to be heard in his or her own defense, and (4) that the hearing be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
Benton v. Board of Ed. of Sch. Dist. No. 17 134
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
2. On appeal of teacher termination cases, this court must determine if the evidence presented at the hearing before the school board is sufficient as a matter of law to support the board's decision.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467
3. Teacher incompetency is not measured in a vacuum nor against a standard of perfection but, instead, must be measured against the standard required of others performing the same or similar duties.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467

Termination of Employment

1. The device of discharging an employee and later reinstating the employee without backpay cannot be used to avoid employment provisions limiting employee suspensions without pay.
   Drinkwine v. Flebbe 291
2. A civil service commission may require that a list of witnesses and documents to be relied upon at a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983) be furnished to an employee by the appointing authority.
   States v. Anderson 545
3. At a hearing under Neb. Rev. Stat. § 19-1808 (Reissue 1983), it is improper to receive unsworn statements and to receive sworn statements from persons not required to submit to cross-examination.
   States v. Anderson 545

Time

1. Where a reasonable controversy exists between the parties as to the payment of compensation, the employee is not entitled to statutory penalties for waiting time.
   Mulder v. Minnesota Mining & Mfg. Co. 241
2. In order to perfect an appeal from an order of the Nebraska Motor Vehicle Industry Licensing Board, an appeal bond must be filed with the board within 10 days of the rendition of the order. Neb. Rev. Stat. § 60-1415 (Reissue 1984).
   Kizzier Chevrolet Co. v. General Motors Corp. 319
3. Where a defendant or his attorney has actual notice of the entry of a sentencing order in a county court within 10 days of the entry of such order, an appeal to the district court must be perfected pursuant to the requirements of Neb. Rev. Stat. § 29-611 (Reissue 1979).
   State v. Fiene 397
4. The point at which a statute of limitations commences to run must be determined from the facts of each case; 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, even though such plaintiff may be ignorant of the existence of the cause of action.
   Mangan v. Landen 643
5. If the fraud or mistake ought to have been discovered, the statute will run from the time such discovery ought to have been made.
   Mangan v. Landen 643
6. Generally, a suit to declare a contract void, which if void was void at its inception, must be commenced within 4 years of the execution of the contract.
   Lake v. Piper, Jaffray & Hopwood Inc. 731

7. The time for redeeming property from a tax sale under the provisions of Neb. Rev. Stat. § 77-1837 (Reissue 1981) expires after 3 years plus 90 days from the date of the original sale.
Bish v. Fletcher 863
8. Under Neb. Rev. Stat. § 77-1902 (Reissue 1981), a petition for the foreclosure of a tax lien must be brought within 90 days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based, as provided for in Neb. Rev. Stat. § 77-1837 (Reissue 1981).
Bish v. Fletcher 863

Tort Claims Act

The Nebraska State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 1981), does not apply to any claim which is covered by the Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984).
Johnston v. State 457

Trial

1. Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.
Anderson v. Farm Bureau Ins. Co. 1
2. Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law. Neb. Rev. Stat. § 25-1127 (Reissue 1979).
Havelock Bank v. Woods 57
3. In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the defendant, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses is corroborated; and the reasonableness or unreasonableness of the statements of the witnesses.
State v. Craig 70
4. Issues not properly raised in the pleadings nor litigated at trial will not generally be considered for the first time on appeal.
Armstrong v. Hartford Life Ins. Co. 128

5. The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery.
Priest v. McConnell 328
6. The right of cross-examination is an essential and fundamental requirement of a fair trial. A defendant is entitled to engage in searching and wide-ranging cross-examination, including anything tending to affect the accuracy, veracity, or credibility of a witness.
State v. Williams 587
7. A ruling on evidence of a collateral matter but intended to affect the credibility of a witness falls within the discretion of a trial court, and absent an abuse of discretion, a trial court's ruling on such evidence is not grounds for reversal.
State v. Williams 587
8. Evidence which does not tend to impeach a witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.
State v. Williams 587
9. The test of whether a fact inquired of in cross-examination in criminal proceedings is collateral is, Would the cross-examining party be entitled to prove it as a part of the case tending to establish his plea?
State v. Williams 587
10. The trial court should refrain from making remarks prejudicial to a litigant or calculated to influence the minds of a jury.
State v. Bideaux 718
11. Substantial evidence requires this court to ask whether the district court could have fairly and reasonably found facts as it did.
Williams v. Goodyear Tire & Rubber Co. 748
12. Trial strategy adopted by counsel without prior consultation with the accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances.
State v. Ohler 840
13. Statements of a 13-year-old boy, a victim of a sexual assault, made to his mother a short time after he was sexually assaulted, relating to the sexual assault, qualify as excited utterances and are admissible as an exception to the hearsay rule.
State v. Gonzales 846
14. In a trial to the court the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
In re Interest of S.S.L. 911
15. 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.
State v. Rolf 917

Trusts

The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.
State v. Jarchow 88

Uniform Commercial Code

1. The use of collateral by a secured party for a period of nearly 3 years manifests an election under Neb. U.C.C. § 9-505(2) (Reissue 1980) to retain the collateral in satisfaction of the obligation.
Schmode's, Inc. v. Wilkinson 209
2. The test for inclusion in or exclusion from the sales provisions of Neb. U.C.C. art. 2 (Reissue 1980) is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
3. 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.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
4. A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
Wendt v. Beardmore Suburban Chevrolet 775
5. A positive statement of a seller of the condition of personal property made during negotiations for its sale which indicates an intention to be bound by the truth thereof, and which was so understood and relied upon by the other party, is an express warranty.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
6. To establish a breach of implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury. In order for the goods to be

merchantable under Neb. U.C.C. § 2-314 (Reissue 1980), they must be at least such as are fit for the ordinary purposes for which such goods are used.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303

7. In order for one to recover for a breach of an implied warranty of fitness, the purchaser must prove that (1) the seller had reason to know of the buyer's particular purpose, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303

8. There is a good faith obligation in the performance or the enforcement of every contract or duty within the Nebraska Uniform Commercial Code. Neb. U.C.C. § 1-203 (Reissue 1980).
Yankton Prod. Credit Assn. v. Larsen 610

9. Revocation of acceptance and breach of warranty of accepted goods are separate remedies, and a buyer may pursue either remedy or both.
Wendt v. Beardmore Suburban Chevrolet 775

10. A buyer who elects to exercise his right to revoke acceptance has a duty to not exercise ownership over the goods.
Wendt v. Beardmore Suburban Chevrolet 775

11. Use of the goods by the buyer may waive any right to revoke acceptance.
Wendt v. Beardmore Suburban Chevrolet 775

12. An express warranty must have been made a part of the basis of the bargain. In order to recover for breach of an express warranty, a buyer must prove there was reliance upon the warranty.
Wendt v. Beardmore Suburban Chevrolet 775

Vendor and Vendee

1. A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry.
Mader v. Kallos 579

2. The burden of proof is upon a litigant who alleges that he is a good faith purchaser to prove that he purchased the property for value and without notice.
Mader v. Kallos 579

3. A purchaser having notice of a previous outstanding title in land, who purchases from one without notice, will be protected in his title by want of notice in his vendor.
Mader v. Kallos 579

4. A seller of goods may not reclaim such goods from one who has been adjudicated a bankrupt unless such seller demands in writing reclamation of such goods before 10 days after receipt of such goods by the bankrupt.
Prososki v. Commercial Nat. Bank 607

Venue

A court which has jurisdiction in a divorce action does not lose its continuing jurisdiction over child support matters when a support order in the action is transcribed and filed with the clerk of the district court in another county.
Nemec v. Nemec 891

Verdicts

A jury verdict of guilty will not be overturned on appeal unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it.
State v. Smith 176

Visitation

1. In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to the evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is an abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record.
Koch v. Koch 195
2. The right of access to one's children should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation.
Koch v. Koch 195

Waiver

1. An accused is entitled to be represented by counsel in all critical stages of a criminal proceedings against him, but the right to counsel may be waived, if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel.
State v. Jost 162
2. A defendant has a constitutional right of self-representation and may proceed to defend himself without counsel, when he voluntarily, understandingly, and intelligently elects to do so.
State v. Jost 162
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. Jones 184
4. 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. Jones 184
5. The record of a prior conviction used for enhancement purposes is not required to show a complete waiver of constitutional rights as required by *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).
State v. Jones 184
6. When the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), conflicts with this holding, it is overruled.
Pointer v. State 315
7. The right to enforce a restrictive covenant may be waived by acquiescing in its violation, the circumstances of each case controlling whether there has been such a waiver.
Egan v. Catholic Bishop 365
8. In considering whether *Miranda* rights have been voluntarily waived, the court must look to the background, experience, and conduct of the accused.
State v. Perkins 491
9. A defendant may waive counsel as long as the waiver is done intelligently, knowingly, and voluntarily.
State v. Denbeck 672
10. Use of the goods by the buyer may waive any right to revoke acceptance.
Wendt v. Beardmore Suburban Chevrolet 775
11. For enhancement purposes the burden on the State to prove valid prior convictions is only to show that the defendant had, or waived, counsel at the time of such prior convictions.
State v. Soe 797

Warrants

An application seeking an extension of time within which to retire warrants, filed pursuant to Neb. Rev. Stat. § 31-755 (Reissue 1984), is an equitable proceeding reviewed by the Nebraska Supreme Court de novo on the record.
In re Application of S.I.D. No. 65 647

Warranty

1. The test for inclusion in or exclusion from the sales provisions of Neb. U.C.C. art. 2 (Reissue 1980) is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor

incidentally involved.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
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.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
3. A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
Wendt v. Beardmore Suburban Chevrolet 775
4. A positive statement of a seller of the condition of personal property made during negotiations for its sale which indicates an intention to be bound by the truth thereof, and which was so understood and relied upon by the other party, is an express warranty.
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. 303
5. An express warranty must have been made a part of the basis of the bargain. In order to recover for breach of an express warranty, a buyer must prove there was reliance upon the warranty.
Wendt v. Beardmore Suburban Chevrolet 775

Waters

1. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, in the absence of negligence.
Bohaty v. Briard 42
Shotkoski v. Prososki 213
2. Alteration of natural drainage is acceptable only where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present.
Bohaty v. Briard 42
3. Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainageway, the rule as to diffused surface waters does not apply.
Shotkoski v. Prososki 213
4. In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated.
Shotkoski v. Prososki 213

5. Disregarding the statutory requirements for a watercourse, so as to prevent a lower landowner from diverting surface waters, it still must be established that the surface waters are running through a natural depression, draw, swale, or drainageway.
Shotkoski v. Prososki 213
6. The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all landowners within the district upon fair and equitable terms and conditions.
Peterson v. Gering Irr. Dist. 275
7. In deciding what is just and equitable in determining water apportionment, the size of the tract, the elevations of possible points of delivery, the topography and the nature of the soil, the location and availability of alternative or additional sources of water supply, and the comparative advantages and disadvantages to the landowner and the irrigation district should all be considered.
Peterson v. Gering Irr. Dist. 275

Wills

1. Where an ambiguity in a codicil appears on the face of the document, the resolution of such a patent ambiguity is a matter of law and properly the subject of a motion for summary judgment if there is no dispute as to any material fact.
In re Estate of Casselman 516
2. Generally, where part of a codicil is invalid, the valid provisions of the codicil should be upheld unless to do so would defeat the testator's intent and interfere with his general scheme of distribution.
In re Estate of Casselman 516
3. Formal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted before a judge, with notice to interested persons.
In re Estate of Casselman 653
4. Informal proceedings under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), are those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.
In re Estate of Casselman 653
5. In appeals from the appointment of personal representatives in probate cases, the district court reviews the matter under Neb. Rev. Stat. §§ 24-541.01 et seq. (Cum. Supp. 1982), and this court reviews the matter under Neb. Rev. Stat. § 25-1911 (Reissue 1979); both such reviews being for error appearing on the record.
In re Estate of Casselman 653
6. Notice of a formal hearing under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 et seq. (Reissue 1979), must be given to

all interested persons unless these persons waive notice.
In re Estate of Casselman 653
7. The rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth.
In re Trust Estate of Darling 705
8. The law looks with favor upon the early vesting of estates, and a remainder will not be held to be contingent if it can reasonably be held to be a vested remainder.
In re Trust Estate of Darling 705
9. The rule against perpetuities, by its terms, relates solely to the vesting of estates or interests and is not concerned with their possession or enjoyment.
In re Trust Estate of Darling 705
10. In the absence of a contrary intention, there is a presumption that a class will be determined upon the death of the testator.
In re Trust Estate of Darling 705

Witnesses

1. In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the defendant, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses is corroborated; and the reasonableness or unreasonableness of the statements of the witnesses.
State v. Craig 70
2. Where the jury has been properly instructed that the testimony of an accomplice should be scrutinized closely for possible motives of falsification, the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction.
State v. Smith 176
3. The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery.
Priest v. McConnell 328
4. The right of cross-examination is an essential and fundamental requirement of a fair trial. A defendant is entitled to engage in searching and wide-ranging cross-examination, including anything tending to affect the accuracy, veracity, or credibility of a witness.
State v. Williams 587
5. A ruling on evidence of a collateral matter but intended to affect

the credibility of a witness falls within the discretion of a trial court, and absent an abuse of discretion, a trial court's ruling on such evidence is not grounds for reversal.
State v. Williams 587
6. Evidence which does not tend to impeach a witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.
State v. Williams 587
7. The test of whether a fact inquired of in cross-examination in criminal proceedings is collateral is, Would the cross-examining party be entitled to prove it as a part of the case tending to establish his plea?
State v. Williams 587
8. It is proper in a criminal case to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime.
State v. Bideaux 718
9. Prejudice is not established by the alleged failure to call witnesses in the absence of showing the uncalled witnesses' expected testimony or to constantly consult with one's client in the absence of showing what additional consultation would have changed.
State v. Hurley 829

Words and Phrases

1. In Neb. Rev. Stat. § 25-2121 (Reissue 1979), when referring to the willful disobedience of any lawful order of the court, the word "willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order.
In re Contempt of Sileven 34
2. *Conceal* means to hide, secrete, or withhold from the knowledge of others; to withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight; or to prevent discovery. The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld.
Christopher v. Evans 51
3. *Modus operandi* is a characteristic method employed by a defendant in the performance of repeated criminal acts, and means, literally, "method of working," and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.
State v. Craig 70
4. As used in Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)), *intent* is the state of mind operative at the time of an action.
State v. Craig 70

5. A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.
Witherspoon v. Sides Constr. Co. 117
6. Architects and engineers are professionals for purposes of Neb. Rev. Stat. § 25-222 (Reissue 1979).
Witherspoon v. Sides Constr. Co. 117
7. "Need" for nursing beds as defined by the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. §§ 71-5801 et seq. (Reissue 1981), is not synonymous with "demand." "Need" focuses on long-range plans to provide required services to an entire population. It is a quantitative analysis. "Demand" connotes an immediate preference on the part of an individual to live in a particular nursing facility.
Beatrice Manor v. Department of Health 141
8. Under the law of this state, surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow.
Shotkoski v. Prososki 213
9. The "unexpected or unforeseen" requirement of an accident, as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1984), is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen.
McLaughlin v. Self-Insurance Servs. 260
10. The "suddenly and violently" element of an accident, as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1984), means not "instantaneously and with force" but, rather, an injury which occurs "at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment."
McLaughlin v. Self-Insurance Servs. 260
11. The word "abuse" insofar as it includes verbal abuse is construed to include only those which have been described as "fighting" words, that is, those which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. As so construed, a statute or ordinance violates neither the first amendment to the Constitution of the United States nor article I, § 5, of the Constitution of Nebraska.
State v. Groves 382
12. Whether any particular use of abusive language constitutes "fighting words" depends not only upon the words but also upon the circumstances in which they are used.
State v. Groves 382
13. Evidence is "substantial" or "sufficient as a matter of law," or

constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict; it is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.
Eshom v. Board of Ed. of Sch. Dist. No. 54 467

14. Generally, before one is a person in authority perhaps affecting voluntariness of an accused's statement or confession, the accused must reasonably believe that the person making a promise or inducement related to a statement or confession is one who has the capacity, directly or indirectly, to produce a represented material result in the prosecution or disposition of a matter in the criminal justice system.
State v. Bodtke 504

15. A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent man on inquiry.
Mader v. Kallos 579

16. Proximate cause is that cause which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
Corbet, Inc. v. County of Pawnee 622

17. A stairway servicing only a tenant's second story apartment is not a common area under a landlord's control.
Hiatt v. Tallmage 635

18. Although a municipal corporation is a body corporate and politic, not all bodies corporate and politic are municipal corporations.
In re Application of S.I.D. No. 65 647

19. In its strict and proper sense, a municipal corporation is a body corporate and politic constituted by the incorporation of the inhabitants of a city or town for the purposes of local government.
In re Application of S.I.D. No. 65 647

20. Bodies other than those within the strict and proper sense of the term "municipal corporations" are at times referred to as such for certain purposes; a sanitary and improvement district is a municipal corporation for the purposes of Neb. Rev. Stat. § 77-2201 (Reissue 1981).
In re Application of S.I.D. No. 65 647

21. Dogs are not livestock, and the care or production of dogs is not included in the term "animal husbandry."
City of Beatrice v. Goodenkauf 756

22. An accessory use is defined as a subordinate use, clearly incidental and related to the principal structure, building, or use of the land, and located on the same lot as that of the principal structure, building, or use.
City of Beatrice v. Goodenkauf 756

23. Whether a use is customary is not to be determined merely by a mathematical count; but numbers are a factor which must be considered.
City of Beatrice v. Goodenkauf 756
24. Good cause means a material and substantial change in circumstances and depends upon the circumstances of the individual case.
Creager v. Creager 760
25. Consideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. Valuable consideration to support a contract need not be one translatable into dollars and cents. Compensation and consideration are neither identical nor synonymous.
Buckingham v. Wray 807
26. The act of fellatio constitutes a sexual penetration within the meaning of Neb. Rev. Stat. § 28-318(5) (Reissue 1979).
State v. Gonzales 846
27. 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.
First Fed. Sav. & Loan Assn. v. Cal-Neb Land Co. 887

Workmen's Compensation

1. Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Nebraska Workmen's Compensation Court.
Zaleski v. Farmland Foods 157
Mulder v. Minnesota Mining & Mfg. Co. 241
2. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
Mulder v. Minnesota Mining & Mfg. Co. 241
3. The burden of proof in a compensation case is upon the plaintiff to establish by a preponderance of the evidence that his disability was caused by an injury arising out of and in the course of his employment.
Mulder v. Minnesota Mining & Mfg. Co. 241
4. Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation.
Mulder v. Minnesota Mining & Mfg. Co. 241
5. Where the evidence is in conflict, the compensation court may find a percentage of disability within the range of the testimony.
Mulder v. Minnesota Mining & Mfg. Co. 241
6. No attorney fee should be allowed on rehearing where the employer receives a reduction of the award on rehearing.
Mulder v. Minnesota Mining & Mfg. Co. 241

7. Where an award for permanent partial disability is made on rehearing, following an award for temporary total disability, the employee is entitled to an award of attorney fees on the rehearing.
Mulder v. Minnesota Mining & Mfg. Co. 241
8. Where a reasonable controversy exists between the parties as to the payment of compensation, the employee is not entitled to statutory penalties for waiting time.
Mulder v. Minnesota Mining & Mfg. Co. 241
9. On appeal from an award of the Nebraska Workmen's Compensation Court, this court does not reweigh the facts but accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case; the findings will not be set aside where they are supported by the evidence and are not clearly wrong.
McLaughlin v. Self-Insurance Servs. 260
Baumbach v. Standard Chem. Mfg. Co. 324
Allen v. IBP, Inc. 424
Johnston v. State 457
10. In testing the sufficiency of the evidence in a workmen's compensation case, the successful party is entitled to have every controverted fact resolved in his favor and to receive the benefit of every inference which can be drawn from the evidence.
McLaughlin v. Self-Insurance Servs. 260
Baumbach v. Standard Chem. Mfg. Co. 324
Allen v. IBP, Inc. 424
11. The "unexpected or unforeseen" requirement of an accident, as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1984), is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen.
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McLaughlin v. Self-Insurance Servs. 260
13. Where compensation has been commuted by agreement and paid in a lump sum without court approval, Neb. Rev. Stat. § 48-139 (Reissue 1984), such a payment is not final; it is nothing more than an advance payment; and the statute of limitations, Neb. Rev. Stat. § 48-137 (Reissue 1984), does not begin to run until the last periodic payment would have been paid, had payments been made in installments.
Allen v. IBP, Inc. 424
14. The assessment of interest pursuant to Neb. Rev. Stat. § 48-125(2) (Reissue 1984), like the allowance of attorney fees, is a remedy

affecting procedure only, and the same may be awarded on a claim that arose before 1983 Neb. Laws, L.B. 18, became law.
Allen v. IBP, Inc. 424
15. The Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984), provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment.
Johnston v. State 457
16. The Nebraska State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 1981), does not apply to any claim which is covered by the Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984).
Johnston v. State 457
17. A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability.
Johnston v. State 457

Zoning

1. A private individual, with standing, may bring suit in district court to enjoin an alleged violation of the zoning laws or ordinances.
Burgess v. Omahawks Radio Control Org. 100
2. Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
City of Beatrice v. Goodenkauf 756
3. Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
City of Beatrice v. Goodenkauf 756
4. An accessory use is defined as a subordinate use, clearly incidental and related to the principal structure, building, or use of the land, and located on the same lot as that of the principal structure, building, or use.
City of Beatrice v. Goodenkauf 756
5. Whether a use is customary is not to be determined merely by a mathematical count; but numbers are a factor which must be considered.
City of Beatrice v. Goodenkauf 756