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STATE OF NEBRASKA, APPELLANT, V. SHERRI MERITHEW, APPELLEE.

371 N.W.2d 110

Filed July 26, 1985. No. 84-877.

1. **Constitutional Law: Statutes: Appeal and Error.** In a facial challenge to the overbreadth and vagueness of a law, if we can determine that the prohibition contained in the enactment does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail.
2. **Criminal Law: Statutes.** In a criminal prosecution the law requires that the criminal statute must be reasonably clear and definite, setting forth standards that are not so uncertain as to be left to conjecture the conduct proscribed.
3. _____: _____. The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law.
4. **Constitutional Law: Words and Phrases.** The words "carelessly or without due caution" are synonymous with the common-law words of "negligently or without due care," and as such are not unconstitutionally vague.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Exception sustained, and cause remanded for further proceedings.

Steven A. Russell, Deputy Hall County Attorney, for appellant.

John A. Wagoner of Wagoner Law Office, for appellee.

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

HASTINGS, J.

This is a proceeding by the State under the provisions of Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1984). It seeks to review the ruling by the county court, and affirmed by the district court, which dismissed, on pretrial motion, the complaint filed against the defendant for careless driving. Such act is made unlawful by Neb. Rev. Stat. § 39-669 (Reissue 1984), but defendant claimed that section is unconstitutionally vague.

Section 39-669 reads as follows: "Any person who drives any motor vehicle in this state carelessly or without due caution so as to endanger a person or property shall be guilty of careless driving." Defendant was charged by complaint with "on the 24 day of June 1984 [at] 10:30 PM . . . at or near . . . South Locust

and Stolley Park Rd. Located in the County of Hall . . . did unlawfully commit the following offense: . . . Careless Driving."

Defendant also contends that the failure of § 39-669 to limit the proscription as to careless driving to the public roads amounts to impermissible overbreadth and resultant unconstitutionality. Neb. Rev. Stat. § 39-603(1) (Reissue 1984) provides in part that "the provisions relative to careless driving . . . shall apply upon highways and anywhere throughout the state."

In a facial challenge to the overbreadth and vagueness of a law, if we can determine that the prohibition contained in the enactment does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail. *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985). Defendant has cited to us no case which holds that driving in a careless manner is in any way protected conduct under either the Constitution of the United States or the Constitution of Nebraska, nor has our independent research disclosed any such authority. The answer must be that none exists, and the overbreadth argument must be rejected.

Defendant next argues both that the statute is vague as applied to the facts of this case and vague in general. References are made to the facts of this case. We must dispose of that argument summarily by pointing out that nowhere in the record do the facts of this case appear. This case was decided on a motion to dismiss.

As to the general claim of vagueness, defendant places heavy reliance on *State v. Huffman*, 202 Neb. 434, 275 N.W.2d 838 (1979). In that case the predecessor to the present § 39-669 was declared unconstitutional. The section read at that time: "Any person who operates a vehicle in a manner so as to endanger or be likely to endanger any person or property shall be guilty of careless driving." § 39-669 (Reissue 1978). This court in its opinion emphasized "or be likely to endanger."

After concluding that this was a criminal prosecution which requires that the criminal statute must be reasonably clear and definite, setting standards that are not so uncertain as to be left to conjecture, we concluded that the language here did not meet

those standards. We stated:

> If, in fact, as we said in State v. Adams, [180 Neb. 542, 143 N.W.2d 920 (1966)], men of common intelligence cannot ascertain in advance when they are operating a motor vehicle in a manner so as to *endanger* any person or property, all the more must it be said that it would be difficult or at least open to sufficient conjecture as to when one was operating a motor vehicle "in a manner so as to * * * *be likely* to endanger any person or property * * * " (Emphasis supplied.)

202 Neb. at 436, 275 N.W.2d at 840.

Focusing on the phrase "likely to endanger any person or property," it is readily apparent that *Huffman* is easily distinguished from the instant case.

The State points to *State v. Adams*, 180 Neb. 542, 143 N.W.2d 920 (1966), upon which *Huffman* was based. In *Adams* we cited a New Jersey case, *State v. Joas*, 34 N.J. 179, 168 A.2d 27 (1961), in which a statute was approved which involved a prohibition upon driving a vehicle upon a highway carelessly or without due caution and circumspection in a manner so as to endanger a person or property. We said:

> The New Jersey statute included an element of careless or negligent operation which is absent from section 39-7,108.01, R.R.S. 1943. In the absence of a further requirement that the operation of the vehicle be "negligent" or "careless" or some similar specification, we think the statute fails to prescribe an ascertainable standard of guilt.

180 Neb. at 545, 143 N.W.2d at 922-23.

In *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981), we rejected an argument of vagueness directed at Neb. Rev. Stat. § 39-644 (Reissue 1978), which required that "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway . . . ." In doing so we said:

> The ultimate fact here was the failure to exercise due care. The evidence was sufficient to support a finding beyond a reasonable doubt that the defendant failed to maintain a proper lookout. The failure to maintain a proper lookout was a failure to exercise due care. . . .

. . . .

> The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law. [Citations omitted.] Due care is a well-understood term meaning the absence of negligence.

207 Neb. at 682, 684, 300 N.W.2d at 812-13.

By the same token, due caution is defined in Webster's Third New International Dictionary, Unabridged 356 (1968) as "heedful prudent forethought to minimize risk or danger: provident care about the results of an action or course: careful avoidance of undue risk," the absence of which we find nearly synonymous with the common-law definition of negligence.

A similar North Dakota statute was held constitutional in *State v. Hagge*, 211 N.W.2d 395 (N.D. 1973). That section in pertinent part reads as follows: "Any person driving a vehicle upon a highway shall drive the same in a careful and prudent manner . . . . No person shall drive any vehicle upon a highway in a manner to endanger the life, limb, or property of any person." *Id.* at 396. The North Dakota court distinguished *State v. Adams, supra*, by pointing out that the North Dakota statute, contrary to that in Nebraska (which proscribed driving in a manner so as to endanger the safety of others), "requires that a driver 'drive [the vehicle] in a careful and prudent manner . . . .' " 211 N.W.2d at 397.

The words "carelessly or without due caution" are synonymous with "negligently or without due care," and as such are not unconstitutionally vague.

The exception is sustained and the cause remanded to the district court with direction to that court to remand to the county court for further proceedings.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., concurs in the result.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this case in that I agree that Neb. Rev. Stat. § 39-669 (Reissue 1984) is not unconstitutionally vague. I reach that conclusion because the statute provides that one is guilty of careless driving only if he or she drives carelessly or without due caution so as to endanger a

person or property. I believe that the requirement that the driving be so careless as to endanger a person or property makes the elements of the crime sufficiently clear so as to overcome the attack for vagueness.

I cannot, however, agree with all of the language of the majority, and for that reason I must concur in the result. This particular case is the completion of a trilogy which began with *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984), and *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985). I suggest that if one attempts to lay those three decisions side by side and arrive at any clear understanding of how and under what conditions a statute may be constitutionally attacked, one will find such task impossible.

Frey was a case in which the information was dismissed before any evidence was adduced. In *Frey, supra* at 561-62, 357 N.W.2d at 219, we said:

> In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others. We should therefore examine Frey's conduct before analyzing other hypothetical applications of the law. . . .
>
> . . . .
>
> The difficulty with completing the second step in the constitutional analysis, determining whether § 28-708 is impermissibly vague, is that the record is devoid of any facts which would tell us whether Frey's conduct was clearly proscribed by the statute. Consequently, we are unable to determine whether Frey has standing to attack the constitutionality of § 28-708.

We, therefore, remanded the cause for further proceedings on the merits.

In *Groves, supra*, we were presented with a situation in which the defendant was tried and convicted of violating a city ordinance and, as part of his appeal, argued that the ordinance was unconstitutional. In rejecting Groves' right to raise that issue, we held that because Groves' conduct clearly came within the conduct prohibited by the ordinance, he lacked standing to test the constitutionality of the ordinance for vagueness.

Finally, in *Merithew*, in which there are no facts, we proceed to determine whether the statute is vague in general, although we make note in passing that we cannot decide whether it is vague as applied to Merithew. Why *Merithew* is treated differently than *Frey* is difficult to discern from a mere reading of the opinions.

What I believe all of this points up is that what we created in *Frey* was wrong, and we should quickly overrule *Frey* and *Groves* and once again return to what I perceive was the rule in this jurisdiction—that anyone may challenge the constitutionality of a statute which he or she maintains is unconstitutional because it is vague.

STATE OF NEBRASKA, APPELLEE, V. CAROLYN A. JOY, APPELLANT.
371 N.W.2d 113

Filed July 26, 1985. No. 84-913.

1. **Convictions: Appeal and Error.** 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.
2. **Convictions: Proof.** A conviction may be supported by the uncorroborated testimony of an accomplice.
3. **Verdicts: Appeal and Error.** 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.

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

Donald W. Kleine, for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe, for appellee.

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

WHITE, J.

The defendant, Carolyn A. Joy, was charged in Douglas County with first degree murder in connection with the April 11, 1983, killing of Laura LaPointe. We reversed the defendant's earlier conviction and remanded the case for new trial because of the State's use of an inadmissible confession. *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).

A new trial was subsequently held, and the defendant was again convicted of the charge and sentenced to life imprisonment.

Defendant's sole assignment of error on this appeal is the district court's denial of her motion for directed verdict. Specifically, Joy contends that there was insufficient evidence for a jury to find beyond a reasonable doubt that a robbery occurred or was attempted in connection with LaPointe's murder. We affirm.

The gruesome facts surrounding the LaPointe murder are set forth in this court's opinions in *State v. Smith,* 219 Neb. 176, 361 N.W.2d 532 (1985), and *State v. Robertson,* 219 Neb. 782, 366 N.W.2d 429 (1985). We need not elaborate on those facts.

At trial Geraldine Carr, a primary witness for the State, testified that the victim was robbed by the defendant before she was killed by the defendant and other prostitutes involved in the crime. The defendant now claims that because this testimony was uncorroborated and directly contradicted by some of the State's other witnesses, it is therefore "so weak or doubtful a conviction based thereon could not be sustained." *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984).

In reviewing the sufficiency of evidence, this court neither determines the plausibility of evidence nor weighs that evidence, such matters being reserved to the trier of fact. A conviction must be sustained if, viewing the evidence most favorably to the State, that evidence is sufficient to support it. *State v. Brennan*, 218 Neb. 454, 356 N.W.2d 861 (1984); *State v. Smith, supra.*

In the present case, after listening to the witnesses, the jury chose to believe Geraldine Carr's testimony, that the victim was robbed, over that of another witness, Loray Smith, that there was no robbery.

The defendant argues that since the State has vouched for the credibility and truthfulness of both witnesses, that without corroborating testimony the State has failed to prove its case beyond a reasonable doubt. This argument is without merit. A party no longer "vouches" for the credibility of its witness. Neb. Rev. Stat. § 27-607 (Reissue 1979); *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979). Further, a conviction may be supported by the uncorroborated testimony of an accomplice. *State v. Huffman*, 214 Neb. 429, 334 N.W.2d 3 (1983).

We will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict beyond a reasonable doubt. *State v. Smith, supra.* An examination of the record reveals sufficient competent evidence to sustain the jury's verdict.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL RUBEK, APPELLANT.
371 N.W.2d 537

Filed July 26, 1985. No. 84-966.

1. **Criminal Law: Preliminary Hearings: Indictments and Informations.** The discharge of one accused of crime by an examining magistrate following a preliminary hearing does not bar the refiling of the same or different charges before another magistrate.
2. **Criminal Law: Preliminary Hearings: Courts: Jurisdiction.** A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony.
3. **Preliminary Hearings: Indictments and Informations.** An examining magistrate's refusal to bind a defendant over does not bar refiling the identical charges.
4. **Directed Verdict.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
5. **Sexual Assault: Corroboration.** In a prosecution for attempted first degree

sexual assault, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

6. **Jury Instructions.** All the instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.

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

Emil M. Fabian of Taylor, Fabian, Thielen & Thielen, for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe, for appellee.

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

KRIVOSHA, C.J.

Russell Rubek was convicted by a jury of attempted first degree sexual assault in violation of Neb. Rev. Stat. §§ 28-201 and 28-319(1)(a) (Reissue 1979) (count I) and assault in the third degree in violation of Neb. Rev. Stat. § 28-310 (Reissue 1979) (count II). He was sentenced on count I to a term of imprisonment of not less than 3 nor more than 10 years and on count II to a term of imprisonment of 1 year, the sentence on count II to be served concurrently with the sentence on count I. It is from those convictions and sentences that Rubek now appeals to this court. We affirm.

Rubek has assigned 10 separate errors which he maintains were committed by the district court and which entitle him to a new trial. Though the assignments are 10 in number, they may be grouped into 3 basic claims. The first claim is that the district court should have sustained Rubek's motion to quash count I of the information filed in the district court because the county court for Sarpy County, Nebraska, had earlier refused to bind him over. His second claim is that, in any event, the evidence is insufficient to establish guilt beyond a reasonable doubt with regard to count I, attempted first degree sexual assault. His

final claim is that the district court committed prejudicial error in refusing to include an instruction on the defense of self-defense in the same instruction as that describing the elements necessary to establish assault in the third degree, even though the instruction on self-defense was given as part of a subsequent instruction. We shall address the issues as raised by Rubek in these three categories.

In order to discuss the first claim, it is necessary to provide some brief background. Rubek was initially charged in the county court for Sarpy County, Nebraska, with attempted first degree sexual assault and first degree assault. Following a preliminary hearing, the county judge bound Rubek over on the first degree assault charge but discharged him on the attempted first degree sexual assault charge on the basis that the evidence was insufficient to establish probable cause. An information charging Rubek with both attempted first degree sexual assault and assault in the first degree was filed in the district court for Sarpy County, Nebraska, and a second preliminary hearing was held in the district court on the attempted first degree sexual assault charge. Following the second preliminary hearing, the district judge found probable cause to hold Rubek for trial on the attempted first degree sexual assault charge, in addition to the first degree assault charge on which he had been previously bound over.

Rubek in essence argues that it is not fair for the county attorney to be permitted to file an information in the district court after the county court has refused to bind an individual over to the district court. In support of his argument he maintains that once a complaint has been discharged in the county court, the State should have no authority to refile the identical charge in the district court.

It has long been the rule in this jurisdiction that the discharge of one accused of crime by an examining magistrate following a preliminary hearing does not bar the refiling of the same or different charges before another magistrate. In *In Re Garst*, 10 Neb. 78, 81, 4 N.W. 511, 512-13 (1880), we said:

> An examination of a person accused of a felony before a committing magistrate is in no sense a trial. If so, the officer would have no jurisdiction whatever. The object of

> an examination is, *first*, to ascertain whether an offense has been committed; *second*, if so, whether there is probable cause to believe that the accused committed it.
>
> Where a complaint is made under oath before a magistrate charging a party with the commission of an offense, such magistrate has authority to issue a warrant for the arrest of the accused, and the examination which follows is for the purpose of determining whether sufficient cause exists for his retention to abide the action of the grand jury. The grand jury may refuse to indict even if the accused is bound over, or may find an indictment even if he is discharged. But his discharge by one magistrate is no bar to an examination for the same offense in case the proper complaint is made before the same or another magistrate.
>
> It is urged that a party accused of an offense might thus be subjected to great annoyance by reason of repeated examinations. While this is true, and if there is not a reasonable ground of suspicion a party may maintain in a proper case an action for malicious prosecution for injuries sustained by such prosecutions, yet such re-examinations afford no grounds of themselves to justify the issuance of a writ of habeas corpus.

We have repeated that statement or one similar to that on a number of subsequent occasions. See, *Skinner v. Jensen*, 178 Neb. 733, 135 N.W.2d 134 (1965); *Van Buren v. State*, 65 Neb. 223, 91 N.W. 201 (1902). The only change between the reasoning and conclusion reached by the court in *Garst* and the present situation is that as a general rule we no longer prosecute in the district court by action of the grand jury but, rather, by the filing of an information. See, Neb. Rev. Stat. § 29-1601 (Reissue 1979); *Duggan v. Olson*, 146 Neb. 248, 19 N.W.2d 353 (1945). That change does not affect our decision in *Garst* or the subsequent decisions of this court.

Furthermore, one may be charged directly in the district court and afforded a preliminary hearing before a district judge without ever having appeared in the county court. Neb. Rev. Stat. § 29-203 (Reissue 1979) provides in part:

> Judges of the district courts shall have the same powers to

> require securities for the keeping of the peace and good behavior, and bail for appearance in courts to answer complaints to keep the peace, and for crimes and offenses committed in their respective districts as any of the magistrates aforesaid have in their respective counties.

In *Callies v. State*, 157 Neb. 640, 646-47, 61 N.W.2d 370, 375 (1953), we said:

> A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony. See Van Buren v. State, 65 Neb. 223, 91 N.W. 201.
>
> "It is discretionary with the district court whether it will sit as an examining magistrate, and its ruling in that regard will not be disturbed where no abuse is shown." [Citation omitted.]

See, also, *Fugate v. Ronin*, 167 Neb. 70, 91 N.W.2d 240 (1958).

Likewise, it would appear to be the majority rule throughout the United States that an examining magistrate's refusal to bind a defendant over does not bar refiling the identical charges. See, *State v. Ruiz*, 106 Idaho 336, 678 P.2d 1109 (1984); *People v. Jordan*, 155 Cal. App. 3d 769, 203 Cal. Rptr. 172 (1984); *Com. v. McClain*, 325 Pa. Super. 29, 472 A.2d 630 (1984); *State v. Mayberry*, 457 So. 2d 880 (La. App. 1984); *People v. Mitchell*, 116 Ill. App. 3d 44, 451 N.E.2d 934 (1983); *State v. Stewart*, 615 S.W.2d 600 (Mo. App. 1981); *State v. Turner*, 223 Kan. 707, 576 P.2d 644 (1978); *People v. Ackrish*, 92 Misc. 2d 431, 400 N.Y.S.2d 684 (1977).

Rubek argues that the enactment of Neb. Rev. Stat. § 29-2317 (Reissue 1979) in 1975 has invalidated the historically accepted procedure of permitting a prosecutor to refile charges against an accused after discharge by the original examining magistrate. In support of that argument he cites to us § 29-2317, which provides in part as follows:

> A prosecuting attorney, including any county attorney, city attorney, or designated assistant, may take exception to any ruling or decision of the municipal or county court made during the prosecution of a cause by presenting to the court a notice of intent to take an appeal to the district

> court with reference to the rulings or decisions of which complaint is made.

The fact that the Legislature has granted to a prosecuting attorney the right to appeal a decision of a municipal or county court does not thereby repeal by implication the authority of the prosecuting attorney to refile in a county court or to file directly in a district court, and the adoption of § 29-2317 simply does not stand for that proposition. Rubek's first claim must therefore be overruled.

We turn, then, to Rubek's second claim, that the evidence was insufficient to convict him on count I. There was certainly sufficient evidence to submit the issue to the jury for its determination. We have frequently said:

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

State v. Piskorski, 218 Neb. 543, 550, 357 N.W.2d 206, 212 (1984). See, also, *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). While the evidence was in conflict, there was more than enough evidence, as we shall note in a moment, if believed by it, to permit the jury to find beyond a reasonable doubt that Rubek committed the crimes with which he was charged. The jury apparently believed the victim and her witnesses and disbelieved Rubek.

> In a criminal case it is not the province of [the Supreme Court] to determine the credibility of witnesses or weigh the evidence. Where there is sufficient evidence to justify the verdict, the verdict will not be set aside on appeal unless clearly wrong. See, State v. Davis, 198 Neb. 823, 255 N.W.2d 434; State v. Von Suggs, 196 Neb. 757, 246 N.W.2d 206.

State v. Morosin, 200 Neb. 62, 69, 262 N.W.2d 194, 197 (1978). We believe an examination of the record compels us to reject Rubek's second claim.

As we have noted, while certain aspects of the evidence were in dispute, it is undisputed that the evidence established that the

victim and a friend went to the Last Outpost Bar on U.S. Highway 73-75 in the Bellevue-South Omaha area on the night of February 11, 1984. While there, they met Rubek and two of his male friends. The victim and her friend ultimately sat at a table in the bar with Rubek and his friends, and during the course of the evening the victim and Rubek became friendly and danced together several times. The victim consumed alcoholic beverages, both before going to the bar and while at the bar. At approximately 1 a.m. the following morning the bar closed, and the victim and her friend left to return home. The victim apparently agreed to give Rubek a ride home, and Rubek got in the back seat behind the victim, who was driving.

At this point the evidence is in conflict. The victim testified that she drove her friend home first because the friend lived nearby and because the victim could easily find her house. The victim maintains that after taking her friend home she was guided by directions given by Rubek and that, because of the alcohol she had earlier consumed, she became disoriented and uncertain of where she was driving. Finally, the victim maintains, she realized she was in an area with few lights. She saw headstones and knew she was in a cemetery near some sort of garage or shed. She maintains that she became frightened and tried to put her car into reverse in order to leave the area. However, Rubek, at this point, reached over the seat, threw the gearshift into park, and proceeded to pull her into the back seat of the car by her hair and her shoulder. According to the victim, Rubek immediately started hitting her about the head and chest area with his hands. She claims that she passed out for some short period of time but came back to consciousness when she felt a very hard blow on her chest. She then realized that Rubek was removing her jeans and panties. He had them off one leg and was attempting to get them off over her boot on her other foot, and they did eventually come off. The victim maintains that she struggled with Rubek and distracted him momentarily by saying that she saw someone outside. While Rubek was distracted, the victim unlocked the car door at her head. She then kicked the defendant, crawled out of the door, and ran away from the car. As she was running, she heard her car start and leave the cemetery.

Rubek, on the other hand, maintains that the victim was a willing participant, desirous of engaging in sexual relations with him, and that it was the victim who freely and voluntarily drove them to the cemetery. Upon arriving they both voluntarily moved from the front seat to the back seat and proceeded to caress and fondle each other. Rubek maintains that together they removed the victim's jeans and panties, and it was at this point that the victim apparently had second thoughts and struck him in the groin with her knee. Rubek maintains he lost control and hit the victim in the face with his fist.

There was further evidence, uncontradicted, that the victim then ran down a hill in the cemetery, bruising and scratching her legs and knees, climbed over a fence at the boundary of the cemetery, and ran to a nearby house. She rang the bell of the house, awoke the residents, and pleaded to be let into the dwelling. The residents of the house observed that the victim had bruises, injuries to her face, swelling of her eyes, a cut on her lip, and was bleeding. They also saw that she was hysterical, screaming, frightened, and emotionally upset, and noted that she was wearing no pants or underwear and had only a jacket wrapped around her waist. Additionally, she was missing one boot. The victim told the residents that she was scared of a man named "Russ" coming back to get her. A Bellevue policeman was called, and he too observed the injuries and swelling on the victim's face, the victim's hysterical, incoherent demeanor, and her lack of clothing. The victim reported to the officer that she had been assaulted. The victim was then taken by rescue squad to Midlands Community Hospital, where observations of her injuries were made and treatment given. The emergency room report was put into evidence. The report established that the victim had a large bruise on her chest area, incurred loss of feeling in her cheek, and had a cut requiring suturing in her pubic area, thought to be caused when she climbed over a fence while fleeing from Rubek. A photograph taken of the victim the next morning and put into evidence showed graphically the swelling and disfiguration of the victim's face in the immediate aftermath of the assault. There was more than sufficient evidence which, if believed by the jury, supported the conviction.

The testimony of the residents of the home to which the victim ran and of the police officer was sufficient to constitute corroborative evidence. It is not necessary in a sexual assault case that there be an independent eyewitness. In most instances such could not be provided. The rule is properly set out in *Miller v. State*, 169 Neb. 737, 740, 100 N.W.2d 876, 879 (1960), wherein we said:

> "In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn."

See, also, *State v. Beasley*, 214 Neb. 918, 336 N.W.2d 601 (1983); *State v. Gero*, 184 Neb. 107, 165 N.W.2d 371 (1969); *Shepperd v. State*, 168 Neb. 464, 96 N.W.2d 261 (1959). We must keep in mind that Rubek was not charged or convicted of sexual assault in the first degree, which requires penetration, but merely of attempted first degree sexual assault, which requires that the person so charged and convicted "[i]ntentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime." § 28-201(1)(b). The jury could reasonably find, if it believed the evidence offered by the victim, that more than a substantial step was taken in an effort to commit first degree sexual assault and that, had the victim not otherwise escaped, penetration would have occurred. The second claim must likewise be overruled.

That brings us, then, to the final claim regarding the jury instructions. Before embarking upon an examination of that claim, we observe that Rubek was originally charged with assault in the first degree. At the close of the evidence, the district judge announced that he believed the evidence was insufficient to establish assault in the first degree, in that the evidence failed to establish serious bodily injury as required by Neb. Rev. Stat. § 28-308 (Reissue 1979). He advised the parties

that, instead, he intended to submit to the jury an instruction on assault in the third degree, which requires bodily injury but not "serious" bodily injury. See § 28-310(1)(a). Rubek made no objection to the giving of such an instruction, nor has he assigned that matter as error before this court. This court will generally not consider instructions to which no objection is made, see *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985), nor will we consider errors not assigned, see, Neb. Ct. R. 9D(1)d (rev. 1983); *State v. Hoekstra, ante* p. 309, 369 N.W.2d 643 (1985); *State v. Toth, ante* p. 311, 369 N.W.2d 644 (1985). Furthermore, because we do not consider the matter, we make no decision on the propriety of a trial court's tendering what is believed to be a lesser-included offense instruction on the court's own motion. That is not to say that such procedure is valid or invalid, but merely to point out that the procedure in this case is accepted without comment because of the posture in which it comes to this court. With that observation we turn to the specific claim.

In instruction No. 4 the district court instructed the jury on the elements necessary to be established in order for Rubek to be found guilty of assault in the third degree. In instruction No. 10 the district court instructed the jury on the defense of "self-defense." There is no claim made that the instructions as given were incorrect, but only that instruction No. 10 should have been a part of instruction No. 4. Apparently, Rubek believes that by combining the instructions the jury might be more inclined to favor his defense. We know of no rule to that effect. Quite to the contrary, we have repeatedly held that " '[a]ll the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.' " *State v. Bartholomew*, 212 Neb. 270, 275, 322 N.W.2d 432, 436 (1982). See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Rubek's final claim must likewise be overruled. For these reasons, therefore, the judgment must be affirmed.

AFFIRMED.

MONTCLAIR NURSING CENTER, APPELLEE, V. BRENDA WILLS AND RONALD E. SORENSEN, COMMISSIONER OF LABOR, APPELLANTS.

371 N.W.2d 121

Filed July 26, 1985. No. 85-012.

1. **Employment Security Law: Words and Phrases.** The phrase "to leave work voluntarily" has been defined to mean to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
2. **Employment Security Law: Good Cause.** The burden of proof under Neb. Rev. Stat. § 48-628(a)(1) (Reissue 1984) is upon the employee to show that he or she left his or her employment for good cause.
3. _____: _____. A change in hours, absent some compelling circumstances, does not rise to the level of good cause within the meaning of Neb. Rev. Stat. § 48-628(a)(1) (Reissue 1984).
4. _____: _____. Where there is no competent medical evidence offered to substantiate a claim that an employee's health would be affected by a change in hours, the claimant has failed to meet his or her burden of proving that termination was for good cause because of health reasons.
5. _____: _____. An employer may change an employee's hours of employment without giving the employee good cause to terminate the employment, absent some evidence that the shift change was done for some improper purpose.

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

Paul D. Kratz, for appellant Sorensen.

Gary L. Fischer, for appellant Wills.

Patrick J. Barrett of McGrath, North, O'Malley & Kratz, for appellee.

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

KRIVOSHA, C.J.

Brenda Wills appeals from a judgment entered by the district court for Douglas County, Nebraska, finding that she voluntarily terminated her employment with appellee, Montclair Nursing Center, without good cause and thereby was disqualified from receiving unemployment insurance benefits during the period prescribed by Neb. Rev. Stat. § 48-628 (Reissue 1984). While Wills has assigned a number of errors, in essence all of them resolve into but a single assignment which

requires us to determine as a matter of fact whether the district court erred in finding that Wills left her employment voluntarily and without good cause. That is so because the scope of review in this court is de novo on the record from the district court, see *McClemens v. United Parcel Serv.*, 218 Neb. 689, 358 N.W.2d 748 (1984), and it is our duty to retry the issues of fact involved and the findings complained of and reach independent conclusions with respect thereto, see *Taylor v. Collateral Control Corp.*, 218 Neb. 432, 355 N.W.2d 788 (1984). We have now reviewed the record de novo, and we conclude that the district court was correct. We therefore affirm the judgment.

Wills began her employment at Montclair Nursing Center as a licensed practical nurse on September 8, 1982. The application she filled out at that time listed the hours she desired to work as "full-time 3-11," or "part-time." The application indicates that she was hired at a rate of $5.80 per hour "F.T. 3-11," presumably meaning full time, 3 to 11 p.m. shift. At this point the evidence appears in conflict.

On October 11, 1983, Montclair informed Wills that she would either have to resign or accept employment at another nursing station on the 11 p.m. to 7 a.m. shift. Montclair maintains that the ultimatum resulted from complaints that Montclair had received about Wills from other employees who refused to work with her on the 3 to 11 p.m. shift. While Montclair representatives spoke in terms of a persistent pattern of inability to get along with coworkers, the evidence obtained from an "Employee Evaluation" form, admitted into evidence, seems to contradict those statements. The evaluation, dated September 14, 1983, lists Wills' "job attitudes" as "good" or "very good." Wills refused to accept the 11 p.m. to 7 a.m. shift, maintaining that she was unable to work the night shift because of a liver problem. No medical evidence was provided the employer at that time or at any subsequent time, nor was any medical evidence concerning her liver condition offered into evidence throughout the administrative proceedings in this case or before the district court when additional evidence was adduced. The contention that working the 11 p.m. to 7 a.m. shift will affect Wills' liver is established only by her own

medically unsupported statements. Furthermore, we are not advised from any evidence found in the record what the liver condition is or how working on the 11 p.m. to 7 a.m. shift would produce a problem. Additionally, on her application for employment Wills responded "good" when asked about her "present state of health."

Before she terminated her employment she amended the resignation form given her by Montclair to read "staff members feel I'm incompatible." No mention of her health was made on the form, although space was available to make such comment, and it is clear that Wills modified the form to more fully reflect what she believed to be the facts. Upon resigning her employment with Montclair, Wills filed a claim for unemployment insurance benefits. The Department of Labor claims deputy imposed an 8-week disqualification because he determined that Wills left her employment voluntarily and without good cause. On appeal the Nebraska Appeal Tribunal reversed the determination of the claims deputy, and Montclair appealed that decision to the district court for Douglas County. The district court reversed the appeal tribunal after permitting the parties to produce additional evidence.

Section 48-628(a)(1) provides:

> An individual shall be disqualified for benefits:
>
> (a)(1) For the week in which he or she has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case.

The phrase "to leave work voluntarily" has been defined to mean " ' "to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment." ' " *McClemens v. United Parcel Serv.*, 218 Neb. 689, 690, 358 N.W.2d 748, 750 (1984); *Nuss v. Sorensen*, 218 Neb. 703, 358 N.W.2d 752 (1984). Furthermore, the burden of proof under § 48-628(a)(1) is upon the employee to show that he or she left his or her employment for good cause. See *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979).

Wills maintains that she was compelled to terminate her

employment because of the employer's insistence that she work the night shift. This, in and of itself, is not sufficient to establish good cause. Though there appears to be no specific Nebraska decision on the point, the majority rule, as conceded by the Commissioner of Labor, is that a change in hours, absent some compelling circumstances, does not rise to the level of good cause within the meaning of employment security laws. See, *Mosebauer v. Com., Unemployment Comp. Bd., etc.*, 61 Pa. Commw. 269, 433 A.2d 599 (1981); *ABC Auto Parts v. Florida Dept. of Labor, etc.*, 372 So. 2d 197 (Fla. App. 1979). Both Wills and the commissioner argue, however, that there is present in this case a compelling circumstance, that being Wills' health problem. The difficulty with this argument is that but for Wills' unsubstantiated statement that working the night shift would cause her to have problems in the future because of her liver condition, there is no other evidence to support a finding of compelling circumstances. The unsupported statement of Wills is insufficient to meet her burden of proof.

The situation in the instant case is similar to that in *McClemens v. United Parcel Serv., supra* at 693, 358 N.W.2d at 751, wherein we observed: "[N]o matter how the February 9 letter is viewed, the record is devoid of any competent medical evidence which supports a finding of an inability on McClemens' part to perform his work." We held that, absent such evidence, judgment must be entered for the employer.

Other jurisdictions that have examined this issue have held that employees who assert that they voluntarily left their employment for good cause because of medical reasons are required to produce some medical evidence to support that claim. We believe that where there is no competent medical evidence offered to substantiate a claim that an employee's health would be affected by a change in hours, the claimant has failed to meet his or her burden of proving that termination was for good cause because of health reasons. See, *Dornblum v. Com., Unemp. Comp. Bd. of Rev.*, 77 Pa. Commw. 547, 466 A.2d 747 (1983); *Miller v. Catherwood*, 30 A.D.2d 610, 290 N.Y.S.2d 244 (1968); *De Patra v. Administrator*, 25 Conn. Supp. 242, 202 A.2d 153 (1964).

Wills argues that there was some type of contract between

Wills and Montclair to the effect that she would always work the 3 to 11 p.m. shift and, therefore, when the employer changed the contract, Wills was given good cause to terminate. The record simply does not support this claim. Hiring Wills for the 3 to 11 p.m. shift in a facility that requires round-the-clock coverage by employees is insufficient to establish some form of binding contract or to take the case out of the general rule that an employer may change an employee's hours of employment without giving the employee good cause to terminate the employment, absent some evidence that the shift change was done for some improper purpose.

The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD RICHTER, APPELLANT.
371 N.W.2d 125

Filed July 26, 1985. No. 85-066.

1. **Pleas.** A plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. _____. The record must affirmatively show the defendant entered his plea understandingly and voluntarily.
3. _____. The factual basis for a plea may be determined by inquiry of the defendant or county attorney, or by examination of the presentence investigation.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless the trial court abused its discretion.

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

Kathy Goudy and James T. Hansen, for appellant.

Robert M. Spire, Attorney General, and Dale A. Comer, for appellee.

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

BOSLAUGH, J.

Upon pleas of no contest to felonious destruction of property and misdemeanor destruction of property in violation of Neb. Rev. Stat. § 28-519 (Reissue 1979), the defendant was sentenced to imprisonment for 1 to 2 years on count I and 6 months on count II, the sentences to run concurrently. The defendant has appealed and has assigned as error (1) that his pleas were not voluntarily made, (2) that no factual basis existed for the pleas, and (3) that the sentences imposed were excessive.

The defendant originally pleaded "not guilty" to three felony counts including a charge of use of a firearm in the commission of a felony. He subsequently changed his pleas to "no contest" pursuant to a plea bargain in which the third count was dismissed and the second count reduced to misdemeanor destruction of property. The State also agreed to make no comments regarding the sentencing.

At the arraignment on the amended information, the trial court explained the nature of the charges and possible penalties and that the court was not bound by any plea bargain. The court further explained that a plea of "no contest" waived the defendant's constitutional rights to a jury trial, compulsory process, confrontation, the presumption of innocence, and the requirement the State prove his guilt beyond a reasonable doubt. To each of these advisements the defendant replied that he understood. During the arraignment, some reference was made to advice concerning constitutional rights that had been made at an earlier arraignment. The record of that arraignment is not before us.

When an assertion is made that a plea of guilty was involuntarily made, one of the propositions that may be inherent in that claim is that some, if not all, of the defendant's constitutional rights were either not explained to or waived by the defendant. As the defendant chose not to include the entire proceedings, i.e., the initial arraignment, in the bill of exceptions, we do not consider any deficiency that may have existed in the court's explanation of the defendant's constitutional rights.

Following a statement as to the factual basis for the charges by the deputy county attorney, the defendant's plea was

accepted, and he was found guilty as charged. Sentence was imposed later, after receipt of a presentence report. At all times the defendant was represented by counsel and stated that he was satisfied with that representation.

A plea of no contest places the defendant in the same position as a plea of guilty so far as sentencing is concerned. Such a plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971); *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

It is clear from the record before us that the defendant's pleas in this case were voluntarily and intelligently made.

Although the defendant contends that he pleaded "no contest" under the impression that he would receive a light jail sentence, the trial court made it clear that the court was not bound by any agreement limiting sentence and specifically told the defendant the court would not accept his plea if the defendant believed that was the case. The defendant understood the court's position. The court said, "but I want you to know today clearly on the record without a doubt, that I'm not bound by any sentencing. And if you think I am, I'm not going to accept your pleas. Do you see what I mean?" The defendant replied, "Yes."

A defendant has no legal basis to rely on a sentence recommendation as part of a plea agreement where the trial court has made it clear that it was not in any way bound by such agreement. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); *State v. Hutton*, 218 Neb. 420, 355 N.W.2d 518 (1984). The first assignment is without merit.

In his second assignment of error the defendant claims there was no evidence that the felonious destruction of property in count I exceeded $300 as required under the statute. See § 28-519(2).

The factual basis as recited in court established that on June 27, 1984, following a fight with the proprietor of the Wooden Nickel Bar in Scottsbluff, Nebraska, the defendant left the bar, only to return about 10 minutes later with a shotgun. He then shot out two double pane glass windows at the front of the bar

and the windshield of a car parked nearby. Defendant was also seen walking on the hood, top, and back of the proprietor's car. Defendant was arrested at his home a short time later. The gun was retrieved from the defendant's mother's house, and four empty shotgun shells were found in the defendant's pickup truck.

The presentence report contains estimates which place the damage to the bar windows at $740 and repairs to the owner's car as high as $1,473. Damage to the other car was slightly more than $300.

The damage to the windows of the bar, which alone exceeded $700, and to the owner's automobile was included in count I and clearly represents damage over the statutory amount of $300 and constitutes felonious destruction of property.

A factual basis may be determined from inquiry of the defendant or county attorney, or by examination of the presentence investigation. *State v. Sare*, 209 Neb. 91, 306 N.W.2d 164 (1981). Both the statement of the deputy county attorney and the reports contained in the presentence investigation established a factual basis for the charges.

Finally, the defendant claims the sentences imposed were excessive.

A sentence imposed within the statutory limits will not be disturbed on appeal unless the trial court abused its discretion. *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984).

In imposing a sentence, matters which should be considered by the trial court include the defendant's past criminal record, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984); *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981).

In this case the maximum sentence under count I is 5 years' imprisonment and a $10,000 fine. § 28-519(2) and Neb. Rev. Stat. § 28-105 (Reissue 1979). The maximum for count II is 6 months' imprisonment and a $1,000 fine. § 28-519(3) and Neb. Rev. Stat. § 28-106 (Cum. Supp. 1984). The sentences imposed were well within the statutory limits.

The defendant is 34 years of age. He has been convicted of a

number of minor offenses. In 1978 he received two concurrent sentences to imprisonment for 1 year. In light of the defendant's criminal record, the injuries which could have resulted from his use of a shotgun in the commission of the crime, and the deliberation the defendant took in leaving the scene and then returning 10 minutes later to commit the crime, the sentences imposed were not excessive. To paraphrase the trial judge, to impose lesser sentences would be to depreciate the seriousness of the offenses.

The judgment is affirmed.

AFFIRMED.

O'NEILL PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. MURRAY D. MELLOR ET AL., APPELLANTS.

371 N.W.2d 265

Filed August 2, 1985. No. 83-604.

1. **Estoppel.** Equitable estoppel requires the coexistence of two separate sets of elements. As to the party estopped, there must be (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 that party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct would 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 party who seeks to invoke the benefit of estoppel, there must be (1) lack of knowledge and of the means of acquiring knowledge of the truth of the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) 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. **Summary Judgment.** A summary judgment is properly granted where the record presents 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.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Richard A. Koehler, for appellants.

John C. Schraufnagel of Cronin, Symonds & Schraufnagel, for appellee.

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

CAPORALE, J.

O'Neill Production Credit Association obtained a summary judgment determining that Murray D. Mellor and his wife, Jean M. Mellor, owed O'Neill $603,995.52 on a secured loan and foreclosing upon the Mellors' interests in and to certain real and personal property. The Mellors' sole assignment of error on appeal is that genuine issues exist as to material facts. We affirm.

The Mellors agree that the loan documents are valid, that the debt is in default, and that the amount determined by the trial court to be owed is correct. Their brief on appeal appears to argue, however, that the evidence presents genuine issues of material facts as to their defenses that O'Neill is estopped by its conduct from asserting any claim against them and has failed to forbear from asserting any claims against them as required by O'Neill's own policy.

The record establishes that the Mellors are farmers and ranchers who began borrowing money from O'Neill in approximately 1961. In determining the amount the Mellors should borrow, they and O'Neill worked together in estimating income, expenses, and market trends. The usual procedure was for Mr. Mellor to make proposals to O'Neill, which would either accept or reject the plans and either lend money or not. At times O'Neill made recommendations as to the course of action the Mellors should take and sometimes refused to loan any money for certain expenditures which O'Neill considered unwise.

The Mellors' operation began to experience financial difficulties in the early 1970s, and by 1977 the Mellors' equity stood at a negative 20 percent.

As early as 1973, O'Neill requested that the Mellors get into a better equity position by selling a quarter section of their land. The Mellors, however, did not want to sell that particular farm in pieces and instead sold four quarter sections, retaining only

one quarter section. Following these sales, the Mellors assigned their rights as sellers under the land sales contracts to O'Neill and executed mortgages covering real estate and a security agreement granting O'Neill a security interest in the Mellors' cattle, farming equipment, and growing crops.

In claiming that O'Neill is estopped by its own conduct from asserting any claims against them, the Mellors argue that O'Neill held itself out as an expert in money matters as related to farming and ranching operations, that the Mellors relied on the advice O'Neill gave them, and that the advice was faulty.

Specifically, the Mellors claim that in 1970 O'Neill required them to sell 500 head of cattle because the market was projected to continue its downward movement. However, the market went up. The Mellors claim they lost $48,000 by selling the cattle early.

The Mellors further claim that if they had held the land they sold, as discussed previously, for another 3 years, they would have received an additional $432,000. In addition, sale of the land meant they had to rent pastureland, which would otherwise have been unnecessary.

In 1978 the Mellors received approval to purchase 200 steers, but O'Neill apparently revoked that approval before the steers were purchased. The Mellors claim that cattle made a good profit that year, and if the approval had not been revoked, it "would have put things in a lot better shape."

In 1979 the Mellors bought yearlings, but O'Neill required that the contracts be hedged. The market moved against the hedge, and instead of making a profit of $24,000, as would have been the case without hedging, a profit of only $12,000 was made.

In 1981, as a condition of renewing the Mellors' loans, O'Neill required that they sell their cattle. Such was done in February 1982. The market price for cattle then rose, and the Mellors again claim a substantial amount of money was lost.

In 1982 O'Neill would not allow the Mellors to sell some corn under a government program, causing another financial loss.

The Mellors calculated their total loss due from the above actions of O'Neill to be $674,849.

The Mellors also claim they were "tricked" into giving the

March 1982 mortgage. Although Mr. Mellor cannot remember what any O'Neill employee said, he claims that the language of the mortgage led him to believe that he was to receive $200,000 for operating money. However, O'Neill refused to advance any money for operating expenses after April 1982. This suit was instituted on December 1, 1982. The mortgage states it is given to secure a collateral note in the principal sum of $200,000 and any future advances "which may be made from time to time by Mortgagee, at its option, to Mortgagor(s)" for any sum not to exceed $200,000.

Even though the Mellors were dissatisfied with O'Neill, they did not attempt to obtain other financing until 1982, and even then "made very little effort" to do so. It was Mr. Mellor's opinion that from 1970 on he would not have been able to obtain financing through any other institution because his financial position was so poor.

In order for the Mellors to succeed in their first defense, equitable estoppel, they must establish the coexistence of two separate sets of elements. They must first prove that O'Neill, the party to be estopped, (1) engaged in conduct which amounts to a false representation or concealment of material facts, or, at least, which was calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which O'Neill now attempts to assert; (2) had the intention, or at least the expectation, that such conduct would be acted upon by, or influence, the Mellors; and (3) had knowledge, actual or constructive, of the real facts. The evidence must also show that, at the same time, the Mellors (1) had a lack of knowledge and of the means of acquiring knowledge of the truth of the facts in question; (2) relied, in good faith, upon the conduct or statements of O'Neill; and (3) acted or refrained from acting because of O'Neill's conduct such as to change their position or status to their injury, detriment, or prejudice. *R.A.S., Inc. v. Crowley*, 217 Neb. 811, 351 N.W.2d 414 (1984); *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 186 N.W.2d 711 (1971); *Cillessen Constr. v. Scotts Bluff Co. Hous. Auth.*, 217 Neb. 39, 348 N.W.2d 418 (1984).

The record raises no questions of fact, either directly or by inference, that O'Neill made any false representations or

concealed any material facts in a manner calculated to convey the impression that the facts were otherwise than, and inconsistent with, those O'Neill now attempts to assert. The fact that matters did not develop as one or all of the parties might have expected or hoped does not prove that O'Neill misrepresented anything.

Unlike the situation in *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985), where a fact question existed as to what Yankton Production Credit Association promised with respect to financing the debtor's expansion, there is no evidence in the present case that O'Neill promised future advances would be made as part of the consideration for execution of the 1982 mortgage. The evidence is only that Mr. Mellor concluded, erroneously, from the mortgage language itself that operating funds would be made available.

Once it is determined, as we do, that the evidence discloses no misleading statements by O'Neill, no further inquiry as to the defense of estoppel need be made, for it cannot exist.

The Mellors next contend, citing 12 C.F.R. § 614.4510 (1985), that O'Neill is required to have adopted a policy which provides for forbearance on claims against borrowers who are cooperative, make an honest effort to meet the loan conditions, and are capable of working out of the debt. They argue that O'Neill has violated such a policy in this case.

The difficulty with that argument, from the Mellors' point of view, is that they do not allege either that O'Neill adopted such a policy and violated it or that O'Neill failed to adopt such a policy and thereby violated the guidelines of § 614.4510. Indeed, on the record before us it would appear that O'Neill forbore for about a decade. In any event, whether compliance with a policy in conformance with § 614.4510 is to be considered a condition precedent to foreclosure to be proved by O'Neill or an affirmative defense against foreclosure to be proved by the Mellors, a matter we do not decide, there can be no factual issues in the absence of appropriate allegations.

A summary judgment is properly granted where the record presents 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. *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985); *Timmerman v. American Trencher, Inc., ante* p. 175, 368 N.W.2d 502 (1985); *Yankton Prod. Credit Assn. v. Larsen, supra*; *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). This is such a case.

The judgment of the trial court, being correct, is affirmed.

AFFIRMED.

REGGIE HAEFFNER, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF PUBLIC INSTITUTIONS, ET AL., APPELLEES.

371 N.W.2d 658

Filed August 2, 1985. No. 83-930.

Administrative Law: Appeal and Error: Case Overruled. Pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1981), the Supreme Court reviews an agency's decision de novo on the record. Previous decisions of this court holding that the Supreme Court's review of an agency's decision is other than a review de novo on the record are hereby overruled.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Steven D. Burns of Steven D. Burns, P.C., for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellees.

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

PER CURIAM.

Reggie Haeffner appeals from the judgment of the district court for Lancaster County. The district court affirmed the decision of the personnel board of the State of Nebraska terminating Haeffner's employment with the Department of Public Institutions of the State of Nebraska. After a hearing on allegations that Haeffner had cashed checks for patients at the Lincoln Regional Center and had supplied a controlled

substance to patients at the center, the personnel board voted to terminate Haeffner's employment due to his violation of existing rules adopted by the Department of Public Institutions. Haeffner appealed to the district court under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). Upon a review of the record of proceedings before the personnel board, the district court modified and affirmed the personnel board's decision terminating Haeffner's employment. We affirm.

Haeffner was employed by the Department of Public Institutions in 1980 as a Security Specialist I at the Lincoln Regional Center. Haeffner's duties involved supervision of patients in the center's security building. At the regional center on July 19, 1982, Haeffner's supervisor accused him of delivering a controlled substance, LSD, to some patients. The supervisor's accusation, if true, constituted Haeffner's violation of rules promulgated by the Department of Public Institutions. The department suspended Haeffner from employment and investigated the supervisor's accusation. The investigation not only supported the controlled substance charge but also revealed that Haeffner had cashed checks for patients, also a violation of departmental rules. Following this investigation, on August 2 Haeffner's employment was terminated as a result of his violating departmental rules concerning check-cashing for patients and illegally delivering a controlled substance to patients. Haeffner filed a grievance and requested a hearing before the personnel board.

At Haeffner's hearing before the personnel board on February 17 and March 17, 1983, six witnesses testified about Haeffner's supplying LSD to patients or the subsequent departmental investigation of Haeffner's activities. The evidence presented to the personnel board showed that Haeffner had cashed checks for patients but that cashing checks was a common practice among security specialists and other employees at the regional center in order to gain a patient's confidence and cultivate a better relationship with patients.

Specifically, evidence presented at Haeffner's hearing before the personnel board shows that on July 17, 1982, a patient at the

regional center was found to be under the influence of LSD. That patient claimed he received LSD from another patient who in turn claimed to have received the LSD from Haeffner. The patient who initially received the LSD testified Haeffner had delivered seven or eight pieces of paper called "blotter acid," when Haeffner handed him a cup of coffee and held the blotter acid against the cup. In this manner Haeffner delivered the blotter acid, each about the size of a fingernail. This transaction was the basis for Haeffner's ultimate dismissal.

Haeffner, apart from presenting witnesses testifying about his good character, presented no evidence in his defense except his own testimony.

On April 21, 1983, the personnel board found against Haeffner and approved termination of Haeffner's employment, finding that the State's witnesses had given credible and consistent testimony.

Haeffner appealed to the district court pursuant to § 84-917 for judicial review of the personnel board's decision. In his petition filed in the district court, Haeffner alleged that the decision of the personnel board was not supported by competent, material, and substantial evidence and that the personnel board made its decision arbitrarily and capriciously with improper motivation, for example, bias. As required by § 84-917(5), the district court reviewed the record made before the personnel board. Section 84-917(6) pertaining to a district court's review of an agency's decision provides:

> The court may affirm the decision of the agency [personnel board] or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner [Haeffner] may have been prejudiced because the agency decision is:
>
> (a) In violation of constitutional provisions;
>
> (b) In excess of the statutory authority or jurisdiction of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

(f) Arbitrary or capricious.

During Haeffner's hearing before the district court, the judge asked Haeffner's attorney: "[Court] It sounds to the Court that basically it's a question of credibility of witnesses; is the Court correct on that? [Counsel] I think that's a fair statement, Your Honor."

The district court, in applying the standards set forth in § 84-917(6), concluded:

> [W]hile some of the witnesses were inmates at the Lincoln Regional Center their testimony appears to be consistent and believable; there was evidence that one patient was under the influence of LSD on July 17, 1982, that he had obtained the drug from a patient who testified that he had received the LSD from Mr. Haeffner having paid for the same by Mr. Haeffner cashing his check and retaining part of the proceeds therefrom for the LSD; that there was corroboration by another patient who testified that Mr. Haeffner had previously delivered controlled substances to him under similar circumstances; that there was evidence and corroboration that a check had passed from the patient to whom the LSD was delivered to Mr. Haeffner and Mr. Haeffner admitted that he had cashed the inmate's paycheck.
>
> . . . Except as hereinbefore stated the decision of the Board was supported by competent, material and substantial evidence in view of the entire record as made on review and the termination for possession and delivery of drugs was not arbitrary or capricious.
>
> . . . [T]he only issue raised on the appeal at time of trial was whether there was competent, material and substantial evidence to uphold the termination of the plaintiff-appellant as Security Specialist I at the Lincoln Regional Center.

The court concluded that Haeffner's cashing checks for patients at the regional center did not constitute a sufficient ground for termination of employment, absent a showing of consistent enforcement of departmental rules prohibiting such activity. As authorized by § 84-917(6), the district court modified the personnel board's decision to terminate

Haeffner's employment on account of the check-cashing incidents. The district court then affirmed Haeffner's dismissal from employment because Haeffner had delivered LSD to patients in the regional center. Haeffner has appealed to this court.

Of the 14 separate assignments of error alleged for appeal to this court, 12 of Haeffner's alleged errors relate to application of the correct law pertinent to Haeffner's hearing before the personnel board; for example, proper allocation of the burden of proof and applicable rules of evidence. As such, those 12 errors claimed by Haeffner are classified as questions of law, whereas the remaining two errors claimed by Haeffner are directed to the evidence before the personnel board as a basis for the decision to terminate Haeffner's employment. These last two questions, whether there was substantial, competent, and material evidence supporting the personnel board's decision and whether the personnel board acted arbitrarily or capriciously in reaching its decision, were the only questions presented to the district court in Haeffner's petition for judicial review of the agency's decision.

In disposing of an appeal the Supreme Court considers only those errors which are properly assigned and presented to this court. See *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984). Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. See *In re Estate of Kothe*, 131 Neb. 780, 270 N.W. 117 (1936).

In *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 792, 140 N.W.2d 626, 633 (1966), we held:

> " 'No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " . . . "A constitutional question should

be raised at the earliest practical opportunity."
(Citation omitted.)

If questions about constitutional rights may be waived by failure to properly assert such questions at the earliest possible time, questions not constitutional in nature may, likewise, be waived by failure of timely presentation. Section 84-917(6) authorizes judicial review concerning law applicable to proceedings before an administrative agency. In his petition filed in district court, Haeffner did not assert any error attributable to incorrect application of law pertaining to proceedings before an administrative agency. By specifying in his district court petition only questions about the type of evidence before the personnel board and possible arbitrariness or capriciousness on the part of the board in reaching its decision, Haeffner waived any other error which may have occurred regarding the personnel board's decision.

We now proceed to determine whether the personnel board's decision to terminate Haeffner's employment was supported by appropriate evidence and whether the board acted arbitrarily or capriciously in deciding to terminate Haeffner's employment.

The Administrative Procedures Act, § 84-918, provides:

> An aggrieved party may secure a review of any final judgment of the district court under sections 84-917 to 84-919 by appeal to the Supreme Court. Such appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and *shall be heard de novo on the record.*

(Emphasis supplied.)

In *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973), we held that in reviewing an agency's decision, the Supreme Court could not make independent findings of fact and stated:

> Where there is substantial evidence supporting the agency's determination it does not appear that the independent determination of the facts by us upon the agency's record would serve any practical purpose. Under the statutory scheme outlined if this court were required to make an independent factual determination on the record then there would be no rational purpose for the limitation

which the statute places upon the District Court's review. *Id.* at 766, 212 N.W.2d at 347.

Subsequently, in *Weiner v. State ex rel. Real Estate Comm.*, 214 Neb. 404, 406, 333 N.W.2d 915, 917 (1983), we stated: "The standard of review to be employed by both the District Court and this court is whether the order of the commission was supported by competent, material, and substantial evidence and whether the order is arbitrary or capricious."

However, upon reexamining the statutory scheme for judicial review of an administrative agency's decision, we feel that the appropriate standard of review for the Supreme Court is found in § 84-918, which prescribes a review of an agency's decision de novo on the record without the limitations imposed on the district court under § 84-917(6)(e) and (f). Therefore, any previous decisions by this court holding that the Supreme Court's review of an agency's decision under the Administrative Procedures Act is other than a review de novo on the record, as exemplified by *The 20's, Inc. v. Nebraska Liquor Control Commission, supra*, and *Weiner v. State ex rel. Real Estate Comm., supra*, are overruled. While stating that the standard now applicable for the Supreme Court's review of an agency's decision is de novo on the record, we reiterate that a district court's standard of review, however, is prescribed by § 84-917(6), irrespective of the standard used by this court in reviewing an agency's decision.

After reviewing the record de novo, we find that the personnel board's decision is correct. Numerous witnesses testified that Haeffner supplied controlled substances to them while they were patients at the regional center. Haeffner tries to make much of the fact that witnesses offering direct testimony against him were involuntary patients at the regional center and suffered from some mental infirmities. However, testimony from patients, as witnesses against Haeffner, was strikingly similar to testimony from other witnesses and, contrary to Haeffner's contention, was reasonably consistent with testimony from other witnesses. The personnel board found such patients and witnesses credible, as do we. There is sufficient evidence in the record justifying the decision of the personnel board in terminating Haeffner's employment.

Arbitrary and capricious action, in reference to action of an administrative agency, means action taken in disregard of facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983). We simply find no evidence whatsoever which would lead us to find that the personnel board's action was arbitrary or capricious.

We conclude that the district court correctly affirmed the decision of the personnel board in that the personnel board's decision is based on appropriate evidence and was neither arbitrary nor capricious. We therefore affirm the judgment of the district court affirming the decision of the personnel board.

AFFIRMED.

SHANAHAN, J., concurring.

As the result of the majority's opinion, an appeal to a district court is similar to a bald man's trip to a barbershop; it affords an opportunity for conversation but accomplishes little. Nevertheless, the result reached by the majority is correct because the personnel board's decision is supported by competent, material, and substantial evidence. See Administrative Procedures Act, Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1981).

The majority gives lukewarm lipservice to some principles mentioned in its opinion; for example,

> only issues properly presented to and passed upon by the district court may be raised on appeal to this court. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

In re Estate of Kothe, 131 Neb. 780, 270 N.W. 117 (1936). Although *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984), involved a district court's appellate review of a conviction in a county court, *Ledingham* supplies an analogy and proposition for appellate procedure: "[T]o deny [a] trial court the opportunity to pass upon [a] matter, is not an appropriate way to conduct either trial courts or appellate courts." *Id.* at 138, 347 N.W.2d at 867. That immutable

proposition announced last year has been changed today by the majority's opinion.

Bearing in mind our somewhat ephemeral enunciations, it is clear the Administrative Procedures Act, Neb. Rev. Stat. § 84-918 (Reissue 1981), indicates a de novo review by this court, while the act, § 84-917, prescribes different and more restrictive criteria for a district court exercising appellate jurisdiction in reviewing an agency's decision. A de novo review by this court necessarily includes finding and weighing facts anew. Yet, a district court reviewing an agency's decision under the standards prescribed by § 84-917 is not permitted to independently determine facts or reweigh evidence presented to the board making the decision to be reviewed. Therefore, we witness an anomaly wherein this court and the district court, as appellate courts, review the identical subject matter, an agency's decision, but conduct a judicial review of that subject under dissimilar standards. If uniformity is one characteristic of a sound system of justice, one would have thought that identical issues presented to courts of appellate jurisdiction should be disposed by reference to an equivalent index and resolved by utilization of the same standard. Common sense, as well as efficiency and practicality in a judicial system, demands application of a uniform principle in answering like questions. As inescapable consequences of the majority's ruling, logical questions arise. Are not questions of fact and weight of evidence matters presented for the first time to the Supreme Court, but never to a district court, in a judicial review pursuant to the Administrative Procedures Act? If a determination of fact and evaluation of evidence are outside the scope of a district court's review, how does this court review for error in a matter never presented to a district court? Is deciding matters not presented to a district court an appropriate manner to conduct an appellate court?

By its decision the majority has eliminated the district court as a significant and efficient appellate step in judicial review of an agency's decision. Circumvention of the district court in effect creates a direct appeal to this court from an agency's decision. Thus, an appeal to the district court from an agency's decision becomes an expensive and inefficient detour on a

litigant's journey through a part of our legal system. Consequently, economy and efficiency in our judicial system become elusive and perhaps illusive.

Today's decision by the majority is absolute adherence to ill-advised legislation dictating an impractical framework to resolve disputes. What is more worrisome is the ominous course we have charted for the judicial process in Nebraska—capitulation to a statutory directive, notwithstanding a contrary conclusion compelled by practicality, logic, inherent judicial authority, and, moreover, this court's ultimate responsibility to the people for judicial administration required by Neb. Const. art. V, § 1.

Our review of a district court's judgment entered upon appellate review of an agency's decision should be made in reference to the standards contained in § 84-917 rather than a review de novo on the record as indicated in § 84-918. Undoubtedly, Milton envisioned such a situation as results from the majority's opinion, when he wrote, "Confusion worse confounded."

BOSLAUGH, J., concurring.

I agree with Judge Shanahan.

The review in this court is a review of the *judgment of the district court*. A de novo review of an appeal where the appeal below was limited to errors appearing on the record is meaningless.

MARY BORIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF GLADYS L. SMITH, DECEASED, APPELLEE, V. GLEN ALLEN HEYD AND ROBIN LEA HEYD, APPELLANTS.

371 N.W.2d 268

Filed August 2, 1985. No. 84-253.

1. **Contracts: Rescission: Damages.** The remedies of rescission and damages are inconsistent, since the former is based on disaffirmance and the latter upon affirmance of the contract.

2. **Contracts: Damages: Pleadings.** To be allowed as a setoff on a claim for damages, the basis for the setoff must be pled and proved.

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

Michael Lehan, for appellants.

Donald W. Kleine, for appellee.

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

GRANT, J.

This proceeding began as a strict foreclosure action on a land contract brought by plaintiff-appellee, Mary Boris, the personal representative of the estate of Gladys L. Smith (referred to as plaintiff), against defendants-appellants, Glen and Robin Heyd, husband and wife. The Heyds answered, generally denying the allegations of the petition and specifically denying that any moneys were due plaintiff under the contract. The Heyds also counterclaimed, seeking damages for fraud, including seeking the return of all moneys paid under the contract, and "for such other relief as the Court deems just and equitable." Plaintiff generally denied the allegations of the counterclaim. The district court dismissed the foreclosure action, ordered the contract rescinded, and awarded the Heyds damages. The Heyds appeal from the district court's order, alleging as error the court's failure to award damages for their "loss of bargain," failure to award them adequate damages for repairs and improvements to the real estate, and granting plaintiff a setoff for rent of the premises during the time the Heyds occupied the premises. There was no cross-appeal. We affirm as modified.

On June 21, 1978, Gladys Smith and the Heyds entered into a purchase agreement for Smith's home and lot at 5939 South 46th Street in Omaha, Nebraska. On August 9, 1978, a land contract was signed. The contract called for $6,000 downpayment and monthly installments of $179.95. The downpayment was made by Heyds, and monthly payments of $180 were made up to December of 1982.

In the spring of 1982 the Heyds learned that Smith could not

convey clear, marketable title due to the fact that the house was sitting on unimproved 46th Street, on property owned by the city. After unsuccessfully attempting to correct the title problems, the Heyds discontinued making monthly payments on December 1, 1982. Gladys Smith died on December 15, 1982, and her duly appointed personal representative filed this action for strict foreclosure on April 4, 1983.

During the period the Heyds lived at the residence, they paid $1,950 in taxes, and Glen Heyd testified that approximately $4,500 was spent in repairs to the premises. No setoff for reasonable rental value was pled or proved by the plaintiff.

After a trial to the court, the court dismissed the foreclosure action filed by plaintiff and rescinded the land contract between the parties. The premises were ordered returned to plaintiff, and plaintiff was ordered to pay the following amount to the Heyds: "(a) $6,000.00 (the return of the down payment plus interest from August 9, 1978); (b) $1,350.00 (the taxes paid by the defendants on the property); (c) $1,875.00 (the value of the improvements on the land)." The court also found and ordered:

> The Court finds that the $9,000.00 paid by the defendants [the Heyds] to the plaintiff is to be considered as the reasonable rental value of the property through November, 1982, (50 payments); and from December, 1982 to January, 1983 the rental value is found to be $2,520.00 and that amount is ordered as a set-off to the plaintiff's above recovery.

The trial court found that, by filing their counterclaim, the Heyds "clearly have elected to rescind the contract." This finding is consistent with the allegations of the counterclaim. All parties have treated the contract as rescinded, and no appeal is taken from that finding. Our review will be on that basis.

This action was commenced as a foreclosure proceeding. "A real estate foreclosure action is an action in equity triable on appeal de novo." *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 328, 352 N.W.2d 921, 923 (1984). Rescission, the relief granted on the counterclaim, is also equitable in nature and triable de novo in this court. *Caruso v. Moy*, 164 Neb. 68, 81 N.W.2d 826 (1957). Our review in this case is therefore de novo on the record. See Neb. Rev. Stat. § 25-1925 (Reissue 1979).

We first note that the trial court found, and the uncontroverted evidence shows, that the Heyds paid $650 in taxes on the property in each of 3 years. The trial court's order awarded the Heyds $1,350. The award appears to be a typographical error and should read $1,950. We modify that award accordingly.

The Heyds first assign as error the trial court's failure to grant the Heyds damages for their "loss of bargain," that is, the alleged increase in the value of the property during the time the parties treated the contract as valid and binding. This assignment of error is without merit for the reason that the remedies of rescission and damages are inconsistent, since the former is based upon disaffirmance and the latter on affirmance of the contract. *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). See, also, *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 342 N.W.2d 191 (1983). As stated in *James v. Hogan*, 154 Neb. 306, 313, 47 N.W.2d 847, 852 (1951), "A party who rescinds can generally recover nothing beyond restitution. He was not entitled to recover any profit of his bargain . . . ."

The Heyds next assign as error the trial court's determination of damages with respect to the value of improvements made to the property. These alleged "improvements" were generally testified to by Glen Heyd as "repairs." The Heyds' contention is that the cost of improvements made totaled $4,649, but that amount is not specifically proved in the evidence. The district court determined that the Heyds were entitled to $1,875. The evidence supports the trial court's determination, and we agree with that finding.

Finally, Heyds argue that the trial court should not have allowed the $9,000 paid over 50 months by Heyds to be treated as rent and retained by appellee as such rent. We agree.

Heyds argue that the issue of rent due appellee was never raised by appellee in any form in the pleadings or during the trial. The fact question as to what would be the reasonable rental value of the property was neither pled nor proved. Since no evidence as to fair rental value appears in the record at any point, a setoff for fair rental value could be based only on conjecture or speculation. "Conjecture, speculation, or choice

of quantitative possibilities are, of course, not proof. There must be something more which would lead a reasonable mind to one conclusion rather than to the other." *Mustion v. Ealy*, 201 Neb. 139, 145, 266 N.W.2d 730, 734 (1978). Furthermore, plaintiff was required by Neb. Rev. Stat. §§ 25-811 and 25-812 (Reissue 1979) to plead the setoff in her response to the Heyds' counterclaim. No such pleading was filed. The setoff of $9,000, representing the 50 monthly installments of $180, plus the $2,520 allowance for future rents must be disallowed. The judgment is modified accordingly. In all other respects the judgment is affirmed.

AFFIRMED AS MODIFIED.

HAROLD W. PETERSON ET AL., APPELLEES, V. EUGENE J. HYNES ET AL., APPELLANTS, BANK OF STAPLETON, A BANKING CORPORATION, ET AL., APPELLEES.

371 N.W.2d 664

Filed August 2, 1985. No. 84-262.

1. **Contracts.** Generally, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are legally one instrument and will be construed together as if they were as much one in form as they are in substance.
2. **Contracts: Parol Evidence.** Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties.
3. **Contracts: Assignments.** Generally, the right to receive money due or to become due under an existing contract may be assigned even though the contract itself is not assignable.
4. _____: _____. A contract to pay money may be assigned by the person to whom the money is payable, unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.
5. **Prejudgment Interest.** Prejudgment interest is allowable where the amount of the claim is liquidated. A claim is liquidated where no reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery. If either of the requirements of the rule is not met, the claim is unliquidated and prejudgment interest is not allowed.

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

James E. Schneider of Schneider & Fugate, P.C., and Mary Cannon Veed of Matthews & Cannon, P.C., for appellants.

John Wightman, for appellees Peterson.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and FAHRNBRUCH, D.J.

FAHRNBRUCH, D.J.

Plaintiffs, Harold W. and D. Lucille Peterson, as assignees, brought a law action to recover amounts claimed due under a consulting services agreement entered into in connection with the sale of a bank holding company. After a bench trial the court granted plaintiffs judgment for $36,000 together with prejudgment interest against three of the defendants who are appellants here. Other defendants were dismissed from the action. The judgment of the trial court is affirmed.

There is no dispute that as of January 17, 1978, plaintiffs' assignors, Larry G. Boesen and Randel K. Boesen, were the owners of all of the stock of Stapleton Investment Co., a bank holding company, which, in turn, owned the Boesen Insurance Agency and virtually all of the stock of the Bank of Stapleton, both of which were located at Stapleton, Nebraska. Neither is there any dispute that the Boesens, by written agreement, granted the defendants Richard A. Polk and Eugene J. Hynes an option on January 17, 1978, to purchase all of the Boesens' stock in the holding company. As a matter of fact, the agreement recited that the sum of $210,000 to be paid by defendant Polk had previously been paid through a transfer of 1,685 acres of real estate. The agreement further provided that the Boesens were to be hired as consultants for the Bank of Stapleton for a period of 40 months for the consideration of $500 per month each, for a total of $40,000.

On January 21, 1978, Polk and Hynes, for valuable consideration, entered into a written agreement with the defendant Michael W. Brosius whereby the three of them agreed to exercise the option and purchase the Stapleton Investment Co. stock. Each of the three was to have a one-third

interest.

At the time of closing the sale on March 29, 1978, the Boesens were presented with a proposed installment purchase contract by Polk, Hynes, and Brosius, all of whom were present. One of the Boesens complained that the contract made no reference to the consulting services provision. Hynes, one of the purchasers and a lawyer who prepared all of the documents, agreed to prepare another document which he said would be considered an addendum to the installment purchase contract. Hynes then typed an agreement containing the consulting services provision. The installment purchase contract was signed by all the parties. The addendum was signed by the Boesens and by Hynes on behalf of himself and Polk. These two documents related to the same transaction, the purchase of the holding company stock, and were in the contemplation of the parties at the time of the signing of the installment purchase contract. They, therefore, are to be considered as one document.

The appellants contend that the consulting agreement must stand alone and that if unambiguous, parol evidence is not admissible to consider it as a part of the installment purchase contract, and vice versa. That position is in error. Generally, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are legally one instrument and will be construed together as if they were as much one in form as they are in substance. Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties. *Bando v. Cole,* 197 Neb. 722, 250 N.W.2d 651 (1977), citing *Pike v. Triska,* 165 Neb. 104, 84 N.W.2d 311 (1957), and *Olds v. Jamison,* 195 Neb. 388, 238 N.W.2d 459 (1976).

Defendant Brosius asserts that since he did not sign the "addendum," he should not be liable on the consulting services agreement. He claims that the agreement for consulting fees provided that the services would not be performed within 1 year and that the statute of frauds requiring that a contract not be performed within 1 year is invalid unless in writing. The cited statute of frauds has no application here. By his own testimony

Brosius was aware of the existence of the provision for consulting services when he entered into the written agreement with Hynes and Polk to join in the exercise of the option; he was present and aware of the provision at the closing on March 29, 1978; and, more importantly, he was aware when he signed the installment purchase contract on March 29, 1978, that a written agreement containing the consulting provision would be an addendum to the installment purchase contract. They constitute but one agreement. The provision was in writing. When Brosius signed the installment purchase contract, knowing the contents of the addendum and that it was intended to be a part of the installment purchase contract, he obligated himself in writing for consulting services.

The evidence is conflicting as to whether the Boesens provided consulting services to the Bank of Stapleton. The trial court accepted the Boesens' version that after the closing of the installment purchase contract and addendum, the Boesens were told by Hynes on March 29, 1978, that their services were no longer needed and that the Boesens were never called upon to provide consulting services. The Boesens were paid $4,000 pursuant to the consulting agreement, after which they received no further payments even after demand for payment. The Boesens were terminated without cause and thereafter had no obligation to offer their services. After not calling upon the Boesens for consulting services, the defendants cannot now complain that the Boesens failed to perform the services required in the agreement.

The trial court in a law action determines the credibility of the witnesses and the weight to be given their testimony. The findings of fact of a trial court in a law action will not be set aside unless clearly wrong. On appeal, controverted facts will be viewed in the light most favorable to the successful party and that party will be given the benefit of every inference available from the record. *Omaha World-Herald Co. v. Nielsen, ante* p. 294, 369 N.W.2d 631 (1985). The findings of the trial court were not clearly wrong. The fact that some of the defendants' defenses are equitable does not convert the case from a law to an equity action where the review is de novo. *In re Estate of Buder*, 117 Neb. 52, 219 N.W. 808 (1928).

By way of further defense all of the appellants claim they are not liable to the plaintiffs because an employment contract requiring personal services cannot be assigned. The Boesens did not assign their obligation to perform consulting services. The only thing the Boesens assigned under their written agreement with the plaintiffs was the unpaid price to which they would be entitled for those services. The Boesens covenanted to fulfill any obligations under the consulting services agreement.

> The general rule is that the right to receive money due or to become due under an existing contract may be assigned even though the contract itself may not be assignable. A contract to pay money may be assigned by the person to whom the money is payable, unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned. This is true of money due or to become due under a contract involving personal skill, service, or confidence; the party who has performed such obligations, or who has contracted to do so, may assign his right to the money earned or which he is to earn, although the contract itself is not assignable.

6 Am. Jur. 2d *Assignments* § 16 at 200-01 (1963).

In this case the provision for consulting services did not prohibit the Boesens from assigning the proceeds from the consulting services agreement. Defendants contend that the cases of *Hilton v. Crooker*, 30 Neb. 707, 47 N.W. 3 (1890), and *Whitney v. Combe*, 151 Neb. 401, 37 N.W.2d 613 (1949), support defendants' contention that the personal service agreement cannot be assigned. Those cases are distinguishable on the facts from this case. In *Hilton v. Crooker*, there was an attempt to assign the obligation and not merely the proceeds.

Defendants claim that the trial court erred in allowing prejudgment interest in this case. The damages were liquidated, since the amounts due at times of payment were expressly set forth in the contract and the unpaid amounts were readily determinable. Under the facts of this case the Petersons, as assignees, are entitled to the unpaid contract price as specified in the consulting services agreement. *Schlueter v. School Dist. No. 42*, 168 Neb. 443, 96 N.W.2d 203 (1959). There was no reasonable controversy over the plaintiffs' right to recover. See

Land Paving Co. v. D. A. Constr. Co., 215 Neb. 406, 338 N.W.2d 779 (1983).

In all, the defendants claimed 18 errors in the trial of the case. Some of those claimed errors were overlapping or duplicative. We have reviewed all of the alleged errors not discussed in this opinion and find them to be without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

JAMES P. FOREHEAD, APPELLANT, V. FRANK GALVIN, APPELLEE.
371 N.W.2d 271

Filed August 2, 1985. No. 84-291.

1. **Rules of Evidence: Expert Witnesses.** A trial court may, either on its own motion or in response to an objection, require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion.
2. **Records: Appeal and Error.** The appellant, by record presented on appeal, must affirmatively establish the existence of a claimed error.

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

Ronald J. Palagi, for appellant.

Michael A. Fortune of Erickson & Sederstrom, P.C., for appellee.

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

WHITE, J.

This is an appeal from a jury verdict in favor of defendant-appellee. The action was filed in the district court for Douglas County to recover for personal injuries sustained in an automobile collision between an automobile operated by the appellant, James P. Forehead, and one operated by the appellee, Frank Galvin. The accident occurred at the intersection of 120th and Maple Streets in Omaha, Nebraska.

Maple Street is an east-west street protected by stop signs at the north and south edges thereof where it intersects 120th Street.

Two errors are assigned. The first assignment of error alleges that the trial court wrongly sustained the objection to the opinion evidence of Dr. John E. Baerwald, a traffic engineer and accident reconstruction expert, as to the speed of the Galvin vehicle at the time of the accident as 59 miles per hour. The second assignment of error alleges that the trial court failed to instruct the jury that the defendant had a duty "to stop his vehicle to avoid the collision with Plaintiff's vehicle when Defendant had sufficient time to do so after observing Plaintiff's vehicle enter the intersection." We shall discuss the assignments in order.

Both parties concede that Dr. Baerwald qualified as an expert in the area of accident reconstruction and was well qualified to render an opinion when possessing necessary facts on which to base an opinion. The difficulty in this case was that appellant, though requested to by appropriate directions from the court, declined to furnish to the court the facts on which Dr. Baerwald based his opinion. While appellant's counsel laboriously asked of the witness the factors that he considered in arriving at an opinion as to the speed of the Galvin vehicle, he failed to ask of the witness the facts upon which the calculations were based. Neb. Rev. Stat. § 27-705 (Cum. Supp. 1984) provides: "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." The trial court, by precise order, declined to receive the opinion into evidence until the facts were disclosed. Counsel steadfastly refused or neglected to do so, and he cannot be heard to complain.

We said in *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 307, 275 N.W.2d 77, 81 (1979): "A trial court may, either on its own motion or in response to an objection, require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion." The assignment of error is without merit.

As to the second assignment of error, we note that the bill of exceptions is incomplete. We are furnished only with Dr. Baerwald's testimony and no testimony of the parties to or witnesses of the accident itself. From this record we are unable to determine whether or not the proposed instruction would or would not have been warranted by the evidence. We note that the trial court did instruct on lookout and control.

The appellant, by record presented on appeal, must affirmatively establish the existence of a claimed error. *Flood v. Keller*, 214 Neb. 797, 336 N.W.2d 549 (1983). The record presented to this court does not demonstrate the error claimed.

AFFIRMED.

LUKE J. CONIGLIO ET AL., APPELLEES, V. NIKOLAUS R. HANSL ET AL., APPELLANTS.

371 N.W.2d 273

Filed August 2, 1985. No. 84-292.

1. **Contracts: Option to Purchase: Specific Performance: Words and Phrases.** There is a clear and classic distinction between an option and a so-called "right of first refusal"; the option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, where the right of first refusal has no binding effect unless the offeror decides to sell. The option gives a clear right to the option-holder to purchase upon specified terms and conditions, regardless of the wishes of the option-giver, whereas the "right of refusal" or "preemption" is conditioned upon the willingness of the owners to sell; it can be enforced by specific performance only where such willingness can be proved.
2. **Contracts: Option to Purchase.** In order for an option to become effective, there must be a clear indication by the offerees that the option is being exercised, coupled with an offer on their part to perform the necessary conditions.
3. **Appeal and Error.** On a de novo review of the record, where the testimony is in conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Specific Performance.** In order to support a claim for specific performance, the evidence in support of such claim must be clear, satisfactory, and unequivocal.

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

E. Scott Dosek and William E. Naviaux of Naviaux, Kinney, Dosek & Andres, and J. Patrick Green, for appellants.

William E. Gast, for appellees.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and FAHRNBRUCH, D.J.

HASTINGS, J.

Plaintiffs brought this action under Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1979), seeking a declaration of the rights and liabilities of the various parties under a certain written contract containing either an option to purchase or a first refusal option, executed sometime during the month of June 1977. Specifically, the plaintiffs sought a declaration that they had no liability to the defendants under the agreement, whereas the defendants counterclaimed, seeking specific performance of what they insist was an option to purchase certain property. We affirm the judgment in favor of plaintiffs.

The plaintiffs were the owners, either personally or through corporate entities, of certain pharmacies within the city of Omaha. They, together with a corporation which they owned, contracted with the defendants to sell to the latter Central Park Pharmacy No. 2. Contemporaneously with the execution of that instrument, the individual plaintiffs, and a third party who has no connection with this litigation, executed exhibit 2, entitled "Guarantee of Performance of Contract and Grant of First Refusal Option." By the terms of that agreement the plaintiffs guaranteed the performance of the sales contract and, in addition, granted a "right of first refusal" in words and figures as follows:

> As part of the consideration for the sale [of] Central Park Pharmacy No. 2 to Obligees [defendants], Guarantors [plaintiffs] hereby grant to Obligees the absolute right of first refusal to purchase one-third (1/3) of the issued and outstanding stock of a corporation which will own and operate the pharmacy in the Millard Shopping Center. It being the intention of the parties that the Obligees shall be given the opportunity to become one-third (1/3) owners of the pharmacy store to be opened by Guarantors in the

Millard Shopping Center.

This document was drafted by the attorney representing the defendants.

The defendants urge that this agreement must be interpreted as one for an absolute option to buy into the Millard pharmacy, now called store No. 8, for the original startup cost, i.e., the amount of capital originally contributed by each of the two plaintiffs to open the store.

The district court concluded that whether the agreement is construed as a "right of first refusal" or an absolute option in favor of the defendants to purchase a one-third interest in store No. 8, defendants are not entitled to a decree of specific performance. If the agreement was a "right of first refusal," reasoned the court, the defendants have no contractual rights to purchase until the plaintiffs have received a bona fide offer of a third person to buy the pharmacy, which contingency has not occurred. If intended as an "option," the contract is illusory because it fails to set forth any terms and conditions upon which the court could base such a decree. Apparently because this case was actually tried as one in specific performance, all parties agree that we should review this appeal de novo on the record.

As we view the instrument, it is not an option but a classic example of a "right of first refusal." A right of first refusal is separate and distinct from an option. As noted by appellees, 11 S. Williston, A Treatise on the Law of Contracts § 1441A at 948-50 (3d ed. 1968), states:

> While options and the so-called "right of first refusal" are sometimes confused, there is a clear and classic distinction: The option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, whereas the right of first refusal has no binding effect unless the offeror decides to sell.
>
> The right of first refusal, or first right to buy, is not a true option but is a valuable prerogative. It limits the right of the owner to dispose freely of his property by compelling him to offer it first to the party who has the first right to buy.

Williston goes on to note:

> In the case of an option . . . the option-giver has no choice but must sell when the option is accepted according to its terms. What is usually provided is that there will be an expression of acceptance communicated to the option-giver, or that payment according to the terms of the option will be made within the time limit. . . .
>
> In summary . . . it may be said that while there has been some tendency to identify an option with the so-called "right of first refusal," the two can and should be distinguished, just as the option is distinguished from a contract of purchase and sale. The option gives a clear right to the option-holder, regardless of the wishes of the option-giver, whereas the "right of first refusal" or "preemption" is conditioned upon the willingness of the owner to sell; it can be enforced by specific performance where such willingness can be proved.

Id. at 951-53.

Appellants argue that while there is ordinarily a clear distinction between options and first refusal agreements, the use of the phrase "right of first refusal" cannot be allowed to defeat the intention of the parties when it is clear from their total agreement that they intended an absolute option. They cite in support of that proposition *Tantum v. Keller*, 95 N.J. Eq. 466, 123 A. 299 (1924), *aff'd* 96 N.J. Eq. 672, 126 A. 925 (1924); *Lancaster Castings Co. v. Dunie*, 365 Pa. 95, 73 A.2d 417 (1950); *Associated Truck Lines v. Baer*, 346 Mich. 106, 77 N.W.2d 384 (1956); and *Pruner and Rees v. Brown*, 216 Va. 885, 223 S.E.2d 890 (1976).

However, appellants neglect to mention that the language used in the cited cases is generally "first right and option to purchase," followed by a definite timeframe and a specific purchase price. As a matter of fact, the *Pruner* agreement granted the lessee the " 'first right to purchase the leasehold property at the end of the fourth year of the lease at the price of Sixty Five Thousand Dollars . . . .' " *Id.* at 886, 223 S.E.2d at 891. The court, in holding this to be an absolute option to purchase, said:

> Here, the lease specified the purchase price, terms and manner of financing and time when the right could be

> exercised. These terms are far more compatible with an absolute option than they would be with a right of first refusal. Even the parties, in line 7 of paragraph 7 of the lease, refer to the right as an option.
>
> We are not dealing here with a bare "right of refusal" but with an instrument which, by its specificity, would unquestionably have created an absolute option except for the word "first" in the first line of paragraph 7. Reading and construing the agreement as a whole, we hold that the right which it created was an option to purchase vested in the lessees rather than a "right of first refusal" as found by the trial court.

Id. at 887, 223 S.E.2d at 892.

On the face of it, the so-called option in the case at bar was merely a "right of first refusal" which required an intervening offer by the appellees to sell the pharmacy for a named price before the appellants' rights ripened into a right to purchase. However, for whatever reason, the appellees seem to concede that by signing the agreement, exhibit 2, which granted appellants the "right of first refusal," it was understood that such an agreement granted appellants an opportunity, if they exercised that option, to become one-third owners of the store.

However, the testimony of the various parties as to the terms of that so-called option is conflicting. Appellants contend that they were to be permitted to purchase, apparently at any time, a one-third interest in the store for one-third of the original "start-up cost."

Appellees agree that had the appellants exercised their option in the beginning and paid the sum of $50,000, which appellee Giesler told them it would take, in June of 1977, the option would have been honored. However, not only was the option not exercised by words or notice but neither was any money paid or tendered by the appellants.

As late as the fall of 1980, after appellees Coniglio and Giesler had furnished all of the capital, including a liquor license held by them at another store, and had invested all the time and labor necessary to make the store a profitable business, appellants insisted they should be allowed to exercise their option based on the "original start-up cost." Appellees

refused and offered one-third of the business for $100,000, which they claimed to be one-third of the then book value of the store. Appellants neither accepted the offer nor tendered any money.

On a de novo review of the record, where the testimony is in conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Brown v. Knox*, 219 Neb. 189, 361 N.W.2d 540 (1985). Accordingly, we believe the version of the agreement testified to by the appellees is the more credible, and we accept that as true.

Determining that the appellants never exercised their option as provided and as agreed, which we do, the evidence in support of appellants' claim for specific performance is neither clear, satisfactory, nor unequivocal. *Tedco Development Corp. v. Overland Hills, Inc.*, 200 Neb. 748, 266 N.W.2d 56 (1978). The judgment of the trial court was correct and is affirmed.

AFFIRMED.

JIM LUSTGARTEN AND JOHN BATES, APPELLANTS, V. TERRY JONES, BOTH INDIVIDUALLY AND AS PRESIDENT OF JONES OIL COMPANY; GARY ERNST; AND JONES OIL COMPANY, A NEBRASKA CORPORATION, APPELLEES.

371 N.W.2d 668

Filed August 2, 1985. No. 84-365.

1. **Equity: Accounting.** Generally, in order to be entitled to the equitable remedy of an accounting, it is necessary to show a fiduciary or trust relationship between the parties or a complicated series of accounts making the remedy at law inadequate.
2. **Contracts: Corporations.** Promoters of a corporation occupy a relationship of trust and confidence toward the corporation to be formed, as well as to each other, and the law requires the promoters to act with good faith as required from other fiduciaries.
3. **Contracts: Rescission.** In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.
4. _____: _____. On rescission of a contract, rights and duties which have accrued under the rescinded contract are terminated and nullified.

5. _____: _____. Rescission of a contract by a subsequent agreement of the parties requires as much a meeting of the parties' minds as does making a contract.
6. _____: _____. Inasmuch as formation of a contract can be prevented by duress exerted upon a party to the contract, likewise, duress may prevent an effective rescission of an existing agreement. However, the burden of proving duress is placed upon the party alleging it.
7. _____: _____. To be rescinded on account of duress, an agreement must be obtained by pressure brought to bear upon a party to a contract, and must be unjust, unconscionable, or illegal.

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

Roger C. Lott of Muffly, Lott & Oglesby, for appellants.

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellees.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

SHANAHAN, J.

Jim Lustgarten and John Bates appeal the judgment of the district court for Lancaster County which dismissed an action brought against Terry Jones, Gary Ernst, and Jones Oil Company for an accounting. We affirm.

As general background, in 1979 Lustgarten and Bates, as early entrants into the Nebraska alcohol-fuel market, rented facilities from Jones Oil. Lustgarten and Bates lacked business contacts and finances for development of a gasohol market, while Jones had experience in the petroleum industry and contacts which might be beneficial in marketing gasohol. Ernst was a business associate of Jones.

After conferences concerning their business arrangement, Bates, Lustgarten, Jones, and Ernst, on March 16, 1979, signed an "Agreement to Form a Corporation," which in pertinent part provided:

> THE UNDERSIGNED each hereby subscribes to the amount of shares hereinafter stated of a Nebraska corporation to be named by the agreement of the parties hereto holding 500 shares of $10.00 par value common stock.

The undersigned further agree to pay to the corporation the sum of $10.00 per share or its equivalent in such installments and at such times as shall be determined by the Board of Directors of the corporation and on the condition that the corporation, by and through its Board of Directors, adopt a plan for the issuance of capital stock which complies with the provisions of Section 1244 of the Internal Revenue Code as amended from time to time. The corporation shall be established for general purposes to include the sale of alcohol.

The undersigned agree to purchase shares in the above corporation in the following amounts:

Gary H. Ernst	40 percent or 200 shares
Terry Jones	40 percent or 200 shares
John Bates	10 percent or 50 shares
Jim Lustgarden [sic]	10 percent or 50 shares

The parties to this agreement agree that any salaries drawn shall be based upon the percentage of ownership and that no draws for salary shall be taken which would reduce current assets to an amount less than twice the current liabilities of the corporation.

The March 16 agreement also provided that the new corporation would lease land and facilities at gasoline pipeline terminals. In furtherance of business to be conducted by the new corporation, Lustgarten and Bates prepared a marketing plan. Ernst and Jones contacted various major oil companies to determine feasibility of constructing alcohol storage facilities at pipeline terminals.

There was limited success in obtaining terminal storage facilities. Continental Oil Company, contacted by Jones, was willing to lease a storage site only if there was a substantial business entity to conduct operations. Conoco declined to enter into any lease with a newly formed, undercapitalized corporation such as that proposed by the parties. However, Conoco was willing to deal with Jones Oil or any other corporation having sufficient financial backing. Meanwhile, Lustgarten and Bates had little success in locating a supply of alcohol for sale through the new corporation and felt they were not being informed about contacts with owners of pipeline

terminals. Ernst and Jones concluded that Lustgarten and Bates had little knowledge about gasohol, other than that possessed by the general public.

At a meeting of the parties on May 22, Ernst and Jones informed Lustgarten and Bates that contacts with the pipeline owners had been unsuccessful due to the proposed corporation's lack of finances. Jones, president of and major shareholder in Jones Oil, explained that Conoco was willing to enter a lease with Jones Oil regarding a terminal facility, since Jones Oil had a sound financial base. Jones was reluctant to involve Jones Oil in the speculative gasohol market. After discussing the situation the parties concluded that the March 16 agreement could not be carried out as contemplated. On an unused part of the second page of the parties' two-page March 16 agreement, the parties placed and signed a handwritten agreement as follows:

> Agreement dated 5/22/79
>
> A new agreement is made this 22nd day of May 1979 by and between Terry L. Jones, Gary H. Ernst, Jim Lustgarten and John Bates to void the forgoing [sic] agreement in each and every part and to substitute a new agreement as follows: This new agreement completely and forever voids and cancels the agreement to "Form a New Corporation" signed on the 16 day of March 1979, by the aformentioned [sic] parties. It is understood that there is or will be 100,000 shares issued and outstanding.
>
> In consideration of transferring the following shares of stock in a Nebraska corporation named Jones Oil Company Inc., the agreement to "form a New Corporation" is here by void and cancelled — Gary H. Ernst 6714 shares, John Bates 338 shares, and Jim Lustgarten 338 shares.
>
> It is hereby agreed that the above named persons will be hired by Jones Oil Company and paid at the rate of 5 % of the gross margin on alcohol sales. However if employment is terminated, the stock may be repurchased by Terry L. Jones for a value of 3 times earnings for the previous 12 months on a 1st right of refusal basis.

As a result of the May 22 agreement and based upon already

issued capital stock of Jones Oil, Lustgarten and Bates each would receive one-third of 1 percent of the capital stock of Jones Oil.

The day after signing the handwritten agreement, Lustgarten and Bates sought to sell Jones their prospective stock in Jones Oil for $30,000, in accordance with the right of first refusal contained in the May 22 agreement. Jones declined to purchase the prospective shares of Lustgarten and Bates. The parties subsequently met and discussed possible employment of Lustgarten and Bates by Jones Oil. During the course of such meetings, according to Bates and Lustgarten, the parties agreed to reinstate the agreement of March 16. Ernst and Jones deny any agreement that the March 16 contract be reinstated. The parties severed their business relationship. Afterwards, Jones Oil entered into an agreement with Conoco to store alcohol at Conoco's pipeline terminal in Lincoln, and presently sells gasohol at wholesale and retail. Ernst and Jones, as individuals, are not involved in any sale of gasohol.

Lustgarten and Bates filed suit against Jones, Ernst, and Jones Oil based on the agreement of March 16, 1979, and claimed that Lustgarten and Bates were induced to "void" their agreement to form a corporation as a result of "business pressure and duress" exerted by Jones, Ernst, and Jones Oil in the form of "substantial difference in economic position and business experience" on the part of Lustgarten and Bates. As further alleged by Lustgarten and Bates: "The Agreement to Form a Corporation gives rise to a fiduciary relationship and fiduciary duties among the parties," and the May 22 agreement should be set aside as a product of duress exerted in the form of "economic pressure and difference in business position and standing." Lustgarten and Bates then prayed for a judgment and accounting by Jones, Ernst, and Jones Oil. Jones, Ernst, and Jones Oil in their answer admitted that the agreement of May 22 canceled the contract of March 16.

The district court dismissed the petition of Lustgarten and Bates, who, on appeal, contend their agreement of May 22 is void so that the original agreement of March 16 became reinstated and was an enforceable contract between the parties.

In order to determine whether Lustgarten and Bates have

properly invoked equity jurisdiction, we must examine the pleadings. See *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982).

In substance, Lustgarten and Bates seek an accounting as a result of their contractual relationship with Jones and Ernst. In Nebraska an action for an accounting may, under one set of circumstances, be brought as an action at law and, under another, as an action in equity. *Schmidt v. Henderson*, 148 Neb. 343, 27 N.W.2d 396 (1947). Generally, in order to be entitled to the equitable remedy of an accounting, it is necessary to show a fiduciary or trust relationship between the parties or a complicated series of accounts making the remedy at law inadequate. See *Trump, Inc. v. Sapp Bros. Ford Center, Inc., supra*. The promoters of a corporation occupy a relationship of trust and confidence toward the corporation to be formed, as well as to each other, and the law requires the promoters to act with good faith as required from other fiduciaries. See *Henderson v. Joplin*, 191 Neb. 827, 217 N.W.2d 920 (1974). Lustgarten and Bates, therefore, have invoked equity jurisdiction. See *Trump, Inc. v. Sapp Bros. Ford Center, Inc., supra*.

The claim of Lustgarten and Bates is founded on existence of a fiduciary relationship resulting from the agreement of March 16 regarding formation of a corporation. In view of the cause of action set forth in the petition, if there is no enforceable agreement of March 16, a court cannot order an accounting in this case. Therefore, the fundamental issue is whether the parties have rescinded their agreement of March 16.

In equity actions it is the duty of the Supreme Court to try issues of fact de novo on the record and to reach independent conclusions therefrom without reference to findings of the district court. *Truman v. Martin*, 212 Neb. 52, 321 N.W.2d 420 (1982).

> " 'The cancellation, abandonment, or rescission of a written contract may not only be written but it may also be oral. Moreover, an implied agreement to rescind a contract may be given effect, and the assent of the parties to rescission may be shown by their acts or conduct, and the surrounding circumstances. Accordingly, in

determining whether a rescission took place, the courts look not only to the language of the parties, but to all the circumstances.' "

Id. at 53, 321 N.W.2d at 422. See, also, *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

On rescission of a contract, rights and duties which have accrued under the rescinded contract are terminated and nullified. As we expressed in *Davco Realty Co. v. Picnic Foods, Inc., supra* at 201, 252 N.W.2d at 148:

"Generally rescission must be exercised in toto and is applied to the contract in its entirety with the result that what has been done is wholly undone and no contract provisions remain in force to bind either of the parties." [Citation omitted.]

"Where a contract has been rescinded by mutual consent, the parties are, as a general rule, restored to their original rights with relation to the subject matter, and they are entitled to be placed in status quo as far as possible. All rights under the rescinded contract are terminated, and the parties are discharged from their obligations thereunder." [Citations omitted.]

Rescission of a contract by a subsequent agreement of the parties requires as much a meeting of the parties' minds as does making a contract. See *Utilities Ins. Co. v. Stuart*, 134 Neb. 413, 278 N.W. 827 (1938). By its express provisions the document signed on May 22 constituted "[a] new agreement" which "completely and forever voids and cancels the agreement to 'Form a New Corporation' signed on the 16 day of March 1979." As a result of their May 22 agreement, the parties manifestly intended a rescission of their March 16 agreement.

Inasmuch as formation of a contract can be prevented by duress exerted upon a party to the contract, likewise, duress may prevent an effective rescission of an existing agreement. However, the burden of proving duress is placed upon the party alleging it. See *Horton v. Bloedorn*, 37 Neb. 666, 56 N.W. 321 (1893). What constitutes duress is a question of law, but existence of duress is a question of fact. See *Meyer v. Guardian Trust Co.*, 296 F. 789 (8th Cir. 1924).

"To be voidable because of duress, an agreement must

> not only be obtained by means of the pressure brought to bear, but the agreemeent [sic] itself must be unjust, unconscionable, or illegal. The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do."

Carpenter Paper Co. v. Kearney Hub Pub. Co., 163 Neb. 145, 151-52, 78 N.W.2d 80, 84 (1956). See, also, *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981); *Buhrman v. International Harvester Co.*, 181 Neb. 633, 150 N.W.2d 220 (1967). Jones' action characterized by Lustgarten and Bates as duress is not coercion exerted by one party to a contract upon another. Rather, any atmosphere of compulsion attendant to the May 22 agreement emanated from a third person beyond the control of the parties, namely, Conoco's unwillingness to enter a lease with a corporation demonstrating questionable financial responsibility. Additionally, there is no evidence that the May 22 agreement is unjust, unconscionable, or illegal. Seeking to sell stock obtained under an agreement claimed to be the product of duress might be viewed as somewhat inconsistent positions on the part of Lustgarten and Bates, to say the least.

In any event, the record does not support the claim of duress exerted on Lustgarten and Bates. The May 22 agreement between the parties was an effective cancellation or nullification of the agreement entered by the parties on March 16. By virtue of the parties' abrogation of their agreement entered March 16, there was no contract between the parties as a basis of a fiduciary or confidential relationship supporting a claim for an accounting.

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

AFFIRMED.

NORFOLK PRODUCTION CREDIT ASSOCIATION, APPELLANT, V. BANK OF NORFOLK, APPELLEE.

371 N.W.2d 276

Filed August 2, 1985. No. 84-442.

1. **Uniform Commercial Code: Security Interests: Sales.** A security interest continues in the proceeds of the sale of collateral only if the proceeds can be identified.
2. _____: _____: _____. A secured creditor's right to proceeds under Neb. U.C.C. § 9-306 (Reissue 1980) is generally dependent on the ability to trace and identify the fund as his property.
3. _____: _____: _____. The burden is upon the secured party claiming a lien on proceeds from the sale of collateral to trace and identify proceeds received by the debtor from the disposition of secured collateral.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

James T. Gleason, for appellant.

Jerrold L. Strasheim, William G. Dittrick, and Terrence L. Michael of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

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

BOSLAUGH, J.

This was an action for conversion brought by the Norfolk Production Credit Association (PCA), plaintiff, against the Bank of Norfolk (Bank), defendant. After a bench trial the plaintiff's petition was dismissed. In this appeal the plaintiff has assigned as error the trial court's findings (1) that the PCA had released its security interest in the collateral and the proceeds thereof; (2) that the PCA had failed to prove that a conversion occurred; (3) that the debtor's notes to the PCA were not due or in default; and (4) that the failure to find that the PCA's right to the proceeds of its collateral had priority over any rights of the Bank.

The record demonstrates that on April 22 and June 1, 1981, the PCA extended credit to Philip G. Schmer, totaling $320,000, in the form of a "Renewal Note" and an "Additional Note" in order to finance his farming and cattle business. The

notes were payable on or before October 5, 1981. As collateral, the PCA perfected a security interest in all of Schmer's livestock to be purchased, all feed and grain, all owned or thereafter acquired machinery, equipment, and tools as described, and all crops as described.

Schmer also maintained and operated a trucking business, Philip G. Schmer, Inc., which was financed by the Bank in the amount of $317,644.88. This line of credit was evidenced by five separate notes due on September 15, 1981, or on demand. As collateral, the Bank retained a security interest in "[a]ll trucking equipment including but not limited to truck tractors, trailers, inventory, supplies, tools and equipment, sheds and buildings, all contracts and contract rights, and accounts now owned or hereafter acquired." At no time did the Bank have a secured interest in any farm-related property, nor did the PCA have a secured interest in any trucking-related property.

On October 2, 1981, certain items of personal property owned by Schmer and Philip G. Schmer, Inc., were sold at an auction sale conducted by Taylor & Martin, Inc. The sale was conducted pursuant to an "Auction Agreement," signed by Schmer, which provided in part: "6. Seller agrees that if one or more, individuals, and or corporations, and or firms, own the property listed on one or more auction agreements signed by and between the Seller and Agent, the proceeds therefrom may be commingled and used to pay guarantees, costs and commissions."

At the time of the sale, Philip G. Schmer, Inc.'s, notes were due and owing to the Bank. Consequently, the Bank had arranged with Taylor & Martin, Inc., that it was to receive all proceeds resulting from the sale of its collateral directly from Taylor & Martin, Inc. Additionally, Schmer had received consent of the PCA to conduct the sale some 30 to 45 days beforehand.

After the auction sale Taylor & Martin, Inc., prepared a report of the sale on which it indicated the property sold and the amount received therefrom, some of which was prefaced with a "T" or "F" indicating whether it was trucking-related or farm-related property. The total proceeds received from the sale were $681,268. From this, Taylor & Martin, Inc., issued the

following checks: $106,999.42 to the Commercial Savings Company; $139,894.94 to Security National Bank; $14,612.84 to John Deere Co.; and $252,170.60 to the Bank. After subtracting its commission and advertising payments, Taylor & Martin, Inc., issued a final check in the amount of $108,319.88 to Philip Schmer, Inc., for the net proceeds of the sale. This check was received by Schmer and deposited in the account of Philip G. Schmer, Inc., at the Bank on or about October 23, 1981.

On October 26, 1981, Schmer delivered two checks to the PCA, totaling $80,000, payable from the account of Philip G. Schmer, Inc. These checks were returned unpaid by the Bank, marked "See Maker." Prior to the time these checks were presented for payment, a "hold" had been placed on the Philip G. Schmer, Inc., account; at that time the account had a balance in excess of $110,000. On November 12, 1981, the Bank debited the account of Philip G. Schmer, Inc., to pay the outstanding obligation of the corporation to the bank.

In the order dismissing the petition, the district court found that the PCA released any and all security interest it may have had in the property sold by Schmer; that when the $108,319.88 check payable to Philip Schmer, Inc., was deposited in the account of Philip G. Schmer, Inc., the Bank, through the use of its term "freeze," legally offset an amount in the account of Philip G. Schmer, Inc., sufficient to satisfy the debt of Philip G. Schmer, Inc., to the Bank; and that the PCA had failed to prove that a conversion had occurred. The assignments of error all relate to this order.

The plaintiff's theory of the case is premised on Neb. U.C.C. § 9-306(2) (Reissue 1980), which provides:

> (2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and *also continues in any identifiable proceeds including collections received by the debtor.*

(Emphasis supplied.) Of specific concern here is the italicized language above.

The plaintiff cites *Rudio v. Yellowstone Merchandising, etc.*, 200 Mont. 537, 652 P.2d 1163 (1982), in support of its theory. In *Rudio* the court held:

> Whether or not Rudio waived his security interest has no bearing on his right to the proceeds of the sale as against competing creditors such as MMI. In, *In Re Mid State Wood Products Company* (D.Ill.1971), 323 F.Supp. 853, the Federal District Court held:
>
> "Section 9-306(2) of the code expressly reserves the right to proceeds notwithstanding authorization to sell the primary collateral. Whether the sale was authorized is made determinative only of the secured party's right to follow the collateral after sale affecting his priorities as against the purchaser, *but in no manner affects his interest in the retained proceeds as against competing creditors.* This construction of the statutory provision is emphasized in the Official Code Comment upon that provision. See UCC, Official Code Comment, section 9-306(2) at par. 2. . .
>
> "As previously discussed, the Uniform Commercial Code is explicit in preserving the priority of the secured party to the proceeds notwithstanding his consent to the sale of the primary collateral and further notwithstanding his consent to the debtor's unrestricted use and disposition of these proceeds so long as they remain identifiable. See UCC sections 9-306, 9-205 and the Official Code Comments upon these sections.
>
> . . . ."

(Emphasis in original.) 200 Mont. at 546-47, 652 P.2d at 1168-69. The plaintiff contends that since the "PCA had a continuously perfected security interest in the primary collateral and its proceeds . . . that security interest was not afffected [sic] by the sale of the collateral. Moreover, the proceeds remained at all times identifiable in the Philip G. Schmer, Inc. corporate account by virtue of the freeze." Brief for Appellant at 9.

While the funds which the plaintiff claims may have been in the Philip G. Schmer, Inc., account, whether those funds were "identifiable proceeds" as contemplated by § 9-306(2) is a different question.

Section 9-306(2) provides that a security interest continues in the proceeds of the sale of collateral *if those proceeds can be identified. C. O. Funk & Sons, Inc. v. Sullivan Equip., Inc.*, 89 Ill. 2d 27, 431 N.E.2d 370 (1982). We paraphrased that section in *Ceres Fertilizer, Inc. v. Beekman,* 209 Neb. 447, 451, 308 N.W.2d 347, 350 (1981), where we said: "Neb. U.C.C. § 9-306 (Reissue 1971) provides that in spite of the sale or other disposition by the debtor of the collateral, the security interest may continue in such property and in any identifiable proceeds received by the debtor."

A secured creditor's right to proceeds under this section is generally dependent on the ability to trace and identify the fund as his property. See J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 24-6 (2d ed. 1980). In *Howarth v. Universal C.I.T. Credit Corporation*, 203 F. Supp. 279 (W.D. Pa. 1962), the court held that a secured party must identify the source of money in a bank account. "The court may not assume the source of the money in the bank. The burden is upon [the secured party] to trace cash proceeds received by [the debtor] from the disposition of secured collateral into the bank deposits." *Id.* at 282.

In this case not only were the funds claimed by the plaintiff evidenced by a check written to Philip Schmer, Inc., and deposited in the corporation's account but the plaintiff made no showing that the source of those funds was proceeds from its collateral. Rather, the check represented the *net* proceeds from an auction sale of collateral, which predominantly secured the defendant. The evidence indicates that at the time of the sale all of the proceeds were commingled and checks written to various creditors from one pool. The evidence does not support a finding that the $108,319.88 check to Philip Schmer, Inc., represented proceeds from the sale of the plaintiff's collateral. Furthermore, Schmer, the individual, as distinguished from Philip G. Schmer, Inc., the corporation, received no proceeds from the auction sale.

Section 9-306(1) provides in part, " 'Proceeds' includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." In *Terra Western Corp. v. Berry and Co.*, 207 Neb. 28, 295 N.W.2d 693 (1980), this court

emphasized the receipt requirement contained within the definition of "proceeds," at least as it referred to insurance proceeds. This court said: "An examination of the language of the statute shows that proceeds of an insurance policy covering destroyed property or other proceeds do not become 'proceeds' within the meaning of the code until the money 'is received.' Patently, this means receiving by the owner." *Id.* at 33-34, 295 N.W.2d at 697.

Since the plaintiff failed to prove that the defendant had received "identifiable proceeds" from the sale of the plaintiff's collateral, it is unnecessary to address the remaining issues.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

ROSE M. KRESHA, APPELLANT, V. JOSEPH A. KRESHA, APPELLEE.
371 N.W.2d 280

Filed August 2, 1985. No. 84-445.

1. **Landlord and Tenant: Tenancy in Common: Property: Leases.** One of several coowners of real property can lease his or her own interest to third persons.
2. **Property: Leases.** One who acquires property covered by an existing lease of which he or she has knowledge acquires the property subject to the existing lease.

Appeal from the District Court for Polk County: JOHN M. BROWER, Judge. Affirmed.

Patrick W. Healey of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellant.

Bradley E. Barrows of Svehla & Barrows, for appellee.

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

CAPORALE, J.

On August 30, 1979, Adolph Kresha and plaintiff-appellant, Rose M. Kresha, were husband and wife and the coowners of two tracts of land. They are the parents of defendant-appellee,

Joseph A. Kresha. On the aforesaid date the father, by written instrument and without the consent, knowledge, or authority of the mother, leased nonhomestead lands to the son for a period of 6 years. The mother learned of the lease, at the latest, on March 12, 1980. Subsequently, on March 18, 1980, the mother filed an action for separate maintenance, which the father converted into a dissolution action. The dissolution decree awarded the subject lands to the mother. Following dismissal of the father's appeal of that decree to this court, a deed conveying the lands to the mother was recorded on August 16, 1982. On August 26, 1982, the mother wrote the son, advising that she was terminating his lease. The son, in turn, wrote the mother that he considered his lease to be valid, and remained on the lands. On March 2, 1983, the mother sent another notice directing the son to vacate the lands. Again, the son continued his occupancy. The mother then, on March 14, 1983, brought this forcible entry and detainer action in the county court to obtain possession of the lands. The county court dismissed her action, and the district court affirmed. On appeal to this court she assigns as error (1) the district court's ruling that the lease is valid as to the interest the father had in the lands at the time of its execution; (2) the district court's speculation that the judge dissolving the marriage considered the son's leasehold interest when distributing the property; and (3) the district court's advice that the mother's remedy is in partition. We, without passing on the last two issues, affirm.

It should perhaps be noted that this is the second time the mother and her son have litigated in this court their respective rights under various leases. The first occasion is found in *Kresha v. Kresha*, 211 Neb. 92, 317 N.W.2d 776 (1982). Although many of the circumstances in that earlier case are similar to the circumstances of the present case, the tracts of land leased and the legal issues presented are different.

This jurisdiction has recognized that one of several tenants in common can lease his or her own interest to third persons. *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950), a partition action, holds that in the absence of ratification a lease by less than all of the tenants in common does not bind the nonleasing cotenants. In so holding, *Trowbridge* relied on

Jackson v. O'Rorke, 71 Neb. 418, 98 N.W. 1068 (1904), also a partition action. The question in *Jackson* concerned the rights of lessees under a lease executed by one of several tenants in common on her own behalf and as guardian of the three remaining cotenants, one of whom had reached majority before execution of the lease, another of whom reached majority shortly after the lease was executed, and the third of whom remained a minor. This court held that the lease was binding upon the tenant executing the lease on her own behalf and upon the minor cotenant on whose behalf she executed the lease as his guardian. However, the lease was held to be null and void in its entirety as to the interest of the cotenant who was an adult at the time it was executed and null and void from the date of suit as to the cotenant who became an adult after the lease had been executed. In so holding, this court said:

> Mrs. O'Rorke in her representative capacity stood in the position of one tenant in common attempting to lease the entire estate, without the consent of the other cotenants. While such a lease as this may be upheld under certain conditions in a contest between the lessor and the lessee, yet, it is universally held that such a lease may be avoided by any of the tenants in common who did not execute it or subsequently ratify its execution. And, where a lease is executed by one tenant in common of the entire estate for a term of years, and such lease is repudiated by the cotenants, the lessee in the lease is held to be not a trespasser but a tenant by sufferance of the estate occupied under such lease. [Citations omitted.] In other words, the lessee of one tenant in common stands in the shoes of his lessor, and has no other or greater rights in the common property than that attaching to his lessor. It would be paradoxical to say that a tenant in common in possession of the estate might contract with himself to occupy the estate for a period of years, and defeat the right of partition of the estate by his cotenants by such an act.

71 Neb. at 422-23, 98 N.W. at 1070.

This jurisdiction's rule that one of several owners can lease his or her own interest to third persons has, as we have seen, been developed in connection with tenancies in common.

According to the mother, she and the father had been joint tenants of the subject lands. We conclude, however, that the nature of the concurrent ownership is not material for the purpose of resolving the question before us, for there is authority applying the same rule to joint tenancy ownerships. *Swartzbaugh v. Sampson*, 11 Cal. App. 2d 451, 54 P.2d 73 (1936); *Booth v. Cebula*, 25 Ill. App. 2d 411, 166 N.E.2d 618 (1960); 48A C.J.S. *Joint Tenancy* § 33 (1981).

We conclude, therefore, that the father could and did encumber his own interest in the lands by the lease with his son, but did not encumber the mother's interest.

The next question is whether the mother, when the entire ownership of the lands was conveyed to her pursuant to the dissolution decree, took the lands subject to the son's leasehold interest in the father's former ownership interest. We conclude that she did.

In the final analysis the situation is not dissimilar to that presented in the acquisition of property from a fee owner which the purchaser knows to be encumbered by an existing lease. In such a situation the purchaser acquires the property subject to the lease. *Grand Island Hotel Corp. v. Second Island Development Co.*, 191 Neb. 98, 214 N.W.2d 253 (1974); *Gregory v. Pribbeno*, 143 Neb. 379, 9 N.W.2d 485 (1943).

In an attempt to avoid application of this general rule to the present case, the mother cites several cases from other jurisdictions in which a life tenant, mortgagor, or purchaser under a contract for deed executed a lease which the remainderman, mortgagee, or seller successfully refused to recognize once the life tenant died or the mortgagor or contract for deed purchaser defaulted. *Campos v. Warner*, 90 N.M. 63, 559 P.2d 1190 (1977); *Schrunk v. Andres*, 221 Minn. 465, 22 N.W.2d 548 (1946); *Ins. Co. v. Products Corp.*, 135 Ohio St. 501, 21 N.E.2d 585 (1939); *Geo. Benz & Sons v. Willar*, 198 Minn. 311, 269 N.W. 840 (1936). These cases, however, are not applicable. Here, the father owned, at the time of entering into the lease, a fee interest, whereas in the cases cited by the mother the lessors did not have fee title and simply undertook to encumber more than they owned.

For example, *Statler v. Watson*, 160 Neb. 1, 68 N.W.2d 604

(1955), holds that a lease given by one who was the owner of an undivided one-fourth interest and the life tenant of the remainder was binding after her death as to her undivided one-fourth interest but not as to the remainder.

Nor are we unmindful of *George & Teas v. George*, 267 Ark. 823, 591 S.W.2d 655 (1979), upon which the mother places substantial reliance. In *George* the Court of Appeals for the State of Arkansas set aside, upon motion of a purchaser without notice, the lease by the husband of real property owned jointly with his wife. The lease to the husband's mother was for a 99-year term and called for only a nominal rental. The mother knew her son was having marital difficulties, and the lease was entered into after the husband filed the last of two or three divorce actions. The wife did not learn of the lease until after it was ordered sold at judicial sale in satisfaction of the divorce decree. The *George* court stated the law permitted the husband in good faith and without fraud to convey his interest in nonhomestead property, subject to the wife's dower interest, but found that under the circumstances the lease constituted a fraudulent conveyance. It is sufficient to note the *George* facts are not the facts of the present case. There is nothing before us to indicate that the terms of the 6-year lease involved here are other than ordinary and customary. Moreover, the mother knew of the lease and its provisions throughout the dissolution proceedings and was free to develop all the facts surrounding it for the consideration of the dissolution court. Whether she did so is immaterial, particularly in view of the fact that the dissolution decree has become final.

The determination that the mother took the lands subject to the lease of the father's former interest makes consideration of her remaining assignments of error unnecessary.

The controlling fact is that the trial judge decided the case correctly. That he may have erred, if he did, in his speculations as to what the judge dissolving the marriage had in mind when he distributed the property or in his gratuitous advice as to the mother's remedy is of no consequence. A proper judgment will not be reversed even if the trial court gave the wrong reasons for its rendition. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

The judgment of the district court is affirmed.

AFFIRMED.

RONALD W. CARMAN ET AL., APPELLEES, V. JAMES E. GIBBS, APPELLEE, ARLENE O. GIBBS, APPELLANT.

371 N.W.2d 283

Filed August 2, 1985. No. 84-474.

1. **Real Estate: Vendor and Vendee: Contracts: Foreclosure.** Upon default of payment by the vendee in an executory land contract, the vendor may sue to foreclose the land contract in the same manner as foreclosing a real estate mortgage.
2. _____: _____: _____: _____. After foreclosure of an executory land contract, the vendor in that contract may sue the vendee for a deficiency judgment.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Vince Kirby, for appellant.

Parker, Grossart, Bahensky & Wright, for appellees Carman.

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

GRANT, J.

This is an appeal from the district court for Buffalo County where a judgment was entered for the plaintiffs-appellees, Ronald W. Carman and Grace M. Carman (hereinafter Carmans), against the defendants, James E. Gibbs and Arlene O. Gibbs (hereinafter Gibbs'), for $34,561.69. Arlene O. Gibbs appeals. We affirm.

On May 28, 1980, the Gibbs' executed and delivered to the Carmans a purchase agreement to buy a home owned by the Carmans. The purchase agreement contemplated the issuing of a deed and was accepted by the Carmans. On November 20, 1980, the parties amended the purchase agreement and

executed an "Installment Purchase Agreement" providing for delivery of the deed after the final payment under the contract.

On May 23, 1983, in a foreclosure action begun by Carmans, the Buffalo County District Court found the above facts and, further, that the Gibbs' were in default, that the entire balance had been accelerated, and that the Gibbs' owed the Carmans a total of $75,761.42 under the contract. The court found the Carmans were entitled to a foreclosure and ordered a public sale of the property if the Gibbs' did not redeem in 20 days. The Gibbs' did not redeem.

A sheriff's sale was held on August 16, 1983, and the Carmans purchased the property for $43,200. On September 14, 1983, the district court signed an order confirming the sale.

The Carmans then filed a petition in a separate action on September 20, 1983, in the district court, asking that a deficiency judgment be entered against the Gibbs' for $35,074.47. The court, on April 17, 1984, entered its order granting the Carmans judgment against the Gibbs' in the amount of $34,561.69 plus costs.

Appellant Arlene Gibbs filed a motion for new trial, which was overruled on May 17, 1984. She timely appealed. Defendant James Gibbs did not join in this appeal.

Appellant assigns two errors: (1) That the trial court erred in overruling appellant's motion to dismiss on the ground that Carmans' evidence was insufficient to support an award as a matter of law; and (2) That the court erred in granting a deficiency judgment. While couched in language more appropriate in seeking a new trial, the assignments, when considered together with the appellant's brief, do present one legal issue which we will address. It should be noted that errors encompassed in catchall assignments but not briefed, and those vaguely alluded to in the facts but not argued, will not be considered on appeal. On appeal we consider only errors which are assigned and discussed in appellant's brief. Neb. Ct. R. 9D(1)d (rev. 1983).

The appellant argues that a deficiency judgment may not be entered following a foreclosure on an installment sales contract for real estate. Since the Nebraska case of *Hendrix v. Barker*, 49 Neb. 369, 68 N.W. 531 (1896), we have recognized the right of a

vendor in an executory land contract, upon default of payment by the vendee, to foreclose on the executory land contract as if it were a mortgage. Since *Kloke v. Gardels*, 52 Neb. 117, 71 N.W. 955 (1897), we have recognized the right of a vendor to a deficiency judgment after such a foreclosure.

The appellant's argument that the Carmans' foreclosure precludes them from bringing an action for the deficiency after the sale is based on a case and an amendment to a statute, both subsequent to the *Kloke* case.

The appellant cites *Litz v. Wilson*, 208 Neb. 483, 304 N.W.2d 48 (1981), to support her argument that foreclosure is the exclusive remedy of the plaintiffs when it is chosen. She notes the language of *Litz* citing *Colson v. Estate of Johnson*, 111 Neb. 773, 776, 197 N.W. 674, 675 (1924): "[W]here the land contract is executory and the vendee makes default, the remedies of the vendor are to rescind, specific performance, foreclose the contract as a mortgage, or bring suit for damages for the breach." Appellant points out that each of the options as set out in *Colson* is in the alternative and that in the case at bar the plaintiffs have chosen foreclosure as their remedy, and thus are precluded from further action.

We first note that the quoted language in *Colson* is dicta because the case was decided on the point that plaintiff could not declare, upon defendant's default of payment, that the entire amount of the executory land contract was due, where the contract contained no provisions that the entire amount would become due on default of any payment. The foreclosure of an executory land contract together with a subsequent deficiency judgment, as allowed in *Kloke*, was not considered in the *Colson* opinion. The cases cited in *Colson* noted the right of vendors to collect damages, that is, the difference between the land contract price and the fair market value of the property at the time of the breach. This result, the courts noted, would give the vendor the benefit of his bargain without a windfall. Foreclosure followed by a deficiency judgment also gives the vendor the benefit of his bargain without a windfall. The public sale produces the fair market value of the property at the time of the sale, and the difference between that price and the contract price constitutes the "damages," or the deficiency

judgment. We think it is clear that foreclosure, as discussed in the *Colson* opinion, was not meant to eliminate the *Kloke* right of foreclosure and deficiency judgment.

Secondly, the appellant cites Neb. Rev. Stat. § 25-2139 (Reissue 1979), which, as last amended in 1933, states: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel delivery of the premises to the purchaser thereof." This 1933 amendment to the Nebraska law resulted in preventing a district court from ordering a deficiency judgment following a foreclosure in the same case. The appellant argues this amendment eliminates deficiency judgments insofar as foreclosures are concerned, but in *Federal Farm Mtg. Corporation v. Thiele*, 137 Neb. 626, 631-32, 290 N.W. 471, 474 (1940), we held:

> Sections 20-2142, 20-2144, and 20-2145, Comp. St. 1929 [now Neb. Rev. Stat. §§ 25-2140, 25-2142, and 25-2143 (Reissue 1979)], providing for the contingency of the creditor electing to sue on the note (debt) were left intact. There is no conflict, in the face of its plain language, between chapter 41, Laws 1933, and other provisions of the law with regard to actions at law before, during or subsequent to foreclosure under authority of the court. Abolishment of actions at law on debts secured by mortgages is not included in chapter 41, Laws 1933. If the legislature contemplated abolishment of such actions, it could have amended the statutory provisions thereof, instead of leaving them intact.

We have consistently recognized the right to bring an action at law for a deficiency following a foreclosure of a mortgage. Section 25-2139 only operates to separate the deficiency action from the foreclosure action, and requires a separate action be brought at law to collect a deficiency after foreclosure. It should be noted that a contrary position holding that a deficiency judgment could not follow a foreclosure under § 25-2139 as amended was taken by Judge Johnsen in his dissent in *Federal Farm Mtg. Corporation v. Claussen,* 138 Neb. 518, 293 N.W. 424 (1940). The position of his dissent, however, was not adopted by the majority of the court, nor was

the position ever adopted by subsequent Legislatures.

Since foreclosures under executory land contracts have been consistently treated in the same fashion as foreclosures of real estate mortgages, we see no reason to treat a deficiency under either type of foreclosure in a different manner. The contract in an installment sales action, like the note which supports a mortgage, can support an action at law. The trial court was correct in granting a deficiency judgment.

AFFIRMED.

SPENCER HOLIDAY HOUSE, INC., A CORPORATION, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF GAGE COUNTY, NEBRASKA, APPELLEE.

371 N.W.2d 286

Filed August 2, 1985. No. 84-487.

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

William E. Peters of Peters & Chunka, for appellant.

Jerry L. Shelton, Deputy Gage County Attorney, for appellee.

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

PER CURIAM.

Spencer Holiday House, Inc. (Spencer), appeals the judgment of the district court for Gage County which affirmed the Gage County Board of Equalization's determination of value of Spencer's motel for real estate taxation. We affirm.

Spencer operates a 65-unit motel located on a 3.62-acre tract adjacent to U.S. Highway 77 at the edge of Beatrice. The motel complex consists of three buildings. One building, constructed in 1965, houses a restaurant, lounge, coffeeshop, kitchen,

meeting rooms, registration lobby, and administrative office. A second building, also built in 1965, contains 51 motel units. The third building was built in 1974 and includes 14 motel units. The motel also has a swimming pool which was constructed in 1965.

Hubert Kreuzberg, Gage County assessor responsible for the 1982 valuation, testified and explained his method to determine the motel's value. Kreuzberg valued the unimproved site at $45,615. After inspecting and measuring the motel, Kreuzberg arrived at a value for the motel improvements by using a cost formula based on projected cost of reproducing or replacing the motel improvements. Kreuzberg used a replacement cost manual supplied by the Nebraska Department of Revenue. Using a depreciation factor of 25 percent for improvements constructed in 1965 and 15 percent for those built in 1974, Kreuzberg then applied an economic obsolescence factor of 10 percent for all structures. The resultant value of the motel complex, according to Kreuzberg, was $585,370. Kreuzberg testified that he uniformly utilized the cost formula for all taxable real estate within Gage County and did not consider projected income as a factor affecting valuation.

Using the described cost formula in 1982, Kreuzberg also assessed a 39-unit Super 8 motel at $320,640. The Super 8 motel was located near Spencer's motel but had no direct access to Highway 77. Also, Super 8 did not have a restaurant, lounge, meeting room, or swimming pool. In 1981 Super 8 was sold for $590,000.

Gage County called an expert witness, Wayne Kubert, who testified the Spencer property had an actual value of $660,000 in 1982. Kubert arrived at that value by using methods involving replacement cost, market, and income.

Kubert explained the three approaches he used in arriving at the value of the Spencer motel. Under the cost approach, reproduction cost normally sets the upper limit of value, subject to a deduction for depreciation. Kubert's value for the motel under the replacement cost approach was $760,000 (replacement of $1,224,477 less depreciation of 40 percent). Kubert estimated the value of the motel at $641,885 under the market approach, after considering recent sales of motel properties in comparable communities, including the sale of the

Super 8 in Beatrice. Using the income approach, Kubert arrived at a value of $671,845. The income approach used by Kubert was based on capitalized net income from the property. In describing use of an income approach, Kubert testified that it was necessary to consider the gross income which a property could produce, that is, the earning capacity of a property, and then deduct properly anticipated losses.

Frank Frost, an expert witness, testified for Spencer and expressed an opinion that the motel's actual value was $471,845 under the replacement cost method and $407,000 under the income method. Frost made no determination of value based on a market approach.

Frost used a total replacement cost of $1,216,774 for the motel and a depreciation factor of 65 percent in arriving at his valuation of the motel complex, $425,800, to which the value of the motel site, $45,615, was added, for a total value of $471,845 regarding the motel. Frost testified that the income approach was the most accurate method of determining value of a commercial property. Regarding use of an income method to establish value, Frost considered decreases in net income of the motel over a 3-year period, that is, net income of $140,477 in 1979; $110,364 in 1980; and $71,048 in 1981. Gross income of the motel was $573,004 in 1979; $530,233 in 1980; and $551,295 in 1981.

On the question of equalization Spencer presented witnesses who testified about assessment-sales ratios as indications that the value of classes of property in a county increased or decreased after revaluation by an assessor. There was no evidence that the assessed value for Spencer was excessive or that there was any disproportionate assessment of Spencer's property within its classification as a motel and commercial property.

Spencer assigns two errors: (1) The county assessor's valuation of $585,370 is incorrect; and (2) The motel property was not equalized with other property in Gage County.

The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the district court and the Supreme Court, is de novo as an equitable proceeding. *Gradoville v. Board of Equalization*, 207 Neb. 615, 301 N.W.2d

62 (1981).

In *Richman Gordman v. Board of Equalization*, 215 Neb. 379, 381, 338 N.W.2d 761, 763 (1983), we held:

> There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board.

See, also, *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982).

> "[T]he burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment."

Spencer Holiday House v. County Bd. of Equal., 215 Neb. 194, 200, 337 N.W.2d 759, 763 (1983).

To dispose of the issue concerning equalization, we reiterate our holding in *Lincoln Tel. & Tel. Co. v. County Board of Equalization*, 209 Neb. 465, 472, 308 N.W.2d 515, 520 (1981): "In order for a taxpayer to secure a reduction in the assessed value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not been fairly and proportionately equalized." There is no evidence in the record that Spencer's property has been assessed at an excessive value or that the Spencer property has not been fairly and proportionately equalized with respect to other property within the classification assigned to Spencer's real estate. The district court was correct in resolving the equalization question in favor

of the county.

In tax valuation cases actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy. See *Rodeo Tel. Membership Corp. v. County of Greeley*, 181 Neb. 492, 149 N.W.2d 357 (1967).

Actual value is determined by using the applicable elements of valuation, including the elements contained in Neb. Rev. Stat. § 77-112 (Reissue 1981), which provides:

> Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property.

See, also, *Chudomelka v. Board of Equalization*, 187 Neb. 542, 192 N.W.2d 403 (1971).

In *LaGord Assoc. v. County of Cass*, 209 Neb. 99, 101, 306 N.W.2d 578, 579 (1981), we stated: "Nothing in the above statute [§ 77-112] requires the county assessor or county board to use all of the factors set forth therein. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Nebraska."

Witnesses before the district court considered several reasonable factors in arriving at their different values for the Spencer property. The differences in value are attributable to differences in opinions. Spencer would have us prefer a net income approach used by its expert in arriving at value and disregard the approaches suggested by the county, including the county assessor's replacement cost-depreciation formula. As we stated in *In re Assessment of OL&B Ry. Co.*, 213 Neb. 71, 75-76, 327 N.W.2d 108, 111 (1982): "[I]t is the earning capacity of the railroad that is of greater importance. Earning capacity and actual earnings are not the same thing. It is what the property, efficiently managed, should have earned that throws light on value."

Upon the record presented to this court, Spencer has failed to meet its burden to show that the board of equalization's determination as to actual value is incorrect or invalid, and, therefore, unreasonable.

AFFIRMED.

WILLIAM L. ROTH, APPELLANT, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLEE.

371 N.W.2d 289

Filed August 2, 1985. No. 84-530.

1. **Summary Judgment.** A party is entitled to summary judgment if there is no genuine issue of material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
2. **Conversion: Words and Phrases.** Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time.
3. **Insurance: Liability.** An insurer may limit its own liability as long as it does not violate public policy.
4. **Insurance: Contracts: Intent.** An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
5. _____: _____: _____. The insurance policy should be given meaning and effect according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense.

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

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

Edward G. Warin and John W. Iliff of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

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

BOSLAUGH, J.

This is an action on a perpetual farm policy of insurance issued by the defendant, Farmers Mutual Insurance Company

of Nebraska, to the plaintiff, William L. Roth. Under the blanket farm personal property section of the policy, livestock was insured against theft.

In 1979 Roth owned a number of swine. That year he entered into an agreement with Allen Bestmann in which Roth agreed to maintain 25 sows and 2 boars or 10 percent of the herd, whichever was greater, in a farrowing-nursery facility owned by Bestmann, for which Bestmann would be paid $550 a month and 10 percent of all other expenses. Bestmann would provide the services and labor to operate the facility, and produce feeder pigs, weighing between 40 and 50 pounds, for market. Roth was to receive 10 percent of the sales. An addendum to the agreement executed in December 1981 provided that Bestmann would purchase from Roth 100 sows held by Bestmann under the agreement. Roth was to receive $11,130 for 265 feeder pigs that had been sold. Another 174 pigs held under the agreement were to be sold as soon as possible.

Bestmann sold the swine in late 1981 or early 1982 and wrote three checks to Roth for the sale proceeds. Two of the checks were returned for insufficient funds. Roth was not repaid and the hogs were not returned.

Roth filed a claim with the defendant insurance company for theft of the swine, valued at $33,979. The claim was denied under a provision of Roth's policy which provides coverage for loss of livestock, including swine, due to: "3. *Theft and Overturn* including direct loss by theft (but *excluding* escape, mysterious disappearance, inventory shortages, *wrongful conversion and embezzlement*), and overturn." (Emphasis supplied.)

Roth brought this suit to recover under the theft provision of the policy. The defendant insurer denied that a loss due to theft had occurred and defended on the specific exclusion for conversion and embezzlement. The defendant subsequently moved for summary judgment.

The trial court found that there were no contested issues of fact, that the swine had been wrongfully converted by Bestmann, and that the policy exclusion applied. The trial court granted summary judgment and dismissed the plaintiff's petition.

On appeal Roth argues that summary judgment was inappropriate as there existed both a dispute as to a material fact and a question of law to be resolved by a trial.

The general rule is that a party is entitled to summary judgment if there is no genuine issue of material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. *Signor v. National Transp., Inc.*, 217 Neb. 667, 351 N.W.2d 58 (1984).

Roth contends that in Nebraska the term "theft," as found in an insurance policy, will be construed very broadly where not defined by the policy itself. *Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co.*, 200 Neb. 46, 262 N.W.2d 183 (1978). The term may include pilferage, swindling, embezzlement, wrongful conversion, and other unlawful appropriations. *Raff v. Farm Bureau Ins. Co.*, 181 Neb. 444, 149 N.W.2d 52 (1967). As the definition of theft may be very broad, Roth maintains a factual dispute exists as to what type of behavior Allen Bestmann had engaged in by paying Roth for his swine with insufficient fund checks. However, under the facts of this case the behavior involved was conversion.

Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time. *B. E. Implement Co. v. Valley Farm*, 216 Neb. 269, 343 N.W.2d 892 (1984); *Raff, supra*. Under an insurance policy covering direct loss of livestock by theft but excluding loss by wrongful conversion, "unlawful conversion" presupposes converting of lawful possession into an unlawful one. *Raff, supra*.

In the present case, under the agreement between the parties, Bestmann was paid for caring for the swine and Roth was to receive 10 percent of the sale proceeds therefrom. Roth at all times remained the owner, but Bestmann had lawful possession of the swine. When Bestmann sold the hogs pursuant to the agreement but failed to turn the proceeds over to Roth, he converted the proceeds from the sale. Roth was never paid for the hogs, nor were they returned to him.

The proceeds from the sale of the hogs were converted by

Bestmann. Other jurisdictions faced with similar situations have held that the failure of a party to pay over the proceeds from the sale of livestock is conversion. See, *Alonso v. Badger*, 58 Cal. App. 2d 752, 138 P.2d 24 (1943); *Larsen v. Housh*, 259 Iowa 911, 146 N.W.2d 314 (1966).

While the term "theft" may, under some circumstances, include conversion, the term must be construed in the light of the specific exclusions contained in the insurance policy. *Raff, supra*. Where the insured's loss falls within specific exceptions contained in the policy, the court must apply the exception. *Thos v. Employers Mutual Cas. Co.*, 215 Neb. 424, 338 N.W.2d 784 (1983); *Raff, supra*; *Steinbach v. Continental Western Ins. Co.*, 237 N.W.2d 780 (Iowa 1976).

Whether the plaintiff's loss was covered by the insurance policy was a question of law. *Omaha Public Power Dist. v. Travelers Ind. Co.*, 178 Neb. 709, 135 N.W.2d 1 (1965). The defendant was entitled to judgment as a matter of law.

As noted in *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984), an insurer may limit its own liability as long as it does not violate public policy. A court, in construing the provisions of an insurance policy, must determine from the clear language of the contract whether the insurer in fact insured against the risk involved.

The rules governing the construction of an insurance contract were set out in *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982), and repeated in *Swedberg*. The court said:

> "An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted. There is, however, a difference between a favorable construction and a favorable finding for the insured. The

> former does not mean imposing upon the insurer a gratuitous obligation not justified by the usual meaning of the words employed. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction. Construction ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured. *The policy should be given meaning and effect according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense.*"

(Emphasis supplied.) 218 Neb. at 450, 356 N.W.2d at 459.

Under the theft provision of the policy issued by the defendant, it is clear that conversion was specifically excluded from coverage. As there were no special circumstances which would render the exclusion inapplicable, the specific exclusion as to conversion limited the liability of the insurer and is controlling. See, 5 J. & J. Appleman, Insurance Law and Practice § 3171 (1970); *Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co.*, 200 Neb. 46, 262 N.W.2d 183 (1978).

Since the plaintiff did not recover judgment, it is unnecessary to consider his contention in regard to an attorney fee. See, *Omaha Paper Stock Co. v. California Union Ins. Co.*, 200 Neb. 31, 262 N.W.2d 175 (1978); *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973); *State Farm Mut. Auto. Ins. Co. v. Selders*, 189 Neb. 334, 202 N.W.2d 625 (1972).

The judgment of the district court is affirmed.

AFFIRMED.

MARVIN E. HULSE, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES D. HULSE, DECEASED, APPELLANT, V. STERLING L. SCHELKOPF ET AL., APPELLEES.

371 N.W.2d 673

Filed August 2, 1985. No. 84-563.

1. **Equity: Appeal and Error.** This court reviews an equitable action de novo on the record, but considers that the trial court saw and heard the witnesses and accepted one version of the facts rather than another.
2. **Equity: Trial: Motions to Dismiss.** When a defendant in an equity action moves for a dismissal at the close of the plaintiff's evidence, he thereby admits to be true plaintiff's evidence and every inference favorable to the plaintiff which may fairly and reasonably be drawn therefrom; where the plaintiff has made a prima facie case, the motion to dismiss is to be overruled.
3. **Trusts: Fraud.** Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus, if one person procures legal title to property from another by fraud or misrepresentation or, by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.
4. **Trusts: Evidence: Proof.** Grounds for imposing a constructive trust must be proved by clear, satisfactory, and convincing evidence.
5. **Trial: Evidence: Appeal and Error.** Where a ruling excluding evidence is made, an offer of proof is generally a prerequisite to our review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
6. **Trial: Pretrial Motions: Records: Appeal and Error.** This court cannot review the trial court's alleged abuse of discretion in entering a discovery order where there is no evidence in the record to either support or refute a contention that such abuse exists.
7. **Evidence: Records: Appeal and Error.** Evidence which does not appear in the record cannot be considered by this court on appeal.

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

Kenneth R. Lang of Angle, Murphy, Lang & Valentino, P.C., for appellant.

Daniel E. Bryan of Heinisch & Bryan Law Office, for appellees.

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

CAPORALE, J.

The capital stock of appellee H & S Lumber Co., Inc., a Nebraska corporation, is owned by the estate of Charles D. Hulse, deceased, and appellees Sterling L. Schelkopf and Kenneth C. Lorenzen. Schelkopf and Lorenzen are also the owners and beneficiaries of a $200,000 decreasing term policy of insurance issued on decedent's life by Philadelphia Life Insurance Company. Appellant, Marvin E. Hulse, decedent's brother and personal representative of the estate, sued Schelkopf, Lorenzen, the corporation, and the insurer to recover the proceeds of that policy under the theories that either there exists an oral buy-and-sell agreement among the three stockholders which is to be specifically enforced or that a constructive trust is to be imposed upon the proceeds because of a breach of a confidential relationship. Schelkopf and Lorenzen also sued the insurer to recover the proceeds. The cases were consolidated and the insurer paid the proceeds into an escrow account. The insurer was thereupon discharged from further liability and dismissed from the actions. Following trial, the court below dismissed the personal representative's suit and determined that Schelkopf and Lorenzen were the rightful owners of the policy proceeds. The personal representative discusses in his brief on appeal to this court four assignments of error, namely, that the trial court erred in (1) finding that the evidence fell short of establishing the existence of a buy-and-sell agreement; (2) finding that the evidence fell short of establishing grounds for the imposition of a constructive trust; (3) refusing to permit a certain witness to testify; and (4) entering a protective order with respect to the deposition of an attorney. We affirm.

As an action in equity, we review this case de novo on the record, but consider that the trial court saw and heard the witnesses and accepted one version of the facts rather than another. *Reilly v. First Nat. Bank & Trust Co., ante* p. 443, 370 N.W.2d 163 (1985).

Reviewed in accordance with that standard, we find the relevant facts to be that Schelkopf, Lorenzen, and Allen Sippel were partners in the practice of veterinary medicine. In 1978 those three and decedent organized H & S for the purpose of

acquiring an existing lumberyard business. Decedent became owner of half of the capital stock of the corporation, and each of the others became an owner of one-sixth of the stock.

Decedent borrowed the $78,000 he needed to buy his stock, and Schelkopf cosigned on decedent's loan. Schelkopf also borrowed $78,000, and his partners guaranteed his note. Later, Sippel withdrew from the veterinary practice and sold his stock, in equal shares, to Schelkopf and Lorenzen.

In 1980 Schelkopf contacted Gary Gammel, an insurance agent with whom he had previously dealt, and asked about purchasing insurance on the lives of the three stockholders of H & S. Schelkopf and Lorenzen then purchased decreasing term life insurance policies issued by Philadelphia Life Insurance Company on each of their lives, as well as on decedent's life. As a consequence, Lorenzen became the owner and beneficiary of a $100,000 policy insuring Schelkopf's life, and Schelkopf became the owner and beneficiary of a $100,000 policy on Lorenzen's life. In addition, Schelkopf and Lorenzen became the joint owners and beneficiaries of the subject $200,000 policy on decedent's life. H & S also purchased and paid the premiums on a $50,000 double indemnity policy on decedent's life on which decedent had named his brother as beneficiary.

Several months after the policies were issued, decedent telephoned Gammel, wanting to know if he should own insurance on the lives of Schelkopf and Lorenzen. Gammel informed decedent that he would need an insurable interest in the lives of Schelkopf and Lorenzen in order to buy policies on their lives, and mentioned a buy-and-sell agreement as a possible means of creating such an interest. Gammel then talked with Schelkopf about such an agreement, but Schelkopf indicated that he was not interested. Decedent did not follow up on the idea, and Gammel then came to understand from talking to decedent, Schelkopf, and Lorenzen that the purpose of the policies he had sold to Schelkopf and Lorenzen was to "protect each other for the amount of capital that had a risk." Because that risk diminished as payments were made on the debts, the policies decreased in value as time went on.

The 1980 and 1981 premiums for all three policies were paid by checks drawn on Lorenzen and Schelkopf's veterinary clinic

account. In October 1982, after Schelkopf had paid the premiums for the three policies, his wife, Beverly, who worked as Schelkopf's secretary in the veterinary practice and whose duty it was to see that the premiums were paid, requested that Lorenzen reimburse Schelkopf for half of the premiums. Lorenzen suggested that she ask decedent to pay a portion of the premiums' cost in return for the bank loan guarantees. Decedent then reimbursed Schelkopf the total amount of the 1982 premiums on all three policies and wanted to know where the policies were. On October 16, 1982, she sent a memorandum to decedent, noting that she had enclosed the 1981 and 1982 insurance premium notices and stating that "Gary Gammel has the policies in his possession waiting for Sterling [Schelkopf] to make out your buy-sell agreement."

Decedent died on August 13, 1983, as the result of an automobile accident. Following decedent's death, the personal representative requested that Schelkopf and Lorenzen transfer the proceeds of the subject policy to the estate in exchange for decedent's stock in H & S. Schelkopf and Lorenzen refused, and this litigation resulted.

The personal representative alleges that Schelkopf and Lorenzen orally agreed to purchase decedent's shares of H & S stock at the time of his death and that the purchase was to be funded by the proceeds, approximately $181,000, of the $200,000 decreasing term life insurance policy. The personal representative further alleges that the agreement provided that in the event of the death of any stockholder, that stockholder's individual stock value was to be equal to the amount of the proceeds of the insurance as represented by the various policies.

The fact of the matter, however, is that there simply is no evidence that such an agreement ever existed. Schelkopf and Lorenzen deny the existence of such an agreement, Gammel testified he knew of no such agreement, and decedent's former wife testified she knew of no such agreement. A girl friend of the decedent testified she asked him why he was paying premiums on policies that gave him nothing. He replied it was to protect Schelkopf and he did not mind, as H & S was paying the premium on another policy on his life.

Nonetheless, the personal representative argues the trial

court erred in sustaining the motion to dismiss his first alternative theory of recovery at the close of his evidence because an inference can be drawn from Mrs. Schelkopf's memorandum to decedent that there was to be a buy-and-sell agreement.

He correctly argues that when a defendant in an equity action moves for a dismissal at the close of the plaintiff's evidence, he thereby admits to be true plaintiff's evidence and every inference favorable to the plaintiff which may fairly and reasonably be drawn therefrom. Where the plaintiff has made a prima facie case, the motion to dismiss is to be overruled. *Marco v. Marco,* 196 Neb. 313, 242 N.W.2d 867 (1976).

The difficulty from the personal representative's point of view, however, is that the evidence does not permit the inference he seeks to draw.

Schelkopf testified he did not know about the memorandum. Mrs. Schelkopf testified that she sent the memorandum to decedent in response to decedent's question about the location of the policies. She stated that while she was under the impression that Gammel was holding the policies in his possession until he could talk with all the stockholders about a buy-and-sell agreement, she did not know of the existence of any such agreement even though she took care of her husband's records. Further, the evidence is that decedent paid the premiums on October 14, 1982, 2 days before the memorandum was written. Consequently, he could not have paid the premiums in reliance of the statements in the memorandum.

There is no merit to the personal representative's first assignment of error.

He urges, however, that even if his proof failed to establish the existence of a buy-and-sell agreement, there did exist proof of grounds to impose a constructive trust in favor of decedent's estate upon the policy proceeds.

The personal representative cites *Paul v. McGahan*, 152 Neb. 578, 42 N.W.2d 172 (1950), arguing, apparently, that Schelkopf and Lorenzen perpetrated a fraud upon the decedent in obtaining the insurance policy on his life and in obtaining reimbursement from decedent for the premiums on three policies for 1982. In *Paul* we stated at 580, 42 N.W.2d at 174:

> Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.

See, also, *Ford v. Jordan, ante* p. 492, 370 N.W.2d 714 (1985); *Guynan v. Guynan,* 208 Neb. 775, 305 N.W.2d 882 (1981).

The personal representative again points to the memorandum from Mrs. Schelkopf and asserts that it is evidence decedent was led to believe that some type of relationship beneficial to him existed in connection with the insurance policies.

Such a position fails for the same reason it failed in the personal representative's first alternative theory of recovery. There is simply no evidence to indicate that Schelkopf and Lorenzen in any way misrepresented the reason they were buying insurance on decedent's life.

The personal representative also apparently contends that a constructive trust should be imposed on the policy proceeds because Schelkopf abused a confidential relationship with decedent. Although the personal representative asserts in his brief at 11 that the record "is replete with examples of Sterling Schelkopf's 'king pin' status in the operation of H & S Lumber Company," we are at a loss to ascertain what evidence he is talking about. It was decedent who became the majority shareholder, and it was he who became president of the corporation.

The evidence is that although Schelkopf and decedent discussed the business affairs of the corporation, Schelkopf was not familiar with the operation of H & S and was even uncertain about the office he held in the corporation.

Lorenzen had not taken an active part in the management of H & S and did not know whether he was an officer or director of

the corporation.

There is nothing else in the record concerning who ran H & S, who made the day-to-day business decisions, or decedent's role in relation to Schelkopf and the corporation.

As said in *Ford v. Jordan, supra*, the grounds for imposing a constructive trust must be proved by clear, satisfactory, and convincing evidence.

There being no evidence at all to show the existence of circumstances such that Schelkopf and Lorenzen cannot, in good conscience, retain a beneficial interest in the policy proceeds, *Ford v. Jordan, supra*, the trial court correctly dismissed, at the close of his evidence, the personal representative's second alternative theory of recovery.

He argues, however, that if the evidence fails to support either of his theories of recovery, it is because of the trial court's erroneous evidentiary and discovery rulings.

In this connection the personal representative first argues in his third assignment that the trial court erred in refusing to permit Hardy Liggett to testify at trial. Liggett, a life insurance agent, was called by the personal representative to testify as an expert witness. However, an objection to his testimony was made as soon as he stated his name and occupation, on the basis that he had not been disclosed as a witness as apparently required by a pretrial interrogatory.

We do not reach the question of whether the trial court abused its discretion in sustaining the objection, *Nixon v. Harkins, ante* p. 286, 369 N.W.2d 625 (1985), for there was no offer of proof as to what Liggett was expected to say, and there is nothing in the questions asked of him from which we can determine what that might have been.

Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1979) provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and: . . . In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

We have said that where, on objection, a ruling excluding evidence is made, an offer of proof is generally a prerequisite to

our review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent. *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984).

There is therefore no merit to the personal representative's third assignment of error.

He further complains about the trial court's entry of a protective order relating to the deposition of Frank C. Heinisch, an attorney who was a partner of the law firm which represented Schelkopf, Lorenzen, and H & S at trial. These parties made a motion for the protective order pursuant to this court's Rules 30(d) and 26(c), Nebraska Discovery Rules (rev. 1983), so as to protect their attorneys from oppression or undue burden and expense. In an affidavit filed in connection with that motion, Heinisch swore that his law partnership represented Schelkopf and Lorenzen regarding their business dealings with decedent but that the partnership did not represent H & S as its general corporate counsel. The protective order provided that the personal representative's discovery from Heinisch was limited to whether the H & S corporate records were altered or corrected while in his possession.

There is no showing as to the areas of discovery the personal representative intended to pursue through Heinisch. While the personal representative states in his brief that the effect of the protective order was to prevent any meaningful inquiry into corporate transactions, as provided by Rule 30, there is no evidence in the record to either support or refute this contention. Again, in the absence of such a showing, we cannot say the trial court abused its discretion. Evidence which does not appear in the record cannot be considered by this court on appeal. *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983).

The personal representative's fourth assignment of error must also fail.

There being no merit to the assignments of error discussed by the personal representative's brief, we affirm the judgment of the trial court.

AFFIRMED.

MICHAELINE K. WALTON, APPELLANT, V. DAVID J. WALTON, APPELLEE.

371 N.W.2d 292

Filed August 2, 1985. No. 84-595.

1. **Modification of Decree: Child Custody: Appeal and Error.** In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, this 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. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, but we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
2. **Modification of Decree: Child Custody.** In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.

Appeal from the District Court for Douglas County: LAWRENCE CORRIGAN, Judge. Affirmed.

Walter M. Calinger, for appellant.

Joseph P. Caniglia of Seminara, Caniglia, Turco, McCarthy & Sacoman, for appellee.

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

WHITE, J.

This is an appeal by Michaeline K. Walton, the mother of David Jay Walton, from an order of the district court for Douglas County, Nebraska, placing possession of the parties' 8-year-old son with the appellee father and removing the custody from the appellant mother. As this is a change of custody, we are governed by the rule recently announced in *Boll v. Boll*, 219 Neb. 486, 488, 363 N.W.2d 542, 544 (1985):

> In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, this 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. We are required

> to make independent conclusions of fact without reference to the conclusion reached by the trial court, but we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.

We further said in that case, "In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children." *Id.*

The marriage of the parties was dissolved on December 10, 1982. Custody of the minor child, David Jay Walton, was awarded jointly to the parties, with possession awarded to the appellant, Michaeline K. Walton. The child, David Jay Walton, was approximately 7 years of age at the date of the dissolution.

After an extended hearing the trial court determined that custody of the child be placed with the court and possession of the child should be placed in the appellee, with provisions for a review 1 year hence. This court has previously expressed its reservations about the concept of joint or shared custody and also its reservations about the periodic review provision of the court's decree, specifically as to whether or not such a review allows the court to depart from the standards reaffirmed in *Boll v. Boll, supra*, in orders affecting custody.

The extended hearing discloses that the separation and divorce had a very traumatic effect on the minor child. There is evidence in the record which suggested that the child had acquired deep psychological problems, specifically with identification with whichever parent then had custody, and some suggestion of severe prevarication concerning the activities of the nonpossessory parent. The evidence tended to establish and the trial court believed that the appellant contributed to the child's psychological problems by denigration of the appellee father and resisted and hampered the visitation efforts of the father. There was an extended investigation by a court-appointed guardian ad litem for the child and extended psychological testimony. No benefit would be obtained by reciting the details of the psychological evidence except to comment that the trial court believed and we believe that emotional problems of the appellant, culminating in a

rather violent confrontation in a McDonald's parking lot in which the appellant crashed the automobile she was driving into the automobile being operated by the appellee, establish that a change of circumstances is present in this case meriting the change of custody.

The trial court was impressed, as we were, with the obvious desire of each of the parents to obtain custody of the child and their love of the child. The trial court believed, and we are inclined to believe, that the general emotional stability of the child has improved since the episode almost 2 years prior to the date of this opinion, when custody was transferred to the husband after the confrontation in the parking lot.

We therefore hold on a review de novo that there has been a sufficient change of circumstances, that is, the emotional disturbance of the minor child and the subsequent improvement in the child's care while in the custody of the father, to justify the order changing custody. We therefore affirm.

AFFIRMED.

TIMOTHY J. MAXEY, APPELLANT, V. FREMONT DEPARTMENT OF UTILITIES, APPELLEE.

371 N.W.2d 294

Filed August 2, 1985. No. 84-606.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case, whether it be to enter an award or cause a dismissal of the claim, may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.
2. **Workmen's Compensation: Words and Phrases.** Payment of medical and hospital expenses when made with reference to a compensable claim constitutes payment of compensation within the meaning of the workmen's compensation laws.
3. _____: _____. Payments for lost time made in lieu of compensation benefits for an undisputed job-related injury constitute payment of compensation.
4. **Workmen's Compensation: Limitations of Actions.** A mistake of law does not

excuse a late filing for workmen's compensation benefits so as to toll the statute of limitations.

5. _____: _____. Payment of wages or reimbursement of medical expense by an employer under an employee benefit plan or group health insurance agreement does not constitute remuneration in lieu of workmen's compensation benefits so as to toll the statute of limitations, unless, by the conduct of the employer, it may reasonably be inferred that such payments were made with an intent that payment constitute compensation and a conscious recognition of liability for compensation benefits on the part of the employer.
6. _____: _____. Where an injury is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee.
7. _____: _____. Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations begins to run.
8. _____: _____. The mere fact that an employee did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable.

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

Thomas A. Grennan and John W. Iliff of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

Dennis R. Riekenberg of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

PER CURIAM.

Plaintiff has appealed from an order of the Nebraska Workmen's Compensation Court on rehearing which dismissed his claim for benefits allegedly arising out of an accident on May 15, 1980, because of the running of the 2-year statute of limitations.

Plaintiff assigns as errors: (1) The holding that the claim was barred by the statute of limitations; (2) The failure to hold that payment of medical expenses by the defendant-employer's health insurance carrier did not constitute payment of workmen's compensation benefits; (3) The holding that plaintiff's injury was not latent and progressive; and (4) The

holding that defendant was not estopped to interpose the statute of limitations as an affirmative defense.

Plaintiff was the only witness to testify as to the accident. He claimed that on May 15, 1980, while employed by the Fremont Department of Utilities, he was shutting an overhead door in a building owned by the defendant when the door came off the rails and struck his lower leg. He was taken to Dodge County Memorial Hospital and eventually, that same day, was examined by a Dr. Dillow. Plaintiff was off work all day Friday, May 16, as well as Monday, May 19, and returned to light duty on the 20th. It is his contention that two of his supervisors, Irv Hoerath and Bob Realph, urged him to return to work on May 20. Both of them deny this.

According to the deposition of Dr. Dillow, the complaints by plaintiff and the medical treatment did not include the knee because the "injury in question according to these notes was well below the knee." Dr. Dillow examined plaintiff but one time, and a claim was filed for his services with the workmen's compensation insurance carrier.

Generally, plaintiff's reasoning for not having filed claims with the workmen's compensation carrier for time he was off work and, later, for medical expenses was because both Irv Hoerath and Bob Realph told him he had to be off work 7 days before he would be entitled to pay under workmen's compensation. Such statements were denied by both of them.

However, according to the plaintiff's testimony, from the day he returned to work on May 20, 1980, until the end of 1982, he said he thought he was not qualified for workmen's compensation benefits even though the defendant never denied the claim.

Plaintiff testified that his knee continued to bother him throughout the months following the accident, and particularly after a day's work it would get worse and would swell. He had problems with his knee from May of 1980 through November of 1982, when he first consulted with an orthopedic surgeon, Dr. Brantigan, on November 8, 1982.

According to a diary which plaintiff prepared from his employment records, exhibit 26, he was off work in excess of 20 days from May 15, 1980, to May 15, 1982, all because of his

knee. He either took sick leave or vacation time and did not make claim for workmen's compensation benefits. During this same period of time, he was consulting with a Dr. Eaton and a chiropractor, Dr. Beach, on innumerable occasions, complaining, among other things, about his knee. Specifically, he first consulted with Dr. Beach on March 15, 1982, with a history of having fallen on an icy porch some 8 weeks earlier, injuring his back and knee. On October 31, 1981, he was examined by Dr. Eaton because of a bruise on the left knee.

According to the original history recited in Dr. Brantigan's report of November 8, 1982, plaintiff had had four surgical procedures on this particular knee in 1978 and 1979, including a partial arthroscopic meniscectomy, an open medial meniscectomy, and a patellar shaving procedure. Significant is the physician's statement that plaintiff suffered an accident 1½ years earlier, causing extensive ecchymosis to the leg, but "does not think that this caused any damage to the knee itself."

Sometime the following summer, plaintiff wrote to Dr. Brantigan, advising him that he always did think his knee problem arose out of the accident, and Dr. Brantigan changed his report accordingly. Dr. Brantigan diagnosed plaintiff's problem as a probable cartilaginous loose body in the knee and did an arthroscopic examination which revealed a large tear in the lateral meniscus of the knee. It was his further diagnosis that plaintiff possessed an insufficiency of the anterior cruciate ligament that caused the knee joint to have rotary laxity, allowing the tear of the lateral meniscus to occur just prior to the time that plaintiff came to see Dr. Brantigan.

Following the bills for the initial treatment the day of the accident, all of the medical bills through August of 1983, totaling nearly $10,000, were turned in by the plaintiff on forms of the group health insurance carrier, on which he had indicated each time "not a work-related injury." He seems to justify this position on the original disputed statements of his superiors that he had to be off work more than 7 days to qualify for compensation benefits. In the same manner, and presumably for the same reason, when plaintiff would call in to report that he would not be at work, he would designate whether sick leave or vacation leave should apply.

The only "live" witness other than the plaintiff to testify was Jan Marie Rice, administrative secretary for the Fremont Department of Utilities. It was her testimony generally that the department would rely on the information provided by the employee as to whether to process an injury claim as workmen's compensation or health and accident.

In our review of this case we are guided by the principle that findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case, whether it be to enter an award or cause a dismissal of the claim, may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984).

As previously stated, the accident in question occurred on May 15, 1980. Plaintiff's petition was filed in the compensation court on November 7, 1983. The final payment made by the workmen's compensation carrier, Aetna Insurance Company, was made on June 15, 1980. All other payments for medical services were made by defendant's health insurance carrier.

Neb. Rev. Stat. § 48-137 (Reissue 1984) provides that all claims for workmen's compensation benefits shall be forever barred unless a petition shall have been filed within 2 years of the accident or 2 years of the last payment of compensation benefits.

Therefore, unless the payments for medical services made by the health insurance carrier can be considered as payments of compensation benefits, or unless the injury was latent and progressive so as to toll the running of the statute of limitations, this claim is barred because of not having been filed within 2 years of June 15, 1980.

Plaintiff admits, by way of argument, that this court has not directly addressed the issue of medical payments under a health and accident plan as constituting payment of compensation, but argues that several of our cases suggest such a result. One such case is *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N.W. 42 (1928). However, in that case the employer unquestionably made weekly compensation payments, but only

argued that they were for a different injury than that for which the employee was then claiming benefits. This court rejected that argument because "the district court evidently found to the contrary, and the evidence in the record supports that conclusion." *Id.* at 668, 222 N.W. at 45.

The employee next cites *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445, 225 N.W. 117 (1929). We do not understand that opinion to hold that payment of medical expenses by a health and accident insurer tolls the statute of limitations. Rather, we believe, in the context of that case, that the payments were made by the compensation carrier, and this court was saying for the first time that payments of medical and hospital expenses "clearly constitute payments of compensation within the meaning of [the compensation law]." *Id.* at 448, 225 N.W. at 119.

Also relied on by the plaintiff is *Gourley v. City of Grand Island*, 168 Neb. 538, 96 N.W.2d 309 (1959), which, citing *Baade v. Omaha Flour Mills Co., supra*, held that providing of sick leave and treatment by the city physician constituted payment of compensation. However, in *Gourley* this court said: "Plaintiff went to the mayor and notified him of his accident and was ordered to go to the city physician, which he did. He was given 'sick leave' of one day on an application blank which recited that his condition resulted from his employment by the city." 168 Neb. at 539, 96 N.W.2d at 311.

We have no quarrel with a rule which provides that payments for time off or for medical treatment made in lieu of compensation benefits for an undisputed job-related injury constitute payment of compensation. However, in the instant case, other than the self-serving statements of the plaintiff himself some 3 years after the alleged accident, there is no competent evidence that the knee injury was ever claimed to be work related.

We agree with plaintiff that in *Novak v. Triangle Steel Co.*, 197 Neb. 783, 251 N.W.2d 158 (1977), which held that a mistake of law does not excuse a late filing, this court said: "When he entered the hospital in December 1973, Novak knew he had suffered a disabling injury. He related that injury to the accident of October 23, 1973. He accepted benefits from his

employer's group health carrier for hospitalization and surgical care between December 31, 1973, and January 17, 1974." *Id.* at 787, 251 N.W.2d at 161. We are not sure the premise supports the conclusion. We do not agree with plaintiff that such statement recognizes that payment of health insurance benefits with nothing more constitutes payment of compensation.

Plaintiff cites cases from other jurisdictions. *Elsas v. Montgomery Elevator Co.*, 330 Mo. 596, 50 S.W.2d 130 (1932); *Matter of Gould v. Champeney & Turk, Inc.*, 249 A.D. 911, 292 N.Y.S. 530 (1937); *Pizza Hut of San Diego, Inc. v. Workers' Comp. Appeals Bd.*, 76 Cal. App. 3d 818, 143 Cal. Rptr. 131 (1978). However, in *Elsas* there is no indication that the insurance company paying benefits was the compensation carrier or a group health carrier. The case turned on the fact that the company adjuster testified he did not make the payment under the compensation law but, rather, as a common-law claim, to which the court answered that no one had ever told the employee the theory upon which the payments were made. In the present case it was Maxey who in effect determined the nature of the payments.

Gould does not disclose otherwise than that the insurance carrier making payments may have been the compensation carrier. All that case stands for is that payments of medical benefits and for wages lost due to an industrial accident constitute payments of compensation.

In *Pizza Hut* the court held that the employer had prompt notice of the *industrial* accident and permitted the employee to receive company-provided insurance benefits, stressing that the employer took no action which would have given the employee notice that it was not furnishing benefits for the industrial accident. Again, we point out that it was Maxey, not the employer, who designated the claim as medical and non-job-related and assigned vacation or sick benefits to compensate him for work missed.

Finally, plaintiff points to *Girlish v Acme Precision Products*, 404 Mich. 371, 273 N.W.2d 62 (1978). In a 4-to-3 decision, the Michigan court did hold that voluntary payment of medical expense by an employer's group health policy of insurance constitutes a waiver of the 6-month notice

requirement.

On the other hand, it is apparent that the Nebraska Legislature intended to maintain the separate and distinct nature of benefits payable under the compensation act and benefits payable under other plans, whether sponsored by employee associations or employers under group health plans, when it enacted Neb. Rev. Stat. §§ 48-130 and 48-147 (Reissue 1984).

The first section provides in pertinent part as follows: "[N]or shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided, be considered in fixing compensation under this act." § 48-130.

The Legislature further separated the benefits payable under the act from other benefits to which an employee might be entitled when it enacted the following provision:

> Nothing in this act shall affect any existing contract for employer's liability insurance, or affect the organization of any mutual or other insurance company, or any arrangement existing between employers and employees, providing for payment to such employees, their families, dependents or representatives, sick, accident or death benefits in addition to the compensation provided for by this act; *but liability for compensation under this act shall not be reduced or affected by any insurance of the injured employee*, or any contribution or other benefit whatsoever, due to or received by the person entitled to such compensation . . . .

(Emphasis supplied.) § 48-147.

The express language used by the Nebraska Legislature in the preceding sections clearly reveals benefits secured by an injured employee from collateral sources are not to be considered in fixing compensation under the Workmen's Compensation Act, nor are they to affect liability for compensation to the injured employee. Appellant has requested this court to act contrary to this express language by asking the court to find benefits paid by collateral sources are "compensation" sufficient to toll the statute of limitations of the act. Such a contravention of the act's clear and express provisions is impermissible even under the "liberal construction" sought by appellant.

This court previously upheld the separate and distinct nature of the Workmen's Compensation Act and other benefit plans in *Shandy v. City of Omaha*, 127 Neb. 406, 413, 255 N.W. 477, 480 (1934), when it held that "payment of pensions to firemen or their dependents under the laws relating to metropolitan cities in no way affects the claims of such persons under the workmen's compensation act or their right to recover under the provisions thereof."

Although perhaps not directly on point, *Teague v. City of Omaha*, 211 Neb. 872, 320 N.W.2d 779 (1982), specifically held that payments in lieu of workmen's compensation made under a disability pension plan did not toll the period of limitations, and the city was not estopped from asserting that as a defense.

Expanding somewhat on *Pizza Hut of San Diego, Inc. v. Workers' Comp. Appeals Bd.*, 76 Cal. App. 3d 818, 143 Cal Rptr. 131 (1978), a decision by the California Supreme Court, *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d 329, 562 P.2d 1037, 137 Cal. Rptr. 878 (1977), suggests the underlying purpose of the tolling provisions of the law is to prevent a potential claimant from being misled by the employer's voluntary acts which reasonably indicate an acceptance of responsibility for the employee's injury. Any misleading in this case, if such be the fact, was done by the employee in requesting sick leave and vacation rather than compensation benefits, and reciting in connection with claims for medical payments that the injury was not job related.

As previously pointed out, *Matter of Gould v. Champeney & Turk, Inc.*, 249 A.D. 911, 292 N.Y.S. 530 (1937), did not indicate whether the medical payments were paid by a group health or a compensation carrier. However, in *Matter of Iovino v. Western Elec. Co.*, 71 A.D.2d 717, 419 N.Y.S.2d 210 (1979), without going into great detail, the New York court held that payment of wages and medical insurance benefits under an employee benefit plan did not constitute advance payment of compensation.

Another case from that jurisdiction, *Matter of Kaszas v. Monticello Cent. School*, 53 A.D.2d 940, 385 N.Y.S.2d 420 (1976), setting forth a rule similar to that of California, held that furnishing of medical care to an employee under a group

health plan would be considered as advance payment of compensation only when made under such circumstances as to imply knowledge of recognition of liability for compensation benefits.

In *Deabay v. St. Regis Paper Co.*, 442 A.2d 963 (Me. 1982), that court held, in interpreting a particular statute of that state, that payments made by a group health insurer were not made pursuant to the workmen's compensation laws but as required by union contract.

Erwin v. Agrico Chemical Co. of Delaware, 422 So. 2d 1385 (La. App. 1982), involved a similar situation in which the employee filled out claim forms indicating that her injury was not work related. Although holding that such a statement would not bar a claim where the employee later becomes aware of the injury's relationship to a work-related accident and notifies the employer, the court went on to state at 1387:

> In this case, however, the causal relation between plaintiff's work and her injury is not at issue. Rather, it is plaintiff's understanding as to the character of the payments she received, *at the time she received them*, that is at issue here. Because plaintiff did not connect the injury with her work at the time she signed the forms, nor did she subsequently notify her employer of any suspected connection, we can only conclude that she could not at that time have reasonably believed that these payments were compensation for a work-related injury, i.e., workmen's compensation.
>
> In addition, the record reveals that the trial judge, after having viewed the evidence and heard the testimony of all the witnesses, stated in his oral reasons for judgment that he simply did not believe that plaintiff thought the long term disability payments were workmen's compensation benefits.

We hold that payment of wages or reimbursement of medical expense by an employer under an employee benefit plan or group health insurance agreement does not constitute remuneration in lieu of workmen's compensation benefits so as to toll the statute of limitations, unless, by the conduct of the employer, it may reasonably be inferred that such payments

were made with an intent that payment constitute compensation and a conscious recognition of liability for compensation benefits on the part of the employer. *Rhola v. Wonder Bread*, 639 P.2d 1242 (Okla. 1982). See, also, *Chemstrand Company v. Enfinger*, 231 So. 2d 816 (Fla. 1970), to the effect that voluntary payment of wages or medical benefits does not toll the statute of limitations unless the employer is aware or should be aware that it constitutes payment of compensation for the injury.

Where an injury is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the plaintiff-employee. *Ohnmacht v. Peter Kiewit Sons Co.*, 178 Neb. 741, 135 N.W.2d 237 (1965).

In his testimony plaintiff insists that his knee had bothered him on a weekly basis since the date of the accident and that he felt strongly that the accident was the cause of his difficulty. But he claims he did not know the full extent of his injury. However, knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls. *Seymour v. Journal-Star Printing Co.*, 174 Neb. 150, 116 N.W.2d 297 (1962).

Maxey cites *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981), and *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972), in support of his claim that his was a latent and progressive injury. However, as pointed out by this court in *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 708-09, 320 N.W.2d 111, 114 (1982):

> In both the *O'Connor* case and the *Borowski* case, and cases of similar import where we have applied the latent exception, the evidence disclosed that indeed the initial accident was either trifling in nature or appeared to be healed and subsequently the injury began to get progressively worse. Specifically, in *Borowski* the employee was advised by the treating physician that while he suffered damages to the muscles of his upper leg and

that it would be a slow healing process, he should not be alarmed and would fully recover. After a period of months the pain subsided. Thereafter, when the pain reoccurred, he consulted a physician on seven occasions and was assured that his condition was normal. It was not until sometime later that he was referred to an orthopedic surgeon who performed a myelogram and discovered the herniated disc caused by the initial injury.

Likewise, in *O'Connor* the employee was initially injured in September of 1965 while laying a sewer line in a ditch. He received compensation for this injury and continued thereafter working. It was not until October of 1977, when operating a cigarette machine, that the employee's left arm went completely dead. From the time of the accident until the original award, plaintiff was examined or treated by five different doctors—a general practitioner, three orthopedic surgeons, and a neurologist—none of whom diagnosed his subsequent condition. He repeatedly consulted his personal physician and periodically received ultrasonic treatments and physiotherapy. He was advised by a treating physician: "It's all in your head. Go see a psychiatrist." It was not until the incident resulting in the complete disability of his left arm that the worker's condition was fully diagnosed following the administration of a myelogram.

We went on to say, in substance, that the mere fact that an employee did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable.

Plaintiff claims he knew he was suffering from some disability, as witnessed by the many days off, but never once made claim for compensation even though by his own admission he knew he was eligible for payment after 7 days. Certainly he was aware of the need for medical treatment, which he sought, yet he never did claim to be entitled to compensation benefits for the particular injury.

As stated further in *Thomas, supra* at 710, 320 N.W.2d at 115: "Both the one-judge court and, again, the three-judge court found that the injury was not latent or progressive and

therefore not within the 'latent exception' to the statute of limitations. We are unable to say that the evidence does not amply support that conclusion."

Maxey's final contention, that the defendant-employer is estopped from asserting the statute of limitations defense because of false representations or concealment of material facts, may be disposed of on two grounds. First, the claimed representation by the employer that plaintiff was not entitled to compensation until he was off work for 7 days is entirely accurate. Secondly, that representation, and certainly plaintiff's claim that he was told to cover up the fact that his injury was work related, was denied by all involved. This was a purely factual question which was resolved by the compensation court, which resolution finds support in the record and will not be disturbed on appeal.

The judgment of the compensation court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY K. TRIMBLE, APPELLANT.

371 N.W.2d 302

Filed August 2, 1985. No. 84-777.

1. **Verdicts: Appeal and Error.** This court on appeal will reverse a verdict of guilty based on evidence whenever it is so lacking in probative force that the court can say as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt.
2. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
3. **Circumstantial Evidence: Proof.** The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
4. **Criminal Law: Evidence.** Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. The proper rule is

that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed.

James R. Wefso, for appellant.

A. Eugene Crump, Deputy Attorney General, and Lynne R. Fritz, for appellee.

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

WHITE, J.

The defendant was convicted in the district court for Sheridan County on August 14, 1984, of theft and second degree arson. He was sentenced to 2 years' imprisonment for theft and 8 years 9 months' imprisonment for second degree arson. The defendant has appealed to this court, assigning nine errors. We consider only the claim as to the insufficiency of the evidence. We reverse.

On May 17, 1983, Hinn's Restaurant in Gordon, Nebraska, was damaged by fire and smoke. After the fire was controlled, employees of the restaurant entered the building with a local police officer and firefighters and discovered that the previous night's receipts, estimated at $390, were missing. Also, a cash till box usually containing $50-$60 was empty.

Gerald Larson, deputy state fire marshal, investigated and concluded that the fire started on top of the grill. Eggs, egg cartons, flour, and grease had been dumped on the grill, and the grill had been turned on. The deep-fat fryers had also been turned on, but the circuit breaker required to turn on the deep-fat fryers was still in the off position and the fryers did not heat.

Michael Streeter, a Nebraska State Patrol investigator, testified that the southeast takeout door was found open by the firemen. Investigator Streeter searched the basement and found three matches and three cigarette butts. They appeared to be Marlboro 100's, and the butts were not crushed. The cigarettes

were put out by mashing the lit end against a water heater. Trimble scraped the fire off his cigarettes in the same manner. Streeter testified that when he first observed the cigarette butts, they were dry and appeared fresh. By the time he returned to the basement, water had drained into the basement and the cigarette butts had become damp. The cigarette butts were sent to the State Patrol Criminalistics Laboratory, which identified blood group substance A in the saliva from the cigarette butts. Saliva samples from Trimble and Marty Hugen were obtained, and the laboratory determined that blood group substance A was identified from the saliva of Trimble. No blood group substance was identified from the saliva sample taken from Hugen. Saliva samples were not taken from any other employees, although all of the employees who worked the afternoon to closing shift on the day of the fire smoked cigarettes. Hugen testified that other employees had occasionally smoked in the basement. Trimble smoked two to three packs a day and usually smoked when he was away from the grill. Several of the employees also smoked Marlboro 100's, and they frequently borrowed cigarettes from each other.

At 1:30 a.m. on the night of the fire, police officers went to Trimble's home. They informed him of his constitutional rights, and he agreed to speak with them. The police found no flour, grease, or eggs on the clothing that Trimble had been wearing, and Trimble appeared as if he had just been awakened. The officers did not inspect Trimble's shoes, search the pockets of his clothing, or look for a carryout box, although one officer admitted that he had been told previously that Trimble had ordered a takeout dinner.

The defendant began working at the restaurant in January of 1983. On the night of the fire Trimble was called in by the assistant manager because the scheduled cook, Marty Hugen, did not report for work as scheduled. Hugen came in later, and Trimble departed after waiting a short while to make sure that Hugen would stay. At 7:45 p.m. Trimble returned to the restaurant and ordered a takeout dinner. While waiting for his dinner, Trimble drank two beers, checked recipes for his next shift, and went down to the basement to get some hamburger for the next day. Trimble normally worked the morning shift.

After getting his takeout dinner, Trimble testified, he went home, ate dinner, and went to bed. The other employees working that night testified that they did not see Trimble leave the restaurant. However, the employees were busy, as one employee, the waitress, did not show up that night. The assistant manager was performing the waitress duties along with her normal duties as cashier and assistant manager. The other two employees, Sherry Swallow, the dishwasher, and Marty Hugen, the cook, worked in the kitchen. Neither Investigator Streeter nor the fire marshal found the box from the takeout dinner in the basement. Later, when questioned in his residence, Trimble pointed out to Streeter the box in his trash can.

On May 7, 1983, Trimble pled guilty to a misdemeanor theft charge involving the theft of money from Shirley Wiles' wallet. He was granted work release during the time he served a county jail sentence and continued to work at the restaurant. Trimble was still paying restitution to Wiles when the fire occurred.

Hugen and Wiles both testified that Wiles had previously loaned the restaurant keys to other employees. Additionally, there had been several occasions when employees had come to the restaurant to open for business and found doors unlocked. Shirley Wiles testified that she had noticed a bitter attitude on the part of an employee named Sheryl Buresh. Buresh had a workmen's compensation claim against the restaurant that resulted in litigation. There was also testimony of disputes Wiles had with both present and former employees.

Trimble continued to work for the restaurant in the cleanup operation after the fire, at a reduced wage. Trimble could not meet his financial obligations on this wage and was served an eviction notice by his landlord. Trimble contacted ABC Employment Agency in Colorado, and they promised him a job if he came to Colorado. The end of June 1983, Trimble had his utilities disconnected and sold some belongings. He departed Gordon for Colorado on July 4, 1983, and notified his mother and niece of his indefinite plans. Trimble obtained employment as a cook at the Old Plantation restaurant in Estes Park, Colorado.

This court on appeal will reverse a verdict of guilty based on

evidence whenever it is so lacking in probative force that the court can say as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt. *State v. Hai Dang, ante* p. 120, 368 N.W.2d 486 (1985).

One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). We have said that a conviction may rest solely on circumstantial evidence. *State v. Evans*, 214 Neb. 432, 334 N.W.2d 5 (1983). However, mere suspicion or speculation is not sufficient to sustain a conviction.

> "To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. . . . Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused." . . . "[A] conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained."

State v. Klutts, 204 Neb. 616, 619, 284 N.W.2d 415, 418 (1979).

The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. *State v. Costanzo*, 203 Neb. 586, 279 N.W.2d 404 (1979).

In this case the circumstantial evidence does not meet the test of sufficiency. There was nothing particularly unusual about Trimble's actions prior to or after the fire. In the course of his employment he was required to go to the basement for supplies.

He was a heavy smoker, and it would not have been unusual for him to smoke in the basement. We do not see how the finding of Trimble's cigarette butts in the basement links him to the cause of the fire. The fact that he was in the restaurant the night of the fire does not point to guilt. He was initially called in to cook by his employer.

The fact that Trimble left Gordon on July 4, 1983, does nothing to establish his guilt.

> Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. . . . [T]he proper rule [is] that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

State v. Lincoln, 183 Neb. 770, 772, 164 N.W.2d 470, 472 (1969). After the fire Trimble worked at reduced wages for Hinn's Restaurant in the cleanup operation. The amount he was earning was not sufficient to make his rent payments, and he was served a notice of eviction. He departed Gordon about a month and a half after the fire, in search of employment. This departure, together with the other facts, does not, as a matter of law, constitute "flight" or infer guilt.

In this case all the evidence taken together is so lacking in probative force that we determine as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.

REVERSED.

FIRST DATA RESOURCES, INC., APPELLEE AND CROSS-APPELLEE, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, BESTELLE COOPER, APPELLEE AND CROSS-APPELLANT.

371 N.W.2d 306

Filed August 2, 1985. No. 84-804.

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

Paul D. Kratz, for appellant.

Daniel W. Ryberg, for appellee Cooper.

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

PER CURIAM.

After her dismissal from employment by First Data Resources, Inc., Bestelle Cooper sought unemployment compensation benefits pursuant to the Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984). A claims deputy for the Department of Labor awarded Cooper benefits. First Data appealed to the Nebraska Appeal Tribunal, which, after a hearing, affirmed the deputy's decision. First Data next appealed to the district court for Douglas County and named as defendants Ronald Sorensen, Commissioner of Labor, and Cooper.

When she attempted to personally file her answer in the district court proceedings, Cooper was informed she "needed a lawyer" and sought assistance from Legal Aid Society. As reflected on its "INTAKE REVIEW FORM" dated April 18, 1984, Legal Aid was aware that Cooper had "already missed the Answer date, which was April 16." The only income for Cooper and her children was the weekly payment of unemployment compensation in the amount of $120. Although Legal Aid determined "we should accept" Cooper's case, the record does not disclose that Legal Aid undertook any representation of Cooper. Meanwhile, Cooper was interviewed by Legal Services/Lawyer Referral of the Nebraska State Bar Association which found Cooper to be "eligible for pro bono

assistance and in need of legal counsel," and on May 3 referred Cooper's case to Daniel Ryberg, an attorney engaged in the private practice of law.

The commissioner and Cooper each filed an answer to First Data's petition and alleged the Nebraska Appeal Tribunal's decision should be affirmed. The district court affirmed the tribunal's decision.

After Cooper prevailed on her claim for unemployment compensation, Cooper's attorney sent the Commissioner of Labor a letter requesting that an attorney fee in the amount of $420 be paid from the Employment Security Administration Fund pursuant to § 48-646, which provides:

> No individual claiming benefits shall be charged fees of any kind in any proceeding under sections 48-601 to 48-668 except as provided herein. Any individual claiming benefits in any proceeding before the commissioner or an appeal tribunal or his, her, or its representative may be represented by counsel, any other duly authorized agent, or a person of his or her choice. Any individual claiming benefits in any proceeding before a court may be represented by counsel. Such counsel may either charge or receive for such services a reasonable fee to be approved by the commissioner. *The commissioner may, in special cases, pay such fee from the Employment Security Administration Fund.* Any person who violates any provision of this section shall be guilty of a Class II misdemeanor.

(Emphasis supplied.)

Although he had not adopted any rule or regulation pertaining to "special cases" as used in § 48-646, the commissioner denied Cooper's request for an attorney fee paid from the Employment Security Administration Fund. In a letter informing Cooper's attorney about denial of the fee as requested, general counsel for the commissioner stated:

> Section 48-646 of the Nebraska Revised Statutes provides that the Commissioner may, in special cases, pay such fees from the Employment Security Administration Fund. These "special cases" have generally been defined to be situations where (1) an individual has a legal problem

requiring the services of an attorney, (2) the individual is indigent and unable to afford an attorney, and (3) the individual is unable to obtain the services of a Legal Aid Society.

The instant matter does not fall within the criteria established for "special cases". Furthermore, it is the Commissioner's interpretation that the above referenced statute is not applicable to representation before the Nebraska Appeal Tribunal. Therefore, the Commissioner is unable to approve the payment of legal fees from the Employment Security Administration Fund. However, the amount is reasonable and is hereby approved by the Commissioner.

After the commissioner denied the requested attorney fee, Cooper's attorney filed a motion in district court and alleged that the commissioner's denial was arbitrary and capricious and requested an order compelling the commissioner to pay the requested fee. Cooper's attorney also requested an additional attorney fee as a result of efforts on the motion for attorney fees and based such claim for an additional fee on Neb. Rev. Stat. § 25-1803 (Cum. Supp. 1984):

(1) Unless otherwise provided by law, the court having jurisdiction over a civil action brought by the state or an action for judicial review brought against the state pursuant to sections 84-917 to 84-919 shall award fees and other expenses to the prevailing party unless the prevailing party is the state, except that the court shall not award fees and expenses if it finds that the position of the state was substantially justified.

The district court found that the commissioner's denial of an attorney fee was arbitrary and capricious, ordered the commissioner to pay $420 as a fee for Cooper's attorney, but denied any additional attorney fee based on § 25-1803.

The commissioner has appealed and contends (1) denial of an attorney fee under § 48-646 is totally discretionary with the commissioner and, therefore, not subject to judicial review and (2) if the matter of an attorney fee is judicially reviewable, the commissioner's decision was not arbitrary and capricious. In his appeal the commissioner concedes that Cooper is an

indigent with a problem requiring legal assistance. Cooper has cross-appealed from the disallowance of an attorney fee under § 25-1803.

Regarding the commissioner's contention that there can be no judicial review of his refusal to pay the requested attorney fee, we must disagree. Section 48-646 clearly envisions proceedings before a district court, as in Cooper's case. Cooper's claim for benefits and her employer's appeal for judicial review provided a justiciable issue to be resolved in the district court. In resolving the question concerning Cooper's right to unemployment compensation, the district court also acquired jurisdiction to review all aspects of Cooper's claim, including the ancillary award of an attorney fee authorized by § 48-646. Therefore, the commissioner's refusal to pay an attorney fee authorized by statute is a matter for judicial review.

Section 48-646 provides no assistance to determine the meaning of "special cases." Although authorized to adopt and promulgate rules and regulations which might identify "special cases" (see § 48-606), the commissioner has declined or neglected to adopt any rule or regulation applicable to the allowance of an attorney fee under § 48-646. Consequently, it becomes the duty of this court to ascertain the meaning of "special cases" for the purpose of § 48-646.

The present case is analogous to *Lambert v. Nebraska Cr. Vict. Rep. Bd.*, 214 Neb. 817, 336 N.W.2d 320 (1983), where this court was asked to construe the phrase "pecuniary loss" used in the Nebraska Crime Victim's Reparations Act, Neb. Rev. Stat. §§ 81-1801 et seq. (Reissue 1981). Neither the Nebraska Crime Victim's Reparations Act examined in *Lambert* nor the rules and regulations of the board charged with administration of the act contained a definition or guidelines for determination of a "pecuniary loss" compensable under the act. In the absence of a definition provided by statute or rules and regulations pertaining to the Nebraska Crime Victim's Reparations Act, this court construed the phrase "pecuniary loss" to have the same meaning under the act as was applicable and used in conjunction with wrongful death actions.

The word *special* means "unusual; uncommon; exceptional; extraordinary." See Webster's New Universal Unabridged Dictionary 1741 (2d ed. 1983).

The case before this court involves the claim of an indigent who, unrepresented by an attorney, became entangled in litigation contesting her right to unemployment compensation—her only source of income—and who faced imminent default in pending proceedings determinative of her right to compensation. Under the circumstances such situation can be fairly characterized as unusual, uncommon, exceptional, or extraordinary. It was fortunate for Cooper, an indigent, that she was able to obtain effective counsel who undertook representation without a demand for a fee, a commendable gesture in keeping with the finest tradition of the legal profession. We conclude, therefore, that Cooper's claim was a special case and that denial of an attorney fee paid from the Employment Security Administration Fund under the circumstances was contrary to the letter and intent of the statute and was arbitrary and capricious. The district court correctly ordered the commissioner to pay an attorney fee from the Employment Security Administration Fund.

Regarding Cooper's cross-appeal, the court correctly refused to order a fee under the provisions of § 25-1803. The commissioner did not commence the action, nor was the appeal in the district court for review of a decision of an administrative agency pursuant to Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981 & Cum. Supp. 1984).

AFFIRMED.

IRENE L. GIBB, APPELLEE, V. DANIEL DEAN GIBB, APPELLANT.
371 N.W.2d 128

Filed August 2, 1985. No. 84-844.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Vincent Valentino and Kenneth R. Lang of Angle, Murphy, Lang & Valentino, P.C., for appellant.

James L. Haszard of Zimmerman & Haszard, for appellee.

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

PER CURIAM.

Following a hearing on appellee's application for modification of a decree of dissolution of marriage, the district court entered an order dismissing a citation for contempt, changed custody of the parties' minor child from the appellant to the appellee, and ordered the appellant to pay $200 per month child support.

We have reviewed the record in this case de novo and determine that the judgment of the district court was not in error. The judgment is affirmed.

AFFIRMED.

LYNN WILLIAM METTENBRINK, APPELLANT, V. BILLIE JO METTENBRINK, APPELLEE.

371 N.W.2d 310

Filed August 2, 1985. No. 84-861.

1. **Modification of Decree: Child Custody: Appeal and Error.** 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.
2. **Modification of Decree: Child Custody.** In a modification order to determine who should have custody of the children, the paramount concern is the best interests of the children.
3. _____: _____. 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.
4. **Child Custody: Words and Phrases.** The best interests of the child include, but are not limited to, the general health, welfare, and social behavior of the child. Neb. Rev. Stat. § 42-364(1)(c) (Reissue 1984).

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

William E. Naviaux and J. Patrick Green, for appellant.

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

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

WHITE, J.

This is an appeal by the petitioner below, Lynn W. Mettenbrink, from an order of the district court for Hall County denying his application to modify a decree of dissolution and give him primary custody of the child, Trent William Mettenbrink. We affirm the district court's decision.

On June 23, 1981, the district court for Hall County entered a decree dissolving the marriage of Lynn W. Mettenbrink and Billie Jo Mettenbrink. During their marriage, the parties had one child, Trent, born November 19, 1977. In its decree dissolving the marriage, the district court found that both the mother and father were "fit and proper persons to have custody of the minor child of the parties." Accordingly, the court, pursuant to an agreement entered into by the parties, divided custody of the child between the parties as follows:

> Custody of the minor child of the parties, Trent William Mettenbrink, is awarded to Petitioner during the months of June, July and August of each year with Respondent to have visitation one day a week and also from Friday evening through Sunday evening on the second and fourth week-ends of each month during such period, and to the Respondent during the months of September through May of each year with Petitioner to have the right of visitation with said child one day each week and also from Friday evening through Sunday evening on the first and third week-ends of each month during said period. In addition, the parties may by mutual agreement arrange for such other visitation as may be reasonable under the circumstances.

The agreement reached by the parties and approved by the

court was satisfactory until the fall of 1983. At that time Trent started attending kindergarten. The parties agreed that it would be in the best interests of the child to end weeknight visitations with his father in favor of visitation on every weekend.

On February 13, 1984, dissatisfied with the divided custody arrangement, the father petitioned the district court to modify the decree of dissolution, alleging that circumstances had materially changed since the decree was entered and that it would be in the best interests of the child to have physical custody transferred to him.

A hearing on the matter was held on April 4 and continued until April 19. Before the latter date the court was notified that the parties had apparently reached another agreement concerning the child's custody; however, in August of 1984 both parties' counsel requested that the matter be allowed to proceed. On September 6, after 2 days of testimony, the district court entered its order finding no change in circumstances but modifying its earlier decree by reducing the father's 3-month summer custody of the child to 1 month of summer visitation, and ordered that custody of the child remain with the mother, subject to every other weekend visitation with the father.

In light of the court's earlier order awarding the respective parties "divided custody" of the child, we find its present order to be inconsistent. Regardless of this finding, however, as in any action seeking modification of a trial court's order as to custody of a child,

> this 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. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, but we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.

Walton v. Walton, ante p. 625, 625-26, 371 N.W.2d 292, 293 (1985); *Boll v. Boll,* 219 Neb. 486, 363 N.W.2d 542 (1985). Further, in cases involving custody disputes, our paramount concern, as well as that of the parties, should be and is the best

interests of the child. *Boll, supra.*

As a general rule, 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. *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982). The best interests of the child include, but are not limited to, the general health, welfare, and social behavior of the child. Neb. Rev. Stat. § 42-364(1)(c) (Reissue 1984).

Our de novo review of the record reveals that there has been a change of circumstances in this case, primarily concerning the future welfare and present social behavior of the child.

Since the Mettenbrinks were divorced, Trent has at various times been subject to the control of several different adults. Following their divorce, both his mother and father heavily relied on extended family for additional support and care of Trent. Both parties have since remarried, leaving Trent at times also under the control of his new stepmother and stepfather, not to mention aunts, uncles, and babysitters.

In the spring of 1983 Trent began to evidence some behavior problems, e.g., temper tantrums and exhibiting belligerent, uncooperative, and argumentative conduct. Concerned about his child's behavior and the effects the split custody arrangement was having on Trent, Lynn Mettenbrink consulted with a child psychologist, Dr. Michael O'Neill.

At the hearing Dr. O'Neill testified that Trent is a child who exists on two different levels. Trent was described not only by Dr. O'Neill but by several other witnesses as a charming, bright, and attractive child. However, Dr. O'Neill testified that socially and emotionally Trent has the potential of developing severe problems, so much so that Dr. O'Neill described the child as a "sociopath in training." Trent, as the doctor testified,

> has superficial kinds of attachments with many, many people, but no genuine sense of allegiance to anyone except himself.
>
> He spends a great deal of his time protecting himself, watching out for what's coming. He's learned to play the system that he's been put into very well, very effectively,

> but guards himself real carefully. Emotionally, is not about to invest . . . too much of himself in any person or any thing.

The doctor further testified that such behavior was not uncommon in a child who has been shifted about from place to place and person to person. Although the child senses love from each of the adults in his life, "he's very, very careful . . . not to do or say anything that will antagonize any of those people in his life. He's a master at pleasing people."

After testing the child and observing his behavior, Dr. O'Neill recommended to Mr. Mettenbrink that Trent's life be made as normal and regular as possible and that the child be allowed to put down roots. Trent's father tried to carry out Dr. O'Neill's suggestions but never informed Trent's mother of his consultation or the child's problems.

We believe that the divided custody arrangement in this case is a major factor in the child's emotional problems. These problems have thus created a change in circumstances which demand that the decree be modified. We are therefore left, as the district court was, with the difficult task of choosing which of two fit and proper parents should be given primary custody of the child.

At the hearing, witnesses for both parties testified that the mother and father are equally qualified as parents. Regarding the mother, the record shows that after the divorce she went through a period of adjustment. She moved several times, between family members, and changed employment at least three times. She also returned to school to begin a nursing career, which has been postponed indefinitely pending the outcome of this dispute. She also actively participated in and enjoyed several sports. The mother remarried May 19, 1984. She and her new husband currently reside in the husband's house in the city of Grand Island.

The father is a farmer engaged in a family farming operation north of Grand Island. He remarried on May 25, 1984. His wife is also previously divorced, with two children. Trent appears to have developed a very close relationship with his stepsiblings. Trent's father wishes to have his child grow up in a rural environment, as he did, and to pass along the family farm to

him. The father and his new family now reside in an older farmhouse left to the father by a family member.

The parents thus offer the child two different lifestyles, one based in the city and the other in the country. Our choice of one parent or the other is not to be seen as an endorsement or preference for either way of life. Neither has any preference been given to either parent on the basis of the sex of the parent. *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981).

In our judgment the best interests of the child dictate that he be left in the custody of the mother, with reasonable rights of visitation in the father, as ordered by the district court. Although the record does show that following the divorce the mother's lifestyle was somewhat erratic, it does not indicate to us severe signs of instability as petitioner-appellant would have us believe. Our decision is based primarily on the child's need to be allowed to place some roots. The father admirably provided a very healthy, happy environment for his child during the summer of 1984, in which he had custody. However, since that time, following the court's modification of custody, the child has been in the primary care of the mother. Therefore, we do not feel that it would be in Trent's best interest to uproot him again and return him to his father. The child needs a sense of security and an understanding of the word "home."

We agree with the district court's provisions for visitation and its recommendation that the parents cooperate in any further psychological therapy the child may need to ensure his healthy growth.

AFFIRMED.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RICHARD H. JACKSON, APPELLANT.
371 N.W.2d 679

Filed August 2, 1985. No. 84-949.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Remanded for further proceedings.

Donald B. Fiedler and Deborah R. Pred of Fiedler Law Offices, for appellant.

Robert M. Spire, Attorney General, and Calvin D. Hansen, for appellee.

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

SHANAHAN, J.

Richard H. Jackson appeals his conviction of operating a motor vehicle while under the influence of alcoholic liquor, second offense, in violation of Neb. Rev. Stat. § 39-669.07(2) (Reissue 1984), following his plea of no contest to the charge in the Sarpy County Court. The county court sentenced Jackson to 30 days in jail, imposed a fine of $500, and suspended Jackson's driving privileges for 1 year.

Jackson was initially charged with one count of "driving while intoxicated," second offense, and one count of refusal to submit to a chemical blood, breath, or urine test required by Neb. Rev. Stat. § 39-669.08(4) (Reissue 1984). On October 3, 1983, Jackson entered a plea of not guilty to both charges. On May 8, 1984, pursuant to a plea bargain, the State dismissed the charge alleging Jackson's refusal to submit to a chemical test, and Jackson entered his plea of no contest to the charge of driving while intoxicated, second offense. When the judge accepted Jackson's plea, the following colloquy occurred:

> THE COURT: You wish to plead "no contest" to driving while intoxicated. Is that correct?
>
> MR. JACKSON: Yes, sir.
>
> THE COURT: And do you understand that a plea of "no contest" is treated the same as a plea of "guilty" for purposes of sentencing?

MR. JACKSON: Yes, Your Honor.

THE COURT: Do you also understand that by pleading "no contest" it's treated the same as a plea of "guilty" in that you waive your constitutional rights including your right to a jury trial, your right to confront the witnesses that would testify against you and your privilege against compulsory self-incrimination?

MR. JACKSON: Yes, Your Honor.

The transcript in Jackson's case includes a document entitled "COURT RECORD" as follows:

Arraignment held 5/8/84 (date) Re-arraigned _____ (date)

Original/Amended Complaint _____

Defendant present JLC. Defense Counsel Debra Pred

State's Counsel Wm. MacKenzie

Constitutional rights explained JLC.

Understands rights JLC. Explanation waived ____

Understands Guilty/No Contest plea waives right to counsel, public/jury trial, right to confront/cross-examine/subpoena witnesses, testify, privilege against self-incrimination, presumption of innocence, burden of proof JLC.

Plea bargain: Plead to (1) and dismiss (2)

Elements of offense explained _____

Understands elements _____

Penalty explained	JLC.	Understands penalty	JLC.
Jail waived			
Plea entered	Oct. 3, 1983 (date)	Counts: Guilty	
No Contest		Not Guilty	1, 2 yes
Plea changed	5/8/84 (date)	Counts: Guilty	
No Contest	JLC. (1)	Not Guilty	

The verbatim transcription of Jackson's arraignment and the court's acceptance of Jackson's plea does not show that Jackson was informed of the permissible penalty which could be imposed after Jackson's conviction of the offense charged. After accepting Jackson's plea the court set a date for an enhancement hearing. At the enhancement hearing the court found that Jackson had a previous valid conviction for driving while intoxicated and sentenced Jackson. Jackson appealed to

the district court, which affirmed Jackson's conviction and sentence in the county court.

On appeal to this court Jackson argues that his plea was not voluntarily and intelligently made because the county court, before accepting Jackson's plea, failed to inform Jackson concerning the minimum and maximum penalties possible upon conviction. Jackson also argues that his sentence is excessive.

In *State v. Turner*, 186 Neb. 424, 425, 183 N.W.2d 763, 765 (1971), we stated that "a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily." We went on in *Turner* to state: "Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea." *Id.* at 425-26, 183 N.W.2d at 765. See, also, *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985); *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984).

Regarding the verity attributable to a checklist used for enhancement purposes, we held in *State v. Ziemba*, 216 Neb. 612, 628, 346 N.W.2d 208, 218 (1984),

> that a verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid. A checklist or other docket entry which is sufficiently complete to comply with the requirements . . . previously set out in this opinion can establish a valid waiver. A checklist or other such docket entry which is made by one authorized to make it imports verity, *and unless contradicted it stands as a true record of the event.*

(Emphasis supplied.)

In Jackson's direct appeal of his conviction, it is true that the transcript contains a checklist similar to that approved by this court in *State v. Ziemba, supra*. The checklist in this case indicates that Jackson was informed of and understood the possible penalties as a consequence of his conviction. However, the verbatim transcription of proceedings before the county court, contained in the bill of exceptions, is also before us and

contradicts the checklist completed by the county court. The verbatim transcript does not show that the county court informed Jackson about the possible penalties for his conviction of the offense charged. In this case the checklist was a synopsis or summary of the proceedings before the county court, while the verbatim transcript is more complete and a much more accurate account of what actually occurred at the entry of Jackson's plea. We therefore conclude, upon a reading of the entire record before us, the county court failed to inform Jackson concerning the possible penalty which might be imposed upon conviction of the offense charged. This leaves the question whether Jackson knew the possible penalty for the offense in question at the time he entered his plea.

In cases where we have found the defendant has not been informed of possible penalties upon conviction, we have followed the procedures set out in *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979).

> We therefore remand this case to the sentencing court. In such court, defendant is granted the right to apply to that court for leave to withdraw his plea of guilty. Should defendant fail to exercise that right to seek withdrawal of his plea within 10 days of the issuance of the mandate in this case, then the sentence heretofore entered by the sentencing court shall stand.
>
> If the defendant elects to withdraw his plea, the trial court shall hold an evidentiary hearing to determine whether the defendant was, in fact, aware of the possible penalties for the offense in question at the time he entered his plea. If the court finds that defendant was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and he shall be permitted to plead again. If the court determines that defendant was aware of the penalties and consequences of the plea, the judgment and sentence stand.

State v. Fischer, supra at 679, 357 N.W.2d at 478.

Since Jackson's sentence may stand if he fails to apply for leave to withdraw his plea of no contest, we must also dispose of Jackson's claim of excessive sentence, namely, Jackson's claim that the county court should have placed him on probation. A

conviction of operating a motor vehicle under the influence of alcoholic liquor, second offense, is a Class W misdemeanor. Conviction of a Class W misdemeanor authorizes punishment by a mandatory 30-day jail sentence, a fine of $500, and suspension of driving privileges for 1 year. In the alternative, there may be a sentence of probation, including prohibition of driving for 6 months and confinement in jail for 48 hours. See Neb. Rev. Stat. §§ 28-106 (Cum. Supp. 1984) and 39-669.07(2).

The presentence report regarding Jackson reflects that before the present prosecution Jackson had been arrested three times for driving while intoxicated. In 1980 Jackson was sentenced to 6 months' probation "for his second arrest for Driving While Intoxicated." Also, Jackson's license was previously revoked for Jackson's failure to submit to a chemical test under the implied consent law of Nebraska. Additionally, Jackson has been arrested for leaving the scene of an accident, driving under suspension, disorderly conduct, and speeding. The presentence report indicates many of these offenses may have been related to alcohol abuse.

An order denying probation and a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. *State v. Wood, ante* p. 388, 370 N.W.2d 133 (1985). There is no abuse of discretion in the sentence imposed on Jackson.

This cause is remanded to the district court, which shall return the case to the county court for proceedings in conformity with this opinion.

REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. JAMES BATTERSHAW, APPELLANT.
371 N.W.2d 313

Filed August 2, 1985. No. 84-956.

Appeal from the District Court for Cherry County: EDWARD E. HANNON, Judge. Affirmed.

Rodney J. Palmer of Palmer & Kozisek, for appellant.

Robert M. Spire, Attorney General, and Timothy E. Divis, for appellee.

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

SHANAHAN, J.

James Battershaw appeals his conviction and sentence for sexual assault on a child of 14 years of age or younger in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 1984), after his guilty plea to the charge in the district court for Cherry County. The district court sentenced Battershaw to a term of imprisonment not less than 1 1/2 nor more than 2 1/2 years. We affirm.

Initially, Battershaw was charged with first degree sexual assault (sexual penetration) of a victim under the age of 16 years in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979), a Class II felony, punishable by imprisonment for a minimum term of 1 year and a maximum term of 50 years. See Neb. Rev. Stat. § 28-105 (Reissue 1979). The original information alleged the sexual assault occurred on July 7, 1984. Pursuant to a plea bargain, an amended information was filed, charging Battershaw with sexual assault (sexual contact) with the victim in violation of § 28-320.01, which became effective on July 10, 1984. Violation of § 28-320.01 is a Class IV felony, punishable by a maximum term of imprisonment for 5 years, a fine of $10,000, or by both such imprisonment and fine. See § 28-105. The amended information alleged that Battershaw's sexual contact with the victim occurred on July 10, 1984. On October 18 Battershaw entered a guilty plea to the amended information. Before accepting Battershaw's guilty plea the

district court explained that if the sexual assault took place before July 10, 1984, Battershaw was not guilty of violating § 28-320.01 in view of the effective date of the statute. In response to the court's explanation, Battershaw admitted he sexually assaulted the victim at Battershaw's house on July 10, 1984. Furthermore, the State informed the court that the police investigation revealed the last sexual contact between Battershaw and the victim occurred between July 10 and July 19, 1984. After accepting Battershaw's guilty plea the court ordered a presentence investigation and an evaluation to determine whether Battershaw was a mentally disordered sex offender. See Neb. Rev. Stat. §§ 29-2911 et seq. (Reissue 1979). Battershaw and the State agreed that the court select and appoint the persons to conduct the evaluation. The court appointed a psychiatrist and a clinical psychologist. In its order for the evaluation, the court stated that the examiners "are qualified to conduct the examination and have agreed to do so, and that said persons are hereby appointed to conduct the examination provided under Section 29-2913 and to report to the Court when their examination is completed."

On December 20, after completion of the presentence report and evaluations ordered by the court, Battershaw appeared before the district court for sentencing. Before imposing sentence the court specifically asked Battershaw and his attorney if they had reviewed the presentence report. Battershaw acknowledged review of the presentence report with his attorney and declined any corrections or additions to the presentence report submitted to the court. The presentence report contained written evaluations by the psychiatrist and clinical psychologist appointed by the court. These evaluations recited that Battershaw was not a mentally disordered sex offender. The presentence report also contained a "victim impact statement" in which the victim expressed a desire that Battershaw be imprisoned. At the sentencing hearing and in addition to the presentence report, the State separately offered the written evaluations by the psychiatrist and clinical psychologist. Battershaw did not object to the court's receiving or using the evaluations. The court then sentenced Battershaw. The next day, December 21, Battershaw filed a notice of appeal

to this court in accordance with Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1984) and deposited the docket fee required for such appeal.

One week after filing his notice of appeal to the Supreme Court, Battershaw filed a motion for new trial in the district court. The district court ruled it was without jurisdiction to hear the motion and held that the Nebraska Supreme Court had sole jurisdiction of the matter.

On appeal to this court Battershaw assigns numerous errors which we find to be meritless.

First, Battershaw argues the trial court incorrectly held it lacked jurisdiction to hear the motion for new trial. This court has held that the district court is divested of jurisdiction over a particular case when an appeal of the case is perfected to the Supreme Court. *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976). Therefore, the district court was correct in ruling that it lacked jurisdiction to dispose of Battershaw's motion for new trial.

Second, Battershaw contends the record does not indicate that the clinical psychologist and psychiatrist who rendered evaluations of Battershaw possessed the requisite 3 years of "special training in treatment of mental disorders" as specified in § 29-2913. Also, Battershaw claims prejudice because the evaluations were not filed with the court at least 10 days before Battershaw was sentenced, as required by § 29-2913. When the evaluations were offered at the sentencing hearing, Battershaw did not object to any aspect of the written evaluations submitted and used by the court, including the qualification of either examiner who prepared the evaluations concerning Battershaw. "It is fundamental that error may not be predicated on a ground not preserved by a proper objection." *State v. Bevins*, 198 Neb. 761, 765, 255 N.W.2d 284, 287 (1977). In this case absence of objection in the district court precludes our reviewing Battershaw's questions raised on appeal.

Third, Battershaw argues that the record fails to show that the county attorney consulted with the victim before entering into the plea bargain reached in this case. Neb. Rev. Stat. § 23-1201 (Reissue 1983) in part provides: "Prior to reaching a plea agreement with defense counsel, the county attorney shall

consult with or make a good faith effort to consult with the victim regarding the content of and reasons for such plea agreement." Battershaw failed to object to proceedings conducted consequential to the plea bargain, as well as participated in and accepted the bargained disposition, namely, reduction in the gravity of the charge with a corresponding reduction in possible penalty. Furthermore, the record contains no information or indication to this court concerning any remote possibility of prejudice attributable to the county attorney's apparent failure to consult with the victim regarding the plea agreement reached for disposition of Battershaw's case. Cf. Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1984). Under the circumstances it is not necessary that we consider Battershaw's argument directed toward the plea agreement.

Fourth, Battershaw contends that the presentence report does not contain a written statement from the victim. See Neb. Rev. Stat. § 29-2261 (Cum. Supp. 1984). As previously noted, the presentence report did contain a written "victim impact statement."

Finally, Battershaw claims there was no factual basis shown regarding the date of the sexual assault charged in the amended information. Suffice it to say, the record contains the requisite and sufficient factual basis for Battershaw's plea of guilty.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES H. FISCHER, APPELLANT.

371 N.W.2d 316

Filed August 2, 1985. No. 85-061.

Pleas: Proof. At the time of entering a plea of guilty to a crime, it is sufficient to establish that the defendant entered his plea of guilty knowingly, intelligently, and voluntarily, insofar as knowledge of the possible penalty for the crime, if defendant understood the penalty for the crime from information other than that given to him by the judge receiving his plea.

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

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Timothy E. Divis, for appellee.

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

PER CURIAM.

In *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984), this case was remanded to the trial court and defendant given the opportunity to apply to that court for leave to withdraw his plea of guilty because the trial court had not advised defendant of the possible penalty when defendant entered his guilty plea. We further directed the trial court, if defendant so applied to withdraw his plea, to hold an evidentiary hearing to determine if defendant was, in fact, aware of the possible penalty for the offense in question at the time he entered his plea. The underlying facts of the case were set out in *State v. Fischer, supra*.

The defendant filed a motion to withdraw his plea, and an evidentiary hearing was held. At that hearing the evidence showed (by the introduction of the record before the county court) that at the hearing before the county court for Adams County on the complaint filed against defendant, the county attorney prosecuting the case read the complaint verbatim to defendant in open court and told defendant, "This is a Class II felony providing a possible penalty of not less than one nor more that 50 years in the penal complex." The county court judge then asked defendant if he understood the possible penalty associated with the charge, and defendant stated that he did understand.

Other evidence adduced at the hearing on defendant's motion to withdraw his plea included the testimony of defendant himself. After waiving his privilege against self-incrimination, defendant testified that he was told in county court that the penalty was 1 to 50 years, that his attorney informed him that the possible penalty was 1 to 50 years in the

penal complex, and that he was aware of the penalty at all times before and after he entered his plea, although on the day of the plea he was "hazy." At the time of entering his plea of not guilty, the trial court asked defendant if he understood "the penalties that could be imposed on you." The defendant answered, "Yes, sir." Based on the evidence at the hearing on defendant's motion to withdraw his plea, the trial court found "the evidence is overwhelming here that the defendant was in fact aware of the possible penalties." The evidence fully supports the trial court's finding as to defendant's knowledge of the possible penalty at the time of his plea.

On this appeal defendant contends that if the trial court neglects to inform him of the penalty, his plea of guilty may not stand. We do not agree. The test is whether defendant entered his plea of guilty knowingly, intelligently, voluntarily, and understandingly. A defendant must know the penalty for the crime to which he is pleading guilty in order to enter a knowing and intelligent plea. Although it is preferable that the trial judge accepting a defendant's plea inform the defendant of the possible penalty, it is possible to prove defendant's knowledge of that penalty, at the time of his plea, by other means. The State has so proved defendant's knowledge in this case, and defendant's motion to withdraw his plea was properly denied and defendant's sentence properly affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. KNIGHT, APPELLANT.

371 N.W.2d 317

Filed August 2, 1985. No. 85-107.

1. **Criminal Law: Sentences.** The granting of credit for jail time served while awaiting sentence is within the sound discretion of the court.
2. _____: _____. Refusing to grant credit for jail time served while awaiting sentence may not be used to impose minimum sentences in excess of one-third of the maximum term, as provided in Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981).

Appeal from the District Court for Red Willow County: WILLIAM G. CAMBRIDGE, Judge. Remanded.

Maurice A. Green of Burger, Bennett & Green, P.C., for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf; for appellee.

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

PER CURIAM.

Pursuant to a plea bargain, defendant pled no contest to the crimes of intentionally causing bodily injury with a dangerous instrument to his wife (a second degree assault in violation of Neb. Rev. Stat. § 28-309 (Cum. Supp. 1984) and a Class IV felony with a possible penalty of zero to 5 years in the penal complex) and using a firearm in commission of a felony (a Class III felony with a penalty of 1 to 20 years, consecutive to the underlying felony). A charge of attempted murder was dismissed.

Defendant was sentenced to 18 months to 3 years on the Class IV felony and to 2 to 5 years on the Class III felony, to be served consecutively to the Class IV felony sentence. The sentencing court did not give defendant any credit for 151 days spent in the county jail while awaiting sentence.

Defendant appeals, alleging that the sentences are excessive and that the court erred in failing to give him credit for time served.

Insofar as defendant contends his sentences were excessive, his appeal is without merit. During a fight with his wife, defendant fired a shot at his wife at close range, and the gun jammed before he fired another. The sentences were not excessive.

Defendant's other point on appeal has merit. As stated above, the trial court sentenced defendant to 18 months to 3 years in the penal complex, with no credit for time served. At the time of the sentencing, defendant had been in jail 151 days, or approximately 5 months. We have held that allowing credit for jail time is discretionary with the sentencing court. *State v. Tweedy*, 196 Neb. 246, 242 N.W.2d 626 (1976).

We adhere to that general rule, but now hold that the court's

discretion in withholding credit for jail time cannot be used to impose sentences in violation of Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981). That statute requires that in imposing an indeterminate sentence "the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term . . . ." The maximum term for a Class IV felony is 5 years. One-third of that period is 20 months. Defendant was sentenced to 18 months to 3 years. When the approximately 5-month period that defendant was in jail is added to the 18-month sentence, defendant is serving a minimum of 23 months—an amount in excess of the statutory minimum.

The cause is remanded to the sentencing court for the imposition of a proper sentence. The trial court is directed to impose a sentence containing a minimum sentence, including time served while awaiting sentence, not greater than one-third of the possible maximum.

REMANDED.

MAGNUS KRISTENSEN, APPELLEE, V. NORMAN REESE, APPELLANT.
371 N.W.2d 319

Filed August 2, 1985. No. 85-128.

Witnesses: Property: Valuation. The owner of personalty is qualified to express an opinion of its value solely because of his status as owner.

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

Frank Roubicek, for appellant.

Vince Kirby, for appellee.

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

BOSLAUGH, J.

The plaintiff, Magnus Kristensen, commenced this action to recover the damages his 1973 Ford pickup sustained when it was involved in an accident on December 13, 1982, with a vehicle operated by the defendant, Norman Reese. The county court

found for the plaintiff in the amount of $1,750, and the district court affirmed. The sole issue on this appeal is whether the evidence supports the award of damages.

At trial the plaintiff testified that immediately prior to the accident the value of his pickup was $1,800, that as a result of the accident the pickup was damaged beyond repair, and that immediately after the accident the value of his pickup was $50. The plaintiff further testified that he determined the pickup was a total loss after he "had a body man, Neil Retzlaff (phonetic), I believe his last name is, from Wausa who owns a body shop there, look at it." The defendant did not offer any contradictory evidence.

In *Jeffres v. Countryside Homes, ante* p. 26, 30, 367 N.W.2d 728, 731 (1985), this court said:

> In this case it cannot be said that there was not sufficient competent and relevant evidence presented. For instance, the appellee, the owner of the mobile home, testified as to its value. While the rule may be different in the case of realty, at least with respect to personal property such as the mobile home in question, the law is well settled that the owner of personalty is qualified to express an opinion of its value solely because of her status as owner. *Peck v. Masonic Manor Apartment Hotel*, 203 Neb. 308, 278 N.W.2d 589 (1979). Cf. *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

The plaintiff's testimony concerning the value of his pickup was properly received.

In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment. *Jeffres v. Countryside Homes, supra*; *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984).

The judgment of the district court is affirmed.

AFFIRMED.

TOM T. BERNSTEIN, JR., AND SUSAN K. BERNSTEIN, APPELLANTS, V. LAWRENCE A. AINSWORTH AND GERALDINE AINSWORTH, AND HOCKENBERGER & CHAMBERS COMPANY, A NEBRASKA CORPORATION, JOINTLY AND SEVERALLY, APPELLEES.

371 N.W.2d 682

Filed August 9, 1985. No. 83-700.

1. **Demurrer: Pleadings.** A demurrer admits all well-pleaded facts.
2. **Demurrer: Causes of Action: Pleadings.** In determining the sufficiency of a demurrer to state a cause of action, the court accepts as true all facts well pleaded, but does not accept as true facts not well pleaded, such as conclusions of law.
3. **Real Estate: Vendor and Vendee: Warranty.** The owner and occupiers of a residence do not impliedly warrant the habitability of such house on sale to another.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Affirmed.

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

Edward F. Carter, Jr., and Mark D. Petersen of Barney, Carter & Johnson, P.C., and Cleo Robak, for appellees Ainsworths.

Douglas R. Milbourn of Tessendorf, Milbourn & Fehringer, P.C., for appellee Hockenberger & Chambers Company.

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

GRANT, J.

This is an appeal from an order dismissing plaintiffs-appellants' petition seeking recovery for damages to their home resulting from the overflow of a manmade lake. The trial court sustained the separate demurrers of defendants-appellees. The plaintiffs-appellants, Tom T. Bernstein, Jr., and Susan K. Bernstein, husband and wife (hereinafter Bernsteins), brought their action based on alternative theories of strict liability, negligence, or breach of implied warranty. The defendants were Hockenberger & Chambers Company, a Nebraska corporation (hereinafter Hockenberger), which developed the lot on which Bernsteins' home was located, and Lawrence A. and Geraldine

Ainsworth, husband and wife (hereinafter Ainsworths), who bought the lot, had a house constructed thereon, and sold that house to the Bernsteins.

Hockenberger's demurrer alleged that the petition showed a misjoinder of parties defendant, misjoinder of causes of action, and a failure to state a cause of action. Ainsworths' demurrer claimed only a failure to state a cause of action.

As stated above, the trial court sustained the separate demurrers and dismissed plaintiffs' petition. For the reasons set out below we affirm.

First of all, we note that a demurrer admits all well-pleaded facts. *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth., ante* p. 504, 371 N.W.2d 258 (1985). Defendants, therefore, by their demurrers admitted the facts set out in Bernsteins' petition. Those facts were that on January 30, 1980, Bernsteins purchased a house from Ainsworths. The Ainsworths had purchased a building lot from Hockenberger on August 29, 1979, and had a house built on the lot. Hockenberger had developed the Northbrook Addition to the City of Columbus, Nebraska, in which addition the lot sold to the Ainsworths was located. As a part of the development of the addition, Hockenberger had constructed a manmade lake "abutting said addition which was completed in 1972." Ainsworths' lot was adjacent to this lake. The grading, filling, and leveling of this lot, and the installation of water, sewer, and paving to the lot were completed in September of 1974.

On August 5, 1981, the Northbrook Addition was subject to a rain of approximately 5½ inches during a period of approximately 3 hours. The runoff of surface waters filled the manmade lake, and during and immediately after the rain the water level of the lake rose, the lake overflowed, and plaintiffs' house was flooded to a depth of approximately 31 inches on the ground floor level, causing damages to Bernsteins' home.

Based on these facts, the Bernsteins pled three "causes of action" in their petition. In this connection we note that what plaintiffs have pled is one cause of action against each of two sets of defendants while setting out three different theories of recovery or three different reasons why defendants are allegedly separately responsible to plaintiffs in damages. See

Vantage Enterprises, Inc. v. Caldwell, 196 Neb. 671, 244 N.W.2d 678 (1976). The different theories of recovery will be discussed separately.

STRICT LIABILITY

Bernsteins' first theory of recovery as to Hockenberger is that Hockenberger is liable under a theory of strict liability. Bernsteins have pled that Hockenberger completed the manmade lake in 1972 and sold the vacant lot next to that lake to Ainsworths in 1979 and that there were such defects in the development of the lot that Hockenberger was strictly liable for all damages resulting from those defects. Any factual allegation as to such defects is missing from the petition. Bernsteins allege only conclusions such as "said lot as constructed would subject any improvements thereon to flooding," and "the level of said lot in relationship to the level of the adjacent lake is to [sic] low." By these allegations Bernsteins have pled that Hockenberger's construction or manufacturing (i.e., the grading, filling, and leveling) of the lot resulted in rendering Hockenberger strictly liable to all future owners of the lot in question for any defects in the lot. This allegation seeks to apply the doctrine of strict liability to real property transactions—the first time such a question has been presented to this court. Bernsteins state the proposition of law they allege is applicable as: "A developer of land or houses erected thereon may be strictly liable in tort to the ultimate owner for damages suffered as proximate result of latent defects in the process of manufacturing the lot or the house located thereon." Brief for Appellants at 20. In support of the proposition, Bernsteins cite *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969), which case in turn relies on *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), and *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). The latter two cases, *Schipper* and *Kriegler*, rest on fact considerations not present in the case at bar. In *Schipper* the defendant was a mass developer of houses and had sold thousands of similar houses in planned communities. The individual sales were made from a model, and the individual houses, including water and heating, were "manufactured," as

the term is ordinarily used. In *Kriegler* the defendant builder had "manufactured" 4,000 homes which included heating by the installation of steel tubes in the floor. In *Schipper* a child was injured when burned by excessively hot tapwater, and in *Kriegler* there was only property damage resulting from the early deterioration of the steel heating tubes embedded in the floor. Both cases applied the doctrine of strict liability. In *Kriegler* the court stated at 269 Cal. App. 2d at 227, 74 Cal. Rptr. at 752: "We think, in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same." In *Schipper* the New Jersey court drew much the same analogy between the manufacturing of homes and the manufacturing of automobiles.

It is obvious that the situations discussed in *Schipper* and *Kriegler* are not present in the case before us. Here, there is no "mass production" alleged, nor, in considering the position of Hockenberger, is there any allegation of improper construction of the integral parts of a house.

It is clear, however, that in *Avner v. Longridge Estates, supra*, the *Schipper* and *Kriegler* holdings were extended one step further to hold the developer-vendor of a lot strictly liable for latent defects in a tract of lots on "hillside properties." The court stated at 272 Cal. App. 2d at 615, 77 Cal Rptr. at 639:

> Here we have allegations that defendants manufactured the lot by cutting, grading, filling and compacting for the purpose of sale to the public and the construction of a house thereon, knowing that if said work was defective, it would cause damage to any improvements thereon; that the manufacturing process was defective in that it had inadequate provision for drainage, which caused water to accumulate between the fill and bedrock, in that it had organic matter beneath the fill which decomposed, causing the lot pad to settle; and in that it had not been sufficiently compacted, which also caused the lot pad to settle. The alleged defects were not visible or apparent to a purchaser; conceivably they were many feet beneath the surface of the lot pad.

The California court took judicial notice of matters that, in the factual posture of the case before us, we cannot do. The court states at 272 Cal. App. 2d at 611-12, 77 Cal. Rptr. at 637:

> It is common knowledge that with modern grading and trucking equipment, earth is moved considerable distances for filling purposes, that it is not improbable for the imported soil to have entirely different characteristics from those of the native soil. It is also common knowledge that geologists and soils engineers are able to determine with a reasonable degree of certainty the stability of soil from tests of the surface and subsurface, and that if adequate and proper tests are made, it is highly improbable that any condition affecting stability will remain unknown and latent.

In the amended petition herein there are no factual allegations which would bring this case within the holdings of the cases above cited determining strict liability on builders of homes or developers of lots. There are no allegations of mass production of lots nor any allegations as to massive moving of earth resulting in unstable soil for foundations. There is no allegation of latent defects. In the posture of this case, it is not appropriate for this court to make any determination as to imposing strict liability on a developer of vacant lots. The trial court properly sustained the demurrer attacking the petition on the ground that no cause of action was stated as to Hockenberger on the theory of strict liability. We hold, under the allegations of the petition herein, the seller of the vacant lot is not subject to strict liability for damages resulting from the use of the lot, and the seller of the vacant lot does not impliedly warrant the suitability of the lot where the seller of the lot does not build on the lot or control such building.

Similarly, we determine that there is no strict liability on Ainsworths, the vendor of the improved lot. In Bernsteins' petition it is pled that Ainsworths "caused to be built thereupon a house." It is not shown whether the Ainsworths were builders or merely purchasers of a newly built house, and we will not impose strict liability on all owners of residential houses who sell their residences.

The trial court was correct in determining that Bernsteins'

petition did not state a cause of action against any of the defendants, insofar as that cause of action depends on strict liability.

NEGLIGENCE

Bernsteins allege in their petition that Hockenberger was negligent in its "construction" of the lot in "developing or constructing Plaintiffs' lot at its present grade elevation adjacent to the lake created by Defendant [Hockenberger] which it knew or in the exercise of reasonable care should have known presented an unreasonable risk of harm to persons such as Plaintiffs." We decline to hold at this time that a developer of a lot, under some circumstances, may or may not be liable for negligence in developing the lot. What we do determine is that Bernsteins' petition does not state facts which constitute negligence.

We note that "[f]or purposes of determining the sufficiency of a petition to state a cause of action, we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclusions of law . . . of the pleader." *County of Knox v. City of Creighton*, 214 Neb. 196, 197, 333 N.W.2d 395, 396 (1983). The manmade lake referred to throughout the petition is not factually described as to size, level of water, source of water, depth, configuration, spillage, runoff provisions, or any other facts concerning it. Hockenberger's negligence is alleged to be that it developed a lot "at its present grade elevation adjacent to the lake." There is no allegation of facts constituting negligence in the development of the lot.

The remaining allegations consist of negligence charged in failing to object to the location of the house on the lot and general allegations of failure to warn about "defects."

We determine that the trial court was correct in sustaining Hockenberger's demurrer insofar as the petition did not state a cause of action in negligence against Hockenberger.

With regard to the allegations against the Ainsworths for negligence, the petition alleges that the Ainsworths were negligent "[i]n designing, constructing, and selling the Plaintiff's [sic] house at its present grade elevation adjacent to

said lake . . . ." As in the case of the allegations against Hockenberger, these conclusory statements do not set out any facts constituting negligence. There are no specific allegations of fact that the Ainsworths themselves designed or constructed the home, and the selling of the home cannot be considered an act of negligence. Neither this allegation against the Ainsworths nor the subsequent general allegations of failure to warn or inspect are allegations of negligence.

The trial court was correct in determining that no cause of action in negligence was pled against Ainsworths.

IMPLIED WARRANTY

With regard to Bernsteins' cause of action against Hockenberger based on implied warranty, we note again that Hockenberger sold a vacant lot to Ainsworths. Bernsteins equate the implied warranty that some courts have held exists between the builder of a house and the buyer of that house to the sale of a lot to a buyer who contracts with another to build a house on the lot. Nebraska has adopted the builder-vendor rule in *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974). In the *Henggeler* case we held "As a general rule a contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner and in accordance with good usage and accepted practices in the community in which the work is done." *Id.* at 319, 214 N.W.2d at 926. In the *Henggeler* case there was a construction defect. In the case at bar there is no factual allegation of a construction defect, nor is a latent defect alleged in the vacant lot as sold by Hockenberger. In that situation we adopt the reasoning of the South Carolina court in *Lane v. Trenholm Building Company*, 267 S.C. 497, 229 S.E.2d 728 (1976), which differentiated between the sale of a house and the sale of a vacant lot. In *Lane* at 501-02, 229 S.E.2d at 730, the court states:

> When land is conveyed, there is often no clearly defined objective in the transfer and it would be impossible to imply a warranty of fitness for any purpose. Even when a particular purpose is contemplated, as, for example, by restrictive covenants, the suitability of the land may depend on architectural proposals or other matters

entirely independent of the conveyance. Finally, the purchaser can fully inspect undeveloped land and, therefore, when the law denies the purchaser of real estate the benefit of an implied warranty, the consequences are generally not unfair or unjust.

The same factual considerations control this case. The vacant lot was sold by Hockenberger. It is not alleged that the precise use of the lot—as to location of the building on the lot or the type of building—was controlled by Hockenberger. There is a passing reference in the petition to protective covenants, but the pleadings do not set out what those covenants provided nor how compliance with the covenants would have avoided Bernsteins' damages.

The trial court correctly sustained Hockenberger's demurrer as directed to Bernsteins' cause of action based on implied warranty.

Insofar as Bernsteins' petition alleges a cause of action based on implied warranty against Ainsworths, again we note that it is not alleged that Ainsworths built the house. The petition alleges that the Ainsworths "caused to be built thereupon [on such lot] a house." The allegations do not set out the circumstances of the building of the house nor Ainsworths' role in that building. The petition clearly sets out that Hockenberger was engaged in the business of selling lots, but there is no allegation that the Ainsworths are engaged in building and selling houses.

As set out above with regard to strict liability against Ainsworths, the petition does not state whether this was a pure business transaction or the sale of a personal residence by Ainsworths. We decline to hold in this case that every seller of a residence gives an implied warranty as to that residence.

The implied warranty in connection with the construction of a building, as discussed in *Henggeler v. Jindra, supra*, is not applicable to the sale of the building by the owner who is not the builder. The trial court correctly sustained Ainsworths' demurrer as to the implied warranty theory of recovery against Ainsworths.

In view of our determination that facts sufficient to constitute a cause of action were not pled in Bernsteins' petition, it is not necessary to discuss the further grounds of

Hockenberger's demurrer.

The actions of the trial court in sustaining the demurrers of both Hockenberger and the Ainsworths were correct, and those trial court rulings are affirmed.

AFFIRMED.

THERESIA HARRIS, APPELLANT, V. MISTY LOUNGE, INC., A NEBRASKA CORPORATION, APPELLEE.

371 N.W.2d 688

Filed August 9, 1985. No. 84-436.

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 on the record.
2. _____: _____. Upon appeal to this court of the district court's review of an order of the Nebraska Equal Opportunity Commission, our review is de novo on the record.
3. **Equal Opportunity Commission: Discrimination: Proof.** An individual case of discrimination based on the employee's filing of a discrimination charge before the Nebraska Equal Opportunity Commission will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's firing. Third, should the defendant carry that burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
4. _____: _____: _____. A showing by an employee that he or she was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal.

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

Kirk E. Naylor, Jr., for appellant.

Richard H. Williams of Ryan & Williams, P.C., for appellee.

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

GRANT, J.

Theresia Harris appeals from an order of the district court for Lancaster County. The district court had reversed a finding by the Nebraska Equal Opportunity Commission (hereinafter Commission) that appellant had been wrongfully discharged by appellee, Misty Lounge, Inc. We affirm the district court's order.

Appellant was hired by Misty in September of 1980 as kitchen manager at Misty's Edgewood location, which was just in the process of opening. She had been employed for the previous 18 years by a different restaurant as head cook and kitchen manager. Appellant continued her employment with Misty until her discharge on March 29, 1982.

It is clear from the evidence that appellant started working for Misty with the hope for advancement within the organization. All parties agreed that, at least at the beginning of her term of employment, appellant performed her duties admirably. She received two substantial pay increases during her first year with appellee.

In May of 1981 Mark Read was named as manager of Misty's Edgewood location. In June of that year Steven Berry, who had been employed by appellee since February of 1980 as a bartender, was promoted to assistant manager. On August 18, 1981, appellant filed a complaint against Misty with the Commission, alleging discrimination in failure to promote her to one of the jobs. Subsequently, on November 12, 1982, the Commission determined that there was no reasonable cause to believe Misty had discriminated against appellant in that case.

The immediate circumstances preceding appellant's discharge were testified to by appellant and Read. On March 27, 1982, a Saturday evening, appellant approached Read to discuss her displeasure with night cooks coming in early and standing around or eating at a time when the restaurant was trying to hold down labor costs. Read testified that the conversation got heated because appellant wanted to talk about her responsibilities at that time and he was too busy to do so. He told her to worry about the kitchen and that he would worry about labor costs. After a heated argument appellant walked out of Read's office.

Read reported the incident to William Leung, who was the general manager of Misty's three locations, who in turn reported it to Misty's co-owners, Grace and Bob Milton. After a discussion that evening the decision was made to discharge appellant, and Read was instructed to do so.

On the following Monday appellant returned to the restaurant to complain to Read about the language he had used to her on Saturday night. Read informed her of the decision to terminate her employment. Appellant testified that Read would not give her reasons for the termination. Read testified that she turned and walked out before he could explain the reasons. The complaint which is the basis of this action was subsequently filed by appellant with the Commission.

In its answer to the complaint Misty alleged that appellant's discharge was not in retaliation for her making the prior complaint but, rather, was based on a combination of reasons, including appellant's persistent insubordination and unsatisfactory work performance, and elimination of the kitchen manager position for economic reasons.

While it is clear that appellant's work performance was initially good, the testimony of Bob Milton, Read, Leung, and Berry indicated that her performance changed. Bob Milton testified that he started receiving complaints about appellant in the fall of 1981. While he was initially impressed with her performance, "she went downhill the last six months she was there."

Read related that toward the end of her employment, appellant was not adequately preparing food for the night crew. He had several conversations with her in this regard, but she told him she wanted the night cooks to do it. The problem was not alleviated. Berry began receiving complaints from the waitresses and night cooks concerning appellant in the summer of 1981. Leung also testified that he received complaints from the night cooks concerning the lack of adequate food preparation during appellant's last 2 or 3 months.

Leung further testified about his inability to communicate with appellant after Berry was named assistant manager. He began to receive reports from employees about appellant's complaining. Berry testified that, while he was still a bartender,

appellant complained to him about Read's performance. Appellant had discussions with other employees concerning Read's ability to manage the restaurant. Read also developed communication problems with appellant.

Friction developed between appellant and management at about the time of Berry's promotion. The atmosphere in the restaurant became tense and continued to worsen as time went on. Read attributed the friction to appellant's desire to be manager and disappointment in not being named to the position.

The evidence also clearly shows that from the time it opened Misty did not meet sales projections, falling short by over 25 percent, and lost money in its first 2 years. In an attempt to turn the business into a profitable operation, efforts were made to reduce controllable expenses. Food costs and payroll were the major targets. Some part-time employees were discharged, and others had their hours reduced. Employees were allowed to work little or no overtime. Appellant, who had been working 8 to 10 hours overtime per week, was displeased with the reduction in her hours.

Leung testified that by March of 1982 the employee staff had been trimmed as much as possible. He stated that the business was topheavy and that cuts would have to be made in management positions. Appellant's position, kitchen manager, had been created for her based on early sales predictions. It was felt that the position was unnecessary and that appellant's management duties could be handled by the restaurant manager. The argument on March 27, 1982, combined with the other three reasons to produce appellant's discharge.

We first note that the standard of review in the district court is de novo on the record. The district court may not vacate, modify, or set aside an order of the Commission unless "[t]he findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence." Neb. Rev. Stat. § 48-1120(3)(b) (Reissue 1984). With regard to our review, as stated in *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 291, 348 N.W.2d 846, 848 (1984), "since no different statutory standard of review is provided for in the

Nebraska Fair Employment Practice Act, we are bound by the provisions of Neb. Rev. Stat. § 84-918 (Reissue 1981)." In *Haeffner v. State, ante* p. 560, 371 N.W.2d 658 (1985), we held that our review under Neb. Rev. Stat. § 84-918 (Reissue 1981) is de novo on the record. We review this case accordingly.

It is appellant's position that her employment with appellee was terminated in retaliation for her having filed an earlier complaint with the Commission. Such termination would be in violation of Neb. Rev. Stat. § 48-1114 (Reissue 1984), which forbids discrimination by an employer against an employee who has made a charge against the employer before the Commission. Appellant contends that the district court erred in finding that Misty had established legitimate, nondiscriminatory reasons for her discharge. We do not agree with appellant's position.

The analysis to be utilized in determining whether appellant was wrongfully discharged is set out in *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm., supra* at 292, 348 N.W.2d at 849:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Appellant clearly satisfied the first requirement of this test. A showing by appellant that she was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal. *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779 (9th Cir. 1976). See, also, *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980). The parties agree that appellant had filed a complaint with the Commission and that Misty knew it.

The second prong of the test places the burden upon Misty to

articulate some legitimate, nondiscriminatory reason for its discharge of appellant. Misty met this burden by advancing as justification for appellant's discharge her insubordination, her inadequate work performance, and the financial difficulties encountered by the restaurant. The record adequately substantiates these reasons.

Appellant contends that Misty did not satisfy the second prong. However, in making that argument appellant places a heavier burden on Misty than does the law. As stated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981):

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. [Citation omitted.] It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

See, also, *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm., supra*. The burden placed on appellee is not a burden of persuasion but, rather, a burden of production. Appellee clearly satisfied the latter burden by articulating its three nondiscriminatory reasons for discharging appellant and offering proof thereof.

Since Misty rebutted the presumption created by establishment of appellant's prima facie case, our analysis must proceed to the third prong of the test. Appellee has the burden of proving "that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 256. On our review of the record we agree with the district court that appellant did not prove she was a victim of intentional discrimination by Misty nor that the justifications offered by Misty were a sham, or a pretext, or unworthy of credence. The district court's order is affirmed.

AFFIRMED.

SARAH W.P. BROWN ET AL., APPELLANTS AND CROSS-APPELLEES, V. UNITED STATES NATIONAL BANK OF OMAHA, APPELLEE AND CROSS-APPELLANT, GUARANTY BANK & TRUST COMPANY, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

371 N.W.2d 692

Filed August 9, 1985. No. 84-488.

1. **Uniform Commercial Code: Banks and Banking: Words and Phrases.** A letter of credit is an engagement by a bank at its customer's request that the bank honor drafts for payment to a beneficiary upon compliance with conditions specified in the letter of credit. The Uniform Commercial Code statutorily obligates the issuer of a letter of credit to honor drafts drawn by the beneficiary in compliance with terms of the credit.
2. **Uniform Commercial Code: Banks and Banking: Contracts.** A cardinal principle regarding letters of credit is that the credit engagement is completely independent of the underlying contract which engenders a letter of credit.
3. **Uniform Commercial Code: Banks and Banking: Fraud.** The material elements of common-law fraud must be established before any relief is available for the "fraud" contemplated by Neb. U.C.C. § 5-114(2) (Reissue 1980).
4. _____: _____: _____. The principle of independence regarding a bank's obligation under a letter of credit does not extend to protect fraud by the beneficiary of the letter of credit.
5. **Uniform Commercial Code: Banks and Banking.** An issuer of a letter of credit can refuse to honor such instrument if the beneficiary does not strictly comply with the provisions of the letter of credit for drawing upon such letter.
6. **Uniform Commercial Code: Banks and Banking: Words and Phrases.** In documentation for a letter of credit, Neb. U.C.C. §§ 5-101 to 5-117 (Reissue 1980), certify means to make known; to confirm formally as true, accurate, or genuine; to tell positively; to vouch for in writing.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part, and in part reversed and remanded with direction.

Christine M. Schild of Schumacher & Gilroy, for appellants.

Michael M. Hupp and David J. Lanphier of McGill, Koley, Parsonage & Lanphier, P.C., for appellee.

Thomas J. Culhane of Erickson & Sederstrom, P.C., and George W. Dahnke of Hastie and Kirschner, for intervenor-appellee.

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

SHANAHAN, J.

Sarah W.P. Brown; Sarah W.P. Brown, custodian for Charles D. Brown III; Sarah W.P. Brown, custodian for James A. Brown; and the Brown Family Partnership, a Nebraska partnership (herein collectively called "Brown"), appeal the judgment of the district court for Douglas County denying an injunction preventing payment to Guaranty Bank & Trust Company (Guaranty) regarding letters of credit issued by United States National Bank of Omaha (U.S.N.B.). We affirm in part, reverse in part, and remand with directions.

Invoil LA-TX Drilling Fund 1981, Ltd. (Invoil), was a limited partnership to be formed in Oklahoma for drilling development oil and gas wells. A development well is drilled in a known producing formation in a previously discovered field or extends limits of a known oil and gas reservoir. Invoil Inc., an Oklahoma corporation, was the general partner of Invoil, the proposed limited partnership.

To finance operations, Invoil negotiated a "Loan Agreement" with Guaranty of Oklahoma City. As collateral for its loan to Invoil, Guaranty agreed to accept certain letters of credit from Invoil's limited partners. The Invoil-Guaranty loan agreement contained the following provisions:

> Draw on Letter of Credit. . . . If any other event of Default occurs, [Guaranty] will have the right to draw down the entire outstanding balance of each of the Letters of Credit. The amount received from such draw down will be credited by [Guaranty] to the Note together with interest thereon and costs of collection thereof, including a reasonable attorney's fee, with any excess, after the payment thereof, to be paid by [Guaranty] to the respective Limited Partner or refunded to the Issuing Bank for the respective Limited Partner's account. . . .
>
> . . . .
>
> Disclaimer. . . . (a) [Guaranty] has made no evaluation of [Invoil] and will not be deemed to have made any representation as to the proposed activities of [Invoil] or the financial strength or integrity of [Invoil Inc.]; (b) [Guaranty] has no responsibility or liability for the issuance, offer or sale of the interests in [Invoil]; and (c)

> nothing herein contained or contained in any Loan Document or the Private Placement Memorandum is intended by the parties hereto to impose such liability or responsibility on [Guaranty]. [Guaranty] has made no representation, warranty or statement regarding the advisability of the Limited Partners' purchasing the Limited Partnership interest. [Guaranty] did not participate in the preparation of the Private Placement Memorandum and is not responsible for any statements contained therein or the accuracy or completeness thereof. [Guaranty] will not in any way be responsible or liable to [Invoil], [Invoil Inc.] or any other party for determination of the amount, type, source or what constitutes revenue or income from [Invoil]. [Guaranty] may rely on the representations made by [Invoil Inc.] in the Private Placement Memorandum for [Invoil] as if such representations were made directly to [Guaranty] by [Invoil Inc.]. This Disclaimer and this paragraph must be set forth in the Private Placement Memorandum.

Invoil issued a "Private Placement Memorandum" summarizing the "program," that is, subscription in the limited partnership, and stating:

> THESE SECURITIES INVOLVE A HIGH DEGREE OF RISK
>
> . . . .
>
> THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY STATE SECURITIES ACT AND MAY NOT BE SOLD OR TRANSFERRED IN THE ABSENCE OF AN EFFECTIVE REGISTRATION UNDER THE ACT OR AN OPINION OF COUNSEL ACCEPTABLE TO THE GENERAL PARTNER, THAT SUCH REGISTRATION IS NOT REQUIRED. ADDITIONAL RESTRICTIONS ON TRANSFER ARE CONTAINED HEREIN.

The private placement memorandum separately contained Guaranty's disclaimer required by the loan agreement and a copy of the loan agreement itself. The placement memorandum

described a "Subscription Payment Option" available to investors:

> Persons subscribing in cash shall pay their full cash subscription of $75,000 per Unit at the time of executing a Subscription Agreement. However, persons subscribing under the Subscription Payment option shall pay their subscription in the following manner: $15,000 of each Unit shall be paid in cash, the remaining $60,000 shall be payable on a deferred basis, coupled with the assumption of, and personal liability for, their pro rata share of a Program loan. Such obligation for payment will further be secured by the delivery of an irrevocable letter of credit (in a face amount of $69,000) from the Subscription Payment Participant's bank, in a form and drawn on a bank, satisfactory to the General Partner.

The limited partnership agreement for Invoil in part provided:

> CAPITAL CONTRIBUTIONS
>
> 4.1. The Limited Partners and the Special Limited Partner.
>
> (a) The General Partner intends to permit a maximum of thirty-four (34) Limited Partners and the Special Limited Partner . . . to invest in the Partnership at a minimum Initial Subscription of one (1) Unit unless the General Partner, at its sole discretion, agrees to accept a lesser amount. The price per Unit is $75,000, whether a Limited Partner contributes to the capital of the Partnership in cash or elects the Subscription Payment method. . . .
>
> . . . .
>
> (c) A Limited Partner may pay his Initial Subscription by electing to use the Subscription Payment.
>
> (d) A prospective Limited Partner may subscribe to a Limited Partner's Interest by completing and executing the signature page to the Partnership Agreement appended hereto and by tendering the executed signature page along with his payment in cash or letter of credit required by the Subscription Payment.

In the Invoil partnership agreement, immediately above the line supplied for a limited partner's signature, there is printed:

"I hereby assume my proportionate share of any Partnership 'Letter of Credit' loan to the extent of my letter of credit given in accordance with Section 4.1 of the Limited Partnership Agreement."

A Prudential-Bache representative gave Invoil's private placement memorandum to James Schumacher, Brown's attorney. After Schumacher's examination of the private placement memorandum, Brown signed the Invoil limited partnership agreement and purchased two units of Invoil under the "Subscription Payment Option." Pursuant to such option, Brown paid $30,000 in cash and directed U.S.N.B. to issue two irrevocable letters of credit, Nos. 02414 and 02415. Each letter of credit had a face amount of $70,000, expired on July 31, 1983, and authorized Guaranty to sight draw $70,000 when an officer of Guaranty signed a statement "certifying that the amount drawn is due [Guaranty] in connection with the loan to [Invoil]." Interests in Invoil were not registered.

Invoil and Guaranty signed the loan agreement on August 4, 1981. Invoil borrowed $1,860,000 from Guaranty, which, according to Invoil's promissory note, was payable on July 1, 1983. As the result of an inquiry by the Federal Deposit Insurance Corporation, Invoil's general partner, on March 30, 1983, wrote to the FDIC and indicated that unless Guaranty restructured its loan to Invoil bankruptcy was "the only alternative." Guaranty deemed itself "insecure" and, as provided in its loan agreement with Invoil, declared a default regarding the Invoil loan.

On April 13, 1983, Guaranty sent U.S.N.B. two letters stating that Brown's letters of credit were due and enclosed a sight draft in the amount of $70,000 with each letter. In its letter to U.S.N.B. regarding letter of credit No. 02414, Guaranty stated: "We certify the amount drawn is due Guaranty . . . in connection with the loan to Invoil . . . ." Regarding letter of credit No. 02415, Guaranty's letter in part read: "The amount drawn is due Guaranty . . . in connection with the loan [to] Invoil . . . ." Each of Guaranty's letters to U.S.N.B. was signed by the senior executive vice president of Guaranty. Among other documents sent to U.S.N.B. by Guaranty was an "Assumption of Personal Liability" signed by Brown, limiting

Brown's share of Invoil's indebtedness to $60,000.

On April 21 Brown filed an action in the district court for Douglas County seeking to enjoin U.S.N.B. from honoring the letters of credit, and obtained a temporary restraining order enjoining U.S.N.B. from honoring Guaranty's draw authorized by the letters of credit.

In an amended petition Brown alleged that the letters of credit constituted "contracts which arise out of a violation of the Nebraska Securities Act" and are unenforceable by virtue of Neb. Rev. Stat. § 8-1118(4) (Reissue 1983). Brown also alleged misrepresentations in the private placement memorandum of Invoil and a deliberate nondisclosure that Guaranty might call the "full face value of the letter of credits even though the loan secured thereby is substantially less than the face value of the letter of credits to in essence use one investor's credit to pay off another investor's loan or the cost of collecting another investor's loan." Such fraud, Brown alleged, was perpetrated with the "actual knowledge and consent" of Guaranty. In a supplemental petition Brown alleged Guaranty's documentation accompanying its sight draft No. 02415 did not include "certification" of the amount due Guaranty on the Invoil loan. Having filed companion actions in federal courts for rescission of the sale involving Invoil's unregistered securities, Brown requested an injunction prohibiting U.S.N.B. from paying Guaranty's sight draft or that U.S.N.B. "be allowed to honor said letters of credit only to the extent of [Brown's] respective $60,000 participation interest" in Invoil.

U.S.N.B. filed an answer in the form of a general denial. Guaranty filed a petition of intervention requesting dismissal of Brown's petition. Neither bank filed a cross-action to determine liability on account of the letters of credit.

On June 10, 1983, the district court granted a temporary injunction prohibiting U.S.N.B. from honoring Guaranty's sight drafts, provided that Brown obtain an extension of the letters of credit until November 29, 1984, or post a surety bond for $155,000. Brown later filed a surety bond in the amount specified.

At the hearing on the permanent injunction, Brown's attorney, Schumacher, testified about apparent misrepresen-

tations made by Invoil in its private placement memorandum. Schumacher admitted he had read Guaranty's disclaimer as a part of Invoil's placement memorandum. Brown did not dispute Guaranty's good faith in declaring Invoil to be in default on account of prospective bankruptcy proceedings indicated by Invoil.

Sam Hillhouse, senior executive vice president of Guaranty, testified each of Brown's letters of credit was for $70,000, that is, "[w]e used the Letter of Credit as collateral on our loan, and this be at risk and to receive the tax benefits they [Brown] signed a Personal Assumption Agreement which was in the amount of $60,000." Hillhouse explained the $10,000 differential between the letter of credit and personal loan assumption was to "cover expenses we might have in collections and also interest." Hillhouse also testified that all letters of credit as collateral for the Invoil loan had been collected except Brown's two letters of credit. When Guaranty called the letters of credit, the principal of the loan was $1,443,315.33, but, as a result of calling the letters of credit, Guaranty had received $1,894,970. Guaranty's collection in excess of the face amount of the loan was returned to Invoil's investors pursuant to the loan agreement. Hillhouse admitted he had not read the Invoil memorandum, although it was his usual practice to read a private placement memorandum in ventures similar to Invoil's program.

The district court dissolved the temporary injunction and, among its findings, factually determined Guaranty's "call of the letters" in their face amount of $70,000 was not "fraud in the underlying transaction" justifying an injunction; Guaranty was entitled to make its call "in the amount of the face value" of each letter of credit; and Guaranty's documentation complied with the letters of credit.

The district court then ordered U.S.N.B. to honor Guaranty's draw on each of Brown's letters of credit, but limited such draw to $55,000, which the district court decided was Brown's pro rata share of Guaranty's "Letter of Credit" loan to Invoil.

Brown has appealed and argues the district court should have enjoined U.S.N.B. from honoring Guaranty's draw upon the letters of credit. Brown contends an injunction should have

been granted because interests in the Invoil limited partnership were unregistered, nonexempt securities in violation of securities laws, state and federal; there was fraud in the transaction underlying the letters of credit; Guaranty's draw of $70,000, exceeding Brown's acknowledged $60,000 liability as a pro rata share of Invoil's debt, is fraudulent; and Guaranty had not complied with documentation requirements contained in the letters of credit, namely, Guaranty had not certified that the amount drawn was due Guaranty under the loan to Invoil.

Guaranty has cross-appealed and claims the district court should have directed U.S.N.B. to honor its draw for $70,000, the face amount of each letter of credit.

In its cross-appeal U.S.N.B. contends the letters of credit expired at the latest on November 29, 1983, so that U.S.N.B.'s obligation has been terminated by such expiration.

Historically, a letter of credit was a commercial device for assuring payment of the purchase price to a seller under a contract for the sale of goods by substituting a bank's acceptable credit standing for the unknown standing of a buyer. See, *New York Life Ins. Co. v. Hartford National Bank & Trust Co.*, 173 Conn. 492, 378 A.2d 562 (1977); J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 18-1 (2d ed. 1980). The bank issuing a letter of credit made itself primarily liable to the seller of goods and paid the seller on presentation of a draft accompanied by various types of shipping documents. See *O'Grady v. Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978).

More recently, as a species of letters of credit there has appeared the standby letter of credit, which White and Summers characterize as follows:

> [T]he [standby letter of credit] device functions not as a medium of *payment* for property sold, services rendered, or the like, but rather as a "back up" against customer default on financial or other obligations. Such letters function somewhat like guaranties, for it is customer *default* that triggers issuer's obligation.

J. White & R. Summers, *supra* at 709. See 12 C.F.R. § 208.8(d)(1) (1985). See, also, Arnold and Bransilver, *The Standby Letter of Credit—The Controversy Continues*, 10

U.C.C. L.J. 272 (1978).

The standby letter of credit is analogous to a performance bond; for example, a beneficiary will receive payment in the event of default by an obligor on an obligation owed a beneficiary of a letter of credit. However, unlike a surety or other forms of guarantee, the issuer of a standby letter of credit is bound in the first instance (primary liability), not secondarily or derivatively. Recovery under a standby letter of credit requires only presentation of documentation specified by the letter of credit, whether or not there has been performance of the basic agreement for which the standby letter of credit has been obtained. See, J. White & R. Summers, *supra* § 18-2; Arnold and Bransilver, *supra*; J. Dolan, The Law of Letters of Credit ¶ 1.05 (1984). Brown's letters of credit are, therefore, standby letters of credit.

Today, letters of credit are primarily governed by the Uniform Commercial Code. See Neb. U.C.C. §§ 5-101 to 5-117 (Reissue 1980). As described in the Uniform Commercial Code, a letter of credit is an engagement by a bank at its customer's request that the bank honor drafts for payment to a beneficiary upon compliance with conditions specified in the letter of credit. See § 5-103, Uniform Commercial Code—Letters of Credit. Article 5 of the U.C.C. makes no distinction between the types of letters of credit. *O'Grady v. Bank, supra.*

The Uniform Commercial Code statutorily obligates the issuer of a letter of credit to honor drafts drawn by the beneficiary in compliance with terms of the credit. As expressed in J. White & R. Summers, *supra* at 711-12:

> This obligation of the issuer to pay the beneficiary is generally *independent* of any obligation . . . of the issuer's customer to the beneficiary under the contract between the customer and beneficiary. It follows that it is generally wrongful for the issuer to dishonor on the ground that the beneficiary has failed to perform its underlying obligations to the issuer's customer. In other words, the issuer generally cannot justify refusal to honor on the ground that its customer is not getting what he bargained for from the beneficiary-seller.

See, *Bank of Newport v. First Nat. Bank*, 687 F.2d 1257 (8th Cir. 1982); *KMW Intern. v. Chase Manhattan Bank, N. A.*, 606 F.2d 10 (2d Cir. 1979); *Chase Manhattan Bank v. Equibank*, 550 F.2d 882 (3d Cir. 1977); *Courtaulds North America, Inc. v. N. C. Nat. Bank*, 528 F.2d 802 (4th Cir. 1975); *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970); *Dynamics Corp. of Amer. v. Citizens & Southern Nat. Bank*, 356 F. Supp. 991 (N.D. Ga. 1973); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 259 N.W.2d 310 (1977).

A cardinal principle regarding letters of credit is that the credit engagement is completely independent of the underlying contract which engenders a letter of credit. Independence or separation of a letter of credit from the underlying transaction is based on two policy considerations. First, the issuer-bank can assume no liability for performance of the underlying contract because such bank does not control making the underlying contract or selecting the beneficiary of a letter of credit. Second, a letter of credit would lose its commercial vitality and efficacy if, before honoring drafts, the issuer-bank were obliged to look beyond the terms of the letter of credit to the underlying contract and controversy between the bank's customer and the beneficiary of a letter of credit. *Bank of Newport v. First Nat. Bank, supra*; *Intraworld Industries, Inc. v. Girard Trust Bank*, 461 Pa. 343, 336 A.2d 316 (1975).

However, the issuer-bank of a letter of credit does not have an absolute duty to honor a sight draft authorized by a letter of credit. Section 5-114(2) of the U.C.C. provides:

> (2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (Section 7-507) or of a security (Section 8-306) or is forged or fraudulent or there is fraud in the transaction
>
> (a) the issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (Section 3-302) and in an appropriate case would make it a person to

> whom a document of title has been duly negotiated (Section 7-502) or a bona fide purchaser of a security (Section 8-302); and
>
> (b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor.

Section 5-114(2) contemplates a situation in which an issuer-bank may refuse to honor a sight draft or a bank's customer may obtain an injunction if

> (1) the documents do not in fact conform to the warranties made on negotiation or transfer of a document of title . . . or of a security . . . or (2) the documents are in fact forged or fraudulent, or (3) there is in fact "fraud in the transaction," provided that the party presenting the draft or demand for payment is the beneficiary or some other party who is not (a) a holder in due course . . . or (b) a person to whom a document of title has been duly negotiated . . . or (c) a bona fide purchaser of a security
>
> . . . .

J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 18-6 at 734 (2d ed. 1980).

The Uniform Commercial Code does not statutorily specify the precise nature or elements of "fraud" as such term is used in § 5-114(2). Therefore, the material elements of common-law fraud must be established before any relief is available for the "fraud" contemplated by § 5-114(2). See *West Virginia Housing Development Fund v. Sroka,* 415 F. Supp. 1107 (W.D. Pa. 1976); cf. *Gitschel v. Sauer,* 212 Neb. 454, 323 N.W.2d 93 (1982) (elements of a cause of action for fraudulent representation).

Proceedings for an injunction are within equity jurisdiction. Consequently, we review the matter de novo without reference to the findings of fact made by the trial court. See *Grint v. Hart,* 216 Neb. 406, 343 N.W.2d 921 (1984). A party seeking an injunction must establish by competent evidence every controverted fact to warrant relief. *Grint v. Hart, supra.*

Brown was not entitled to injunctive relief on the ground of fraud.

First, whatever might be misconduct on the part of Invoil, whether fraudulent representation contained in the private placement memorandum or noncompliance with securities law, in the absence of Guaranty's involvement in such alleged misconduct, the credit engagement is completely independent of any conduct in formation of the limited partnership. Cf. *Prudential Ins. Co. of America v. Marquette Nat. Bank*, 419 F. Supp. 734 (D. Minn. 1976) (underlying contract involved payment of a penalty prohibited by law; held, alleged illegality of a commitment standby fee was not a defense). Cf., also, *New York Life Ins. Co. v. Hartford National Bank & Trust Co.*, 173 Conn. 492, 378 A.2d 562 (1977) (although a clause in a loan commitment referred to liquidated damages whereas the payment was actually a penalty prohibited by law, such illegality was not a proper defense to the issuer's obligation to honor a draft pursuant to a letter of credit).

Brown has failed to establish Guaranty's involvement in any alleged misconduct, such as by participation or ratification. Therefore, under the circumstances any improper conduct on the part of Invoil is irrelevant to the case before us.

Second, there was no "fraud in the transaction." In *Sztejn v. Schroder Banking Corp.*, 177 Misc. 719, 31 N.Y.S.2d 631 (1941), a frequently cited case decided before the Uniform Commercial Code, a buyer sought to enjoin payment of drafts under a letter of credit. The seller's documentation complied with the letter of credit, but the goods sold were worthless. The New York court held that although a letter of credit is independent of the underlying contract of sale and a bank is not required to look beyond documentations supplied for payment of a draft authorized by a letter of credit, "the application of this doctrine presupposes that the documents accompanying the draft are genuine," *id.* at 721, 31 N.Y.S.2d at 634, and "the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous [beneficiary]," *id.* at 722, 31 N.Y.S.2d at 634. Section 5-114(2) of the Uniform Commercial Code has evolved from *Sztejn*. See, also, *United Bank v Sporting Goods*, 41

N.Y.2d 254, 360 N.E.2d 943, 392 N.Y.S.2d 265 (1976). The "fraudulent document" exception relates to a document "that is completely forged or drawn up without any underlying basis in fact, one that is but partly spurious or a document which has been materially altered." *O'Grady v. Bank*, 296 N.C. 212, 234, 250 S.E.2d 587, 601 (1978). As J. White & R. Summers, *supra* at 736, notes, the demarcation between the "fraudulent document" exception and the "fraud in the transaction" exception is not clear, and "[a]t least in some cases, the line is not at all clear, for a 'fraudulent transaction' may be held to generate what would also qualify as 'fraudulent documents'."

In the case before us, Invoil, not Guaranty, sold interests in the limited partnership. Guaranty clearly disclaimed any knowledge of the placement memorandum's contents. Brown did not show that Guaranty participated in preparing or disseminating Invoil's private placement memorandum. Under the circumstances Hillhouse's failure or neglect to read the private placement memorandum does not constitute fraud on Brown. In short, Brown has failed to demonstrate any fraud by Guaranty in the transaction, vitiating the entire transaction so that the legitimate purposes of separation and independence of the issuer's obligation would no longer be served. See *Intraworld Industries, Inc. v. Girard Trust Bank*, 461 Pa. 343, 336 A.2d 316 (1975). There was no "fraud in the transaction."

Third, there was no fraud in Guaranty's draw under the letters of credit. Brown claims there was fraud in Guaranty's draw of $70,000 because Brown's liability for a pro rata share of Invoil's indebtedness was known to be less than the $70,000 face amount of the letter of credit and corresponding sight draft. The "Draw on Letter of Credit," contained in the Invoil-Guaranty loan agreement known to Brown, provided that any excess after collection on the limited partner's letters of credit would be refunded to the bank issuing a letter of credit or to the limited partners. There could be no misrepresentation of a material fact already known to Brown. Cf. *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985).

Brown's final claim relates to lack of certification concerning documentation presented for letter of credit No. 02415, namely, Guaranty failed to use the word *certify* in its letter to U.S.N.B.,

but, rather, stated that the "amount drawn is due" on Guaranty's loan to Invoil.

An issuer of a letter of credit can refuse to honor such instrument if the beneficiary does not strictly comply with the provisions of the letter of credit for drawing upon such letter. § 5-114(1); *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970); *Data General Corp. v. Citizens Nat. Bank*, 502 F. Supp. 776 (D. Conn. 1980); *American Bell Intern. v. Islamic Republic of Iran*, 474 F. Supp. 420 (S.D.N.Y. 1979); *United Technologies Corp. v. Citibank, N.A.*, 469 F. Supp. 473 (S.D.N.Y. 1979); *Dynamics Corp. of Amer. v. Citizens & Southern Nat. Bank*, 356 F. Supp. 991 (N.D. Ga. 1973). White and Summers also suggest there is no reason why a bank's customer is not entitled to an injunction preventing an issuer from honoring a draft on a letter of credit in the absence of strict compliance with the documentation requirement.

A particular form or terminology to be used for Guaranty's certification is not prescribed by the Uniform Commercial Code and was not specified by Brown or U.S.N.B. in the letter of credit issued. Certify means "[t]o authenticate or vouch for a thing in writing. To attest as being true or as represented," Black's Law Dictionary 207 (5th ed. 1979); "to make known or establish (a fact)," Webster's New Universal Unabridged Dictionary 297 (2d ed. 1983); "to confirm formally as true, accurate or genuine; to testify or vouch for in writing; to assure or make certain; to tell positively," The American Heritage Dictionary of the English Language 220 (1981). Brown has overlooked the purpose of certification regarding a letter of credit. Section 5-111 in part provides: "(1) Unless otherwise agreed the beneficiary by transferring or presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with. This is in addition to any warranties arising under articles 3, 4, 7 and 8." Under § 5-111 the beneficiary warrants that a documented fact has occurred so that the issuer-bank and its customer have a cause of action against the beneficiary if a fact attested has not occurred. Guaranty's demand for payment was based on a fact stated in its letter to U.S.N.B.—Invoil's debt to Guaranty was due and,

therefore, Brown's payment in accordance with the letter of credit was also due. In construing provisions regarding documentation for a letter of credit, we will not demand literal adherence to requirements dictated by the parties at the risk of frustrating the objectives of the Uniform Commercial Code. There is no way U.S.N.B. and Brown could have been misled by Guaranty's wording of its demand for payment. See *Flagship Cruises, Ltd. v. New England Merchants*, 569 F.2d 699 (1st Cir. 1978) (variance in documentation is not fatal if there is no possibility that documents tendered could mislead a paying bank to its detriment). Brown's claim regarding certification is without merit.

We note that the district court, as a part of its judgment, ordered U.S.N.B. to honor the letters of credit to the extent of $55,000. Brown's requested limitation of the amount payable under the letters of credit is in essence a reformation of the letters of credit, namely, a change in the face amount from $70,000 to some lesser amount. Such alteration by reformation is somewhat difficult without the requisite proof for reformation. See *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984) (reformation available in cases of mutual mistake or unilateral fraud). Moreover, recalling our recognition of a credit engagement's independence of the underlying contract, Brown's attempt to change the terms of the letters of credit must suffer the same fate as Brown's claim of alleged fraud regarding the underlying transaction with Invoil. If Brown is denied relief for alleged fraud involving the underlying contract, Brown must also be denied reformation, under the circumstances, lest the independence between the credit arrangement and underlying contract be negated. Consequently, we find that the district court's judgment regarding the amount to be paid under the letters of credit is incorrect and is reversed with direction to vacate that part of the judgment directing payment. The remainder of the district court's judgment, that is, denial of injunctive relief to Brown, is affirmed.

In view of our disposition we need not consider the cross-appeals of Guaranty and U.S.N.B.

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

STATE OF NEBRASKA, APPELLEE, V. STEPHEN P. MURPHREY, APPELLANT.

371 N.W.2d 702

Filed August 9, 1985. No. 84-566.

1. **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.
2. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
3. **Lesser-Included Offenses: Jury Instructions.** It is error for a court to instruct on lesser-included offenses where the offenses so instructed on are not in reality lesser-included offenses.
4. **Juries: Presumptions: Verdicts.** It is presumed that a jury followed the instructions given in arriving at its verdict.
5. **Jury Instructions: Appeal and Error.** Before error predicated on the giving of an instruction may be considered a ground for reversal, a defendant must show that he was prejudiced by the instruction given.

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

Charles D. Hahn, and Daniel E. Wherry, for appellant.

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

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

GRANT, J.

In an information filed in Richardson County, Nebraska, the defendant, Stephen P. Murphrey, was charged with attempted burglary, a violation of Neb. Rev. Stat. §§ 28-507(1) (defining burglary) and 28-201 (defining criminal attempt) (Reissue 1979). Attempted burglary is a Class IV felony. The defendant pled not guilty to the charge and, after a jury trial, was found guilty. The defendant was sentenced to 5 years' probation and timely appealed to this court. The defendant has assigned various errors which can be consolidated into three assignments: (1) The jury verdict of guilty was not sustained by the evidence; (2) The court erred in instructing the jury on

lesser-included offenses; and (3) The court erred in denying defendant's motion for dismissal and later for a mistrial because the State failed to comply with the court's discovery order. After consideration of the defendant's assigned errors, we affirm.

The evidence and testimony presented at trial showed that the defendant met Liza Weiss while defendant was hitchhiking near his home in Wichita, Kansas. After spending 4 days with defendant in Wichita while she attended a conference for librarians, Ms. Weiss returned to Falls City, Nebraska, where she lived with her uncle, Donald Sailors. During the next several weeks, the defendant and Ms. Weiss wrote each other letters and defendant made several trips to Falls City.

Although the testimony is somewhat in conflict, the evidence shows that on the weekend of May 13, 1983, the defendant came up to visit Ms. Weiss and gave her a copy of his will and his safe-deposit box key. The will named Ms. Weiss as a devisee. The defendant stayed with Ms. Weiss at her uncle's home. By Sunday the two had had some arguments and defendant was feeling depressed due to Ms. Weiss' indecisiveness about marrying him. Ms. Weiss took him to the highway to hitchhike back to Wichita. There he was picked up by some sympathetic men who took him to a bar and drank with him. The defendant called Ms. Weiss several times from the bar, threatening to kill himself if they could not get back together. He then hitchhiked back to Falls City and went to the Sailors home at about 11 p.m. There he knocked on the kitchen door, and getting no response, went to Ms. Weiss' window where he saw a light. Frustrated at her refusal to talk to him, he cut a hole in the screen to her bedroom window and broke the window. She still refused to speak with him even though he persisted in threatening suicide with the knife he held in his hand.

Defendant then went to the back of the house, entered an enclosed porch, and approached the kitchen door. At this point Mr. Sailors, a man 79 years old, appeared at the door with a gun, recognized defendant, and told defendant he could not come in. Mr. Sailors testified that the defendant then broke the window in the kitchen door by plunging his hand with the knife in it through the window. Sailors testified that defendant poked

the knife at him and tried to break the door down. Sailors then fired one shot and hit the defendant in his left shoulder. The defendant fell on the enclosed back porch. Paramedics and police officers arrived on the scene. Defendant struggled with the police, and his arm was broken in that scuffle. Eventually, defendant was transported to a Lincoln hospital. Later, he was charged with attempted burglary.

As stated above, defendant's testimony conflicts in many respects with that of Mr. Sailors.

In *State v. Evans*, 215 Neb. 433, 443, 338 N.W.2d 788, 795 (1983), citing *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), we noted that

> it is not for this court to accept one version of the case over another; that was for the jury. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

To commit a burglary, as defined in § 28-507(1), it is necessary that there be a breaking and entering with the intent to commit any felony or to steal property of any value. Here, the defendant, charged with attempted burglary, argues that he had no intent to commit a felony in or take anything from the Sailors home. Defendant testified he had the knife because he was contemplating suicide. Mr. Sailors, on the other hand, testified that the defendant had thrust his knife at Mr. Sailors. If the jury chose to believe Mr. Sailors and not the defendant, it could well find that the defendant intended to harm Mr. Sailors with that knife. Such conduct on the part of defendant would constitute the felony of assault in the second degree, as defined in Neb. Rev. Stat. § 28-309 (Cum. Supp. 1984). The evidence would also support a jury finding that the defendant attempted to break and enter the Sailors home and that in fact defendant had opened a screen door and entered the enclosed back porch. Since these facts constitute the material elements of attempted burglary, the evidence before the jury fully supports the jury's

finding of defendant's guilt. Defendant's contention to the contrary is without merit.

Defendant's second grouping of assigned errors concerns the trial court's alleged errors in instructing the jury on lesser-included offenses. The trial court instructed the jury:

> Under the information in this case, depending on the evidence, you may find the defendant: A. Guilty of attempted burglary; B. Guilty of attempted assault in the second degree; C. Guilty of assault in the third degree; D. Guilty of criminal trespass, first degree; E. Guilty of criminal mischief; F. Not guilty.

The court gave instructions on all the crimes listed as B, C, D, and E on the theory that those crimes constituted lesser-included offenses.

The trial court was clearly in error in so instructing the jury. In *State v. Lovelace*, 212 Neb. 356, 359, 322 N.W.2d 673, 675 (1982), we stated: " 'To be a lesser included offense, the elements of the lesser offense must be such that is is impossible to commit the greater without at the same time having committed the lesser. . . .' " It is obvious that attempted burglary could be committed in many ways without committing any of the other crimes enumerated in the instructions. See, also, *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984).

Such error, however, in this case was not prejudicial. The trial court properly instructed the jury on the crime of attempted burglary, and concluded its instruction on that crime as follows:

> If you find, from the evidence, beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of attempted burglary, and you shall not then consider the lesser included offenses hereafter set forth in this instruction.

Since the jury found the defendant guilty of attempted burglary and the instruction told them not to consider the "lesser included offenses hereafter set forth," we find no prejudice in the instruction. We presume the jury followed the court's instruction and did not consider any of the purported lesser-included offenses after the defendant was found guilty of the primary charge against him. As set out in *State v. Sayers*,

211 Neb. 555, 567, 319 N.W.2d 438, 444 (1982), "The rule in Nebraska is: ' "It is presumed a jury followed the instructions given in arriving at its verdict and, unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded." ' " Defendant's brief does not point out how the error was prejudicial. In *State v. Bartholomew*, 212 Neb. 270, 276-77, 322 N.W.2d 432, 436-37 (1982), we held:

> Even though the court should not have used the precise language that it did, before such error can be considered as a ground for reversal, it must be considered prejudicial to the rights of the defendant. "Defendant has failed to show how he was in fact prejudiced by the instruction as given. Other than the mere statement that the instruction was prejudicial, defendant has adduced no proof of prejudice that could be a ground for reversal." *State v. O'Kelly*, 193 Neb. 390, 393, 227 N.W.2d 415, 418 (1975).

The defendant's final assignment of error charged that the prosecution did not comply with the court's discovery order. The court had ordered that the prosecution provide to the defendant the address of Liza Weiss. The prosecution could not comply with the court's order because Ms. Weiss' whereabouts were not known to the State authorities. It is also clear that the prosecution offered to have Ms. Weiss present at trial, if the defense wanted, but that advance notice had to be given because Ms. Weiss telephoned the county attorney only once a week and could not furnish her address because she was traveling. Ms. Weiss had told the county attorney she would appear on request if notified, and the county attorney had so informed defendant's counsel.

The defendant's attorney did not make any effort to have Ms. Weiss located, to take her deposition, or to have her brought back for the trial. Defendant's attorney knew the week before the trial that the county attorney did not know where Ms. Weiss was and that she would not be called as a witness by the State. Defendant's attorney did not request a continuance, nor did he make a formal offer of proof as to what he believed Ms. Weiss' testimony would be. The trial court was correct in refusing to grant defendant's motion to dismiss the case or to grant defendant's motion for a mistrial.

There being no judgment error in any of the matters raised by defendant, we affirm the defendant's conviction and sentence.

AFFIRMED.

WILLIAM L. CHALUPA, APPELLANT, V. KELCY A. CHALUPA, APPELLEE.

371 N.W.2d 706

Filed August 9, 1985. No. 84-698.

1. **Records: Appeal and Error.** Where evidence or rulings do not appear in the record, they cannot be considered on appeal.
2. **Trial: Pretrial Conferences: Appeal and Error.** Where a pretrial order improperly restricts the issues, the parties are bound by it at trial and on appeal, if no objection has been made, unless it does violence to the issues raised by the petition.
3. **Guardians Ad Litem.** The appointment of a guardian ad litem is a matter involving the discretionary powers of the court.
4. **Courts: Jurisdiction: Minors: Guardians Ad Litem.** Generally speaking, adequate representation by counsel for the respective parties and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protect the children's interests and render unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children.
5. **Child Custody: Appeal and Error.** 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.
6. _____: _____. In considering the best interests of the child so as to determine the question of which parent should have the care and custody of the child, although we review the record de novo, great weight will be given to the fact that the trial court observed the witnesses and their manner of testifying.

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

Steven O. Stumpff, for appellant.

John O. Sennett of Black, Sennett & Roth, for appellee.

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

HASTINGS, J.

Petitioner has appealed from a judgment of the district court which, in granting a decree of dissolution of marriage, awarded custody of the parties' minor child to the respondent wife. In his appeal petitioner has assigned as errors the action of the trial court in limiting the time within which each party might present evidence, the refusal of the trial court to appoint a guardian ad litem, and the awarding by the court of child custody to the respondent.

The parties were married in January of 1982, and to that marriage one daughter, Kodi, was born on October 13, 1982. The parties separated in November of 1983, when respondent took Kodi to Alaska to visit respondent's parents. The following month, petitioner filed this action. The trial court, on May 10, 1984, awarded temporary custody of the minor child to the petitioner, but the final decree of July 20 granted permanent custody to the respondent.

The court entered a pretrial order in which each party was granted 3 hours for presentation of his or her case and one-half hour each for rebuttal. Although petitioner asserts that this order was made over his objection, nothing to that effect appears in the record.

Where evidence or rulings do not appear in the record, they cannot be considered on appeal. *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982). Therefore, we deal only with a pretrial order in which no objection appears of record. Where a pretrial order improperly restricts the issues, nevertheless the parties are bound by it at trial and on appeal, if no objection has been made, unless it does violence to the issues raised by the petition. *Zavoral v. Pacific Intermountain Express*, 181 Neb. 40, 146 N.W.2d 796 (1966). In any event, no showing of prejudice was made by the petitioner, and we do not agree that the trial court's order constituted an abuse of discretion.

The appointment of a guardian ad litem is a matter involving the discretionary powers of the court. Neb. Rev. Stat. § 42-358(1) (Reissue 1984). Generally speaking, we have said

that adequate representation by counsel for the respective parties and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protect the children's interests and render unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children. *Ford v. Ford,* 191 Neb. 548, 216 N.W.2d 176 (1974).

The main issue remaining is the granting of custody to the respondent.

> 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.

Parsons v. Parsons, 219 Neb. 736, 365 N.W.2d 841, 842 (1985).

The record contains a great deal of testimony as to the relative merits and detractions of the two parties as custodial parents. In considering the best interests of the child so as to determine the question of which parent should have the care and custody of the child, although we review the record de novo, great weight will be given to the fact that the trial court observed the witnesses and their manner of testifying. *Koch v. Koch*, 209 Neb. 896, 312 N.W.2d 294 (1981).

From a de novo review of the record, we determine that there is no showing of an abuse of discretion on the part of the trial court, and the award of custody to respondent is supported by the weight of the evidence.

The judgment of the district court is affirmed. Respondent is awarded a fee for her attorney of $1,000.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT EDWARD HUNT, JR., APPELLANT.

371 N.W.2d 708

Filed August 9, 1985. No. 84-797.

1. **Criminal Law: Trial: Prosecuting Attorneys.** A prosecutor states a case as contemplated by Neb. Rev. Stat. § 29-2016 (Reissue 1979) when he or she outlines the nature of the proceeding against the defendant.
2. **Criminal Law: Convictions: Appeal and Error.** Harmless error provides no ground for the reversal of a judgment of guilt.
3. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
4. _____: _____. Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) is subject to the overriding protection of Neb. Rev. Stat. § 27-403 (Reissue 1979), which states that evidence of other acts must be excluded if, among other things, the probative value of the evidence of other acts is substantially outweighed by the danger of unfair prejudice to the defendant.
5. **Other Acts.** Whether other acts are sufficiently similar to the one charged in the particular case on trial so as to render evidence of the other acts such as to have probative value is a matter left to the discretion of the trial court.
6. **Criminal Law: Statutes: Constitutional Law: Trial: Evidence.** Abolition of the privilege preventing a spouse from testifying about any confidential communication made by one spouse to the other in crimes of violence, Neb. Rev. Stat. § 27-505 (Cum. Supp. 1984), does not constitute special legislation and does not grant a special privilege in violation of Neb. Const. art. III, § 18, nor does it offend concepts of due process and equal protection.
7. **Statutes: Constitutional Law.** Classification for purposes of legislation is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.
8. _____: _____. Classification for the purpose of legislation must be real and not illusive; it cannot be based on distinctions without a substantial difference.
9. _____: _____. This court does not sit as a superlegislature to review the wisdom of legislative acts.
10. _____: _____. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
11. **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 a ground for reversal.
12. **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.

13. **Statutes: Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** A death sentence cannot be imposed absent the existence of at least one of the aggravating circumstances set forth in Neb. Rev. Stat. § 29-2523 (Reissue 1979).
14. **Statutes: Aggravating and Mitigating Circumstances: Proof.** Aggravating circumstance (1)(b) of Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not exist unless the murder was committed for the purpose of concealing the commission of a crime, or for the purpose of concealing the identity of the perpetrator of a crime.
15. _____: _____: _____. Aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not exist unless the method of killing itself entails something more than the ordinary circumstances which attend any death-dealing violence.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Sentence vacated and cause remanded for resentencing.

Thomas H. DeLay of Mueting, DeLay & Stoffer, for appellant.

Robert M. Spire, Attorney General, and J. Kirk Brown, for appellee.

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

CAPORALE, J.

A jury found defendant, Robert Edward Hunt, Jr., guilty of first degree murder. He was thereupon so adjudged and subsequently sentenced to death. We affirm the adjudication of guilt but vacate the sentence and remand for resentencing.

THE CRIME AND ITS INVESTIGATION

On the evening of April 12, 1984, at approximately 10:30 p.m., Officers Kenneth Monroe, Douglas Dekker, Rick Brahmer, and Donald Klug of the Norfolk Police Department were dispatched to defendant's Norfolk home. The officers had been advised by their dispatcher that a woman had called stating her husband thought he had killed someone and was "going off the deep end." Upon their arrival at defendant's residence, the officers were met by Wanda Hunt, defendant's wife, who informed them "he is in the other room. He is not

dangerous. He doesn't have any guns or weapons. He is sitting down." The officers found defendant sitting cross-legged on the floor in the living room, sobbing. Officer Dekker, an acquaintance of the defendant, approached him and asked, "Bob, do you remember me?" The defendant leaned over, put one hand on Officer Dekker's arm and one arm around his side, and said, "Yeah, Doug, I killed her. Doug, I killed her." The defendant responded to further questions from Officer Dekker, stating that he did not know the victim's name but gave them the victim's address. Defendant further said, "She works at Norfolk Dodge. Her picture was in the paper because she is getting married next month." Defendant then informed the officers that he gained entrance into the victim's home by brandishing a BB gun he had stolen earlier from a store and that he "strangled her." Defendant then started mumbling, "I gotta pay. I killed her. I gotta pay." Officer Dekker noticed a large scratch on defendant's chest and arm and asked where it came from, to which defendant replied, "She must have did it."

After a moment or two of silence, defendant directed the officers to a cassette box under a couch. Officer Brahmer opened the box and found that it contained several pairs of ladies' underwear, nylon hosiery, sex-oriented magazines, a pair of glasses, and a BB gun. Officer Brahmer asked Mrs. Hunt if the underwear or the glasses belonged to her. She replied that they did not. Defendant then told the officers he thought the glasses belonged to the victim.

Officer Dekker said he thought someone should go to the address mentioned by defendant to check on the welfare of the person there, to which defendant replied that he killed her and that she was dead. Defendant then said, "I can see her. She's in the bathtub and she's dead." At that time Officers Monroe and Klug, who had just arrived at the scene, left defendant's residence and proceeded to the address given by defendant to determine what had taken place there. Officers Dekker and Brahmer stayed with defendant in his home.

Officer Dekker asked defendant if he had done anything else to the victim. Defendant replied, "Yeah, I sexually assaulted her after she was dead. I always see them girls laid out in the pictures with their eyes closed and I just had to do it. I dreamed

about it for so long that I just had to do it."

Defendant, who continued to sit on the floor, rocking and sobbing, said what Officer Dekker thought was "please don't kill me." Officer Dekker further recalled:

> I wasn't real sure if that's what he said. So then I asked him again the question, "What?" in reference to what he said, at which time he said, "Please don't kill me." I then stated to him, "Bob, nobody is going to kill you." He then started sobbing a little harder and said, "No, not me. She said please don't kill me, please don't kill me, and I didn't listen, I did it anyway."

In the meantime, at approximately 10:50 p.m., Officers Monroe and Klug arrived at the victim's home. After receiving no answer to their repeated knocking and calls, the officers entered the residence, a mobile home, and found the victim nude, lying face down in the bathtub. They observed that a nylon material was wrapped around the victim's neck and that some of the same type of material had been placed in her mouth. Officer Klug, after checking for a pulse and finding none, and observing that the victim's skin was very pale and cool to the touch, concluded that the victim was dead. He then notified Officer Dekker, who was still at defendant's house, that defendant's story was apparently true and to arrest him.

Defendant was thereupon arrested and taken to the Norfolk police station by Officers Dekker and Brahmer. While being booked, defendant pulled a crumpled washcloth from his pocket. When asked by Officer Dekker where the cloth came from, defendant replied that he did not know.

Prior to any interrogation after the arrest and before defendant was advised of his *Miranda* rights, defendant inquired whether he could ask Officer Leon Chapman a question, then asked how "the girl" was. Officer Chapman told defendant that she was dead, to which defendant responded by placing his hands over his face, with his elbows on his knees, for approximately 30 seconds. Defendant then sat up, Officer Chapman advised defendant of his *Miranda* rights, and questioning by Officer Chapman began at 12:15 a.m. on April 13. Officer Chapman testified that at this time defendant was calm and did not act shocked or stunned, other than the gesture

with his hands over his face.

Defendant told Officer Chapman that prior to April 12, 1984, he had told his wife that he had an urge to kill a woman and have sex with her after she was dead. He explained that he had experienced these urges in the past. On these other occasions he would gather up the cassette case, together with sex magazines and a large kitchen knife, and go "out looking for a female to do this with, but on those occasions could not find one."

In response to a question about why he picked this particular girl, defendant stated that the Tuesday prior to April 12, 1984, which was a Thursday, he saw a photograph of the victim on the engagement page of the Norfolk Daily News. She was otherwise unknown to him. He further reported that during the early evening hours of April 12, 1984, he shoplifted a BB gun and some women's panties and nylons, having shoplifted some nylon rope on the previous night.

Defendant then drove to the victim's mobile home and parked. He watched the victim's home for 5 to 10 minutes and saw that the lights were on, a car was in the driveway, and that someone was home. The victim had in fact returned home a short time earlier, having eaten dinner with a friend and her husband at their home. She had left her friend's house at approximately 9:10, telling them she was going to the post office and then home.

Defendant then drove down the street and parked in the lot of a nearby store, positioning his car so that he could see the victim's home. He kept the home under observation for another 5 or 10 minutes while he also looked at some of the sex magazines he had brought with him.

Defendant got out of his car, took his cassette case and the gun, which he had stuck into his pants, and walked up to the victim's home. He walked around it approximately two times, looking into the windows to determine if he could see the victim. He could not, and walked up onto the porch and knocked on the door. When the victim opened the door, defendant pointed the gun at her and walked in.

Defendant commanded the victim to lie on the floor in the kitchen. After she complied, he tied her arms and legs with the

nylon rope. The victim said something about "take my car," but she did not have a chance to say too much as he had stuck some panties into her mouth. Defendant then dragged the victim into the living room, where he removed a nylon stocking from his cassette case and put it around her neck, strangling her. According to Officer Chapman, defendant described the process as tightening "down tighter and tighter trying to render her unconscious." When she finally became unconscious, defendant untied the rope and threw it on a living room table.

Defendant then removed the victim's robe and carried her into the bedroom, where he removed his pants and masturbated, ejaculating onto her stomach. Defendant stated that the victim still had a pulse. He next carried the victim into the bathroom and placed her in the bathtub, which had approximately 1 foot of water in it. The victim was twitching and shaking while he placed her head under the water. Then the telephone rang and defendant gathered his belongings and left.

At the end of this interview Officer Chapman asked defendant to give him a tape-recorded statement or a written statement concerning his involvement in the victim's death. Defendant replied that he "would . . . just as soon have an attorney present for any written or tape recorded statement." Officer Chapman then asked defendant if he would agree to let the police search his home and his car. Defendant replied yes, saying that he was willing to cooperate in any way, except that he would like to have an attorney present when and if he gave a written or tape-recorded statement. The interview then ended at approximately 1:53 a.m., April 13, 1984.

At approximately 2:35 a.m. the same morning, defendant signed a consent form giving the police permission to search his home and automobile. Defendant's home and automobile were then searched by members of the Norfolk Police Department. A partial box for a BB gun, a pair of opera glasses and its box, and items not related to the crime were seized from his automobile.

At 9:34 a.m. Officer Chapman began to interrogate defendant a second time. Defendant had not yet consulted with an attorney, nor had he been given an opportunity to do so. Officer Chapman again informed defendant of his *Miranda*

rights, which defendant again waived. During this second interrogation, defendant told Officer Chapman that he had taken a pair of glasses which the victim was wearing when he entered her home. He removed them from her face at the time of the murder because he feared his fingerprints were on them. Defendant admitted that he used rubber gloves and a washcloth taken from the victim's home to wipe his fingerprints off the doorknob and other things he had handled in the apartment. Defendant also admitted that he had oral sex with the victim after rendering her unconscious but that "it didn't give me the kick that I thought it would." Defendant first said that his purpose was to knock the victim unconscious and then engage in sexual activity with her. However, when Officer Chapman asked, "[L]ast night when you went to the victim's house, did you go there with the intent to kill her and have sex with her," defendant replied, "[T]hat was the general idea when I left my house yes." The defendant then said to Officer Chapman, "I think that you and I agreed that before I made any further statement I would have an attorney." Officer Chapman told defendant he understood defendant was willing to cooperate in any way except giving a written or recorded statement, and then asked:

> "[D]id you recall it being that way" and he [defendant] then waited for a minute and advised "yes." And that was at approximately 10:45 a.m. on the 13th of April, 1984. After that statement then I then asked him again, quote, do you wish questioning to be ceased now, quote, and Hunt then advised me after about 10 or 15 seconds of just sitting there thinking, he stated, quote, that's fine, might as well keep going, quote.

The questioning ended at 10:46 a.m.

After defendant was arrested, Mrs. Hunt disclosed to police, both orally and in writing, that a few months prior to the crime defendant had told her that he fantasized about murdering a woman and then masturbating on her.

An autopsy was performed on the victim's body at approximately 9:30 on the morning of April 13, 1984, by Dr. Harlan Papenfuss, who died prior to trial. Clyde Cassel, Jr., Dr. Papenfuss' assistant, testified by deposition that the victim's

mouth was found to contain two pairs of women's panties, which were removed during the autopsy. The second pair of panties was impacted tightly into the back of the victim's mouth, almost into the throat, and had to be removed with the aid of forceps. Cassel testified that when pushed up into that area, the panties obstructed the nasal passages.

A leg from a pair of nylon stockings had been tied around the victim's neck. After comparing the portion of a pair of nylon stockings found by the police in defendant's cassette box and the portion found around the victim's neck, a forensic chemist testified that in his opinion the two portions had at one time formed a single pair of nylon stockings.

Dr. Steffen Lacey, a pathologist, testified that he had reviewed Dr. Papenfuss' autopsy report, the photographs taken at the time of the autopsy, and the testimony of Clyde Cassel, Jr., and that in his opinion the victim died of asphyxia as a result of ligature strangulation. That is to say, the victim died from a lack of oxygen resulting from some object having been placed around her neck which prevented her from breathing. It appeared to Dr. Lacey that the nylon stocking was used to accomplish the strangulation. The victim's neck showed three bruises running around its circumference in three different positions, indicating the nylon stocking had been moved from point to point on the victim's neck, then tightened. Dr. Lacey also testified that the ligature pressure exerted on the neck in this manner could cause unconsciousness for a brief period prior to death and that in a death caused by lack of oxygen to the brain, the body may twitch or shudder either at the time of death or after death. In Dr. Lacey's opinion death occurred from zero to 24 hours prior to the autopsy.

Carol Zastera, a forensic serologist, testified that no semen was found on the victim's body or on the swabs taken from her body tissue and that it was possible that the body could have been cleansed of the semen by water prior to the autopsy.

PRETRIAL MOTIONS

Prior to trial, defendant moved to suppress any evidence relating to the items seized from his automobile and home and to suppress all statements made by him after he was placed in

custody by the Norfolk Police Department. In addition, defendant moved that all evidence concerning communications between him and his wife be suppressed and that the State be directed not to adduce any evidence which in any manner referred to such communications. The trial court overruled all the motions except that it suppressed defendant's denial of knowledge as to the source of the washcloth found on his person.

ISSUES RE ADJUDICATION OF GUILT

Defendant's 23 assignments of error present the following 5 issues with respect to the determination that he is guilty of first degree murder: (1) Whether the trial court erred in failing to sustain defendant's motion to dismiss following the prosecutor's opening statement; (2) Whether the trial court erred in failing to suppress and exclude evidence of the admissions made by defendant to the police after he was arrested; (3) Whether the trial court erred in finding that elimination of the spousal privilege in violent crimes is constitutional; (4) Whether the trial court erred in failing to suppress evidence concerning the items seized from defendant's home and automobile; and (5) Whether the trial court erred in finding that the evidence was sufficient beyond a reasonable doubt to find the defendant guilty of first degree murder.

We address each of these issues in turn.

(1) Statement of Prosecutor

Defendant contends that the trial court erred in overruling his motion to dismiss the information following the prosecutor's opening statement. He argues that Neb. Rev. Stat. § 29-2016 (Reissue 1979) mandates that the prosecutor define in the State's opening statement the elements of the crime with which a criminal defendant is charged and that the prosecutor in this case failed to so do. Assuming, without deciding, that the elements of first degree murder were not delineated during the State's opening statement, the defendant's contention is nonetheless without merit.

Section 29-2016 provides in part:

> After the jury has been impaneled and sworn, the trial shall proceed in the following order: (1) The counsel for

> the state must state the case of the prosecution and may briefly state the evidence by which he expects to sustain it; (2) the defendant or his counsel must then state his defense and may briefly state the evidence he expects to offer in support of it . . . .

The statute requires the prosecution to "state the case"; it does not, contrary to the defendant's contention, specifically require that the prosecution define the elements of the crime. We so held in *State v. Oltjenbruns*, 187 Neb. 694, 701, 193 N.W.2d 744, 749 (1972), saying: "The statute requires that counsel for the state *must* state the case of the prosecution and may briefly state the evidence by which he expects to sustain it. It contains no requirement that the prosecution must specifically enumerate all of the necessary elements of the offense."

Defendant argues that *Oltjenbruns* is distinguishable because in that case the prosecutor failed to mention some of the elements, whereas in his trial the prosecutor did not mention any of the elements. We do not find this distinction at all meaningful. The prosecution "stated the case" when it outlined the nature of the proceeding against the defendant. It further outlined for the jury the evidence which would disclose how the murder occurred. See, also, *Morris v. State*, 109 Neb. 412, 191 N.W. 717 (1922).

(2) Admissions of Defendant

The second issue, as argued by the defendant, presents two questions: (1) Should the admissions made by defendant during the second April 13 interview beginning at 9:34 a.m. have been suppressed? (2) Should defendant's admission of past searches for women to kill in order that he might satisfy his sexual urges have been suppressed?

Second Interview

The first of these two questions must be answered negatively. At trial the prosecutor wisely refrained from introducing into evidence any of the admissions defendant made during the constitutionally suspect second interview. Thus, the trial court's ruling refusing to suppress those admissions had no effect on the resolution of the issue of defendant's guilt. If there was error

in the ruling, the error did not result in prejudice and was therefore harmless. Harmless error provides no ground for the reversal of a judgment of guilt. *State v. Smith*, 218 Neb. 201, 352 N.W.2d 620 (1984); *State v. Plymate*, 216 Neb. 722, 345 N.W.2d 327 (1984).

Prior Acts

The second question is whether evidence as to defendant's admissions of his prior unsuccessful efforts to satisfy his urges to kill women and sexually use their corpses should have been excluded. Defendant argues that evidence of other acts may not be received in a criminal prosecution unless that evidence is so related in time, place, and circumstance to the offense charged as to have probative value. Defendant asserts that the evidence admitted at trial was too far removed in time from the murder and that the events were not similar enough to the crime in question as to justify its admission. Defendant also complains that the evidence was unduly prejudicial.

Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This court explained the function of § 27-404(2) in *State v. Stewart*, 219 Neb. 347, 351, 363 N.W.2d 368, 371 (1985), as 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.

However, § 27-404(2) is subject to the overriding protection of Neb. Rev. Stat. § 27-403 (Reissue 1979), which states that such evidence must be excluded if, among other things, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Craig*,

219 Neb. 70, 361 N.W.2d 206 (1985). Further,

> Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused. The balancing of the need for other-crimes evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court.

State v. Keithley, 218 Neb. 707, 710, 358 N.W.2d 761, 764 (1984). In discussing the discretion exercised by the trial court in admitting such evidence, we said:

> "The extent to which the discretion of the trial court will be allowed to be exercised in this regard has not been fixed by any decision of this court. Probably it cannot be but depends upon the facts in each case. . . . In State v. Siddoway, 61 Utah 189, 211 P. 968, it was held: 'No exact limitation of time can be fixed as to when another offense tending to prove the intent of the act charged is remote. The decision of that question must depend upon the circumstances of the particular case, and whether evidence is too remote or not is a question whose decision is largely in the sound discretion of the trial court.' [Citations omitted.] The doctrine generally accepted is that remoteness in point of time may weaken the evidential value of the evidence but does not justify its exclusion. [Citations omitted.]
>
> "*Likewise it is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that evidence thereof has probative value.*"

(Emphasis in original.) *Id.* at 709-10, 358 N.W.2d at 763, quoting *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981).

With these principles in mind we turn to the facts of the present case.

Defendant had lived in Norfolk for 6 years. Officer Chapman testified at trial, as indicated earlier, that during the first interview on April 13, 1984, defendant admitted to him that he had experienced past urges to kill a woman and have sex

with her and that he had talked with his wife about it. Defendant then told Officer Chapman that on two or three occasions prior to the murder, he had gathered his cassette case together with the paraphernalia, that being the sex magazines and a knife that he had gotten from the kitchen at his residence, and then went out looking for a female to do this with, but on those occasions could not find one.

This evidence is relevant to prove defendant's intent, which is the state of mind operative at the time of an act. *State v. Stewart, supra.* The evidence was not offered to show defendant's character and that he acted in accordance with it. Rather, the evidence tended to show that defendant went to the victim's home intending to kill her and then to have sex with her. The acts are strikingly similar in nature to the actual crime defendant eventually committed. The evidence is relevant in that it tends to refute defendant's claim that he did not premeditate the murder—that he meant only to render the victim unconscious. The prior acts also tend to prove defendant's motive, preparation, and plan in the present crime.

We therefore cannot say the trial court abused its discretion in admitting this evidence at trial.

(3) Spousal Privilege

Defendant contends that the trial court erred in concluding that abolition of the privilege preventing a spouse from testifying about any confidential communication made by one to the other in crimes of violence is constitutional. Neb. Rev. Stat. § 27-505 (Cum. Supp. 1984). He urges that preserving the privilege in nonviolent crimes and abolishing it in violent ones constitutes special class legislation in violation of Neb. Const. art. III, § 18, prohibiting special laws and the granting of a special privilege to any person, and further offends the concepts of due process and equal protection because the classifications of "violent" and "nonviolent" crimes are arbitrary, capricious, and bear no rational relation to a legitimate state purpose.

Wife's Statements to Police

Defendant first argues that the trial court erred in overruling his motion to suppress and prohibit any reference to the

statements he made to his wife concerning his sexual fantasies. This claim presents no issue because the prosecution offered no trial evidence and made no trial reference to what defendant's wife reported in that respect. As discussed earlier in connection with the second interview, even if the trial court's ruling were erroneous, a matter we do not decide, it had no prejudicial effect upon the defendant and thus provides no basis for reversal.

Defendant's Statements to Wife

Officer Chapman testified at trial that defendant admitted he had told his wife of having an urge to kill a woman and have sex with her "after she was dead."

For the purpose of analyzing defendant's contentions as to the constitutionality of § 27-505, we assume, but again do not decide, that any spousal privilege which may otherwise have existed was not waived by the combined disclosures made by both defendant and his wife to Officer Chapman.

Each of defendant's constitutional arguments depends upon the premise that treating violent crimes differently than nonviolent ones is unreasonable, arbitrary, capricious, and irrational. Such is simply not the fact.

We stated in *Sandberg v. State*, 188 Neb. 335, 338, 196 N.W.2d 501, 504 (1972), quoting *Gossman v. State Employees Retirement System*, 177 Neb. 326, 129 N.W.2d 97 (1964):

> "The principles to be applied to testing legislative classification have been well established. The difficulty arises in their application to a particular set of facts or a particular legislative act. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The Legislature may, and many times must, carve out classes or distinctions that would appear arbitrary or unreasonable. But, on closer examination, it is found that the classifications are related to and are necessary for the accomplishment of the legitimate purposes of the legislation. The question is always whether the things or persons classified by the Act

form by themselves a proper and legitimate class with reference to the purposes of the Act. . . ."

In *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 608-09, 300 N.W.2d 181, 187 (1980), quoting *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970), we said:

> "It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. [Citation omitted.] The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. [Citations omitted.] The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. [Citation omitted.] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.* [Citations omitted.]" (Emphasis in original.)

The legislative history of the amended version of § 27-505 makes it clear that the purpose of the statute is to deny the spousal privilege to those accused of violent crimes, just as it had previously been denied, and continues to be denied, to those accused of bigamy, incest, or other interspousal offenses. Floor Debate, L.B. 696, Judiciary Committee, 88th Leg., 2d Sess. (Feb. 10, 1984). The Legislature intended to strike a balance between the societal interests in the sanctity of the marital relationship and the need of society to protect itself from and to prosecute violent crime. Floor Debate, *supra*.

As we stated in *State v. Ruzicka*, 218 Neb. 594, 597, 357 N.W.2d 457, 461 (1984):

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

The classification of persons who commit violent crimes is based on a substantial difference from the rest of the population and is reasonably related to the purpose of the statute, which is to enable better prosecution of violent crimes and to thereby better protect society. The legislation is not special legislation and grants no special privilege, nor does it offend the concept of due process or equal protection of the law.

(4) Seizure of Items

Defendant argues that the consents he gave for searches of his home and automobile were constitutionally invalid because he had earlier expressed the desire to have an attorney present before giving a written or taped statement. Once again, we assume for the purpose of this analysis, but do not decide, that defendant's claim in this regard is correct.

We need spend no thought on the search of the house, for although some items were seized as a result of that search, they had nothing to do with this crime, and no reference to them was made at the trial.

The partial box for the BB gun and the opera glasses seized from the automobile were received in evidence. The opera glasses were not otherwise mentioned in the testimony. Even if the jury were to speculate that those were the glasses defendant used to observe the victim's home, the fact that he had watched her home before entering it was in evidence through the testimony of Officer Chapman. He testified that defendant told him he had watched the victim's home. The opera glasses,

therefore, were merely cumulative evidence.

The same is true of the partial box. There is no dispute but that the BB gun used by the defendant to gain entrance into the victim's home was properly received in evidence. Admission into evidence of part of the box in which the BB gun had been packaged added nothing of significance to the chain of evidence implicating the defendant in the victim's murder.

We have 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 a ground for reversal. *State v. Fix*, 219 Neb. 674, 365 N.W.2d 471 (1985).

Therefore, even if the opera glasses and partial box should not have been received in evidence, there was no prejudice which resulted from the error.

(5) Sufficiency of the Evidence

It has long been the rule in this state 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. Lichti*, 219 Neb. 894, 367 N.W.2d 138 (1985); *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985); *State v. Morse*, 211 Neb. 448, 318 N.W.2d 893 (1982).

The evidence establishes beyond a reasonable doubt that the victim died of strangulation at defendant's hands. The evidence further is such that the jury could find that defendant thought about the killing over a period of months, that he stole equipment over a period of 2 days with which to perform the act, that he sought out the victim with the intention of killing her, and that he took the victim's life to satisfy a perverted sexual urge.

A person commits murder in the first degree if he, among other things, kills another person purposely and with deliberate and premeditated malice. Neb. Rev. Stat. § 28-303 (Reissue 1979). The evidence supports a finding that defendant did just

that.

THE SENTENCE

A sentencing panel was convened in accordance with the provisions of Neb. Rev. Stat. § 29-2520 (Reissue 1979), which first determined that defendant is an untreatable mentally disordered sex offender. Neb. Rev. Stat. §§ 29-2911 and 29-2914 (Reissue 1979). After conducting a second hearing the panel sentenced defendant to death.

The Legislature has ordained that imposition of the death penalty be limited to the crime of murder in the first degree, and then only if the aggravating circumstances set forth in Neb. Rev. Stat. § 29-2523 (Reissue 1979) outweigh the mitigating circumstances set forth therein. Neb. Rev. Stat. §§ 28-303 and 29-2519 (Reissue 1979).

The sentencing panel in this case found two of the aggravating circumstances delineated in § 29-2523 to exist, namely, aggravating circumstances (1)(b) and (d), which are set forth in the discussion which follows.

Defendant assigns a number of errors to the manner in which the sentencing hearing was conducted, to the findings of the panel, and to the sentence imposed, claiming it to be both excessive and disproportionate. Among his various claims is the specific assignment of error that the evidence does not support the existence of either aggravating circumstance (1)(b) or (1)(d). Defendant concludes by arguing that since no aggravating circumstance exists, the maximum sentence which can be imposed upon him is life imprisonment, the only remaining authorized sentence. Neb. Rev. Stat. §§ 28-105 and 28-303 (Reissue 1979).

Our analysis reveals that defendant's contention with respect to the absence of aggravating circumstances is correct. Since that determination makes the death sentence inappropriate under existing law, we need not, and therefore do not, consider the other errors he assigns to the sentencing hearing and to the sentence itself.

The verdict that defendant is guilty of first degree murder must of necessity rest upon a finding that he killed purposely and with deliberate and premeditated malice. In order to so find

under the evidence in this case, the jury first had to find that defendant went to the victim's home with the intention of killing her so that he could play out his sexual fantasy with a female corpse. Such a finding is inconsistent with the existence of aggravating circumstance (1)(b), which is defined in § 29-2523 as: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." There is no question but that the murder was not committed for the purpose of concealing the commission of a crime. Nor does the evidence establish that it was committed for the purpose of concealing defendant's identity. Certainly, any killing has the effect of rendering the victim incapable of identifying the perpetrator; that truism, however, does not satisfy the requirement that the murder be committed "to conceal the identity of the perpetrator." See, *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). The purpose of the killing in this case was to fulfill a sexual desire.

The evidence establishes that the victim was rendered unconscious within a short time of defendant's intrusion into her home. It therefore cannot be said that the murder was of the nature described in aggravating circumstance (1)(d), as specified in § 29-2523: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

To be sure, forcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.

In order for aggravating circumstance (1)(d) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence. See *State v. Reeves, supra*, wherein aggravating circumstance (1)(d) was held not to be present where a murder was achieved "swiftly and suddenly," but was held to be present in another murder in which the victim, who "did not die quickly," was subjected to sexual penetration while conscious

and defending herself. 216 Neb. at 227, 344 N.W.2d at 447. In contrast, the sexual acts in the present case, as noted earlier, were practiced either on a woman who was unconscious or in whom life had ceased to exist.

Although the method by which defendant achieved sexual gratification may be accurately described as exceptionally heinous and atrocious, and as manifesting exceptional depravity by ordinary standards of morality and intelligence, the murder itself, given the inherent nature of a killing, cannot.

DECISION

Since no aggravating circumstance as defined in § 29-2523 exists, the sentence of death must be, and hereby is, set aside and vacated. The cause is remanded for resentencing in accordance with law.

SENTENCE VACATED AND CAUSE REMANDED FOR RESENTENCING.

BOSLAUGH, J., dissenting in part.

I dissent only from that part of the opinion of the court which finds that the record does not support the finding of the sentencing panel that two aggravating circumstances existed.

The sentencing panel found as follows:

> (b) "The murder was committed in an apparent effort to conceal the commission of a crime or to conceal the identity of the perpetrator of a crime."
>
> The evidence does establish beyond a reasonable doubt that the murder of Beverly K. Ramspott was committed to avoid detection and apprehension and was committed in an apparent effort to conceal the identity of the perpetrator of a crime, to-wit: Robert Edward Hunt, Jr. In this regard, the evidence establishes beyond a reasonable doubt that the defendant Robert Edward Hunt, Jr. obtained through theft a rope, nylon stockings, ladies [sic] panties, and a pellet gun in preparation for his assault of the victim. The only logical conclusion for the theft of these items is that they were stolen by the defendant to avoid the possibility that they might later be traced to the defendant. The defendant then went to the home of Beverly K. Ramspott, gained admission and

rendered his victim helpless and unconscious. The defendant then disrobed his victim, masturbated and ejaculated on her body and then checked her pulse for signs of life. The defendant, after finding a pulse, placed his victim face down in the bathtub partially filled with water. Death was caused by strangulation. The defendant then wiped the premises free of fingerprints, removed the victims [sic] eyeglasses to avoid fingerprint detection, gathered up his remaining paraphernalia and fled. The only conclusion that can logically be reached is that Beverly K. Ramspott was murdered to conceal the identity of the defendant, the perpetrator of the assault upon Beverly K. Ramspott. The evidence establishes this beyond a reasonable doubt.

Therefore, this aggravating circumstance does exist.

. . . .

(d) "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

The evidence establishes beyond a reasonable doubt that defendant's purpose in going to the place where Beverly K. Ramspott resided was to have sexual relations with Beverly K. Ramspott. That the defendant was determined to have sexual relations with Beverly K. Ramspott regardless of what he had to do, is proved beyond a reasonable doubt.

Robert Edward Hunt, Jr. picked his victim at random from an engagement announcement contained in the local newspaper. He then put together the items he deemed necessary to carry out his plan, to-wit: The rope, nylon stockings, panties, magazines, and a pellet gun. The defendant then drove to the vicinity of the victim's home, placed the premises under surveillance for a period of time, and then gained entry by the use of the pellet gun. Upon entering the mobile home, the defendant bound the victim and after hearing her plea of "Please don't kill me" forced two ladies [sic] panties into the mouth and throat and then proceeded to strangle the victim with a nylon stocking in such a manner so as to leave three bruised areas

around the neck of Beverly K. Ramspott, moved her from the living room to the bedroom, determined that she was still alive by taking her pulse, and then placed her unconscious body face down in a bathtub containing water. The defendant then left Beverly K. Ramspott to die. All of the above was proved beyond a reasonable doubt. That Beverly K. Ramspott had physical suffering is inferrable [sic] beyond a reasonable doubt from the evidence of the strangulation method used by the defendant.

That defendant killed Beverly K. Ramspott is indisputable and conclusive.

The facts above summarized and as more fully set forth in the evidence prove beyond a reasonable doubt that defendant was determined to have sexual satisfaction for his own pleasure from a woman selected at random, that he had with him an instrument of death to assist him in carrying out that purpose; that he did make an assault upon Beverly K. Ramspott and that he strangled Beverly K. Ramspott to carry out that purpose. Beverly K. Ramspott died as a result thereof.

The Supreme Court in State v. Rust, 197 Neb. 528, and subsequent cases approved a statement that "all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed (in 1d) but by the use of the words 'specially' and 'exceptional' the Legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving...sexual abuse or the imposition of extreme suffering." The defendant sexually abused Beverly K. Ramspott during the course of strangulation. See State v. Perry, 199 Neb. 656, State v. Simants, 179 Neb. 549, and State v. Williams, 205 Neb. 56. The murder of Beverly K. Ramspott was callous, cold-blooded and involved cruel disregard for human life.

The three-judge sentencing panel in State v. Williams, supra, found that Williams killed two women, one of

whom was attempting to escape. The sentencing panel imposed the death penalty in regard to the murders of each of the women finding that aggravating circumstance 1d did apply to each murder. The Supreme Court affirmed.

Here the defendant strangled Beverly K. Ramspott, rendered her defenseless, sexually abused her and left her to die from strangulation.

This murder displays a callous, cold-blooded and cruel disregard for human life. This murder also manifests a shocking display of maliciousness and ruthlessness in that the victim was selected at random and hunted down. The murder of Beverly K. Ramspott manifested exceptional depravity by ordinary standards of morality and intelligence. The acts of killing this defenseless woman, Beverly K. Ramspott was totally and senselessly bereft of any regard for human life.

This aggravating circumstance does exist.

There is conflicting evidence in the record in regard to both of these matters, but in my opinion the record sustains the findings of the sentencing panel beyond a reasonable doubt.

The defendant went to great pains in an effort to avoid leaving evidence at the scene of the crime, such as fingerprints, which would identify him. His fantasy did not require that the victim be dead at the time of his sex act; it was only necessary that she be helpless and subject to whatever he wished to do. The psychiatrist who examined the defendant at the request of defense counsel stated in his report as follows:

> There is considerable ritualistic quality to the planning of the assaultive episode, with evidence of the defendant's expectation that certain fantasies would be fulfilled. These apparently had to do with the subduing and controlling of a female, who would then be forced to accede to his needs without being able to leave him. I am aware of no specific evidence, and there is no psychiatric evidence, to indicate that Mr. Hunt intended to kill his victim, although he did not show significant concern for the danger in which he obviously placed her.

At the sentencing hearing this witness testified as follows:

Q. Doctor, to clarify the last question of Mr. Smith's for

a minute. From your examination you were aware and did come to some conclusion about an intent of Mr. Hunt to either kill or render unconscious or control Beverly Ramspott as it occurred immediately prior to the events in question, are you not?

A. Yes.

Q. Did you find that he had an — Did you find, Doctor, or do you have an opinion as to whether or not he went into that home with the intent to kill or intent to render unconscious and to incapacitate Beverly Ramspott?

A. Yes, I do.

Q. What was your finding in that regard?

A. My opinion is that he was far more interested in control, rendering unconscious, incapacitating, and not very interested, if at all, in killing an individual.

. . . .

Q. Doctor, your statement about the defendant's primary interest in controlling his victim, rendering her unconscious and lack of interest in killing her, just so I understand, are you saying whether or not he killed her was unimportant to him? Secondary?

A. I believe it was secondary. I don't believe he cared very much at the time while the act was going on. But, I don't believe — I have no reason to believe that he was consciously trying to kill her at the time.

There is evidence which will support a finding beyond a reasonable doubt that the defendant inserted the gag in the victim's mouth to silence her; that he strangled her until she became unconscious; and that he thought she was still alive until sometime shortly before he placed her face down in the tub partially filled with water. If the victim died as a result of panties being forced almost into her throat, instead of drowning in the tub, that was not the cause of death intended by the defendant.

If this murder did not manifest exceptional depravity by ordinary standards of morality and intelligence, I am at a loss to imagine what type of a killing would conform to the statutory description.

I would affirm the judgment of the district court in all

respects.

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

IN RE INTEREST OF MATTHEW ELY, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.
STATE OF NEBRASKA, APPELLEE, V. MATTHEW ELY, APPELLANT.
371 N.W.2d 724

Filed August 9, 1985. No. 84-833.

1. **Mental Health: Evidence.** Evidence which would be inadmissible in criminal proceedings is inadmissible in hearings before a mental health board.
2. **Mental Health: Appeal and Error.** On appeal to the district court from an order of a mental health board, the court reviews the determination of the board de novo on the record.
3. _____: _____. The court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless this court can say as a matter of law that it is not supported by clear and convincing evidence.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

No appearance for appellee.

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

GRANT, J.

This is an appeal under the provisions of Neb. Rev. Stat. § 83-1043 (Reissue 1981) from an order of the district court for Lancaster County affirming an order of the mental health board of Lancaster County. The board had found Matthew Ely to be a mentally ill dangerous person within the meaning of Neb. Rev. Stat. § 83-1009 (Reissue 1981) and committed him to the Department of Public Institutions for up to 60 days. After a

period of observation, as provided in Neb. Rev. Stat. § 83-1041 (Reissue 1981), the facility director certified that Ely was a mentally ill dangerous person and recommended that he remain as an inpatient for treatment in the Lincoln Regional Center. The county attorney of Lancaster County, on March 7, 1985, informed this court that he did not intend to file a brief in the matter or argue before the court. Lancaster County apparently does not desire to inform us as to the county's position as to what is being or should be done about Ely. Nonetheless, the finding that as of July 19, 1984, Ely was a mentally ill dangerous person is of sufficient concern, at least to Ely, that the appeal must be heard.

Ely was first admitted to the regional center on June 18, 1984, because he had allegedly been threatening suicide. He was treated by a regional center staff psychiatrist, Dr. James K. Anthony. Dr. Anthony, after examining Ely, concluded that Ely was not suicidal at the time and did not feel that "he was dangerous to himself as had been alleged when he was brought in." Ely was therefore released on June 28, 1984.

Ely voluntarily returned to the regional center on July 5, 1984, but soon thereafter, on the next day, expressed a desire to be discharged. The staff felt that he was not ready to leave at that time, and a petition was filed with the mental health board on July 6.

A commitment hearing was held on July 12, 1984, before the board. Dr. Anthony testified as to his observations of Ely during his June stay at the regional center. John A. White, a staff psychologist and a member of Ely's treatment team, testified that he had seen Ely on two occasions and that Ely was exhibiting symptoms of manic-depressive disorder. He believed that Ely should remain in the regional center because "we've got very little information on Mr. Ely's case." After White's testimony concluded, the State moved for a continuance so that Ely's treating psychiatrist, Dr. Somasundaram Rajendran, who was testifying in another case, could be present. The continuance was granted over Ely's counsel's objection.

The hearing was resumed on July 19, 1984, with Dr. Rajendran present to testify. He related his observations of Ely and his opinion that Ely was suffering from a bipolar disorder

mixed with psychotic features. He also testified that he did not feel that Ely could provide for his basic human needs, because he believed Ely had "[n]o place to stay, no source of income. He may not be taking his medication." He testified that Ely was not suicidal.

We first note that mental commitment proceedings are reviewed de novo on the record in the district court. This court will not interfere with a final order of the district court unless it can be said that, as a matter of law, the order is not supported by clear and convincing evidence. *Hill v. County Board of Mental Health,* 203 Neb. 610, 279 N.W.2d 838 (1979).

The rules of evidence applicable to hearings before the mental health board are set out in Neb. Rev. Stat. § 83-1059 (Reissue 1981): "The rules of evidence applicable in civil proceedings shall be followed at all hearings held under this act. In no event shall evidence be considered which is inadmissible in criminal proceedings." The evidence is clear that Ely was suffering from a mental illness. All of the witnesses testified that Ely exhibited symptoms of mental disorder. Ely's volunteered statements and inappropriate behavior during the hearing before the mental health board further supported their opinions. However, "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975). In addition, there must be a finding that the person is a danger to others or to himself. *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981); § 83-1009.

In the instant case the finding was that Ely was a danger to himself due to his inability to provide for his basic human needs. Such finding, however, is not supported by admissible evidence. Ely's inability to provide for his basic human needs was allegedly due to his having no place to stay and no source of income. Dr. Rajendran offered his opinion that Ely could not hold a job due to his illness. Dr. Anthony testified that Ely had related to him that he had employment at a grocery store and could return there after his discharge. The employer was not called as a witness, nor was anyone who had seen Ely in a job situation.

Dr. Rajendran testified that "I don't think he has any place to live." White testified that Ely had told him that Ely's mother would not allow Ely to return home. Ely's mother was not called to testify. Hospital notes indicated that Ely wished to get his own apartment after he returned to work.

The evidence that Ely had no place to stay and no source of income was based on speculation and hearsay. Such evidence was admitted over objection and would be considered "inadmissible in criminal proceedings," and therefore inadmissible in these proceedings as provided in § 83-1059. As this case is decided on sufficiency of the evidence, we need not reach the question of whether not having a job or home can be used as a basis for finding one a danger to himself.

The order of the district court is reversed, and the cause is remanded to the district court to remand the case to the mental health board with directions to dismiss the petition of July 6, 1984.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF S.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. K.W., APPELLANT.

371 N.W.2d 726

Filed August 9, 1985. No. 84-851.

1. **Parental Rights.** A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.
2. _____. When the natural parent cannot rehabilitate herself in a reasonable time after the adjudication hearing and the prognosis is poor not only for purposes of rehabilitation but also for correcting the conditions of neglect and dependency, the best interests of the child require that a final disposition be made without delay.
3. **Trial: Juvenile Courts: Evidence.** The case files prepared by social workers for use in child dependency cases are, by statute, privileged and are not subject to discovery as a matter of right.
4. _____: _____: _____. In the absence of a showing of good cause, the refusal to permit discovery of case files prepared by social workers for use in child dependency cases is not an abuse of discretion.

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

Dennis T. Chapman, for appellant.

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

Maureen Fitzgerald Brown, guardian ad litem.

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

BOSLAUGH, J.

K.W., the natural mother of S.W., born December 8, 1980, has appealed from the September 12, 1984, order of the separate juvenile court of Douglas County, Nebraska, which terminated her parental rights to S.W. pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984). The appellant is 27 years old and the single mother of five children.

The principal assignment of error is whether the trial court's finding that the appellant refused to substantially comply with the orders of the separate juvenile court is supported by clear and convincing evidence.

An order terminating parental rights is reviewed de novo on the record in this court, giving great weight, where the evidence is in conflict, to the fact that the trial court observed the parties and witnesses and judged their credibility. An order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984).

Although the motion for termination of parental rights alleged failure to comply with the separate juvenile court's orders beginning on or about June 23, 1983, this case commenced in the summer of 1981. According to the appellant, she took S.W. to the emergency room at St. Joseph's Hospital, Omaha, Nebraska, on June 12, 1981, because she had noticed "transparent, clear, worms" in S.W.'s diaper.

On admittance, S.W., who was 6 months old, weighed only 7 pounds 8 1/2 ounces. Her attending physician, Dr. David Cathro, testified: "The baby looked like something out of a

Cambodia refugee camp. She was just skin and bones, didn't look ill. It looked alert, but absolutely starved looking." No worms were ever found by any hospital personnel. S.W. was diagnosed as suffering from "failure to thrive" and hospitalized for 13 days. Despite extensive tests, no further problems were found or diagnosis made other than an observation that she had not received any immunizations to that date. The only treatment given S.W. was proper feeding and supplemental vitamins (a routine procedure owing to her premature weight); as a result, S.W. "quite remarkably" gained 26½ ounces in 13 days, was discharged, and was placed in a foster home. The only cause attributed to S.W.'s condition was improper feeding. Dr. Cathro testified that he feared for S.W.'s life and would not return her to the appellant "unless I knew the mother had been worried about it. I think the mother needs help to realize how ill this child was."

A petition was filed on July 2, 1981, and a hearing held on July 13. S.W. was placed in the temporary custody of Douglas County Social Services for temporary foster care, and the appellant was given reasonable rights of visitation. Thereafter, a series of hearings took place which spanned more than the next 3 years.

At a hearing on August 27, 1981, S.W. was adjudged to be a child within the meaning of Neb. Rev. Stat. § 43-202(2)(b) (Reissue 1978). That section provided: "The juvenile court in each county . . . shall have jurisdiction as follows: . . . (2) Exclusive original jurisdiction as to any child under the age of eighteen years . . . (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian." Cf. Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984).

On December 9, 1981, S.W. was placed in the custody of the State of Nebraska Department of Public Welfare for continued foster care as supervised by Douglas County Social Services. Additionally, the appellant was ordered to follow the first of several plans. The juvenile court ordered:

> That [K.W.], child's mother, shall:
>
> a. Participate in parenting programs and a nutrition class as arranged by the Court Service Officer and the Child Protective Service worker;

b. Cooperate with the Child Protective Service worker, the Foster Care Worker, the Court Service Officer and the child's guardian ad-litem, and make her home accessible to all the workers;

c. Have all her children in the home receive a physical and follow up with any recommendations made and that the results of such physicals be forwarded to the Juvenile Court.

A psychiatric evaluation made on October 23, 1981, disclosed that the appellant, although appearing "quite bright" intellectually, suffers from a "[p]ossible mixed personality disorder with traits of antisocial passive-aggressive and some emotional instability as well as some immaturity."

After a hearing on March 9, 1982, except for paragraph (c) thereof, which had been complied with, the order was essentially continued without alteration, and the appellant was told to "keep up your good work." The appellant was further given permission to conduct a home visit with S.W. However, when the appellant failed to appear for her regularly arranged visitation outside the home on a date preceding the home visitation, home visitation was discontinued "until [K.W.] maintains a regular schedule of visitation and appears for all visits she confirms through the proper channels."

At a hearing on June 9, 1982, it was ordered that home visits be allowed pending continued compliance with the regular schedule of visitations outside the home. It was further ordered that the appellant participate in individual counseling, including an alcoholism evaluation. This order was based, at least in part, on one social worker's perceptions of the appellant's emotional state. In a letter to the court, Bob Hayes wrote concerning eight sessions he had had with the appellant; the letter stated in part:

> One important theme that repeatedly occurred was the way [K.W.] maintains tight control over herself, her children, and her extended family. . . . [K.W.] also demonstrated this control by insisting that the "system" was falsely accusing her of wrong-doing and that "someone" was out to get her. . . . Since [K.W.] was displaying her anger, her control and her resentments over

> and over again, I felt it was worth exploring her usage of chemicals such as alcohol and drugs. [K.W.] adamantly denied any problem of this kind now in her life, but admitted that at one time she did drink heavily. She shared that she "got scared" and now leaves all mood-altering chemicals alone. In my opinion, the possibility of the personality problems associated with this disease could be present with [K.W.].

The evaluation given led to a finding that the appellant did not have an alcohol problem; a written report to that effect from two Child Protective Services workers was received in evidence at a hearing on August 9, 1982. That report further indicated, however, for the first time that "the current situation is worse."

As a result, the court ordered that appellant shall participate in counseling, locate adequate and suitable housing, be allowed reasonable visitation, and notify the court within 24 hours of a change in address. Similar orders were entered on January 28, March 28, June 30, and October 18, 1983, with variations, including cooperate with workers, "maintain regular and consistent visitation," provide a monthly financial statement, and meet with the workers every 2 weeks.

During the latter review hearings, the concern of the workers involved with the case about the appellant's refusal to accept responsibility for S.W.'s previous condition became the predominant focus. At a hearing on November 30, 1982, a service officer for the juvenile court stated:

> [K.W.] refuses to accept responsibility for [S.W.'s] condition when she was placed in foster care, and I feel that if she does not work out these problems, that placing [S.W.] back in the home she could—if it was a lack of feeding and such—she could continue this probably without her being aware of it, and I feel that could place [S.W.] in danger. She is not accepting any responsibility for [S.W.'s] condition.

The reports presented from workers at the next hearing indicated that the appellant had been attending counseling sessions with relative regularity since that time; the quality of her participation, however, was debatable. Furthermore, this

compliance was somewhat short lived. At the termination hearing the coordinator of Family Support Civil Service testified that the appellant's weekly scheduled counseling sessions were terminated as a matter of policy on October 24, 1983, after the appellant had failed to report for a month previous. She further testified that between July 1983 and October 2, 1983, the appellant attended only two formal counseling sessions and that the appellant did not successfully complete her counseling nor achieve her goals.

Furthermore, during the time period alleged in the motion to terminate, the appellant moved five times without notifying the court of her address changes, and the appellant submitted none of the financial statements required by the court. Workers testified that all of their attempts at home visits had been unsuccessful and that they had received no replies from appellant in response to messages they had left in that regard. The evidence further shows that between September 16, 1983, and March 12, 1984, the appellant made no visits to S.W.; she resumed visits, although not consistently, after March 1984, during which time two of her sons had been placed in foster care and she was able to visit all three children at once.

The appellant presented evidence that she had attended 21 1/4 hours of counseling in a 15-month period and that this period included time she was on a "waiting list" for an available counselor and when she was unable to attend counseling because it interfered with her schooling. While the appellant had a "sporadic" visiting history concerning scheduled visits away from her home, the revocation of home visits was the result of the appellant's failure to attend counseling. There was testimony that as a result of the completed nutrition classes, the appellant "seemed to know pretty much about" the subject.

Consideration must be made of these additional facts: the appellant has a checkered work history and her income is comprised mainly of welfare, food stamps, and ADC payments; the several homes the appellant provided for her four other children were also the homes for numerous other relatives of the appellant; that as a result of marijuana use by the appellant's brother, the juvenile court issued an order that "there shall be no alcoholic beverages or possession or any

consumption or use of any illegal drugs in the home of [K.W.]"; and that the appellant was in jail from June 11 to July 19, 1983, for child abuse, the details of which are not in the record.

Perhaps the most significant fact in this case is the steadfast refusal of the appellant to accept any responsibility for the condition of the child at the time she was hospitalized. It is clear from the medical evidence that the child was in a "starved" condition, so severe that her life was endangered. There is absolutely no corroboration for the mother's testimony about "worms."

The record evidences that throughout the history of this matter, the doctors, caseworkers, and others seeking to provide for the best interests of S.W. were most concerned that the appellant has failed to recognize that she was responsible for the life-threatening condition that S.W. suffered from when this case was first brought to the court's attention. Failing this recognition, those involved fear that the episode could repeat itself should S.W. be returned to appellant's custody.

Although at the beginning of the proceeding the mother seemed to be willing to comply with the orders of the juvenile court, this attitude changed and became one of indifference or open defiance of the court's orders. Between July 1 and October 24, 1983, the appellant attended only one complete 1-hour counseling session, which sessions she was to attend on a weekly basis. From September 16, 1983, through March 12, 1984, the appellant failed to visit S.W. at all. The appellant, repeatedly, refused and neglected to advise the social workers when she moved to a different location. She refused to allow the social workers to monitor home visitations and never supplied the financial statements required by the trial court.

S.W. is now 4½ years old. She has spent the last 4 years of her life in foster care. The appellant has not progressed to the place where anyone familiar with the case, with the exception of the appellant, believes the child should be returned to the mother at this time. The record demonstrates that the appellant often failed and neglected to even visit the child. As time passed, the appellant exhibited less and less willingness to cooperate and comply with the court-ordered plan, which was intended to eventually restore the parent-child relationship. In

the end, her efforts were nonexistent.

The appellant is not asking this court to return custody of S.W. to her; rather, she argues that she should be given a new trial and more time to rehabilitate herself. Yet, as was stated in *In re Interest of Wanek*, 212 Neb. 394, 398, 322 N.W.2d 803, 806 (1982):

> We are concerned here with the best interests of the children, and when the natural parent cannot rehabilitate herself in a reasonable time after the adjudication hearing and the prognosis is poor not only for purposes of rehabilitation but also for correcting the conditions of neglect and dependency, the best interests of the children require that a final disposition be made without delay.

See, also, *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984).

It is time that the child be placed in a stable environment.

> A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity. As we said in *In re Interest of R.D.J. and K.S.J.*, 215 Neb. 724, 728, 340 N.W.2d 415, 418 (1983): " ' "[W]e will not gamble with the child's future." ' "

In re Interest of D., 218 Neb. 23, 29, 352 N.W.2d 566, 570 (1984).

The record supports termination of the appellant's parental rights.

Although not specifically assigned as error, the appellant argues that she was denied due process of law because the juvenile court refused to allow her counsel to inspect the case files maintained by two of the social workers that were assigned to the case.

By statute, the files are privileged, but a judge of the juvenile court "may, subject to applicable federal and state regulations, disseminate such confidential record information to any individual . . . providing services directly to the juvenile and such juvenile's parents or guardian and his or her immediate family who are the subject of such record information." Neb. Rev. Stat. § 43-2,108(3)(a) (Reissue 1984). From our

examination of the record we conclude that the appellant failed to show that the trial court abused its discretion in overruling the motion to produce.

When the motion to produce was overruled, the trial court granted a 3-week continuance, the third or fourth that had been granted, to permit the appellant to depose the two social workers. The depositions were taken, and they appear in the record. The witnesses were questioned at length and were cooperative in answering all of counsel's inquiries.

The appellant's counsel made no showing of any good cause other than the fact that the social workers referred to the files during their testimony in court and his unsupported statement that he had "reason to believe" there was information in the records in addition to that provided in the reports. What that information might be or what was his "reason to believe" was never disclosed to the juvenile court.

Upon consideration of the entire record and the particular circumstances in this case, we are unable to find any abuse of discretion. See *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982).

The judgment of the juvenile court is affirmed.

AFFIRMED.

KENNETH MUELLER ET AL., APPELLANTS, V. UNION PACIFIC RAILROAD, A CORPORATION, ET AL., APPELLEES.

371 N.W.2d 732

Filed August 9, 1985. No. 84-932.

1. **Summary Judgment.** The party who moves for summary judgment has the burden of establishing that there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, as well as the burden of establishing that the movant is entitled to judgment as a matter of law.
2. **Trial: Pleadings: Pretrial Motions.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented.
3. _____: _____: _____. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all

reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.

4. _____: _____: _____. On a motion for judgment on the pleadings, the court may consider all the pleadings and give judgment for the party entitled thereto.
5. **Trial: Pleadings: Pretrial Motions: Waiver.** The making of a motion for judgment on the pleadings is not, however, a waiver of the right to trial of an issue of fact.
6. **Injunction.** An injunction is an extraordinary remedy which is available when there is no adequate remedy at law and where there is a real and imminent danger of irreparable injury.
7. **Employment Contracts: Damages.** Ordinarily, an action for damages is the appropriate remedy for the breach of an employment contract.
8. **Principal and Agent.** As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent.
9. **Employment Contracts: Termination of Employment.** When the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may discharge an employee whenever it chooses, with or without cause.
10. **Corporations: Liability.** A corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation; however, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority.
11. **Employment Contracts: Termination of Employment.** Under some circumstances the termination-at-will rule is subject to modification by promises outside the employment agreement itself.
12. **Agency: Principal and Agent.** Apparent authority is such authority as the agent seems to have by reason of the authority he actually has.
13. _____: _____. A principal is bound by, and liable for, the acts which an agent does within his or her actual or apparent authority.
14. **Fraud.** The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance.
15. _____. Fraud may be predicated on a representation concerning a future event or acts to be done in the future if such representations are falsely and fraudulently made with an intent to deceive.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John P. Fahey of Dowd, Fahey, Dinsmore & Hoffman, for appellants.

John P. Mullen of Gaines, Otis, Haggart, Mullen & Carta, and Barbara W. Zandbergen, for appellees.

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

CAPORALE, J.

Plaintiffs-appellants, Kenneth Mueller, Robert A. Kirk, Samuel F. Irwin, and Lance R. Copeland, sued defendants-appellees, Union Pacific Railroad, a corporation, E.R. Brittenham, C.W. Schaffer, Jr., and D.C. McManigal, for the wrongful termination or change of their employment relationships with the defendant railroad. Defendants successfully moved for a summary judgment dismissing plaintiffs' action. (Although the transcript contains a motion for summary judgment on behalf of the defendant railroad only, the trial court's judgment order refers to the "motion of defendants for summary judgment." (Emphasis supplied.) In addition, the briefs filed in this court represent that defendants filed for summary judgment. Moreover, each of the defendants joined in a stipulation for extension of a brief day and joined in a brief as appellees. We therefore treat the matter as if each of the defendants has filed a motion for summary judgment.) Plaintiffs assign as error (1) the failure to recognize a public policy exception to the termination-at-will rule, (2) the determination that alleging a breach of an agreement not to retaliate for revelations of wrongdoing by others fails to state a cause of action, and (3) the determination that alleging misrepresentations as to the consequences of making such revelations fails to state a cause of action. We affirm in part and in part reverse and remand for further proceedings as to the plaintiff Copeland only against the defendant railroad solely.

POSTURE OF CASE

The record before us consists only of the pleadings. Therefore, the posture of the case is such that we determine only whether plaintiffs' amended petition states a cause of action under any of the theories pled on behalf of one or more plaintiffs against any one or more of the defendants. See, *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb.

793, 366 N.W.2d 436 (1985); *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983). If it does not, the trial court's judgment must be affirmed. If, on the other hand, the petition does state a cause of action under any theory pled, the trial court's judgment must be reversed, for the party who moves for summary judgment has the burden of establishing that there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, as well as the burden of establishing that the movant is entitled to judgment as a matter of law. *Moore v. American Charter Fed. Sav. & Loan Assn., supra*; *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985).

Viewed in another way, the motion for summary judgment in this case is actually a motion for judgment on the pleadings, which is properly granted when it appears from the pleadings that only a question of law is presented. Like a demurrer, a motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted. On such a motion the court may consider all the pleadings and give judgment for the party entitled thereto. *Kent v. Insurance Co. of North America*, 189 Neb. 769, 205 N.W.2d 532 (1973); *Board of Trustees of York College v. Cheney*, 160 Neb. 631, 71 N.W.2d 195 (1955). The making of a motion for judgment on the pleadings is not, however, a waiver of the right to trial of an issue of fact. *Wittler v. Baumgartner*, 180 Neb. 446, 144 N.W.2d 62 (1966), *overruled on other grounds, State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979).

The record in this case is such that either a motion for summary judgment or for judgment on the pleadings explores the same ground and reaches the same destination.

FACTS AS PLED

Mueller, Kirk, and Irwin, current employees of the railroad, and Copeland, a former railroad employee, allege in their amended petition that they worked as special agents or guards

in the railroad's security and special services department and were answerable to Brittenham, Schaffer, and McManigal. Sometime in early 1982, another railroad employee, having been assured by the railroad's comptroller that "no one would lose their jobs," informed the railroad's internal auditing department, which investigates improprieties by railroad employees, that plaintiffs had information concerning the fraudulent misappropriation of railroad funds and services by their supervisors. Thereafter, plaintiffs were assured they need fear no retaliation and were questioned about the alleged misconduct of their supervisors.

Relying on those assurances, which are alleged to have been known to be untrue or made with reckless disregard of the truth, plaintiffs revealed the alleged misappropriation of railroad funds by McManigal and of funds and services by Brittenham.

Subsequently, "some" of the plaintiffs, we are not told who, began to experience retaliation in that their hours of employment were changed. Plaintiffs then talked with one of the vice presidents of the railroad and advised him of the retaliation and of the fear for their jobs. Plaintiffs also revealed to the vice president, among other things, that Brittenham required his employees to make personal contributions to certain candidates for public office, for which they were reimbursed by misrepresenting the expenditures as other legitimately reimbursable items on their expense accounts. Plaintiffs conclude that this practice prevented the railroad from properly reporting corporate campaign contributions, in violation of the public policy of the State of Nebraska as expressed by the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1984).

Plaintiffs further allege that they received assurances from the vice president that they need not worry about retaliation or loss of employment. The petition does not state whether these assurances were given before or after their revelations. In any event, shortly after the revelations, Copeland was discharged from employment by Schaffer. In addition, Mueller was advised his job might be abolished; Kirk was advised his job

would be abolished and he would be transferred to some unknown destination; and Irwin was advised his job was abolished and he was being transferred to Seattle. The petition does not allege who made the foregoing statements to Mueller, Kirk, and Irwin, nor does it allege that those threatened changes in the employment conditions of those three plaintiffs have in fact been made.

According to the operative petition, apparently after plaintiffs had made at least some of their revelations, the president of the railroad sent a letter to all railroad employees advising that it was their obligation to report to the auditing department any violations of the railroad's policy concerning business conduct and that said reports would be kept confidential.

Each defendant generally denied plaintiffs' allegations except those relating to the identity and employment of the plaintiffs, the individual defendants, and others by the railroad.

THEORIES OF RECOVERY

Based on the foregoing allegations, Copeland seeks reinstatement, backpay, restoration of seniority, and other benefits. Mueller, Kirk, and Irwin pray for an injunction preventing a change in their employment conditions. These reliefs are sought on the basis of three alternative theories: (1) that the public policy of this state forbids termination of or any change in their employment status, (2) that there was created by the assurances given plaintiffs an agreement that their employment would be neither terminated nor changed, and (3) that there were misrepresentations such as to require that the reliefs sought be granted.

Mueller, Kirk, and Irwin seek to keep the threatened changes in their employment from being made. An injunction, however, is an extraordinary remedy which is available when there is no adequate remedy at law and where there is a real and imminent danger of irreparable injury. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). Ordinarily, an action for damages is the appropriate remedy for the breach of an employment contract. See *Sullivan v. David City Bank*, 181

Neb. 395, 148 N.W.2d 844 (1967). In *Dania Jai Alai Intern., Inc. v. Murua*, 375 So. 2d 57 (Fla. App. 1979), the plaintiff, a professional jai alai player, alleged his employment contract had been breached in that he had been fired without just cause, that he was unable to find other employment because all other jai alai frontons in the country had already hired their players for the season, and that he was facing deportation because employment was a condition of his visa. The Florida District Court of Appeal nonetheless reversed an injunction ordering plaintiff's immediate reinstatement with backpay pending a trial on the merits, finding that the special circumstances required for the intervention of equity did not exist. See, also, *Melzer v. Jacob Agay H.*, 426 So. 2d 1049 (Fla. App. 1983).

None of the allegations in the present case lead to the conclusion that the requisites for injunctive relief exist, and there is nothing from which we can conclude that Mueller, Kirk, and Irwin have yet been damaged in a legal sense. Accordingly, we determine without further analysis that those three plaintiffs have stated no cause of action, and the trial court's judgment of dismissal was correct as to each of them.

The remaining plaintiff, Copeland, seeks damages for breach of his employment contract from Schaffer as well as from the defendant railroad. As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent. *Stoll v. School Dist. (No. 1) of Lincoln*, 207 Neb. 670, 301 N.W.2d 68 (1981); *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980). There is nothing alleged in the case before us which takes Schaffer out of this general rule; the contract of employment, out of which the cause of action is alleged to arise, is the contract of the defendant railroad only.

Thus, Copeland states no cause of action against Schaffer, and the trial court correctly dismissed Copeland's action as to that defendant.

This leaves us only with the question of whether Copeland has stated a cause of action under any one of his three theories of recovery against the defendant railroad.

TERMINATION AT WILL

The railroad argues that when the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may discharge an employee whenever it chooses, with or without cause.

Copeland, on the other hand, argues that there exist exceptions to this general rule with respect to termination of employees at will.

Public Policy Exception

Copeland cites numerous cases from other jurisdictions which allow actions either in tort or implied contract for wrongful discharge based on violation of public policy, and argues that this court has shown an inclination, in *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), to adopt the public policy exception.

In *Mau* the former supervisor of a bank's mailroom sought damages for what he alleged was his wrongful discharge from the bank. Mau had failed to mail some 300 pension checks issued by the bank's trust department. This court found that such failure constituted "good cause" for his termination. The opinion also noted that Mau's employment relationship was terminable at will and discussed the exception applied in other jurisdictions to the general rule applicable to the termination of such a relationship:

> We recognize, however, that the "employment at will" rule is not, in some jurisdictions, an absolute bar to a claim of wrongful discharge. In a number of jurisdictions, an exception to the "terminable at will" rule has been articulated in recent years. Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. [Citations omitted.]
>
> So far as we are able to ascertain, Nebraska has not adopted this exception to the present time. Assuming *arguendo*, however, that such an exception were to be recognized in this jurisdiction, it is clear in this case that the plaintiff has failed in his burden to prove that his discharge was violative of a public policy of this state. We

> have held that "[c]ourts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear." *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 691, 264 N.W.2d 871, 875 (1978).

Id. at 316, 299 N.W.2d at 151-52.

Although the court referred to the public policy exception of other jurisdictions and distinguished the *Mau* facts from those cases in which the exception was applied by other jurisdictions, it cannot be said, contrary to Copeland's claim, that this court expressed an inclination toward any position with respect to that policy.

We have not had occasion to address this exception since *Mau*, although we have reiterated the rule applicable to at-will terminations several times. In *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982), the plaintiff sought damages for his alleged wrongful discharge. We affirmed the trial court's decision to sustain the defendant's demurrer, holding that the plaintiff did not allege any right to continued employment in his petition. The public policy exception was not at issue.

Nor was the exception at issue in *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). In that case we again affirmed the trial court's decision to sustain the defendant's demurrer. Plaintiff brought an action for recovery of lost wages, past and future, alleging wrongful discharge of her employment. Although we found that the center's grievance procedures were applicable to plaintiff's employment relationship even though she did not have an employment contract for a specific term, we held that plaintiff failed to allege facts supporting a conclusion that her discharge was improper; consequently, an action could not lie.

Finally, in *Smith v. City of Omaha, ante* p. 217, 369 N.W.2d 67 (1985), plaintiff appealed an order of the court affirming the Omaha personnel board's decision suspending his employment, pending termination. Plaintiff contended that the board's decision was not supported by competent evidence, since his labor agreement was not in evidence. We held that it was plaintiff's burden to introduce the agreement and that absent an agreement, his employment was terminable at will.

Nor do we reach the policy issue in the present case. The only allegations which can be said to in any sense relate to that issue are the statements that Brittenham caused contributions of railroad funds to be made to certain candidates for public office in a manner which circumvented the disclosure requirements of the Nebraska Political Accountability and Disclosure Act. Violations of such disclosure provisions constitute a Class III misdemeanor punishable by imprisonment for up to 3 months, a $500 fine, or both. Neb. Rev. Stat. §§ 28-106 (Cum. Supp. 1984) and 49-1469 (Reissue 1984). Without any undertaking to otherwise analyze the applicability of the accountability and disclosure act to the facts as alleged herein, we note that Copeland asks us to impute Brittenham's criminal acts to the railroad.

While a corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority. *Standard Oil Company of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962); *United States v. Thompson-Powell Drilling Company*, 196 F. Supp. 571 (N.D. Tex. 1961); *Vulcan Last Co. v. State*, 194 Wis. 636, 217 N.W. 412 (1928).

The allegations with respect to political contributions do not state whether the candidates were of Brittenham's choice or the railroad's choice, nor is there anything from which it can be inferred that even if the latter were the case, it was within Brittenham's authority to seek contributions for the railroad's candidates. Brittenham's employment as a director or manager of the railroad's security and special services department does not, without further description, imply in him an authority to make political decisions for the railroad.

Thus, even if this jurisdiction were to adopt a public policy exception to the termination-at-will rule, and even if the facts as alleged were to come within such an exception, matters we do not decide, no cause of action would have been stated against the railroad on this alternative theory.

Agreement Exception

Although Copeland characterizes his second alternative theory as one in implied contract, he argues in fact that an express agreement existed that revelations by him of wrongdoing by others would not result in retaliation.

In so arguing he relies upon our opinion in *Morris v. Lutheran Medical Center, supra*, discussed earlier. The opinion does indicate that compliance with the written grievance procedure was promised prior to the oral agreement of employment and that the procedure therefore imposed substantive limits to the termination-at-will rule. Morris failed because she did not allege a material fact relating to the procedure as applied to her discharge. Thus, Copeland correctly argues that under some circumstances the termination-at-will rule is subject to modification by promises outside the employment agreement itself.

Neither assurances given to others nor assurances given to Copeland after he made revelations can form the basis of his express agreement theory. However, the allegation that Copeland was assured by those investigating the allegations of wrongdoing that he need not fear retaliation, in reliance upon which he acted, brings into play an enforceable promise to vary the termination-at-will rule to the extent that liability for damages may be imposed for the breach of that promise. Unlike the question of Brittenham's authority to solicit funds for political candidates, the fact that employees of the railroad were investigating wrongdoing implies their authority to promise that revelations of wrongdoing by others would not result in retaliatory action. Apparent authority is such authority as the agent seems to have by reason of the authority he actually has. See *Stewart v. Spade Township*, 157 Neb. 93, 58 N.W.2d 841 (1953). A principal is bound by, and liable for, the acts which an agent does within his or her actual or apparent authority. See *Bury v. Action Enterprises, Inc.*, 197 Neb. 38, 246 N.W.2d 724 (1976).

Thus, it must be concluded that Copeland has stated a cause of action against the railroad on his express agreement theory, and the trial court's dismissal of that theory as to the plaintiff Copeland against the railroad was erroneous.

Fraud Exception

Lastly, Copeland argues that he was fraudulently induced to make the revelations. Having already established in the foregoing discussion that such representations as were made by the railroad's agents were the representations of the railroad, we move on to a consideration of the nature of those representations.

The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance. See, *Cummings v. Curtiss*, 219 Neb. 106, 361 N.W.2d 508 (1985); *Havelock Bank v. Woods*, 219 Neb. 57, 361 N.W.2d 197 (1985); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983).

Copeland has expressly alleged the existence of elements (2), (4), and (5), and the existence of element (3) may be fairly inferred from his operative petition as a whole.

The question is whether he has alleged the existence of element (1). Asked another way, Can fraud be predicated upon a future event? The answer is yes, under certain circumstances.

The rule that fraud cannot be based on predictions or expressions of mere possibilities in reference to future events, *In re Estate of Hesemann*, 214 Neb. 842, 336 N.W.2d 568 (1983), is subject to the well-known exception that fraud may be predicated on a representation concerning any event in the future or acts to be done in the future if such representations are falsely and fraudulently made with an intent to deceive. *Smith v. Wrehe,* 199 Neb. 753, 261 N.W.2d 620 (1978); *Central Constr. Co. v. Osbahr,* 186 Neb. 1, 180 N.W.2d 139 (1970).

In other words, as applied to the facts of this case, fraud may be predicated on the representation that an event which is in the control of the maker will, or will not, take place in the future if the representation as to the future is known to be false when made, or is made in reckless disregard as to its truthfulness or falsity and the other elements of fraud are present.

Since retaliation in the future, as alleged, was an event in the defendant railroad's control when the representation was made

and the other elements of fraud have been alleged, the trial court erred in dismissing Copeland's fraud theory against the railroad.

DECISION

The judgment of the trial court is therefore affirmed as to the plaintiffs Mueller, Kirk, and Irwin with respect to all defendants and as to the plaintiff Copeland with respect to the defendants Brittenham, Schaffer, and McManigal. The judgment of the trial court is reversed as to the plaintiff Copeland against the defendant railroad only, and remanded for further proceedings consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. RODGER A. BRANCH, APPELLANT.

371 N.W.2d 740

Filed August 9, 1985. No. 85-111.

Pleas. It is impossible to conclude from a record entirely barren of any facts demonstrating that defendant understood his various rights that the defendant voluntarily and intelligently gave them up by pleading guilty.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for further proceedings.

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

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

WHITE, J.

This is an appeal from a conviction and sentence for the

crime of burglary. The appellant was sentenced to a term of 16 to 24 months in the Nebraska Penal and Correctional Complex.

A single assignment of error is presented:

> The District Court committed federal constitutional and otherwise reversible error in finding that the Defendant's guilty plea was voluntarily, knowingly, and intelligently entered, and in adjudging him guilty and sentencing him despite the Court's prior failure to ever advise the Defendant that by pleading guilty he was waiving his essential Fifth and Fourteenth Admendments [sic] privilege against self-incrimination.

In an otherwise well-conducted dialogue, the court explained the constitutional rights of the defendant and the consequences of the plea of guilty the defendant proposed to enter as a result of a plea bargain. However, in the recitation the court omitted any reference to the defendant's right to remain silent and to not testify at the trial. The court elicited from the defendant the factual basis for the burglary charge.

We said in *State v. Tweedy*, 209 Neb. 649, 655-56, 309 N.W.2d 94, 98 (1981):

> It is readily apparent that the *record* fails to disclose that defendant knew of his right to a jury trial, of the right to confront witnesses against him, or of the privilege against self-incrimination. It is therefore impossible to conclude from a record entirely barren of any facts demonstrating that defendant understood his various rights *that the defendant voluntarily and intelligently gave them up by pleading guilty.*

(Emphasis supplied.)

The Attorney General suggests that absent a motion for new trial this issue may not be raised in this court, while conceding that Neb. Rev. Stat. § 25-1912.01(1) (Cum. Supp. 1984) provides that "[a] motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record."

At issue is the voluntariness of a plea of guilty which, under the command of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), cannot be established in the absence of a waiver on the record. We merely point out that in

the sentencing dialogue the court specifically stated, "I find that Mr. Branch has voluntarily, knowingly, and intelligently offered me a plea of guilty to the charge." The argument of the State is without merit.

The judgment is reversed, defendant's conviction is vacated, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., concurs.

CAPORALE, J., concurring.

I agree with the result reached by the majority but believe we should take the time to articulate the distinction between this case and *State v. Fischer,* 218 Neb. 678, 357 N.W.2d 477 (1984), *after remand ante* p. 664, 371 N.W.2d 316 (1985), *State v. McMahon,* 213 Neb. 897, 331 N.W.2d 818 (1983), and *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979), and thereby dispel the suggestion that the situations in all four cases should be treated in the same fashion.

Fischer, *McMahon*, and *Curnyn* hold that where a criminal defendant has not been informed of the penal consequences of his guilty plea, the appropriate remedy on appeal is to remand the matter for a hearing to determine whether the defendant nonetheless knew the range of penalties for the charge. If so, the judgment and sentence are to stand; if not, the judgment and sentence are to be vacated and the defendant permitted to plead anew.

The question arises, then, why a different disposition when the trial judge fails to advise the defendant that he has the right to remain silent and the right to not testify at trial. The answer is that in this situation the trial judge must himself ascertain not only that the defendant knows his rights but must also determine that the defendant voluntarily, knowingly, and intelligently waives them.

A criminal defendant cannot waive a penalty; therefore, it is only required that he know the penal consequences of his plea. Thus, it matters not where or how he acquires that knowledge so long as he has it at the time of his plea. By contrast, a judge cannot satisfy himself that the defendant has voluntarily,

knowingly, and intelligently waived the right to remain silent and the right to not testify without, in the absence of unequivocal conduct by the defendant so establishing, specifically asking whether those rights are waived.

The situations are not the same and therefore cannot be treated as if they were.

BEATRICE NATIONAL BANK & TRUST COMPANY, A NATIONAL BANKING CORPORATION, APPELLEE, V. MID-AMERICA DAIRYMEN, INC., A KANSAS CORPORATION, APPELLANT.

372 N.W.2d 99

Filed August 16, 1985. No. 84-372.

1. **Uniform Commercial Code: Security Interests.** A person buying farm products from a person engaged in farming operations does not take the product free of the security interest created by the seller.
2. **Uniform Commercial Code: Debtors and Creditors.** A debtor in possession has all the power of a trustee and holds title to property as a fiduciary for creditors.
3. **Summary Judgment.** Summary judgment is appropriate when there is no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
4. **Uniform Commercial Code: Debtors and Creditors: Bankruptcy: Security Interests.** Pursuant to 11 U.S.C. §§ 542 and 543 (1982), entities and custodians of property belonging to the debtor are commanded to deliver over such property to the trustee or, in the case of a Chapter 11 proceeding, to the debtor in possession. Claims of secured parties whose property is delivered to the trustee or debtor in possession are then presented to the bankruptcy court.
5. **Uniform Commercial Code: Security Interests: Debtors and Creditors: Words and Phrases.** The term "lien" in 11 U.S.C. § 362(a)(4) (1982) is used to include any consensual security interest in personal property. This section is designed to protect the debtor against harassment and possible frustration of any rehabilitation by prejudicial disposition of the assets of the estate before injunctive relief can be obtained.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded for further proceedings.

Robert C. Guenzel and Gregory B. Bartels of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellee.

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

WHITE, J.

This is an appeal from a judgment of the district court for Gage County granting plaintiff Beatrice National Bank's motion for summary judgment against Mid-America Dairymen, a Kansas corporation.

A brief recitation of the facts elicited by affidavits and exhibits at the hearing on the motion is necessary to an understanding of the issues of the case.

Orville L. Parde granted to the appellee bank a security interest in farm equipment and farm products by virtue of a security agreement dated March 29, 1978, and of a continuation statement filed November 17, 1982. The principal farm product produced and sold by Parde was milk. The appellant, Mid-America Dairymen, purchases milk and did so from Parde at all times relevant to this case. Since "a person buying farm products from a person engaged in farming operations" does not take the product free of the security interest created by the seller, Neb. U.C.C. § 9-307(1) (Cum. Supp. 1984), Parde, Beatrice National Bank, and Mid-America Dairymen executed an agreement whereby Parde assigned to Beatrice National Bank certain of the proceeds from the sale of the milk, and the bank consented to the sale, thus waiving its security interest in the produce.

Apparently, payments were made in due course by Mid-America to the bank until January 1983 when Parde filed a petition in bankruptcy under Chapter 11 of the bankruptcy code and was appointed debtor in possession of the assets of the bankruptcy.

Though not set forth in the evidence, according to the affidavit presented by Mid-America, a demand letter was sent by the attorney for the debtor Parde that payments previously made to the bank be made to Parde. Parde, as a debtor in possession, had authority to make this demand to protect the assets of the estate. A debtor in possession has all the power of a

trustee and holds title to property as a fiduciary for creditors. *In re Brent Explorations, Inc.*, 31 Bankr. 745 (D. Colo. 1983); *Stein v. United Artists Corp.*, 691 F.2d 885 (9th Cir. 1982); 11 U.S.C. § 1107 (1982). Mid-America complied with the demand (though the evidence does not disclose the date or content), and notice of the suspension of payments was given to Beatrice National Bank. A total of $28,815.45 was paid by Mid-America to Parde.

Two issues present themselves for resolution. The first is whether by the execution of the assignment the bank waived its security interest in the milk sold after Mid-America terminated the agreement. The second question is one not squarely presented to the trial court, i.e., whether under 11 U.S.C. §§ 542 and 543 (1982) Mid-America was required to pay over the milk money to Parde as a debtor in possession of a bankrupt estate. We conclude that the consent of the bank to the sale of the milk product was conditioned on the continued payment by Mid-America and that the security interest followed the proceeds and the security remained attached to the proceeds.

As to the second question, we conclude that the matter was not decided by the trial court and must be remanded to the trial court.

Summary judgment is appropriate when there is no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. *Signor v. National Transp., Inc.*, 217 Neb. 667, 351 N.W.2d 58 (1984).

Neb. U.C.C. § 9-306 (Reissue 1980) provides in part:

> (2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

Although argued by Mid-America to the contrary, it is obvious that the consent to the sale by Beatrice National Bank was conditioned on the payment of proceeds to the bank by Mid-America. To hold that, on breach by Mid-America, the

bank was bound by its consent and Mid-America was not would result in a travesty. The proceeds in the hands of Mid-America were subject to the security interest of the bank, since, as buyer, the payment was in its control. *First Nat. Bank, etc. v. Iowa Beef Processors*, 626 F.2d 764 (10th Cir. 1980).

Both parties cite 11 U.S.C. § 552(b) (1982):

> [I]f the debtor and a secured party enter into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, rents, or profits of such property, then such security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to the extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

The cited portion is clear. The security interest is to be honored by the bankruptcy court unless, based on the equities, the court orders otherwise. The section is not helpful to the disposition of this case. Overlooked by both counsel are the provisions of §§ 542 and 543. In those sections, entities and custodians of property belonging to the debtor are commanded to deliver over such property to the trustee or, in the case of a Chapter 11 proceeding, to the debtor in possession. Claims of secured parties whose property is delivered to the trustee or debtor in possession are then presented to the bankruptcy court.

It is obvious that if either § 542 or § 543 applies, then Mid-America was required to pay over the proceeds of the milk sales to the debtor in possession, and any claims to the proceeds should have been presented to the bankruptcy court. Also overlooked by both parties are the provisions of 11 U.S.C. §§ 362 and 363 (1982). In § 362(a) the filing of a petition operates to automatically stay

> (3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

. . . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

The term "lien" in § 362(a)(4) above is used to include any consensual security interest in personal property. This section is designed to protect the debtor against harassment and possible frustration of any rehabilitation by prejudicial disposition of assets of the estate before injunctive relief can be obtained. *Preferred Surfacing, Inc. v. Gwinnett Bank & Trust Co.*, 400 F. Supp. 280 (N.D. Ga. 1975).

The secured creditor is barred from a judicial action outside the bankruptcy court. Section 363(c)(2) states in part: "The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless— (A) each entity that has an interest in such cash collateral consents." There is a question of fact whether Beatrice National Bank consented.

If §§ 362 and 363 apply, Mid-America was correct in paying the proceeds to the debtor in possession. Any claim Beatrice National Bank may have had in the proceeds should have been presented to the bankruptcy court.

As there is no clear right to judgment as a matter of law in favor of the Beatrice National Bank, the motion for summary judgment was improperly granted, and the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MARY M. PROHASKA, APPELLANT, V. FRANK PROHASKA, APPELLEE.
371 N.W.2d 742

Filed August 16, 1985. No. 84-532.

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

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

Herbert J. Elworth of Casey & Elworth, for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter. The petitioner-appellant filed for dissolution of the marriage. The court granted the dissolution, awarded custody of the minor child to appellant, awarded alimony and child support to be paid by the appellee, awarded attorney fees to appellant, and divided the couple's property. The appeal assigns all of these actions except the award of custody as error. All such actions are matters initially entrusted to the sound discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of the trial judge's discretion, recognizing that 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.

We have so reviewed the record and find the decision of the district court is in all respects correct. The judgment is affirmed.

AFFIRMED.

ARUN N. BAPAT, APPELLEE, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

371 N.W.2d 742

Filed August 16, 1985. No. 84-605.

1. **Implied Consent Law: Blood, Breath, and Urine Tests.** Justifiable refusal to take a body fluids test as required by Neb. Rev. Stat. §§ 39-669.08 et seq. (Reissue 1984) depends upon some illegal or unreasonable aspect in the nature of the request to submit, the test itself, or both.
2. _____: _____. Nebraska law does not sanction a conditional refusal to take a chemical test of the blood, breath, or urine, and such a refusal is a refusal under Nebraska's implied consent law.
3. **Implied Consent Law: Right to Counsel: Blood, Breath, and Urine Tests.** A motor vehicle driver is not entitled to consult a lawyer before taking a chemical test of the blood, breath, or urine, nor is the test required to be delayed by a driver's request that permission be granted to contact a lawyer concerning the requested test. This is because the suspension of a driver's license which results from a test refusal is a remedial, not strictly punitive, measure.
4. **Right to Counsel.** The right to counsel attaches at such time as criminal proceedings are initiated.
5. **Implied Consent Law: Blood, Breath, and Urine Tests.** The effect medication may have on the outcome of a body fluids test under the implied consent law may affect its admissibility or credibility as evidence of intoxication, but does not go to the question of whether a person is justified in refusing to take the test.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed.

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

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

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

HASTINGS, J.

Holly Jensen, Director, Department of Motor Vehicles, has appealed a judgment of the district court which reversed her order of February 3, 1983, revoking plaintiff Arun N. Bapat's motor vehicle operator's license for 1 year under Neb. Rev. Stat. § 39-669.16 (Reissue 1984) for failure to submit to a chemical test to determine possible intoxication. We reverse.

On December 11, 1982, Bapat was observed by a police officer of the city of Columbus driving his automobile in an erratic manner, running onto a dividing island, and weaving noticeably. Upon stopping Bapat the officer observed him stagger and detected the odor of alcohol on his breath.

Bapat was arrested for driving while intoxicated and was transported to the police station, where an implied consent form was read to him. Bapat signed the form and circled "urine" as his choice of tests to be administered.

Bapat then went to the restroom and voided his bladder as is required for the test. During the mandatory 20-minute waiting period prior to receiving a test sample, Bapat informed the officer for the first time that he was a diabetic. He had taken insulin that day and wanted to contact an attorney prior to giving a test sample to ask what effect the medication would have on the outcome of the test. The officer told him he could not consult an attorney until after the test sample was given. Bapat refused to take the test. He was told he was required to submit to the test, but Bapat still refused. He was then cited for test refusal.

On appeal the State assigns four errors, all of which turn on whether Bapat's refusal to submit to a body fluids test was reasonable under the circumstances.

Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984) establishes that a body fluids test may be required whenever a law enforcement officer has reasonable grounds to believe the operator of a motor vehicle was driving while under the influence of alcohol. If such reasonable grounds exist, as they clearly do in this case, a licensee may be cited for test refusal where his conduct leads a reasonable person in the officer's position to believe that the licensee is capable of refusing and manifests an unwillingness to submit to the test. *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979).

On appeal from a license revocation the burden is on the licensee to prove by a preponderance of the evidence that his refusal was reasonable under the circumstances. *Wohlgemuth, supra*. See, *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961); § 39-669.16. Justifiable refusal depends

upon some illegal or unreasonable aspect in the nature of the request to submit, the test itself, or both. *Hoyle, supra.*

Here, there was nothing illegal about the nature of the request made by the arresting officer. All procedures were complied with, and the licensee himself chose the type of test to be administered. The arresting officer's denial of Bapat's request to contact an attorney prior to taking the test does not amount to an illegal act.

Nebraska law does not sanction a conditional refusal. A conditional refusal is a refusal under Nebraska's implied consent law. *Hoyle, supra*; *Winter v. Peterson*, 208 Neb. 785, 305 N.W.2d 803 (1981). Further, there is no right to contact an attorney prior to giving a sample for a body fluids test. *Hoyle, supra*; *Stevenson v. Sullivan*, 190 Neb. 295, 207 N.W.2d 680 (1973); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973).

> A refusal to grant a motorist's request to contact an attorney before consenting to a test under the Nebraska implied consent law affords no reasonable ground for refusing to submit to the test. [Citations omitted.] A driver is not entitled to consult with a lawyer before taking a test, nor is the test required to be delayed by a driver's request that he be permitted to contact a lawyer concerning the test requested by the arresting officer.

Hoyle at 257, 343 N.W.2d at 733.

This is because the suspension of a driver's license which results from a test refusal is a remedial, not strictly punitive, measure. *Neil v. Peterson*, 210 Neb. 378, 314 N.W.2d 275 (1982). The right to counsel attaches at such time as criminal proceedings are initiated. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

Further, a refusal is not sanctioned on the ground that the licensee has taken medicine which he feels could affect the results of the test. *Doran v. Johns*, 186 Neb. 321, 182 N.W.2d 900 (1971). The effect medication has on the outcome of a body fluids test may affect its admissibility or credibility as evidence of intoxication, but does not go to the question of whether a person is justified in refusing to take the test. *Raymond v. Department of Motor Vehicles*, 219 Neb. 821, 366 N.W.2d 758

(1985).

As the law is clear that neither a request to contact an attorney nor the effect of medication on the outcome of a chemical test forms a reasonable ground for refusing to take the test, the judgment of the district court declaring the revocation order of the Director of Motor Vehicles void and unenforceable is clearly wrong and is reversed.

REVERSED.

WHITE, J., dissenting.

The evidence is conclusive that a 20-minute delay was required between voiding and the taking of the urine sample. I therefore adhere to the position taken in my dissent in *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984). There was no inconvenience to the authorities in allowing the appellee to contact a lawyer and no threat to the reliability and accuracy of the test. If it is maintained that mere conversation or presence of a lawyer during the time a test is requested inhibits the functions of a police department, the suspicion grows that in the prudent exercise of our constitutional duties we should require no less.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM R. THIERSTEIN, APPELLANT.

371 N.W.2d 746

Filed August 16, 1985. No. 84-751.

1. **Trial: Evidence: Convictions.** Improper admission of evidence does not constitute reversible error where the evidence is cumulative and there is other competent evidence to support the conviction.
2. **Trial: Evidence: Presumptions.** In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant.

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

Richard L. Schmeling, for appellant.

A. Eugene Crump, Deputy Attorney General, and Harold Mosher, for appellee.

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

GRANT, J.

William R. Thierstein appeals from an order of the district court for Lancaster County, which affirmed his conviction in the county court for engaging in the unauthorized practice of law. Thierstein was convicted after trial to the county court and was fined $250. We affirm the decision of the district court.

Thierstein had been an attorney admitted to practice in the State of Nebraska, but had been indefinitely suspended from the practice on January 19, 1982, and remained suspended at the time of trial.

In October of 1983, Constance Miller contacted Thierstein concerning the adoption by her husband of her son by a previous marriage. Thierstein had done some work for Mrs. Miller previously, and she was unaware that he had been suspended. She testified that he never did inform her of that fact. Thierstein quoted Mrs. Miller a price of $150 to $200 to draw up the necessary documents and to represent the Millers in the action.

Later that month, Thierstein delivered to the Millers a "Relinquishment of Minor Child by Parent and Consent to Adoption," with instructions to have the document signed by the child's natural father. The Millers obtained the father's signature, and Thierstein returned to the Miller home to pick up the document.

Thierstein again went to the Miller home, in January of 1984, and left an adoption "Petition" with them for their signatures. On February 5, 1984, Mr. Miller returned the executed petition to Thierstein at his home. Thierstein advised Mrs. Miller that he would submit the documents to the court and inform the Millers of the date for their court appearance. When Thierstein failed to call, Mrs. Miller called the Lancaster County Court to inquire whether the papers had been filed. She was referred to Dennis Carlson of the Nebraska State Bar Association, who in turn contacted the Lincoln Police Department.

At the request of the police, Mrs. Miller telephoned Thierstein on February 22, 1984, to inquire about the adoption. The phone call was recorded by the police. Thierstein told Mrs. Miller that the papers had been filed and that the judge would call her with a court date. Mrs. Miller then arranged a meeting with Thierstein to get copies of the documents and to discuss the adoption.

On February 27, 1984, Thierstein went to the Miller home and delivered copies of the documents to the Millers. During a 30-minute conversation with the Millers, Thierstein admitted to having drafted the documents. Before Thierstein left he accepted $50 in cash from the Millers and signed and gave Mrs. Miller a receipt for "Legal fee for Adoption."

Prior to Thierstein's arrival at the Miller home on this occasion, the police had installed a transmitter in the living room of the home. Two detectives sat in a car outside and recorded about 10 minutes of the conversation. They were unable to record the rest due to a malfunctioning of the recorder, but the two detectives listened to the remainder of the conversation. The police also photocopied the $50 to be given to Thierstein. After Thierstein left the Miller home, he was stopped by the detectives and arrested. The $50 was found in his pocket and compared with the photocopy. The bills matched the copy.

Thierstein thereafter cooperated with police and consented to a search of his home. He showed officers where to find the originals of the documents, which were located on top of a file cabinet in the basement of his home.

Before his suspension as an attorney, Thierstein had been subleasing space he had in an office building to three other attorneys. One of these attorneys was Terry Cannon. After his suspension Thierstein kept the space and conducted the family's business out of the office. When the lease expired, Thierstein moved his office to the basement of his home. Cannon practiced law out of his own home, but used Thierstein's office and typist on occasion. Thierstein testified that he referred several cases to Cannon after his suspension. He also testified that typing done for Cannon was left on top of the file cabinet on which the originals had been found.

Cannon testified that he did receive referrals from Thierstein and that he did discuss adoptions in general with him. However, Cannon also testified that the name Constance Miller was unfamiliar to him, that he did not draft the documents, that he had never seen the documents, and that he had never handled an adoption except one which he was working on at the time of trial.

Thierstein first assigns as error the trial court's finding that he had violated Neb. Rev. Stat. § 7-101 (Reissue 1983). That section states, in pertinent part, that

> no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.

Thierstein suggests that this statute requires both drafting of the pleading and filing of the pleading in a court of record. He argues that because of his arrest he could not have filed the pleading, and the crime was not completed. This argument is tenuous, as it ignores the plain import of the statute. The language of the statute, "to be signed and filed," does not require the actual filing of the pleading but, rather, goes to the purpose of the document and to the intent of the person preparing the document. The statute requires only that a pleading be drafted with the intent that it will be filed in court, and does not require actual filing. The county court found "Defendant Thierstein's intended use of these pleadings is obvious from everything he told the Millers."

Thierstein's second assignment of error is that the trial court failed to find that Thierstein was acting in the capacity of a paralegal. The assignment is without merit. Thierstein's witness, an instructor at the Lincoln School of Commerce and director of its paralegal program, testified that a paralegal would not have a client sign a document until after an attorney approved the document. She testified that a paralegal works under the supervision of an attorney and that the paralegal's work must lose its identity as work of the paralegal and become

the work product of the attorney.

In the instant case there was no supervision, direction, or approval of Thierstein's work by an attorney. Thierstein contends he was acting in the capacity of paralegal for Cannon. Cannon testified that he had never seen the documents, had never directed Thierstein to draft them, and had never met the Millers. The documents never became the work product of an attorney. Thierstein could not have been acting as a paralegal.

Thierstein next assigns as error the trial court's decision to admit as evidence the cassette recording of the conversation which took place in the Miller home on February 27, 1984. We need not address this claim because this error, if it was error at all, did not constitute reversible error. Improper admission of evidence constitutes nonreversible harmless error where the evidence is cumulative and there is other competent evidence to support the conviction. *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984). "Moreover, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant." *Id.* at 599, 357 N.W.2d at 462.

The content of the conversation was testified to by the Millers, who participated in it. The tape which contained a portion of the conversation was cumulative and merely corroborated the testimony of the Millers. Both Mr. and Mrs. Miller testified that Thierstein told them that Thierstein had drawn up the pleading. There was sufficient evidence to sustain the finding of the trial court.

Thierstein's final assignment of error is that the trial court erred in not finding § 7-101 unconstitutionally vague as applied to him. We disagree with Thierstein. The statute prohibits the "drawing [of] pleadings or other papers to be signed and filed by a party, in any court of record of this state." Thierstein drafted pleadings, had them signed by the parties, and told the parties he would file the pleadings with the county court. His conduct was clearly proscribed by § 7-101. He cannot seriously argue that he did not know his actions were in violation of that section.

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

AFFIRMED.

DOROTHY ANN CLARK, APPELLANT, V. PAUL MELVILLE CLARK, APPELLEE.

371 N.W.2d 749

Filed August 16, 1985. No. 84-859.

1. **Physicians and Surgeons: Witnesses: Evidence.** The purchase of a medical practice by another physician does not in any way affect the confidential physician-patient privilege that exists between the patient and the vendor physician.
2. **Divorce: Pleadings: Evidence: Child Custody: Mental Health: Physicians and Surgeons: Waiver.** The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
3. **Trial: Evidence: Waiver.** The determination as to the admissibility of the evidence to which a waiver of privilege applies is to be initially entrusted to the sound discretion of the trial court.
4. **Child Custody: Appeal and Error.** Determinations as to the custody of children 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, keeping in mind, however, that 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 the other.
5. **Child Custody.** In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child.

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

Paul Korslund of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

Jerald W. Kerl of Andersen & Kerl, for appellee.

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

GRANT, J.

Dorothy Ann Clark, petitioner-appellant, filed her petition in Gage County, Nebraska, against Paul Melville Clark, respondent-appellee, seeking dissolution of the marriage of the parties. The parties stipulated to an agreed property settlement disposing of all issues between the parties except the issue as to custody of their minor child. After trial of the action, the court

dissolved the marriage, approved the property settlement, and gave custody of the parties' minor child to the appellee husband, subject to reasonable visitation by appellant wife, including every other weekend and at least 1 month in the summer. The wife appeals, alleging that the trial court erred in permitting a psychiatrist to give an opinion based on the records of another psychiatrist whose practice he purchased, in failing to give proper weight to the opinion of a clinical psychologist, and in finding that "the weight of the evidence sustained the granting of legal and physical custody of the minor child to the Appellee." For the reasons hereinafter set out we affirm.

The evidence showed the parties were married in Oregon on August 6, 1972. The parties had one child, Robert, who was born on November 15, 1975. The petition for divorce was filed on March 7, 1984. At the time of trial in September of 1984, Mrs. Clark was 33 years old, Mr. Clark 35, and the child 8. Mrs. Clark had a bachelor of science degree in secondary education in the field of health and physical education and had taught school, either full time or part time, for 5 years. Mr. Clark is a farmer who rents and operates his father's farm near Lewiston, Nebraska.

After their marriage the parties lived in Oregon for 2 years and then moved to the farm near Lewiston. The farmhouse in which they lived was small and needed repairs. Their child was born while the parties lived there. The record shows that Mrs. Clark did not like the isolated life on the farm. In August of 1979 she was continually crying and was hospitalized for depression and exhaustion, under the care of Dr. Burlingame. In October of 1979 she was again hospitalized for the same reasons. Mrs. Clark continued under Dr. Burlingame's care through the summer of 1981, when she took herself off the prescribed medication and stopped her treatment. In February of 1982 Mrs. Clark was again hospitalized because of continued crying, and again was treated with antidepressant medication. She left the hospital without being released by the doctor and refused to go to seek a different doctor in Omaha, as had been agreed among Dr. Burlingame, Mrs. Clark, and Mr. Clark.

At this point Mr. Clark filed a dissolution action. After 3 weeks Mrs. Clark returned to the farm home, where she lived

with her husband and their child until May 31, 1982. On that day Mrs. Clark drove to the Lincoln airport, left the car there, and took a plane to Aspen, Colorado. On July 4 Mr. Clark took the child to Aspen to see Mrs. Clark, delivered her car to her, and gave her money and clothing. In August the husband again took the child to see her before school started. The child remained with his father at the farm until March of 1983.

Mrs. Clark moved back to Lincoln in September of 1982, where she lived until the parties and Robert moved to an apartment in Beatrice in March of 1983. Mr. Clark dismissed his then-pending divorce action in the same month, and the parties attempted further reconciliation efforts.

After Christmas in 1983 the husband sought psychiatric help by seeing Dr. Tatay for his depression. He continued seeing Dr. Tatay weekly in February and March of 1984. In March of 1984 the parties had a physical confrontation. The husband struck his wife and left the apartment. On March 7, 1984, Mrs. Clark filed her petition for dissolution of the marriage.

Without belaboring the facts further, the situation may be summed up by saying that the case concerns two persons in an unfortunate marriage, where the wife cannot cope with living on the farm and the husband cannot cope with living in an apartment in the city and traveling to the farm. In the middle is their child.

Turning to the first of the wife's assignments of error, the record shows, as stated above, that Mr. Clark began seeing Dr. Tatay regularly in February of 1984. After he began his treatment of Mr. Clark, Dr. Tatay asked to talk with Mrs. Clark to discuss the marital problem that existed between his patient, the husband, and the wife. At his only conference with Mrs. Clark, which took place on February 15, 1984, Dr. Tatay told her "that I had a record of her from the previous physicians since I bought [Dr. Burlingame's] records and his practice . . . ." Dr. Tatay and Mrs. Clark looked at the records together and discussed them. At the trial Dr. Tatay testified "it was not my intent to examine her at that time." Nor did he attempt to treat her. With this background Dr. Tatay testified at the trial of the case 7 months later as to his "impression" of Mrs. Clark. When asked if he had "a medically certain opinion of what her

problems were," Dr. Tatay testified, over objection as to the physician-client privilege and as to foundation, that Mrs. Clark was "suffering from a psychiatric disorder. I could not be more specific than give a couple of possible diagnoses of a psychiatric disorder, a borderline disorder, or a personality disorder."

Mrs. Clark's objection to his opinion was overruled by the trial court, relying on the fact that she had placed her mental condition in issue as an element of her request for custody of her child. This waiver of the physician-patient privilege is set out in Neb. Rev. Stat. § 27-504(4)(c) (Reissue 1979). While we agree generally with the court's ruling, there are certain preliminary matters that must be first discussed.

Initially, we note that there may be some misconception about the implications that flow from Dr. Tatay's belief that when he purchased Dr. Burlingame's practice, he also purchased his records. Because they are neither briefed nor argued, we do not resolve the questions of whether a vendor doctor can, without the consent of the patient, sell patient records at all or whether the vendee doctor acquires such records subject to the privilege existing between the patient and the vendor doctor. We do hold, however, that that purchase of a medical practice by another physician does not in any way affect the confidential physician-patient privilege that exists between the patient and the vendor physician. The privilege continues to exist between the patient and the vendor physician. In 97 C.J.S. *Witnesses* § 252 at 741 (1957) it is stated: "The privilege does not terminate with the cessation of the protected relationship, but continues thereafter." Indeed, in *Boggess v. Aetna Life Ins. Co.*, 128 Ga. App. 190, 191, 196 S.E.2d 172, 174 (1973), the court held that the privilege continues even after the patient dies, stating: "Communications between psychiatrist and patient are of course privileged. . . . Nor does the privilege cease with the death of the client." The privilege protects the communications and the confidences that exist between the psychiatrist and his patient, and it continues to exist.

In the instant case, however, the record shows that during the conversation between Dr. Tatay and Mrs. Clark, she did not claim any privilege as to Dr. Burlingame's records, and

specifically waived any privilege by going through the files with Dr. Tatay. It should be noted that at the time of this conference Mrs. Clark had not yet filed her petition seeking custody, and her actions at the time of the conference were the waiver of her privilege that permitted Dr. Tatay to examine the records. As to the confidential relationship, if any, between Dr. Tatay and Mrs. Clark, she has waived any privilege she had in her conversations with Dr. Tatay by the filing of her petition alleging her fitness to have custody of her child.

As we have stated, we agree with the trial court that by placing her fitness to have custody of her child in issue, Mrs. Clark did waive any physician-patient privilege that existed between herself and Dr. Burlingame and between herself and Dr. Tatay. However, in view of the personal and confidential communications made between a patient and a psychiatrist (see *Taylor v. United States,* 222 F.2d 398, 401 (D.C. Cir. 1955), " 'The psychiatric patient confides more utterly than anyone else in the world . . .' "), when a litigant seeks custody of a child in a dissolution of marriage proceeding, that action does not result in making relevant the information contained in the file cabinets of every psychiatrist who has ever treated the litigant. The determination as to the admissibility of the evidence to which the waiver applies is to be initially entrusted to the sound discretion of the trial court. In this case the trial court did not abuse its discretion, and Dr. Tatay was properly permitted to testify as to his opinion as to Mrs. Clark's mental condition, insofar as considerations of the physician-patient privilege and the waiver thereof.

Mrs. Clark's other objection to Dr. Tatay's opinion is that the psychiatrist had no proper foundation for his opinion because it was based in part on the examination of medical records prepared by another doctor. Neb. Rev. Stat. § 27-703 (Reissue 1979), however, provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in

evidence.

Here, the facts relied on by Dr. Tatay were the records of the previously treating doctor (Dr. Burlingame), and since those records were the earlier records of treatment of Mrs. Clark, the records were "of a type reasonably relied upon by experts in the particular field." As stated in *Com. v. Gilliard*, 300 Pa. Super. 469, 446 A.2d 951, 954 (1982): "A medical witness may express opinion testimony in medical matters based, in part, on reports of others which are not in evidence but upon which the expert customarily relies in the practice of his profession." The objection to Dr. Tatay's opinion as lacking proper foundation was properly overruled.

We turn, then, to consideration of what weight should be given to Dr. Tatay's opinion. We note that in the trial court's decree of dissolution, the court specifically mentioned the testimony of Dr. Tatay insofar as that testimony concerned his opinions as to the mental condition of his patient, Mr. Clark. The trial court makes only passing reference to Dr. Tatay's "conference" with Mrs. Clark, and that fact, we believe, indicates that the court gave little weight to such testimony. In our independent review we reach the same conclusion. Dr. Tatay's opinion as to Mrs. Clark's mental state was not rendered after examination or treatment, but was the result of a "conversation" directed at other matters—the treatment of Mr. Clark. We note also that Dr. Tatay gave a general "impression" without specific psychiatric details and that he admitted he had no "medically certain" opinion as to Mrs. Clark's ability to care for her son—one of the issues before the court. In our decision herein, the opinion of Dr. Tatay as to Mrs. Clark's mental condition will be given little weight.

With regard to the wife's second assignment of error—that the trial court failed "to give proper weight to the opinion of Dr. Price, a clinical psychologist"—we refer to our standard of review of this case as set out below. By agreement of the parties, Dr. Price interviewed both parties, and his report as to his examination of each was placed in evidence by stipulation. The essence of the two reports is that both parties are decent people, that both have some problems, but that both are handling their problems fairly well. All Dr. Price's reports do is to support the

findings of the trial court, which determined, as we do in our independent review, that both parties are fit and proper persons to have custody of the child. There was no error in this regard.

Mrs. Clark's third assignment of error is that the court erred in giving custody to the husband. In reviewing the award of custody of children in a dissolution of marriage case, our determination in this court is governed by similar rulings in such cases in dividing property and awarding attorney fees (*Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984)); in determining alimony awards (*Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985)); and in determining the amount of child support (*Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985)). In our review of initial child custody decisions in a dissolution of marriage case, we hold that determinations as to the custody of children 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, keeping in mind, however, that 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 the other. See, *Koch v. Koch,* 209 Neb. 896, 312 N.W.2d 294 (1981); *Parsons v. Parsons,* 219 Neb. 736, 365 N.W.2d 841 (1985); *Chalupa v. Chalupa, ante* p. 704, 371 N.W.2d 706 (1985).

We have long held that in deciding the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. *Schmer v. Schmer*, 211 Neb. 414, 318 N.W.2d 876 (1982); *Moeller v. Moeller*, 215 Neb. 360, 338 N.W.2d 749 (1983). We agree with the trial court's decision. We, too, find that the husband has exhibited a more stable lifestyle and will offer a more stable environment for the child. The fact that the wife left the child from May to September in 1982 while she resided in Aspen, Colorado, and from September 1982 to March 1983 while she lived in Lincoln is disturbing. However valid her reasons, the fact remains that the husband had sole responsibility for the child during that period. As to other matters, such as whether the child preferred to be in the city or on the farm, which are disputed questions of fact, we

note the trial court observed and heard the witnesses. While both parents are fit, we find the court did not abuse its discretion when determining that Mr. Clark should have custody, with the liberal visitation determined by the trial court. The decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. GREGORY, APPELLANT.

371 N.W.2d 754

Filed August 16, 1985. No. 85-035.

1. **Convictions: Appeal and Error.** A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.
2. **Prosecuting Attorneys: Miranda Rights.** A prosecutor's reference to the defendant's failure to make an exculpatory statement before the defendant is in custody does not violate the defendant's right to remain silent.
3. **Trial: Prosecuting Attorneys: Witnesses: Rebuttal Evidence.** Once a witness' character for truthfulness has been attacked, the prosecution may, under the provisions of Neb. Rev. Stat. § 27-608 (Reissue 1979), adduce rebuttal evidence on that issue.
4. **Testimony: Rebuttal Evidence: Hearsay: Prior Statements.** Under the provisions of Neb. Rev. Stat. § 27-801 (Reissue 1979), evidence of a consistent statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
5. **Testimony: Rebuttal Evidence.** Competent testimony which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
6. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits, including the denial of probation, will not be disturbed on appeal.

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

J. William Gallup, for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

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

CAPORALE, J.

Following a trial by jury, defendant-appellant, John B. Gregory, was convicted of first degree assault and of using a firearm to commit a felony. He was thereafter sentenced to imprisonment at the Nebraska Penal and Correctional Complex for a period of 1 year on each conviction, the sentence on the firearm conviction to be served consecutively to the sentence on the assault conviction. In this appeal of each of his convictions and sentences, he assigns as errors (1) the failure to grant a mistrial because of prosecutorial misconduct; (2) the receipt of opinion testimony concerning the truthfulness of two of the State's witnesses; (3) the receipt of rebuttal testimony concerning the same two witnesses' prior consistent statements; and (4) the claimed excessiveness of the sentence. We affirm.

On Sunday, June 10, 1984, Charles Fisicaro, an Omaha police officer, responded to a radio call which reported a shooting. Upon his arrival, at approximately 8:30 a.m., he found a man, later identified as Philip Drickey, lying face down on the sidewalk in front of Gregory's home. As Officer Fisicaro approached Drickey, the latter looked up and said, "Can you believe it? He shot me over two papers." A rescue squad subsequently arrived and took Drickey to the hospital, where he, after emergency surgery, ultimately recovered from the damage to his bowel and ureter.

Earlier that morning, Drickey accompanied his son, Scott, and Scott's friend, Charlie Murrin, to help them deliver newspapers. Although on that morning Scott was working as a substitute carrier for a friend, he had previously worked on a paper route of his own, with which Drickey had helped.

At approximately 7 a.m. on the day in question, Drickey and the two boys picked up an initial supply of newspapers at the Gregory house, where Mrs. Gregory served as a distributor. After delivering their initial supply the carriers discovered that they were five papers short. As had been done in the past, Drickey and the boys returned to the Gregory house to get the needed additional papers. Drickey parked his truck in front of

the Gregory driveway, and the two boys walked up to the front door, while Drickey remained in his truck.

The boys informed Gregory that they needed five newspapers. Scott and Charlie waited outside the house while Gregory called his wife to find out what he should do. Unable to reach his wife, Gregory gave the boys three newspapers, telling them that the other two papers were needed for other paperboys. Scott and Charlie returned to the truck and told Drickey that they had received only three newspapers and that Gregory had two more papers.

Drickey left the truck and went to Gregory's door. Drickey testified that he had experienced similar problems when his son had his own route and that he had always gone to the Gregorys to try to obtain the needed additional papers.

Gregory's version and Drickey's version of what happened after that differ. Because of the nature of Gregory's assignments of error, it becomes necessary to separately review the evidence of some of the trial witnesses.

Drickey, a 6-foot-tall 36-year-old ironworker weighing approximately 175 pounds, testified that he opened the screen door and knocked on the main door to the home. Gregory answered the door, and Drickey told Gregory that they were short five papers and that "the boys were just trying to do a job." According to Drickey, Gregory mumbled something and slammed the door. Drickey then turned and walked toward his truck, but upon reaching the driveway, turned around and went back to the house to learn where extra papers could be obtained. Drickey opened the screen door and stood between it and the main door with the screen door at his back, and again knocked while he stood on the front step. The main door opened, and Drickey saw a flash and realized he had been shot. He then lunged forward from the step into the front hallway of the house, where he lay to remain calm, because he was in fear of his life. At this point Drickey begged Gregory not to shoot again, to which Gregory replied, "Aren't you dead yet?" Drickey became afraid he was going to be shot again, so he dragged himself outside the door and onto the front sidewalk.

Gregory, a 5-foot 10-inch diabetic civil engineer 66 years of age, testified that after he had given the boys three newspapers,

Drickey came up the driveway. Gregory then stepped outside and said, "Good morning." Drickey, in a loud and angry voice, said, "I don't take this bullshit from anybody. If you've got five newspapers, you give me five newspapers. I don't take this shit." Gregory became afraid, as he "could see" that Drickey was ready to fight, so went inside his house and closed the door. He saw Drickey start to leave, then turn around and come back to the house. Drickey opened the screen door and, instead of ringing the doorbell, kicked, banged, yelled, and cursed. Being afraid Drickey had brought a gun from the truck, Gregory went to his dresser to get a weapon so as to defend himself. Drickey then charged through the door into the house, swinging his fist; Gregory fired once to stop him after Drickey was inside the house. Gregory denied having asked Drickey, "Aren't you dead yet?"

Both boys were called by the prosecution and testified that at the time of the shooting they observed Drickey from the front seat of the truck parked in front of the driveway. According to them, Drickey was standing outside the door of Gregory's home when shot and stumbled into the house after he was shot. The boys also testified that Drickey was not threatening Gregory when he was shot.

A witness called by the defense as an expert in weaponry testified that the impact from the weapon and ammunition used by Gregory would have caused Drickey to fall backward rather than forward.

There are three bases to Gregory's contention that the trial court should have granted a mistrial: that the prosecutor (1) asked Gregory if he had ever had "any involvement with the police"; (2) commented upon Gregory's silence during police interrogation; and (3) said to the jury during closing argument that the State would not have prosecuted had the circumstances been as defendant said they were.

The first incident occurred during the prosecution's cross-examination of Gregory, wherein the prosecutor, Robert C. Sigler, asked: "Well, let me try this one: Yesterday Mr. Gallup [J. William Gallup, defense counsel] asked Mr. Drickey if he had ever had any involvement with the police. Have you ever had any involvement with the police?"

The defense argues in its brief that "[a] freshman in law school knows that impeachment on the basis of prior convictions is limited to felonies or misdemeanors involving dishonesty. The Evidence Code spells this out in language that a kindergarten student can understand." Brief for Appellant at 16-17.

Such may be, but a review of the questioning of Drickey by defense counsel on the previous day enables us to understand why the prosecutor phrased the question as he did. Defense counsel questioned Drickey as follows:

Q. You haven't had any run-ins with the police, have you?
A. Any run-ins so far as what?
Q. Any involvement with the police.
MR. SIGLER: Objection, Your Honor. He knows that's not proper.
MR. GALLUP: Will you just tell him to make his objection?
THE COURT: Overruled. You may answer.
THE WITNESS: What's the question again?
MR. GALLUP: Would you read it back?
Q. (Preceding question read by the reporter as follows: "Any involvement with the police."
A. Have I ever had any involvement with the police? Yes, sir.
Q. When was that?
A. It was — I don't know what the charge was. It was a disorderly conduct.
Q. Against you?
A. Yes.
Q. For fighting?
A. No, sir.
Q. What specifically did they accuse you of doing?
MR. SIGLER: Judge, that is irrelevant.
THE COURT: I'll sustain the objection.
BY MR. GALLUP:
Q. You don't consider that you did anything disorderly on this occasion?
A. What's that?

Q. The occasion the day you got shot, you hadn't been disorderly?
A. No, sir.
MR. GALLUP: That's all.

Nonetheless, the prosecutor should have restrained himself and should not have asked the objectionable question. The trial judge recognized this fact and sustained the defense's objection before any answer was given. Gregory argues, however, that this was not enough, that the trial court should have granted a mistrial as well. He is mistaken.

In *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), the defendant contended it was error for the trial court to overrule his motion for mistrial after testimony was elicited in violation of the court's prior sustainment of his motion in limine, notwithstanding the fact that the trial court sustained defendant's objection made after the improper question had been answered. We held that the trial court did not err in overruling the motion for mistrial, saying: "A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice." *Id.* at 459, 349 N.W.2d at 923.

In *LeBron* there is no showing that the answer prejudiced the defendant. In this case there is no showing that the question in and of itself was actually prejudicial to Gregory.

The trial court properly denied a mistrial at this point.

The next incident which Gregory claims entitled him to a mistrial also occurred during the prosecutor's cross-examination of him. As noted earlier, Gregory in effect testified on direct examination that he told police at the scene of the shooting that he was protecting his life and his property. The following exchange took place during the prosecution's cross-examination concerning this topic:

Q. Now, you say that you told the police you were protecting your life and your property, true?
A. That's true.
Q. You told them that, right?
A. Yeah, one patrolman. I know the one that was in here the last time for testimony this morning was

sitting at the table at the time the patrolman asked me the question.

Which patrolman I'm not sure about, but one asked me what happened.

Q. All right.

A. That's all I said.

Q. Yeah, you didn't tell any police that day about Mr. Drickey charging through the front door, did you? Did you?

A. No. In a subsequent question, I told him, "I want my attorney present," in a subsequent question.

Q. So this is the first time you are telling us any of this stuff about charging, kicking, screaming, cursing, and swearing?

Gregory's attorney objected to the last question and moved for a mistrial. The objection was sustained, but the motion for mistrial was overruled.

Gregory contends that somehow his fifth amendment privilege against self-incrimination was violated by the prosecution's question. He argues that by asking this question, the prosecutor was commenting on his claim of the privilege against self-incrimination, which is impermissible under Neb. Rev. Stat. § 27-513 (Reissue 1979):

> (1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> (2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> (3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

The defense's argument is based on the premise that, under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its progeny, once he claimed his fifth amendment privilege, he could no longer be questioned by

police without an observance of his *Miranda* rights and that his claim of that right may not be commented upon at trial. However, the defense misses an important point. The questions asked by the prosecutor related to what was said and not said before Gregory was in custody, and therefore prior to the time the *Miranda* warnings were required. See *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981).

Thus, the trial court again correctly denied a mistrial at this second juncture.

Gregory's final motion for mistrial came following the prosecution's closing argument, wherein the prosecutor said that the State would never have prosecuted the defendant had the circumstances been as the defendant said they were.

In *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), we held that the remarks of a prosecutor in a closing argument which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.

The defense's objection to the comment was sustained. Moreover, immediately after making the comment and after the court's sustainment of the objection, the prosecutor told the jurors that if they believed Drickey had charged into Gregory's house in an angry, loud, and threatening manner while swearing, as Gregory testified, then they should acquit Gregory. Those two events served to remove any prejudice to Gregory which might otherwise have resulted.

Once again, the trial court correctly denied a mistrial.

In his next assignment Gregory contends that the trial court erred in allowing Drickey's wife to express an opinion that her son, Scott, and his friend, Charlie, were truthful.

When Gregory was being cross-examined by the prosecution about his version of the facts, he stated that "[the boys] were well coached. They are incorrect."

Neb. Rev. Stat. § 27-608 (Reissue 1979) provides in part:

> (1) The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (a) The evidence may refer only to character for truthfulness or untruthfulness, and (b) evidence of truthful character is

admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

In *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978), we held that where the credibility of the prosecution's witnesses was attacked through the testimony of other witnesses who contradicted parts of their testimony, the prosecution properly called rebuttal witnesses to testify as to the witnesses' truthfulness.

As in *Steinmark*, it is clear in this case that the boys' character for truthfulness was attacked by Gregory's statements that the boys were both "well coached" and "incorrect." By so saying, Gregory in effect claimed the boys were lying. As such, the trial court did not err by permitting the prosecution to call Mrs. Drickey as a rebuttal witness to testify as to her opinion that each of the boys had a truthful character.

In his third assignment of error Gregory contends that the trial court erred in receiving the rebuttal testimony of police Sgt. Walter Cooper. He complains that the sergeant's testimony constituted both hearsay and improper rebuttal testimony.

Sergeant Cooper testified that he interviewed Scott and Charlie on the day of the shooting, and at that time the boys said they had gone to Gregory's door to get the additional papers they needed and waited outside until Gregory brought them. They also told the officer that Drickey was shot while he was standing outside the house and that he fell into the house after he was shot.

Gregory had testified earlier that the two boys waited inside his house to receive the papers and that at the time he shot Drickey, Drickey was inside the house, charging at him.

Neb. Rev. Stat. § 27-801 (Reissue 1979) provides in part:

> (4) 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 . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

As noted earlier, Gregory expressly charged that the boys had

recently fabricated their trial testimony. Under the circumstances it is clear that the statements about which Sergeant Cooper testified were not hearsay. *State v. Johnson, ante* p. 392, 370 N.W.2d 136 (1985).

Neither is the defense's claim that the testimony was not proper rebuttal evidence correct. The testimony constituted relevant evidence to the charges against Gregory. Neb. Rev. Stat. § 27-401 (Reissue 1979). As such, it was proper rebuttal testimony, which has been defined to be competent testimony which tends to dispute the testimony offered on behalf of the accused as to a material fact. *State v. Miller*, 213 Neb. 274, 328 N.W.2d 769 (1983), *modified on other grounds, State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984); *State v. Esluer*, 215 Neb. 616, 340 N.W.2d 152 (1983).

Gregory's fourth and final assignment is that the sentences he received are excessive. Both offenses are Class III felonies. Neb. Rev. Stat. §§ 28-308 and 28-1205(2) (Reissue 1979). Each conviction therefore carries a possible sentence of from 1 to 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1979). The sentence for conviction on the charge of using a firearm to commit a felony must run consecutively to the sentence on the conviction for first degree assault. § 28-1205.

Gregory argues that he should have been sentenced to probation in light of his age, background, and health. It is true that Gregory is a successful civil engineer, raised six children and provided them with a college education, and has no prior felony convictions, although on March 13, 1980, he was convicted of carrying a concealed weapon. Several of Gregory's associates and friends wrote letters to the sentencing judge and others concerning Gregory's generally good character. The record shows that the trial court considered these factors when deciding upon the appropriate sentence. It is obvious, however, that the trial court also properly considered the seriousness of the crime.

It is the firmly established rule of this jurisdiction that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. It is also the firmly established rule that the denial of probation will not be overturned on appeal unless there has been an abuse of

discretion. *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984).

We cannot say there was an abuse of discretion.

There being no merit in any of Gregory's assignments of error, we affirm.

AFFIRMED.

RHONDA K. OVERMAN, APPELLEE, V. B.G. BROWN AND PATSY J. BROWN, APPELLANTS.

372 N.W.2d 102

Filed August 16, 1985. No. 85-163.

1. **Demurrer: Pleadings.** A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
2. **Demurrer.** In ruling on a demurrer the courts are obliged to accept plaintiff's well-pleaded facts, as distinguished from conclusions, as true.
3. **Contracts: Offers to Buy or Sell.** If an offer prescribes the place, time, or manner of acceptance, its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time, or manner of acceptance, another method of acceptance is not precluded.
4. _____: _____. An offeror is entitled to prescribe an exclusive method of acceptance of an offer, but when the offer as fairly interpreted merely suggests without explicitly directing a particular method of acceptance, the offer can be accepted in any reasonable manner.
5. _____: _____. Acceptance of an offer may be made in several different ways, and ordinarily need not be express or formal, but may be shown by words, conduct, or acquiescence indicating agreement.
6. _____: _____. The act constituting the alleged acceptance of an offer must be judged by whether that communication by the offeree would lead a reasonable person to conclude that the offer has been accepted.

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

Robert J. Murray of Kennedy, Holland, DeLacy & Svoboda, for appellants.

Donald W. Kleine and Joel L. Klausen of Kleine Law Office, for appellee.

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

PER CURIAM.

Plaintiff filed suit in the municipal court of Omaha alleging the defendants Brown breached a real estate purchase contract. Following the overruling of defendants' demurrer to the amended petition, defendants elected not to plead further and default judgment was entered against them. On appeal to the district court the judgment was affirmed, and defendants have appealed to this court. We affirm.

"A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded." *Blanchard v. White*, 217 Neb. 877, 880, 351 N.W.2d 707, 709 (1984). However, in ruling on a demurrer the courts are obliged to accept plaintiff's well-pleaded facts, as distinguished from conclusions, as true. *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984).

The pertinent portion of plaintiff's amended petition reads as follows:

> 4. That on or about October 12, 1983, Plaintiff and Defendant Patsy J. Brown entered into an agreement wherein said Defendant was to purchase certain premises from the Plaintiff commonly known as 4915 North 118th Street, Omaha, Douglas County, Nebraska. A Uniform Purchase Agreement was executed by the parties as evidence of the agreement, a copy of which is attached hereto and incorporated herein as Exhibit "A". Thereafter, on November 4 [sic], 1983, by agreement of the parties, a second Uniform Purchase Agreement was entered into by the Plaintiff and Defendants Patsy J. Brown and B. G. Brown, which replaced the first purchase agreement. A copy of the second Uniform Purchase Agreement is attached hereto and incorporated herein as Exhibit "B". The second Uniform Purchase Agreement was accepted on November 4, 1983, by the Plaintiff on a separate authorization, a copy of which is

also attached hereto and incorporated herein as Exhibit "C".

The pleading goes on to allege a breach by the defendants and damages suffered by the plaintiff.

The bare facts alleged in the amended petition state the existence of a valid purchase agreement, i.e., the execution of a purchase agreement, including the acceptance by the plaintiff. It is only when reference is made to the actual documents involved, as exhibits to the pleading, that a suggestion of an anomaly appears.

Both of the offers to purchase were made on a "Uniform Purchase Agreement," a printed form, which contained the terms of the offer and the signature of Patsy J. Brown on the October agreement and those of both Patsy and B.G. Brown on the November agreement. Following the signatures of the defendants, still on the first page of the form, is a receipt of the offer and downpayment signed by the real estate agent. Contained within that receipt is the language "the above proposition is taken subject to the written approval and acceptance by the owner . . . ." Immediately following that signature, and at the very bottom of page 1, are the words "ACCEPTANCE ON REVERSE SIDE."

The agreement dated October 12 was signed by the plaintiff, following the heading "ACCEPTANCE" located at the top of the second page, in which plaintiff simply accepted the "foregoing proposition."

The November 3 agreement was not accepted in this same manner. Rather, there does appear in the record a letter dated November 4, written on the letterhead of Wurdeman of Omaha, signed by the plaintiff, which states as follows: "This is authorization of WURDEMAN OF OMAHA to exchange Original contract dated October 12, 1983 between PATSY J. BROWN - Purchaser and RHONDA K. OVERMAN - Seller for newly signed contract on 4915 North 118th Street, Omaha, Nebraska. Copy of which is attached."

Defendants argue that an offeror is the "master of his offer" and that failure to accept such offer in the prescribed manner is ineffective to create a binding agreement. However, we do not construe the offer to have *required* an acceptance in any

mandatorily assigned manner other than that it is to be in writing.

"If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded." Restatement (Second) of Contracts § 60 at 147 (1981).

In other words, an offeror is entitled to prescribe an exclusive method of acceptance of an offer, but when the offer as fairly interpreted merely suggests without explicitly directing a particular method of acceptance, the offer can be accepted in any reasonable manner. *David J. Tierney v. T. Wellington Carpets*, 8 Mass. App. 237, 392 N.E.2d 1066 (1979); *Vaulx v. Cumis Ins. Society, Inc.*, 407 A.2d 262 (D.C. 1979).

We do not view the directory language "ACCEPTANCE ON REVERSE SIDE" to be a mandatory requirement for the acceptance of the offer.

Defendants argue that regardless of the allegations in the petition, the purported acceptance by the plaintiff of the November 3 offer by means of a separate letter was ambiguous and ineffective. We do not agree.

Although it was perhaps ill advised and a clumsy and complicated method of performing a simple task, it could be construed to express an unequivocal intent on the part of the plaintiff to be bound by the terms of the November 3 agreement, sufficiently so that it would withstand the challenge of a demurrer.

"Acceptance may be made in several different ways, and ordinarily need not be express or formal, but may be shown by words, conduct, or acquiescence indicating agreement." 17 C.J.S. *Contracts* § 41 at 666 (1963). The act constituting the alleged acceptance of an offer must be judged by whether that communication by the offeree would lead a reasonable person to conclude that the offer has been accepted. *In re Mapes Enterprises, Inc.*, 15 Bankr. 192 (D. Nev. 1981).

Finally, defendants argue that the purchase agreement is void and unenforceable because it is not acknowledged by the defendants and the agreement purports to encumber their

homestead. Neb. Rev. Stat. § 40-104 (Reissue 1984).

Defendants support their conclusion as to the encumbrance of their homestead by referring to language in the agreement that their offer to purchase is conditioned upon their sale of the present home before they are obligated to close on the subject property. Further, the defendants are given up to 6 months, with an option to extend for 6 months, to sell and close on their present home.

The defendants insist that if they refused to go through with the purchase and refused to sell their home, the plaintiff could commence an action for specific performance and force the defendants to accept any good faith offers on their present home; therefore, such a provision becomes an encumbrance on their property.

The fact of the matter is, of course, that plaintiff has elected to proceed in damages, which forecloses the possibility of a suit for specific performance. Therefore, whether plaintiff could have elected to bring a suit in equity is not before us, and we do not decide that issue. *Litz v. Wilson*, 208 Neb. 483, 304 N.W.2d 48 (1981). However, we are of the opinion that in the event such an action would have been brought, the most the court could do would be to order the purchase of plaintiff's house by the defendants; it could not, we believe, force defendants to sell their own home. The agreement did not constitute an encumbrance.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. PETER M. SINICA, APPELLEE.

372 N.W.2d 445

Filed August 23, 1985. No. 84-703.

1. **Constitutional Law: Statutes: Standing.** A person may have standing to facially challenge an enactment for overbreadth because it may reach a substantial amount of constitutionally protected conduct.
2. **Constitutional Law: Marriage.** The right to privacy protected by the fourteenth

amendment includes a right to freedom of choice in marriage and family decisions.

3. **Constitutional Law: Minors: Parental Rights.** Parents have a fundamental liberty interest protected by the due process guarantees of the fourteenth amendment in the care, custody, and management of their children.
4. **Constitutional Law: Statutes: Appeal and Error.** When a statute is facially challenged as to overbreadth and vagueness, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.
5. **Statutes: Appeal and Error.** In deciding whether a statute is overbroad, a court should evaluate the ambiguous as well as unambiguous scope of the enactment. To this extent the vagueness of a law affects overbreadth analysis.
6. **Statutes: Minors: Words and Phrases.** The term "cruelly punished" as used in Neb. Rev. Stat. § 28-707(1)(b) (Cum. Supp. 1984) has acquired a relatively widely accepted connotation in the law and is capable of an easily understood meaning, as distinguished from the reasonable discipline of a child allowed by the common law and protected by the Constitution.
7. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute we will presume that the Legislature intended a sensible rather than absurd result, and we will endeavor to interpret the statute in a manner consistent with the Constitution.
8. **Constitutional Law: Minors.** Child abuse is not a constitutionally protected activity.
9. **Statutes: Standing.** In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to the conduct of others.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Exception sustained, and cause remanded for further proceedings.

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

Laureen Van Norman, for appellee.

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

WHITE, J.

This is an appeal from a decision of the district court for Lancaster County, Nebraska, in a criminal case.

Pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1984), the State filed an application for leave to docket an appeal to this court, taking exceptions to the ruling of the lower court. We sustain one of the exceptions.

Appellee, Peter M. Sinica, was arrested and charged with child abuse, specifically that he "did knowingly or intentionally cause or permit Peter M. Sinica, Jr., a minor child, to be cruelly punished." Appellee was bound over to the district court after a preliminary hearing. Appellee raised the question of the constitutionality of the statute in both the county court and the district court. The trial court sustained a motion to quash the information, holding that Neb. Rev. Stat. § 28-707(1) (Cum. Supp. 1984) is "so vague that it violates due process of law."

In its order the district court mistakenly cited the statute the appellee was charged under as Neb. Rev. Stat. § 28-708 (Cum. Supp. 1984). While this section contains similar language, it applies to "incompetent or disabled" persons, not minor children. Taken as a whole, however, the trial judgment clearly refers to § 28-707(1), and we assume the court intended it to refer to the proper statute. See *State v. Olson*, 217 Neb. 130, 347 N.W.2d 862 (1984).

The appellee is the father of the alleged victim. The incident which gave rise to the complaint was called to the attention of the 9-year-old child's teacher, who questioned the child about a cut on his face. On questioning, the child revealed that his father had struck him on the face and beaten him with a belt on his buttocks and back. The police were summoned and the child was treated at a local hospital. Photographs taken by the police show the child's buttocks to be severely bruised. The entire surface of the child's backside was a deep purple color. Strap and bruise marks also appear about the child's back and shoulders. The child testified that the punishment was inflicted because the child had disobeyed an order from the appellee. The child was to have brought home notes from his teachers showing that all his schoolwork had been completed before leaving on a family vacation.

The State's exceptions are twofold: (1) That the appellee lacked standing to attack the constitutionality of the statute, *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985), and *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984); and (2) Even on a facial challenge the relevant statutory language, "cruelly punished," is not vague or uncertain.

The State's first exception is overruled. Regardless of

whether an individual may have standing to challenge a statute for vagueness, a question which we addressed in *Groves, supra*, and *Frey, supra*, the appellee may have standing to assert that a statute is overbroad because it reaches a substantial amount of constitutionally protected conduct.

The right to privacy, a fundamental right within the penumbras of the guarantees of the Bill of Rights, includes a right to freedom of choice in marriage and family decisions. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). The Supreme Court has further recognized the fundamental liberty interest of parents in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Thus, the liberty to engage in these parental activities is protected by the due process guarantees of the fourteenth amendment to the U.S. Constitution. *Santosky v. Kramer, supra*; J. Nowak, R. Rotunda & J. Young, Constitutional Law ch. 13, § V (2d ed. 1983).

In *Groves* and *Frey, supra*, based upon the Supreme Court's ruling in *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982), we said that when a statute is facially challenged as to overbreadth and vagueness, "our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Frey, supra* at 561, 357 N.W.2d at 219. If the overbreadth challenge fails, "[w]e are to then examine the facial vagueness . . . ." *Id.* Vagueness is a constitutional vice conceptually distinct from overbreadth, in that an overbroad law need lack neither clarity nor precision and a vague law need not reach constitutionally protected activity. L. Tribe, American Constitutional Law § 12-28 (1978). However, in a footnote to *Hoffman Estates* the Supreme Court recognized that in making an overbreadth determination

> a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings

> cause citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Hoffman Estates, supra at 494 n.6.

Under the facts of this case we find that it would be impossible to determine whether § 28-707(1) is overbroad and impinges on the constitutional right of a parent to reasonably correct and discipline a child without examining the statutory language for clarity and precision in proscribing the offense of child abuse.

Section 28-707(1) reads as follows:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) Placed in a situation that endangers his or her life or health; or (b) Cruelly confined or cruelly punished; or (c) Deprived of necessary food, clothing, shelter, or care.

We focus in particular on subsection (b). Is the term "cruelly punish" defined with sufficient definiteness, and are there ascertainable standards of guilt to inform someone of common intelligence what course is lawful to pursue? *State v. Metzger*, 211 Neb. 593, 319 N.W.2d 459 (1982). The term "cruelly punished" is not defined in a separate section of the statute. However, "cruel" is defined by Webster's Ninth New Collegiate Dictionary 311 (1985) as "1: disposed to inflict pain or suffering: devoid of humane feelings 2 a: causing or conducive to injury, grief, or pain b: unrelieved by leniency." "Punish" is defined by the same source as "1 a: to impose a penalty on for a fault, offense, or violation b: to inflict a penalty for the commission of (an offense) in retribution or retaliation 2 a: to deal with roughly or harshly b: to inflict injury on." *Id.* at 955.

In *People v. Jennings*, 641 P.2d 276 (Colo. 1982), the defendant, Jennings, was charged with child abuse under a statute similar to § 28-707, which provided that a person was guilty of child abuse if he " 'knowingly, intentionally, or negligently, and without justifiable excuse,' caus[ed] or permitt[ed] a child to be 'abandoned, tortured, cruelly confined or cruelly punished.' " 641 P.2d at 277. After a jury

trial and a judgment of conviction, the trial court found the words "cruelly punished" to be unconstitutionally vague because of the subjective nature of the words. On appeal the Colorado Supreme Court reversed. The court held that the term "cruelly punished" is one capable of definition and applies to clearly proscribed conduct.

> That a distinction can be made between permissible punishment and "cruel" punishment is supported by the traditional common law rule concerning parental discipline of children. At common law the parent of a minor child or one standing *in loco parentis* was privileged in using a reasonable amount of force upon a child for purposes of safeguarding or promoting the child's welfare. *Bowers v. State*, 283 Md. 115, 389 A.2d 341 (Ct.App.1978); *Boyd v. State*, 88 Ala. 169, 7 So. 268-69 (1890); *W. LaFave & A. Scott, Handbook on Criminal Law* § 52, at 389-90 (1972); *Restatement of Torts* (Second) § 147(1); Paulsen, *The Legal Framework for Child Protection*, 66 *Colum. L.Rev.* 679 (1966). While at common law the precise test of what constituted permissible force varied from jurisdiction to jurisdiction, *see* Annot. 89 A.L.R.2d 396, as a general proposition, so long as the chastisement was moderate and reasonable in light of the child's age and condition, the misconduct being punished, the kind of punishment inflicted, the degree of harm done to the child and other relevant circumstances, the parent or custodian would incur neither civil nor criminal liability, even though identical behavior against a stranger would be grounds for an action in tort or prosecution for assault and battery or a similar offense. *See W. Prosser, Torts* § 27, at 136-37 (4th ed. 1971); *LaFave & Scott, supra*.

641 P.2d at 278-79. Quoting the Maryland Court of Appeals in *Bowers v. State*, 283 Md. 115, 389 A.2d 341 (1978), the Colorado Supreme Court observed: " 'Since the contours of the common law privilege have been subject for centuries to definition and refinement through careful and constant judicial decision-making, terms like "cruel" or "inhumane" and "malicious" have acquired a relatively widely accepted

connotation in the law.' " 641 P.2d at 279.

Given sufficient definition by the common law, the term "cruelly punished" would not meet the further evil of a vague statute, that of arbitrary and discriminatory application on an ad hoc and subjective basis by policemen, judges, and juries. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

A number of other jurisdictions have examined the phrases "cruel punishment" and "inhumane punishment," *State v. Fahy*, 201 Kan. 366, 440 P.2d 566 (1968), and *Bowers v. State, supra*; "unnecessary punishment or infliction of pain," *Hunter et al. v. State*, 172 Ind. App. 397, 360 N.E.2d 588 (1977); "cruel mistreatment," *State v. Samter*, 4 Or. App. 349, 479 P.2d 237 (1971); and "cruel maltreatment," *State v. Killory*, 73 Wis. 2d 400, 243 N.W.2d 475 (1976), and have found that such phrases do not violate the due process clause of the fourteenth amendment to the U.S. Constitution nor the similar provisions in their own state Constitutions.

The appellee urged before the trial court and in his brief to this court that "cruelly punished" could encompass a broad range of disciplinary techniques. "Many people operate under the philosophy that any physical discipline is cruel, while just as many others believe that spanking is a necessary part of child rearing." Brief for Appellee at 5.

While this assertion may be true, we believe the term "cruelly punished" is capable of an easily understood meaning as distinguished from the reasonable discipline of a child allowed by the common law and protected by the Constitution. It is a mark of statutory interpretation that in construing a statute the Supreme Court will presume that the Legislature intended a sensible rather than an absurd result. *Reed v. McClow*, 205 Neb. 739, 290 N.W.2d 186 (1980). Further, when a statute is constitutionally suspect, we endeavor to interpret it in a manner consistent with the Constitution. *State v. Kock*, 207 Neb. 731, 300 N.W.2d 824 (1981).

Since the term "cruelly punished" has been sufficiently defined by the common law and does not include reasonable disciplinary measures, the appellee's overbreadth challenge to § 28-707(1) must fail. Child abuse is not a constitutionally

protected activity.

Under our analysis appellee's contention that § 28-707 as applied to his conduct is vague would also fail.

As to the alleged facial vagueness of § 28-707(1) as asserted in appellee's brief, the appellee will not be heard to challenge the statute. Since his conduct would be clearly proscribed by the statute, he cannot complain of its application as to the conduct of others. *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984).

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

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

For reasons more specifically set out in my concurring opinion filed in *State v. Merithew, ante* p. 530, 371 N.W.2d 110 (1985), I concur in the result in this case.

BEVERLY A. WARD, APPELLEE, V. BLAINE E. WARD, APPELLANT.
373 N.W.2d 389

Filed September 6, 1985. No. 84-334.

Divorce: Records: Appeal and Error. In a domestic relations case on appeal, where each party has testified, the burden is on the appellant to have a bill of exceptions prepared containing the testimony and evidence of each party on any of the issues affected by the trial court's decree of dissolution to be presented for review by appellant.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

James S. Watson of McHenry and Watson, for appellant.

Hal Bauer of Bauer, Galter, Geier & Flowers, for appellee.

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

PER CURIAM.

Respondent, Blaine E. Ward, appeals from the overruling of his motion for a new trial in a domestic relations case. Petitioner-appellee, Beverly A. Ward, filed her action seeking a

decree of legal separation from her husband. The husband answered the wife's petition and cross-petitioned for a dissolution of the marriage between the parties. The record before us does not show how the petition for legal separation was disposed of (possibly because of the truncated bill of exceptions filed herein), but the matter proceeded to trial, and a decree of dissolution of marriage was entered on March 29, 1984. After his motion for new trial was overruled, the husband timely appealed to this court. In his praecipe for the bill of exceptions, the husband requested that "[t]he Bill of Exceptions should contain all testimony of Respondent [husband] and all of the Exhibits." On page 1 of the bill of exceptions, the court reporter notes: "(As per the praecipe, this bill of exceptions commences with the testimony of the respondent.)."

The trial took place over 2 days. We have a record to examine consisting of the husband's testimony only, along with the exhibits. We have no record indicating how 17 of the first 18 exhibits were received in evidence. In his brief in this court the husband assigns nine errors, all presenting alleged errors of the trial court in dividing the parties' property or in awarding too much alimony to the wife.

Neb. Ct. R. 5A (rev. 1983) states in pertinent part:

> 5. Bill of Exceptions.
>
> A. Ordering Bill of Exceptions.
>
> (1) Appellant shall file a request to prepare a bill of exceptions in the office of the clerk of the District Court at the same time the notice of appeal is filed. . . .
>
> (2) The request shall specifically identify each portion of the evidence and exhibits offered at any hearing which the party appealing believes material to issues to be presented to the Supreme Court for review. The court reporter shall prepare only those portions specified in the request for preparation of bill of exceptions. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary to the evidence, the bill of exceptions must include all evidence relevant to the finding or conclusion. . . .
>
> (3) If the appellee believes additional evidence should be included in the bill of exceptions, the appellee

> shall, within 10 days after service of the request for bill of exceptions filed by the appellant, file a supplemental request for preparation of bill of exceptions. . . .

In the trial of this domestic relations case, each party testified. There were no other witnesses. The issues, as presented by the pleadings, the husband's testimony, and the exhibits, concern a marriage occurring in 1954. Each party pled that the parties had acquired property during the marriage and that an equitable division or distribution of that property should be made by the court.

Without going to the merits of the husband's assignments of error, we must first consider the wife's response to this appeal that if an appellant intends to urge on appeal that a finding or conclusion is not supported by the evidence, the bill of exceptions must include all evidence relevant to the finding or conclusion. See rule 5A(2), above.

In our review of property division and alimony matters, we are governed by the rule set out in *Guggenmos v. Guggenmos*, 218 Neb. 746, 748-49, 359 N.W.2d 87, 90 (1984), that

> the division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

It is, of course, impossible to review this record de novo and reach any valid conclusion as to the proper exercise of the trial court's discretion when we have before us only the testimony of one party to the marriage. We have no basis to conclude that "all evidence relevant to the finding or conclusion" is before us, and we are unable to properly conduct our de novo review as set out above.

The husband states that if the wife wanted any more evidence she could file a supplemental request as permitted by rule 5A(3), set out above. The husband mistakes the import of rule 5. That rule, in mandatory form, requires that if the appellant

intends to urge on appeal that the findings or conclusions of the trial court are not supported by the evidence, the bill of exceptions *must* include all evidence relevant to the findings or conclusion attacked by the appellant. Here, appellant sets out more than 10 errors which he alleges the court made in its property division. It defies human understanding to believe that the wife did not testify to a different conclusion with regard to these factual matters.

We hold that in a domestic relations case on appeal, where each party has testified, the burden is on the appellant to have a bill of exceptions prepared containing the testimony and evidence of each party on any of the issues affected by the trial court's decree of dissolution to be presented for review by appellant.

In the circumstances of this case we determine that the husband did not present to this court a proper record for our review and that there exists no duty of appellee to supplement that record to make appellant's case on appeal. The judgment of the lower court is affirmed.

AFFIRMED.

WAUSAU INSURANCE COMPANY, A WISCONSIN CORPORATION, APPELLANT, V. LARRY SCHAKE, DOING BUSINESS AS LARRY SCHAKE LIVESTOCK TRANSPORTATION, APPELLEE.

373 N.W.2d 669

Filed September 13, 1985. No. 84-277.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Arlen W. Langvardt of Jacobsen, Orr & Nelson, P.C., for appellant.

E. Dean Hascall of Hascall, Jungers & Garvey, for appellee.

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

PER CURIAM.

This is an appeal by Wausau Insurance Company (Wausau) concerning its workmen's compensation insurance policy issued to Larry Schake, doing business as Larry Schake Livestock Transportation. Wausau filed suit in the district court for Buffalo County, seeking judgment for an additional premium earned but not paid by Schake. The jury returned a verdict in favor of Schake.

Larry Schake owns and operates a livestock-hauling business known as Larry Schake Livestock Transportation. As part of the business, Schake owns one truck and several over-the-road trailers, has trucking permits from the appropriate agencies of several states, and has two sets of proration plates from the State of Nebraska. Schake paid one employee, Gene Maack, to drive Schake's one truck used to haul livestock.

However, the bulk of Schake's revenue (90 percent) comes from Schake's locating shipments and contacting truckowners. As one truckowner explained: "He's [Schake] just a dispatcher service. He lines up loads or calls shippers — different shippers and lines up loads of livestock and then he and I communicate together and if the rates [sic] good enough that I'll haul it there, I might rent a trailer from him and haul it." If a truckowner decides to make the haul, Schake charges 8 percent of the gross revenue for the referral. If the truckowner does not have a trailer, Schake will, for an additional 12 percent or a total of 20 percent of the gross revenue, lease or rent one of his trailers to a truckowner. After a truckowner delivers a shipment the shipper pays Schake the entire amount for the transportation. Schake then deducts the agreed percentage and remits the balance to the particular owner whose truck was used for hauling. Schake has never made any withholdings from the truckowners' checks for federal or state income tax, Social Security, or unemployment compensation. Also, Schake has never paid any truckowners' operating expenses and has no control over the truckowners' travel routes, number of stops, fuel, or equipment supplies. In fact, some of the truckowners have hired other drivers to haul loads arranged by Schake. Each of the truckowners has his own trucking permits. All but two of the truckowners have their own proration plates.

Wausau issued a workmen's compensation policy to Schake in 1980. The policy covered a period from March 1, 1980, until November 17, 1981. The policy provided Schake would pay an "estimated" premium which would be adjusted, depending upon the amount of Schake's payroll and each of his employee's classification. Schake paid an initial "estimated" premium of $2,331.

On September 22, 1981, an employee of Wausau conducted an audit of Schake's books and concluded that Schake owed an additional premium of $23,322. This premium was calculated on the basis that the truckowners were Schake's employees. Schake refused to pay the additional premium, and Wausau filed suit. At the close of Wausau's case and again at the conclusion of all the evidence, Schake moved for a directed verdict, arguing the truckowners, not being persons who might recover on a claim against Schake under the Nebraska Workmen's Compensation Act, should not be factors in calculating any premium for Schake's workmen's compensation coverage. The district court overruled Schake's motions and submitted the matter to a jury, which returned a verdict for Schake.

The parties filed a written stipulation in the district court and stated: "The truck driver classification is all that is involved in this dispute." In other words, the parties agreed that the real issue in this case is the answer to the question: Were the truckowners properly included by Wausau in calculating any additional premium due from Schake? Schake, on appeal, argues that these truckowners are independent contractors and, therefore, not includable. Wausau assigns as error that the jury verdict is clearly against the weight of the evidence.

An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. Such a person is not an employee within the meaning of the workmen's compensation statutes. *Schneider v. Village of Shickley*, 156 Neb. 683, 57 N.W.2d 527 (1953).

In *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979), we held as a matter of law, under facts

virtually identical with those in the case before us, an injured worker was an independent contractor and was not entitled to workmen's compensation benefits. See, also, *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984).

The record before us establishes, as a matter of law, that the truckowners were independent contractors. Although the district court should have sustained Schake's motion for a directed verdict, the jury, nevertheless, returned a verdict favorable to Schake. We, therefore, affirm the judgment of the district court.

AFFIRMED.

LARRY J. BAGGETT, APPELLANT, V. CITY OF OMAHA, A METROPOLITAN CITY, AND THE OMAHA PERSONNEL BOARD, APPELLEES.

373 N.W.2d 391

Filed September 13, 1985. No. 85-112.

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

David L. Herzog, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery, for appellees.

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

PER CURIAM.

Larry J. Baggett (Baggett) appeals from the judgment of the district court for Douglas County, Nebraska, affirming the Omaha Personnel Board's dismissing Baggett from his employment as a police officer. Baggett was dismissed from employment as a result of his off duty physical assault on an airman at Offutt Air Force Base. On his pleas of guilty Baggett had been convicted of two misdemeanor assault charges filed in U.S. district court. Baggett's brief filed with this court contains

no assignment of error.

Neb. Rev. Stat. § 25-1919 (Reissue 1979) provides that the appellant's brief in any action before this court "shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous . . . ." Further, § 25-1919 authorizes the Supreme Court to promulgate general rules providing for briefs filed in cases appealed to this court. Pursuant to such authorization, this court has adopted Neb. Ct. R. 9D(1)d (rev. 1983), which requires that appellant's brief shall contain assignments of error which are

> [a] separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed. . . .

State v. Hoekstra, ante p. 309, 310, 369 N.W.2d 643 (1985).

In *Farmers Co-op Grain Co. v. Leuenberger*, 217 Neb. 288, 348 N.W.2d 135 (1984), we held that in the absence of an assigned error, the judgment of the district court will be affirmed.

Baggett has not specified any assignment of error to be reviewed by this court. Our decision and rule set forth in *Farmers Co-op Grain Co. v. Leuenberger, supra*, is applicable in Baggett's case. The record does not disclose any plain error prejudicial to Baggett. Therefore, Baggett's appeal presents no error for review by this court. In the absence of error presented for review, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD A. LITZENBURG, APPELLANT.
374 N.W.2d 1

Filed September 5, 1985. No. 84-898.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Reversed and remanded for further proceedings.

R.E. Richards of Richards & Richards, for appellant.

A. Eugene Crump, Deputy Attorney General, and Terry R. Schaaf, for appellee.

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

PER CURIAM.

This case is a direct appeal in which the only error assigned is that the sentence imposed was excessive. That contention is without merit.

In this case, however, the record discloses plain error in that the trial court at the arraignment failed to advise the defendant of his right against self-incrimination. Such a record will not support a finding that the plea was entered voluntarily and intelligently. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); *State v. Branch, ante* p. 754, 371 N.W.2d 740 (1985); *State v. Wright, post* p. 847, 374 N.W.2d 26 (1985).

Accordingly, the judgment is reversed, defendant's conviction and sentence are vacated, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. AMOS J. RODRIQUEZ, APPELLANT.

374 N.W.2d 1

Filed September 5, 1985. No. 85-062.

Appeal from the District Court for Douglas County: LAWRENCE CORRIGAN, Judge. Reversed and remanded for further proceedings.

J. Joseph McQuillan of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

PER CURIAM.

This case is a direct appeal in which the only error assigned is that the sentence imposed was excessive. That contention is without merit.

In this case, however, the record discloses plain error in that the trial court at the arraignment failed to advise the defendant of his right against self-incrimination. Such a record will not support a finding that the plea was entered voluntarily and intelligently. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); *State v. Branch, ante* p. 754, 371 N.W.2d 740 (1985); *State v. Wright, post* p. 847, 374 N.W.2d 26 (1985).

Accordingly, the judgment is reversed, defendant's conviction and sentence are vacated, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LEE P. HAUMONT ET AL., APPELLEES, V. SECURITY STATE BANK, BROKEN BOW, NEBRASKA, APPELLANT.

374 N.W.2d 2

Filed September 20, 1985. No. 83-955.

1. **Equity: Contracts: Rescission: Appeal and Error.** An action for rescission of a contract is equitable in nature and as such is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
2. **Duress: Words and Phrases.** To constitute business duress there must be an application of such pressure or constraint as compels a person to go against his or her will and takes away his or her free agency, destroying the power of refusing to comply with the unjust demands of another.
3. **Contracts: Duress.** Where a parent or other relative is induced to execute an instrument by threats and fear of criminal punishment of a child or relative, the instrument is the result of duress and the contract may be voided.
4. **Contracts: Rescission: Notice.** When a party seeks to rescind a contract by his or her own act, notice of such action must be given the other party; but when the aid of a court is sought for that purpose, the bringing of the action is sufficient disaffirmance for the purpose of the action.
5. **Equity: Contracts: Rescission.** When the aid of an equity court is sought to rescind a contract, the rescission is effected by the decree of the court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument and renders it as though it does not exist.
6. **Equity: Contracts: Rescission: Restitution.** Because rescission is not accomplished "in equity" until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money which was received from the defendant.
7. _____: _____: _____: _____. An offer of restitution is not necessary where receipt of any benefit is denied by the plaintiff and the good faith of the defendant is challenged.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed.

Gary L. Dolan of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

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

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

HASTINGS, J.

This is an appeal by the defendant, Security State Bank, from a judgment of the district court granting equitable rescission of a guaranty agreement, note, and mortgage executed by the plaintiffs, Lee P. and Letha Haumont. The errors assigned are generally three in nature: (1) The evidence was insufficient to support rescission on the ground of business duress; (2) The evidence failed to establish that proper notice of rescission had been given; and (3) The court erred in not requiring proof that the defendant was returned to its status quo. We affirm.

The plaintiffs' action for rescission is equitable in nature and as such is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite. *Nixon v. Harkins, ante* p. 286, 369 N.W.2d 625 (1985). The application of this latter rule is crucial in our review of the evidence.

The plaintiffs are husband and wife living in Broken Bow and have been farming their own 1,500 acres of land in Custer County for over 40 years. Glen Haumont is their son, and he had operated M & G Implement, Inc., in Broken Bow since the summer of 1977.

M & G Implement ran into financial difficulties in the fall of 1981. As a result, the plaintiffs arranged a loan for the company in the approximate amount of $75,000 with the defendant bank. This was the first that either of the plaintiffs knew of their son's financial difficulties.

During the early part of January 1982, the defendant bank and the Broken Bow Production Credit Association (hereinafter PCA) became aware of installment sales contracts originated by Glen which were irregular. After meeting with Glen and investigating further, it was discovered that six

contracts, totaling some $324,000, were improperly handled by M & G. On two contracts Glen had resold machinery and failed to pay off the lienholder; on three contracts he had financed the same machinery more than once; and on one contract he had simply forged and subsequently financed. This was in addition to the $251,932.60 that was owed to the defendant on M & G's line of credit. During this time, Glen and his attorneys were trying to work with the bank to refinance his business.

On January 20, 1982, Glen was at his parents' home, and, after speaking with his attorney on the phone, he told his father that he, Glen, could be prosecuted and sent to jail. He went on to describe jail conditions, including his fear of drugs and prostitution. Glen did not say specifically why he could go to jail, only that he had financial troubles, and his father was unaware of his business dealings.

On February 8 Glen arranged for his parents to meet with him and his accountant to see if they would be willing to financially back his business. According to the plaintiffs and the accountant, the Haumonts refused to back the business. The next morning Glen spoke to David Schweitz, president of the defendant bank, who had been looking after the interests of the bank with regard to M & G. Glen indicated that his parents were willing to back the long-term financing of the business. According to Schweitz, Glen had claimed all along that his parents were definitely going to help him out.

As a result of that phone call, Schweitz, the bank's attorney, and the president of the PCA determined that they needed written confirmation of the plaintiffs' commitment to M & G and Glen. The bank's attorney contacted Glen's attorney, who drew up a document for Lee Haumont to sign, which reads as follows:

> I, Lee Haumont, intend to pursue a course of action which is reasonably calculated to result in the refinancing of M & G Implement, Inc. I intend to do this by pledging my real estate (in Custer County) as collateral for a sufficient loan to cover the debts of M & G Implement with an appropriate financial institution.

On February 12, 1982, Glen went to see his father and asked him to sign the statement. Lee insisted on seeing his lawyer,

Howard Spencer, who advised him not to sign. Eventually, however, Spencer added a paragraph which allowed his client to withdraw the letter of intent until February 26, 1982, and Lee signed it. Lee testified that he signed it because his son told him it would give Glen 10 more days to straighten up his business before the bank closed him up. Upon receipt, the bank refused the statement and demanded that the original document, without qualification, be signed.

On February 15 Glen went out to his parents' home and tried to convince his father to sign the original statement of intent. Lee refused to sign. Glen stayed approximately 3 to 4 hours, and as he pulled out to leave he met David Schweitz just arriving. The two returned to the plaintiffs' home and found Lee in his garage.

According to Lee, both his son and Schweitz told him that Glen had past due notes, and if he did not sign the statement of intent, Glen would be prosecuted and would go to jail. The three went into the kitchen, where Lee signed the paper. He stated that he signed it because he did not want to be responsible for sending his son to jail. Contrarily, Schweitz testified that no threats were made and that Glen asked his father to sign and he agreed. After the document was signed Letha Haumont entered the kitchen and berated Schweitz for loaning Glen so much money. Thereafter, Schweitz left.

The next morning Lee called Schweitz and told him not to come out and that he did not want to sign any more papers. Schweitz responded that he wanted to come out and explain the transaction, and Lee agreed. In between the phone call and the previous signing of the document, the bank's attorney had spoken to Glen's attorney and had found out that equipment from M & G had been shipped out of state. As a result, Schweitz had the bank's attorney draft a guaranty agreement and a mortgage, which the bank president wanted the plaintiffs to sign.

Schweitz and Glen went out to the plaintiffs' home at approximately 11:30 on that morning, February 16. According to the plaintiffs, Schweitz had Lee read the guaranty agreement and mortgage. Schweitz then threatened to prosecute Glen, through his Omaha attorneys, if the plaintiffs did not sign the

documents by 3 o'clock that afternoon. Lee signed both documents because it "[s]eemed like sending Glen to jail blanked out anything else and so I signed it." He was unaware that he had encumbered his previously debt-free land in the amount of $628,708.99.

Subsequently, Letha read both documents and did not understand them. She told Schweitz that she wanted her lawyer to look at them. In response he offered to, and in fact did, read the papers to her. She told him she still did not understand and wanted to wait for her lawyer. Schweitz said that he did not have time to wait for the lawyer to read it. He once again indicated that the guaranty agreement and mortgage had to be signed or Glen would be prosecuted. Letha also signed both documents and did so because "I was like his dad I couldn't lose another son and so I signed it."

According to both of the plaintiffs, Schweitz did not notarize the signatures at that time, and no description of the property that was subject to these agreements was included.

Letha Haumont testified that before her husband signed the guaranty agreement and mortgage, he was told by Schweitz, "Glen said he would like you to sign it, because if he didn't, he was going to start procedures against him and send him to jail and Mr. Schweitz said I got to have you sign before 3 o'clock."

Plaintiffs' daughter, Carol Lord, corroborated this testimony to the extent that she heard David Schweitz tell her mother before she signed the documents that "he needed to call his lawyer in Omaha by noon to let him know if they were going to prosecute Glen."

The plaintiffs' other son, Lee, Jr., was also present on the day the mortgage and guaranty agreement were signed. He testified that "Dave said that they was going to prosecute Glen and nobody would gain anything out of that, that we was further ahead to sign the mortgage and try and work it out."

David Schweitz himself testified that there was absolutely no discussion about pressing criminal charges against Glen. The attorney for the bank testified that he told both Glen and his attorney that criminal prosecution was not a part of its plans. He said that he specifically was aware of that factor, because not too long before this matter came up another bank in Custer

County had tried to force collection of a sum of money through threat of criminal prosecution.

There was a direct conflict between the parties as to the threat of criminal prosecution. The trial court accepted the version of the facts as related by the plaintiffs. This is substantiated by the fact that we find it wholly incredible that after 50 years of work and savings, parents of an adult son would risk their entire life savings to try to bail out that son's business which was in debt to the extent of $628,000 plus, absent the threat and concern that the son might go to prison.

"To constitute duress, there must be an application of such pressure or constraint as compels a man to go against his will, and takes away his free agency, destroying the power of refusing to comply with the unjust demands of another." *Buhrman v. International Harvester Co.*, 181 Neb. 633, 638, 150 N.W.2d 220, 223 (1967).

And in *Grasso v. Dean*, 171 Neb. 648, 650-51, 107 N.W.2d 421, 423 (1961), this court said: "In Nebraska the law is well established that where a parent or other relative is induced to execute an instrument by threats and fear of criminal punishment of a child or relative, the instrument is the result of duress and the contract may be voided."

The record in the instant case makes clear that Lee Haumont met with counsel on February 12, 1982, and he was advised not to sign an unconditional promise to finance his son's business. Lee followed this advice and subsequently agreed to a revocable promise drafted by his attorney, because "[t]hat was to give Glen 10 more days . . . to straighten his business up . . . ."

It was not until 3 days later, and after Lee had refused once again to sign an unconditional promise, that the bank president came into the picture. Both Glen and Schweitz pressured Lee into signing a financial commitment by stating that Glen's notes were past due and that if the plaintiff did not sign, his son would be prosecuted. The following day a similar pattern was followed concerning the mortgage and guaranty agreement.

Further, the testimony of witnesses indicates that Letha Haumont in fact requested her attorney's assistance, that Schweitz indicated that it was unnecessary, and that he put pressure on her to sign by threatening prosecution.

As Lee Haumont said, "Seemed like sending Glen to jail blanked out anything else and so I signed it."

The defendant contends that the Haumonts did not properly plead and prove notice of rescission as required by *Anson v. Grace*, 174 Neb. 258, 117 N.W.2d 529 (1962). However, that case involved a "legal rescission" where the party has attempted to rescind a contract by his own act. The rule applicable in this case is that expressed in *Geise v. Yarter*, 112 Neb. 44, 53-54, 198 N.W. 359, 363 (1924):

> It is objected that no notice of rescission was given before suit, but this was not necessary. When a party seeks to rescind a contract by his own act, he must give the other party notice; but when he seeks the aid of a court for that purpose, the bringing of the action is sufficient disaffirmance for the purpose of the action.

Although notice was in fact given to defendant's attorney on February 23, 1982, and to the defendant on March 5, 1982, under the rule of *Geise* no notice was required.

The defendant insists that it is entitled to restitution, i.e., to have the plaintiffs repay the money defendant paid out following the execution of the various documents. However, defendant again confuses legal rescission with equitable rescission, which distinction was drawn in *Geise* and expanded on in 12A C.J.S. *Cancellation of Inst.* § 4 at 646-47 (1980):

> Strictly speaking, in a law case, the rescission is by act of the party and is a condition precedent to bringing an action to recover money or thing owing to him by any other party to the contract as a consequence of the rescission, and by his rescission or repudiation of a contract a party merely gives notice to the other party that he does not propose to be bound by the contract. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although nothing is said concerning it either in the pleading or in the judgment, a contract or conveyance, as the case may be, is virtually rescinded; the recovery is based on the fact of such rescission and could not have been granted unless the rescission had taken place.

> In equity, on the other hand, the rescission is effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist.

In recognizing this distinction, D. Dobbs, Handbook on the Law of Remedies § 4.8 at 294 (1973), states that "[s]ince rescission is not accomplished 'in equity' until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money he received from the defendant."

Finally, it is stated in 12A C.J.S., *supra* at § 57 at 732, "An offer of restitution is not necessary where receipt of any benefit is denied by plaintiff and the good faith of defendant is challenged."

Although in this case the bank suffered a detriment when it paid out some $89,000, which generally furnishes a consideration for a contract, no benefit was conferred on the plaintiffs, and we have found that the bank acted in bad faith. The effect of our decision here is to declare the guaranty agreement, note, and mortgage void, and any obligation the plaintiffs would otherwise have had to repay those funds expended by the bank expired with the voided instruments.

The judgment of the district court is affirmed.

AFFIRMED.

BENJAMIN GRABER, APPELLEE, V. GEORGIA KLINE GRABER, APPELLANT.

374 N.W.2d 8

Filed September 20, 1985. No. 84-614.

1. **Child Support: Modification of Decree.** Child support payments are not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.

2. **Modification of Decree.** Any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not arise to the level to justify a change or modification of the order.
3. **Child Support: Modification of Decree: Appeal and Error.** When reviewing applications for modification of child support, we will consider the fact that these matters are initially entrusted to the sound discretion of the trial court, and, while on appeal such matters will be reviewed de novo on the record, the decision of the trial court will be affirmed in the absence of an abuse of discretion.

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

Jeanne A. Weaver and Edward D. Hotz of Hotz, Kizer & Jahn, P.C., for appellant.

Steven J. Lustgarten of Lustgarten & Roberts, P.C., for appellee.

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

KRIVOSHA, C.J.

Georgia Kline Graber appeals from an order entered by the district court for Douglas County, Nebraska, denying her application to modify the decree dissolving her marriage and awarding child support by increasing the amount awarded. We affirm.

The record discloses that the appellant, Georgia Kline Graber, and the appellee, Dr. Benjamin Graber, were married March 3, 1973, and have three children, one of whom has now attained majority. On August 4, 1980, the marriage of the parties was dissolved by decree entered in the district court for Douglas County, Nebraska. The decree reflects that the petitioner was Dr. Graber and the respondent Ms. Graber. The decree further reflects that Ms. Graber did not attend the trial and that matters relating to division of property, custody of children, and child support were arrived at by mutual agreement of the parties, pursuant to an alimony and property settlement agreement previously executed by the parties and approved by the court. Pursuant to that property settlement agreement, Ms. Graber was awarded custody of the three minor

children and Dr. Graber was ordered to pay child support in the amount of $250 per month per child.

Ms. Graber now maintains that there has been a material change of circumstances entitling her to an increase in child support. It is clear that unless there has been a material change of circumstances, Ms. Graber is not entitled to any modification of the decree approving the agreement into which she entered at the time of the divorce. It is a well-established principle that child support payments are not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. See, *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984); *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981).

This court has recognized that the issue of whether there has been a material change of circumstances is a factual determination and, hence, is often incapable of precise definition. In *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785-86 (1984), we said:

> "Material change in circumstances" in reference to modification of child support is analogous to modification of alimony for "good cause." See Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982); cf. *Chamberlin v. Chamberlin*, 206 Neb. 808, 814, 295 N.W.2d 391, 395 (1980) (modification of alimony on account of a "change of circumstances of a material and substantial nature"). "Material change in circumstances" eludes precise and concise definition. Courts may consider various factors to determine if a material change in circumstances has occurred. Among some of the factors or circumstances considered by a court are a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. See 24 Am. Jur. 2d *Divorce and Separation* §§ 1082-1088 (1983). Alteration and passage

> from one condition to another is essential for a material change in circumstances.

Although incapable of precise definition, nevertheless the party seeking modification has the burden of showing not only a change of circumstances but also that such change is material. Absent such a showing, the district court cannot modify a decree previously entered. Furthermore, not all material changes justify modification. Indeed, if the changes are of the type that necessarily were in the contemplation of the parties at the time the decree was entered, even though material, such changes do not, of themselves, justify a modification. For instance, it obviously is in the contemplation of all of the parties in every case that the children involved will grow older and that their needs will therefore change. That fact, standing alone, is not sufficient to justify a modification of a decree of dissolution. In *Cooper v. Cooper*, 219 Neb. 64, 66, 361 N.W.2d 202, 204 (1985), we said:

> Any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not arise to the level to justify a change or modification of the order. *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983).

Were we to hold otherwise, a party might enter into a settlement agreement relying on the promise of the other party to settle on the basis of the agreement, only to discover that he or she might be obligated to make increased payments even though everyone knew about the eventual change and took it into account when entering into the agreement. We should not encourage parties to an agreement found by the district court to be fair, equitable, and not unconscionable to accept the benefits in settlement and then seek to alter the agreement, absent a material change of circumstances which was not within the contemplation of the parties. Settlement agreements offered to the district court for approval should have greater finality once approved.

Ms. Graber maintains that the material changes of circumstances which justify a modification are the following: (1) that Dr. Graber has substantially increased his gross income;

(2) that she has suffered an illness which precludes her from gainful employment; (3) that her mortgage payment has gone up; and (4) that she desires to place the two younger children in a private school. An examination of the record, however, discloses that these matters do not amount to material changes of circumstances or, if material changes, were within the contemplation of the parties at the time the agreement was signed and approved by the court.

With regard to the matter of Dr. Graber's income, while his gross income has increased, the undisputed evidence is that his adjusted gross income as reported for federal income tax purposes has decreased since the entry of the decree. The record discloses that his adjusted gross income for the years involved was as follows: 1980—$47,288; 1981—$41,357; 1982—$39,553; 1983—$41,142. While it is true that Dr. Graber has realized an increase in his gross income, it is likewise true that he has incurred increased expenses. Although one may argue whether the expenses should have been incurred, there is simply no evidence to establish that the expenses are not legitimate or not fairly incurred. During the same period of time, the record discloses that Ms. Graber has realized a substantial increase in her adjusted gross income. Her adjusted gross income for federal income tax purposes, as reflected by the evidence, was as follows: 1980—$8,239; 1981—$29,219; 1982—$35,717; 1983—$22,885. The evidence presented to the district court discloses that as of the time of the hearing in 1983, Dr. Graber had less adjusted gross income than he did at the time the decree was entered, while Ms. Graber had substantially greater adjusted gross income. Ms. Graber's contention that a modification should be made by the district court on the basis that Dr. Graber has increased income is simply without support in the evidence. Considering gross income without considering offsetting expenses is not appropriate. Nor does such an exercise establish a material change of circumstances not contemplated by the parties which would authorize a court to modify a decree of dissolution approving a property settlement agreement.

Insofar as the illness is concerned, the evidence likewise does not support the claim made by Ms. Graber. The evidence

reflects that upon moving to California Ms. Graber resumed work as a registered nurse and completed her master's degree in psychology. As of early 1984, she was employed full-time as a registered nurse and also worked about 48 hours per month as a registered nurse on a part-time basis. She was laid off from her full-time position at the end of March 1984, but was able to increase the hours at her other job from part time to full time. On April 13, 1984, Ms. Graber had surgery and, due to complications, had not yet returned to work at the time of the hearing on July 2, 1984. She testified, however, that her disability would probably not last beyond August 1, 1984, and that, because of her excellent qualifications, she would have no trouble obtaining work once she had recovered from the surgery. It is clear that the illness causing her inability to work was temporary in nature and that once recovered she could return full time to gainful employment. Her temporary unemployment is not a material change of circumstances.

Likewise, with regard to the matter of Ms. Graber's increase in mortgage payments, the evidence reflects that at the time she purchased her home in California she was aware of a pending class action suit which could result in an increase of her mortgage payments. This was a situation which was clearly within her knowledge and one which she freely and voluntarily entered, and cannot be said to be a material change of circumstances which would justify the district court in modifying the decree approving the property settlement agreement.

And, finally, the matter with regard to the private schooling of the children does not constitute a material change of circumstances. Ms. Graber argues that at the time the decree was entered by the district court pursuant to the request of the parties, the children were too young for her to contemplate private school. Yet, the record reflects that the oldest child had already attended private school, and therefore one must assume that this was a matter which she either had considered or should have considered.

It may be that based upon Dr. Graber's income a settlement agreement which provided for child support in the amount of $250 per month per child without some provision for increases

as the children got older was a poor choice on the part of Ms. Graber. It is not unconscionable, and any second thoughts which Ms. Graber may now have about that original settlement cannot be corrected by seeking a modification of the original agreement.

In a line of cases beginning with *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984), we have held that while we review matters involving domestic relations de novo on the record, the matters are initially entrusted to the sound discretion of the trial court and will be affirmed on appeal in the absence of an abuse of the trial court's discretion. Furthermore, 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, supra*. We have recently extended this rule to cases involving modification of alimony awards, see *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985), and actions seeking modification of child custody, see *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985). We see no reason why we should not apply the same rule with regard to matters involving modification of child support. Therefore, we now declare that when reviewing applications for modification of child support, we will consider the fact that these matters are initially entrusted to the sound discretion of the trial court, and, while on appeal such matters will be reviewed de novo on the record, the decision of the trial court will be affirmed in the absence of an abuse of discretion. Our review of the record fails to disclose either a material change of circumstances not within the contemplation of the parties at the time the agreement was entered or any abuse of discretion on the part of the district court. Therefore, the judgment of the district court in denying the motion to modify child support by increasing the amount of the payment is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

There are satisfactory and unsatisfactory aspects of the majority's opinion.

The majority's disposition of the request for increased child support is correct. The record shows Dr. Graber's net income

has generally decreased since 1980, the year the child support was ordered. There is no showing that Dr. Graber's earning capacity increased before July 1984, when the application for modification was heard.

En route to the correct disposition, the majority has formulated an ill-advised principle which will undoubtedly produce dire consequences in an action for modification of a child support order: Because parents involved in dissolution proceedings contemplate that their children will "grow older and that their needs will therefore change," advance in children's ages with concomitant changes in the children's needs never justifies modification of a child support order. To support that proposition the majority relies on *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983), and *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985), which held in substance that a contemplated change of circumstances does not justify modification of an order entered in a dissolution proceeding. Neither *Albers* nor *Cooper* involved requested modification of a child support order but, rather, requested modification of an alimony award.

In *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 266 N.W.2d 82 (1978), this court judicially noticed the contemporary condition of the economy in determining that child support previously ordered was less than the current, actual cost of caring for a child, and further noted "as the ages of the children increase, the expense of care is generally greater." *Id.* at 58, 266 N.W.2d at 84. In *Pfeiffer* the increased cost of maintaining children as they grew older and increased income to the parent responsible for payment of child support were "sufficiently substantial changes of circumstances" justifying a modification and increase in child support. *Id.* at 58-59, 266 N.W.2d at 84. See, also, *Rubottom v. Rubottom*, 185 Neb. 39, 173 N.W.2d 447 (1970).

This court in *Grannell v. Grannell*, 138 Neb. 456, 460, 293 N.W. 280, 281 (1940), recognized that "provisions for the maintenance of children in divorce cases are for the benefit of the child or children and not for the benefit of the parent." In *Grannell* we also held that an advance in the age of a child, from 17 months at entry of the child support order to 7 years of age at

the hearing for modification of that order, was a sufficient change in circumstances because the child "needs care of a different kind now and it is somewhat more expensive than it was at the age of 17 months." *Id.* at 460, 293 N.W. at 282.

Several jurisdictions, 27 according to the annotation at 89 A.L.R.2d 7, § 22 (1963 & Supp. 1985), agree that the natural increase in needs of children as they advance in age justifies an increase in the amount of child support, or is a factor to be seriously considered, where the parent obligated to pay child support has an increased ability to pay support greater than the amount originally ordered. Such justification for modification and increased child support exists independent of any nationwide or general increase in the cost of living or decrease in the purchasing power of the dollar. Accordingly, most courts acknowledge a fiscal fact of life—there is a natural increase in a child's needs as the child's age advances. New needs of a child arise out of the fact that a child simply grows older.

Generally, as indicated by the majority, in dissolution proceedings final resolution of property matters and the parties' personal rights by agreement between a husband and wife is a desirable goal. Previously, maintenance for a child was a child's benefit determined by two essential factors—reasonable needs of a child and earning capacity of the parent judicially obligated to pay child support. As a result of the majority's conclusion that a "poor choice" or bad bargain in an agreed amount of child support "cannot be corrected by seeking a modification of the original agreement," reasonable needs of the child to be supported have become insignificant even to the point of irrelevance. Child support is not a matter to be bartered to inadequacy at some parental bargaining table in dissolution proceedings. If a settlement agreement has the monolithic effect suggested by the majority, serious doubt is cast upon the role and duty of a court regarding continuing jurisdiction in matters of child support.

A child's transition from diapers to discotheques is an expensive journey in life. To hold that parental contemplation of a child's increase of age adversely affects a postdecree application for increased child support is an unrealistic approach to the very real problem of rising costs in raising

children. While judicial realism may vanish, reality will not.

BOSLAUGH and GRANT, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. HINCHEY, APPELLANT.

374 N.W.2d 14

Filed September 20, 1985. No. 84-783.

1. **Constitutional Law: Search and Seizure.** Although there are some recognized exceptions which may justify a warrantless search, as a general rule, searches and seizures inside a home without a warrant are presumptively unreasonable and in violation of an individual's rights guaranteed under the fourth amendment to the U.S. Constitution.
2. _____: _____. In terms that apply equally to seizures of property and to seizures of persons, the fourth amendment to the U.S. Constitution has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.
3. _____: _____. One governing principle, justified by history and by current experience, has consistently been followed: Except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.
4. **Judgments: Debtors and Creditors: Property: Warrants.** The procedure to be followed to obtain an "execution warrant" should be similar to that prescribed by Neb. Rev. Stat. §§ 29-830 to 29-835 (Reissue 1979), which provide for the issuance of "inspection warrants." Such an execution warrant should be issued only by a judge of a court of record upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for a new trial.

Barbara Thielen of Taylor, Fabian, Thielen & Thielen, for appellant.

A. Eugene Crump, Deputy Attorney General, and Lynne R. Fritz, for appellee.

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

KRIVOSHA, C.J.

This appeal presents to the court a case of first impression and concerns the question as to when and under what circumstances a judicial officer, armed only with a writ of execution issued pursuant to the provisions of Neb. Rev. Stat. § 25-1501 (Reissue 1979), may enter a person's dwelling without violating the individual's right to be free from unreasonable searches and seizures under the fourth and fourteenth amendments to the U.S. Constitution.

The evidence discloses that on January 19, 1984, Deputy Lloyd Glesmann was on duty with the Sarpy County, Nebraska, sheriff's office. At 2 p.m. Deputy Glesmann, assigned to the process division, was directed to apartment 11 at 818 Janesview in Papillion, Nebraska, for the purpose of attempting to serve a writ of execution on the appellant, Michael J. Hinchey. The writ of execution had been issued by the clerk of the county court for the purpose of attempting to satisfy a judgment obtained by another against Hinchey in the small claims court in the amount of $208.40. Under the provisions of Neb. Rev. Stat. § 25-1502 (Reissue 1979), executions are of two kinds: (1) against the personal property of the judgment debtor, wherever found; and (2) for the delivery of the possession of real property with damages for withholding such property. The writ of execution which is issued by the clerk of the court directs the sheriff to seek and take possession of property sufficient to satisfy the judgment. See Neb. Rev. Stat. § 25-1516 (Reissue 1979). The sheriff or his deputy must first seek to satisfy the judgment by levying execution upon personal property, and if the value of the personal property is insufficient to satisfy the debt, the sheriff may then levy on real property. See, *Runge v. Brown*, 29 Neb. 116, 45 N.W. 271 (1890); Neb. Rev. Stat. § 25-1518 (Reissue 1979).

Upon arriving at the Hinchey home Deputy Glesmann knocked on the door of the apartment, and after a brief delay

Hinchey answered the door. The deputy identified himself to Hinchey, stated his purpose, and asked for permission to enter the Hinchey premises. Hinchey refused. The officer explained to Hinchey that arrangements had to be made for payment of the judgment. After a few minutes and four or five additional requests for admission by the deputy, to which Hinchey each time said "No," Hinchey finally agreed to let the deputy into his home. Before doing so, however, he said, "Wait a second, let me put something away." The deputy testified that he clearly understood that Hinchey wanted him to wait in the hall and did not want him to come into the apartment until Hinchey returned to the door. Hinchey walked back into the apartment. At this time the front door of the apartment was partially open, and the deputy proceeded to follow Hinchey into the apartment. Once inside the apartment, the deputy observed a jar which appeared to contain marijuana. Hinchey was immediately instructed to sit on the couch and not to move and was subsequently arrested by the deputy for possession of drug paraphernalia in violation of Neb. Rev. Stat. § 28-441 (Cum. Supp. 1984) and possession of marijuana, less than 1 ounce, in violation of Neb. Rev. Stat. § 28-416(6) (Cum. Supp. 1984).

Prior to trial Hinchey filed two motions to suppress the evidence. The first motion was in effect a claim that Hinchey's rights guaranteed to him under the fourth and fourteenth amendments to the U.S. Constitution had been violated. The second motion alleged that the officer had failed to give to Hinchey his *Miranda* warnings, and therefore any statements or evidence obtained after he was arrested was in violation of Hinchey's constitutional rights guaranteed to him under the fifth, sixth, and fourteenth amendments to the U.S. Constitution.

The county court found that all evidence obtained by the officer, including those items which were in plain view and seen prior to the time that Hinchey was placed under arrest, was admissible into evidence but that all statements or evidence obtained after the officer ordered Hinchey to sit on the couch and placed him under arrest but did not give him his *Miranda* warnings was inadmissible. Following trial to the county court, the county court found Hinchey guilty of count II, possession

of marijuana, less than 1 ounce, and dismissed count I, possession of drug paraphernalia. Hinchey was sentenced to pay a fine of $100 plus costs and ordered to take a drug education course. Upon appeal to the district court for Sarpy County, Nebraska, the district court affirmed Hinchey's conviction and sentence. The district court entered a detailed order in which it sought to distinguish the case of *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), and further relied upon the U.S. Supreme Court decision in *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). Specifically, the district court relied on § 25-1518, which directs an officer to whom a writ of execution is delivered to proceed immediately to levy upon goods and chattels. We believe, however, that the decision of the district court was in error, and therefore we must reverse and remand for a new trial.

Although there are some recognized exceptions which may justify a warrantless search, see, *California v. Carney*, ____ U.S. ____, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985) (motor home); *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982) (automobile); *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (automobile); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (automobile inventory); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (consent); *State v. Hert, ante* p. 447, 370 N.W.2d 166 (1985) (exigent circumstances); and *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981) (consent), as a general rule, searches and seizures inside a home without a warrant are presumptively unreasonable and in violation of an individual's rights guaranteed under the fourth amendment to the U.S. Constitution. See, *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *reh'g denied* 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120; *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982). While *Payton v. New York, supra*, concerned itself with a warrantless arrest, the language of the opinion makes it clear that "[t]he simple language of the Amendment applies equally to seizures of

persons and to seizures of property." *Id.* at 585. The *Payton* Court went on to state at 585-86:

> Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v United States District Court*, 407 U. S. 297, 313 [92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)]. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.

The U.S. Supreme Court in *Payton, supra* at 590, continued: "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."

Neither party to this action argues that the entry was consensual. The State, in its brief, concedes that "appellant did not voluntarily consent to the deputy's entry within the consent to search exception to the warrant requirement." In this regard, based upon the evidence, we believe that the State is correct.

The State argues, however, that under the "plain view doctrine" once the officer was inside the premises and saw the marijuana in plain view, he was authorized to seize the marijuana without a warrant. See, *United States v. Lee*, 274 U.S. 559, 47 S. Ct. 746, 71 L. Ed. 1202 (1927); *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983). However, the "plain view doctrine" does not assist us in this case unless it can be said that Deputy Glesmann had some lawful authority to enter Hinchey's apartment without a warrant. The legal justification for being in the apartment without a warrant is the critical issue.

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit,

> search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure.

Coolidge v. New Hampshire, supra at 466.

The State's justification for entry without a warrant is that the officer was required by statute to seek property upon which a levy could be made. Such a statute, however, cannot supersede the prohibitions against unreasonable searches and seizures of the fourth and fourteenth amendments to the U.S. Constitution.

The case of *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), which involved a levy by the U.S. Government for delinquent taxes, makes that point quite clear. As noted by the U.S. Supreme Court in *G. M. Leasing Corp., supra* at 354-55:

> It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.
>
> Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and writs of assistance.

The Court further said at 352-53: " '[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' [Citation omitted.]"

Even without the prohibition created by the fourth amendment, Deputy Glesmann was not authorized to make a nonconsensual, warrantless entry into Hinchey's home for the purpose of making a levy. At common law an officer was not permitted to break open an outer door of the debtor's dwelling house for the purpose of levying an execution on the owner's goods therein. 30 Am. Jur. 2d *Executions* § 261 (1967). The rule has been stated:

> "The common law, both in England and America, jealous of intrusion upon domestic peace and security, regards every man's house as his castle and fortress as well for his defense against injury and violence as for his repose. It is this ancient and well-known principle that underlies the whole law of the right to break and enter a dwelling house to serve a civil writ or process. Accordingly, therefore, the authorities are substantially agreed that, as a general rule, in the absence of statute, the outer door or other outside protection to a dwelling house may not, even after request and refusal of admittance, be broken or forcibly entered in the execution of a civil writ or process either against the person or property of the householder . . . ."

Vanden Bogert v. May, 334 Mich. 606, 611, 55 N.W.2d 115, 117-18 (1952). The establishment of the fourth amendment and more recent decisions such as *G. M. Leasing Corp. v. United States, supra*, only tend to reinforce the common-law rule.

Even if a creditor has a security interest in the debtor's property, he may not violate the debtor's fourth amendment rights. Neb. U.C.C. § 9-503 (Reissue 1980) limits the creditor's right to secure possession of the collateral. It provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 9-504.

It is clear that § 9-503 permits a creditor to take possession of the property without judicial process, only if it can be done without breach of the peace, such as where the debtor grants consent or permission to the creditor. Cases throughout the country which have reviewed what constitutes a "breach of the

peace" are varied, but in no instance has the creditor been permitted to violate the debtor's fourth amendment rights. See, *Henderson v. Security Nat. Bank*, 72 Cal. App. 3d 764, 140 Cal. Rptr. 388 (1977); *Quest v. Barnett Bank of Pensacola*, 397 So. 2d 1020 (Fla. App. 1981); *Deavers v. Standridge*, 144 Ga. App. 673, 242 S.E.2d 331 (1978); *Dixon v. Ford Motor Credit Corp.*, 72 Ill. App. 3d 983, 391 N.E.2d 493 (1979); *Morris v. Bk. & Tr. Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 463 P.2d 651 (1970).

To the same extent, if force or threats of force are necessary to obtain immediate possession of collateral on a debtor's default, the right of the secured party to obtain such possession must be effected by a judicial action rather than by self-help, thereby requiring the individual to bring an appropriate replevin action. See *Platte Valley Bank of North Bend v. Kracl*, 185 Neb. 168, 174 N.W.2d 724 (1970).

One may argue here that this was an attempt to secure property by judicial process in that the deputy was armed with a writ of execution. The difficulty with that argument is that the statutes of Nebraska authorizing the issuance of a writ of execution do not require any action by the court. Section 25-1501 provides: "Executions shall be deemed process of the court, and shall be issued by the clerk and directed to the sheriff of the county. They may be directed to different counties at the same time." The writ of execution is not issued by action of the court but merely upon the filing of a praecipe with the clerk of the court. Upon filing of such praecipe the clerk ministerially issues the writ of execution without any showing upon which it may be found that property cannot otherwise be obtained without violating the debtor's fourth amendment right against unreasonable searches and seizures. That is why arming a sheriff or one of his deputies with a writ of execution is not the same as employing judicial process of a type required for one to obtain a search warrant or an arrest warrant. We see little reason to distinguish between the requirements which must be met before property or persons may be seized for criminal purposes and before property or persons may be seized for civil purposes.

Likewise, the fourth amendment does not recognize such a distinction. Even *Michigan v. Tyler*, 436 U.S. 499, 504-05, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978), relied upon by the district court, notes the absence of any such distinction.

> The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court*, 387 U. S. 523, 528 [87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)], the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See v. Seattle*, 387 U. S. 541 [87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967)]; *Marshall v. Barlow's, Inc., ante*, at 311-313 [98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978)]. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

The U.S. Supreme Court in *Tyler* went on to note that a burning building would indeed constitute an exigent circumstance and that once a fireman was in the building by reason of the fire, he or she could remain for a reasonable time thereafter to investigate. The Court, however, further observed that once the fire was extinguished and the officer had completed his or her initial investigation, any further entry into the building would require the issuance of a warrant.

We are unable to see how an officer armed with nothing more than a writ of execution issued by a clerk of the court may enter the premises of an individual, contrary to the individual's direction and objection, on the basis that the officer has a duty to seek property upon which execution may be made. To be sure, the officer has such a duty and may take possession of property whenever possession can be obtained without violating the owner's fourth amendment rights. Additionally,

the statutes provide that the debtor may be ordered to appear before a judge and supply information as to his or her assets and their whereabouts. See Neb. Rev. Stat. § 25-1565 (Reissue 1979). Interestingly enough, instead of issuing an order requiring the attendance of the judgment debtor as provided for in § 25-1565, the debtor may be placed under arrest, but only after evidence is presented to a judge that the debtor intends to leave the state in order to avoid satisfying the judgment.

We believe, therefore, that, absent exigent circumstances, the rule which applies before an officer may enter into a home for the purpose of seizing property or arresting an individual should also apply where an officer has been unable to secure personal property or real property sufficient to satisfy a judgment and has reason to believe that the debtor has property within his residence which he is concealing in order to avoid satisfying the judgment. We hold that the procedure to be followed to obtain an "execution warrant" should be similar to that prescribed by Neb. Rev. Stat. §§ 29-830 to 29-835 (Reissue 1979), which provide for the issuance of "inspection warrants." Such an execution warrant should be issued only by a judge of a court of record upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution. In this manner the fourth amendment prohibition against unreasonable searches and seizures will be satisfied.

In this case the evidence is clear that the entry by the officer into Hinchey's home was nonconsensual and in violation of Hinchey's fourth amendment rights. For that reason the

motion to suppress should have been sustained. The decision of the district court is therefore reversed and remanded for new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

MARIAN L. MASTERS, APPELLEE, V. IOWA BEEF PROCESSORS, INC., APPELLANT.

374 N.W.2d 21

Filed September 20, 1985. No. 84-796.

1. **Workmen's Compensation: Evidence: Appeal and Error.** 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.
2. **Workmen's Compensation: Words and Phrases.** An accident under the Nebraska Workmen's Compensation Act shall be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
3. **Workmen's Compensation: Evidence: Proof.** In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award.

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

Wayne E. Boyd of Smith, Smith & Boyd, for appellant.

Patrick D. Kuehl and David A. O'Brien of O'Brien, Galvin & Kuehl, for appellee.

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

HASTINGS, J.

The defendant employer has appealed an award on rehearing of the Nebraska Workmen's Compensation Court. Defendant disputes the findings of the compensation court that plaintiff

sustained an accident arising out of and in the course of her employment by the defendant, that a causal connection existed between the alleged accident and plaintiff's injuries, that the plaintiff was still suffering from temporary total disability, and that a waiting time penalty should be paid. We affirm.

Marian L. Masters began working for Iowa Beef Processors, Inc. (IBP), on September 12, 1983. Two days later she began her job as a "brisket boner," wherein she pulled pieces of meat off a line with a meathook, made several cuts, and pulled the meat apart. On September 21, while still in her training period and working at only half speed, the plaintiff injured her left hand. "I did the trim and went to pull it apart and something snapped in my hand and it just — It's like somebody took a rubberband and snapped it on top of the skin and just left it go. It was very painful, numb, burning."

After a brief wait plaintiff continued working until her supper break, although the pain worsened. She then went to the dispensary, where the nurse told her the pain would go away in a couple of weeks and that she should have the hand wrapped every day. She went back to work and completed her shift. She continued working through September 26, and during that time the pain worsened. Her fingers turned white and swelled, and numbness spread up her arm.

On September 26 she began working at full speed, but after a while she was unable to keep up. She again felt snapping in her hand, and eventually she went to the dispensary to obtain a slip in order to see a doctor. The next morning she saw a physician, who put her on light work with no stress to the wrists. She went back to work, and after she refused one job requiring substantial pulling, she was placed on a trim line. This required her to reach out and pull pieces of meat off a line. She continued this work on September 28 but was warned that she was not doing a good enough job. On September 29 she was fired.

On September 30 she saw another physician, Dr. Hoelting, who prescribed complete rest and medication for her injury. She returned to her doctor on October 11 and was examined by another physician, Dr. Garred. After obtaining a medical history and testing the patient, Dr. Garred determined that the plaintiff suffered from carpal tunnel syndrome. He then

performed a carpal tunnel release, which confirmed his diagnosis. Plaintiff rested for approximately 2 weeks and then began physical therapy.

Dr. Garred saw the plaintiff again in December of 1983 and placed her on more strenuous physical therapy, as he was concerned that she was not doing well. Plaintiff's condition improved rapidly after that. She saw a neurologist, Dr. Isgreen, in March of 1984, who did a series of tests on her left arm. He found some weakness, "more diffuse weakness than one would imagine on the basis of simple carpal tunnel problems"; however, his only diagnosis was carpal tunnel syndrome.

The plaintiff, who was still undergoing physical therapy, returned to see Dr. Garred in mid-May. She complained of tightness in her arm, starting at her elbow, as well as swelling in her fingers, which resulted from increased physical activity. At that time Dr. Garred suspected a "pronator syndrome," and referred her to Dr. Linscheid at the Mayo Clinic. On June 7 she was examined at the Mayo Clinic and was diagnosed as suffering from pronator teres syndrome. Dr. Linscheid operated on her to relieve the problem, and at the time of the rehearing, June 21, 1984, she was still recovering from the surgery.

Following a one-judge hearing, the compensation court awarded plaintiff temporary total disability, medical expenses, waiting time penalties, interest, and attorney fees for injuries which it found to have arisen out of an accident while the plaintiff was employed by the defendant.

The defendant, IBP, requested a rehearing. On rehearing, the three-judge panel found that on September 21, 1983, the plaintiff sustained injuries "while engaged in the duties of her employment." The court found that both the carpal tunnel and the pronator teres syndromes were causally related to the accident which occurred on September 21 and that no reasonable controversy existed concerning plaintiff's right to recovery. The panel granted temporary total disability of $157.33 per week, existing and future medical expenses, waiting time, and attorney fees. One judge dissented, finding that no causal relationship was proven as to the pronator teres syndrome.

The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.

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.*, 219 Neb. 424, 363 N.W.2d 520 (1985). See, also, *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985).

As provided for by Neb. Rev. Stat. § 48-151(2) (Reissue 1984), "accident," as used in workmen's compensation law, shall

> be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.

In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award. *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984).

In *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), the claimant suffered from an ailment diagnosed as "lateral epicondylitis." The onset of the condition followed the employee's assignment to a job which required her to lift and turn over stacks of cardboard sheets. Her physician testified that her condition was the result of repetitive flexion and extension of her hand and wrist due to her employment. We held that such condition amounted to an accident because the injury was unexpected or unforeseen, the injury produced immediate objective symptoms, and it happened suddenly and violently.

It is quite apparent from the record, through the testimony of the plaintiff as corroborated by a coworker, that plaintiff's injury satisfied the three-prong injury test of *Sandel*.

We next turn to the question of causation as to both the carpal tunnel syndrome and the pronator teres syndrome. Because this is predominately a question of fact, it is necessary for us to examine the medical testimony.

The only "testimony" from Dr. Linscheid, who made the positive diagnosis of pronator teres syndrome and who performed the corrective surgery, was in the form of a letter of report to Dr. Garred on June 25, 1984. He made absolutely no reference to causation, and apparently no attempt was made to obtain an opinion from him in this regard.

The plaintiff's initial medical examination was made by the Pender Clinic, Drs. Muffly and Hoelting, on September 27. There is no information from these physicians relating to causation.

Dr. Garred, a surgeon specializing in hand surgery and reconstruction, first examined plaintiff on October 11, 1983. His examination confirmed Dr. Hoelting's suspicions that she was suffering from carpal tunnel syndrome, and a surgical release was performed on that same date.

Dr. Garred testified by deposition as follows:

> MR. KUEHL: I'm handing you, Doctor, what has been marked Exhibit 2. And then you've indicated that that is just some of your notes from your file.
>
> A. Uh-huh.
>
> . . . .
>
> Q. Do you know what type of work Marian Masters was doing at IBP?
>
> A. No. I only know she had something to do with handling meat and that she had multiple — and as I stated here, multiple flexion and pronating exercise is probably part of the problem for most of the aggravation of the entrapment situation she had.
>
> Q. So if she was using her left hand with a hook to grab meat and to pull it in, is that something consistent with carpal tunnel syndrome injury?
>
> A. It can be. Multiple trauma. The main problem for

entrapment — nerve entrapment is usually trauma. Not always, but usually.

Q. Did she indicate to you that when this occurred that she had — she was pulling the hook and had a snapping, burning feeling in her wrist and hand?

A. No, sir. But that history is somewhere in some of my records but I don't know where it is.

. . . .

Q. Is the carpal tunnel syndrome and the pronator teres related in any way at all?

A. Oh, I think she had both problems. And after the carpal tunnel release was completed then I think we recognized the pronator teres and we recognized it because she began becoming more active with the arm again after the carpal tunnel release was done.

. . . .

Q. . . . So, you indicate that you felt that at the time of the carpal she also had the pronator teres?

A. I think so. I think that's probably true.

Q. Is some of the symptomatology the same?

A. Yes. Very much. Very similar. It is hard to sort it out sometimes. . . .

. . . .

A. . . . And in my letter [to Dr. Linscheid] I told him I felt she had a pronator teres syndrome and she was willing to come up. I said in the letter — I think this is still a leftover problem with she had her original carpal and part and parcel of the same.

Dr. Garred, after stating, in response to a question, that he did have an opinion based upon reasonable medical certainty as to whether plaintiff's injuries were the result of her work, was asked and answered:

Q. And what is that opinion?

. . . .

[A.] Okay. I think it is not physiologic for people to do some of the things they do in production lines, and this may be one of the problems. And it could also be that Iowa Beef Packers might design a handle that might — or a different technic that might prevent repeated joint

motions. And as I understand these things, this is a long-term repetitive motion during the work period with no let up. And I think on that basis that's where it comes.

Now, when you talk about trauma with a carpal tunnel, the first thing that occurs is that there is an anoxia. And that's the physiologic basis for the beginning of it. Following anoxia you get a swelling and then you have an enclosed rigid place and it produces a pile up of problems. I could go into, if you wanted to, the physiology of the cell and talk about acetylcholine levels, which is some of the physiology of the nerve. And when this is distrubed [sic] then it seems to keep — and if the person goes back day after day to this, then it keeps increasing it. And the person usually has numbness first because the nerve is a mixed nerve and has both sensorium and motor nerves in it. And the weaker action zones are the — are probably the central nerves, and they start to fail first and then the motors start to die after that. And that's about the basis for it. And I think it is physiological.

Dr. Garred was also asked if working at her job for but 6 days was sufficient time for the carpal tunnel and the pronator teres syndromes to develop, and he answered that it was.

Gerald Newman, a licensed physical therapist who treated the plaintiff, suspected as early as December 10, 1983, the possibility of a pronator teres syndrome.

Dr. Isgreen, a neurologist, examined the plaintiff for the defendant's insurance company on March 12, 1984. He stated that the normal causes of carpal tunnel syndrome are repetitive motions, repeated trauma, and repeated flexing and extending of the wrist. He also stated that plaintiff's story of a snap and sudden onset of a burning sensation is typical of damage to a nerve.

We agree with the compensation court that the medical evidence as to causation as to both the carpal tunnel and the pronator teres syndromes is not as clear and precise as we would like to see it be. However, we also conclude that there is sufficient evidence to support the finding of that court, and under the scope of review which we are required to follow, we must affirm its decision.

We reach the same conclusion as to a continuing award of temporary total disability benefits. Although Dr. Isgreen felt that her disability was permanent, it must be remembered that he testified by deposition on May 15, 1984, which preceded plaintiff's surgery for pronator teres syndrome.

Dr. Garred, on the other hand, testified that he did not know whether plaintiff could continue the same work, and did not know whether her disability would be permanent, because it would take a longer period of following the case to make those determinations.

Plaintiff herself testified that she had not been released by her physicians and physical therapist because she could not find a job she could do with only one hand.

Also, because the compensation court found that there was no reasonable controversy as to compensability for the carpal tunnel syndrome, it awarded additional compensation of $78.67 per week waiting time to May 12, 1984, when the pronator teres syndrome controversy arose, and an attorney fee of $500, under the provisions of Neb. Rev. Stat. § 48-125 (Reissue 1984).

Although defendant's counsel, understandably, astutely avoided questioning the medical witnesses on the issue of causation, and plaintiff's counsel refused to pursue some of the rather vague answers given by the same witnesses, we believe that defendant's own physician, as quoted above, left little doubt as to the compensability of the carpal tunnel syndrome.

Accordingly, we affirm the judgment of the Workmen's Compensation Court. Plaintiff is awarded a fee of $1,000 for her attorney for services in this court.

AFFIRMED.

CAPORALE, J., concurring.

I agree with the result in this case, as the record, weak as it is, supports the finding of a causal relationship between the snapping in plaintiff's hand and the carpal tunnel and pronator teres syndromes. I write separately only to express the view that this case is distinguishable from *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). Here, the snapping in plaintiff's hand satisfies the definition of accident as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1984). That

occurrence constitutes an "unexpected or unforeseen injury happening suddenly and violently," which produced at the time of its happening "objective symptoms of an injury." In *Sandel* there was no such trauma. I therefore would have chosen not to use *Sandel* as support for the result reached in the present case. The same can generally be said about *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985).

STATE OF NEBRASKA, APPELLEE, V. WELDON ROSS, APPELLANT.
374 N.W.2d 228

Filed September 20, 1985. No. 84-856.

1. **Trial: Evidence: Witnesses: Appeal and Error.** Generally, 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.
2. **Trial: Prosecuting Attorneys: Motions for Mistrial.** Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
3. **Criminal Law: Sentences.** The granting of presentence jail time credit is within the trial court's discretion except where the statutory maximums are exceeded.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

BOSLAUGH, J.

After trial to a jury the defendant, Weldon Ross, was convicted of assault by a confined person, a felony under Neb. Rev. Stat. § 28-932 (Cum. Supp. 1984). At a subsequent hearing he was determined to be a habitual criminal and

sentenced to 10 years' imprisonment. He has appealed and raises three assignments of error: (1) That there was insufficient evidence to support conviction; (2) That a mistrial should have been declared due to prosecutorial misconduct; and (3) That defendant should have received credit for presentence jail time.

On March 27, 1984, while confined to the Lancaster County jail and awaiting trial on other charges, the defendant struck Officer Michael Craft. At trial there was no dispute as to any fact other than whether Ross actually struck Officer Craft.

The three officers who were at the scene testified that Ross struck Officer Craft when Craft came to the aid of another officer who was attempting to persuade Ross to reenter his cell block following breakfast. Nine inmates of the jail testified for the defense. Their recollections of the event varied considerably, but they all testified that Ross did not exhibit aggressive behavior nor try to hit Officer Craft. Ross himself testified that he did not strike Officer Craft but that he told the officer to "get his fuckin' hands off of me" and pushed the officer's hands away.

The defendant contends the evidence was insufficient to support his conviction because the State's evidence consisted of substantially identical testimony by the three officers who were eyewitnesses. Defendant argues that this testimony should be discredited as a matter of law because it was coordinated. In effect, the defendant asks this court to weigh the credibility of the testimony adduced at trial.

> "In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it."

State v. Rolling, 209 Neb. 243, 248, 307 N.W.2d 123, 126 (1981); *State v. Fix*, 219 Neb. 674, 365 N.W.2d 471 (1985); *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985).

The defendant also attacks the sufficiency of the evidence because the trial court rejected an offer of proof made by

defense counsel. The offer consisted of the testimony of an inmate who claimed to have overheard a conversation during which Officer Craft allegedly stated that he wanted to make sure the reports "jibed" so that he would not have any problem with the case. The testimony was offered to affect the credibility of the officer. The testimony was objected to on the grounds of lack of foundation as well as hearsay.

Generally, "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*, 219 Neb. 587, 590, 365 N.W.2d 414, 416 (1985). On the record presented there was no abuse of discretion in the ruling on the offer of proof. The inmate had testified that he did not see the altercation involving Ross nor could he say for sure that the conversation he overheard was in reference to the Ross incident. The trial court's ruling is not grounds for reversal.

As the second assignment of error, the defendant contends that the record is replete with examples of prosecutorial misconduct and that the trial court erred in not declaring a mistrial. The defendant, however, has cited only four specific instances that were objected to at trial and are properly before this court on appeal. Defendant cites the following three statements made by the prosecutor: "Well, he's your witness, Mr. Ross," "That's correct," and "That's pretty accurate. I appreciate that"; and the prosecutor's offer of a police report containing hearsay. In all four instances defense counsel objected, and the objections were sustained. The statements were stricken from the record, and the jury was advised to disregard the prosecutor's remarks. Additionally, the jury was instructed that "[y]ou should not be influenced by statements of counsel not supported by the evidence."

While the granting of a mistrial is within the discretion of the trial court, "Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a 'substantial miscarriage of justice has actually occurred.' " *State v. Wounded Arrow*, 207 Neb. 544, 548, 300 N.W.2d 19, 22 (1980). Furthermore, Neb. Rev. Stat. § 29-2308 (Cum. Supp.

1984) provides that "[n]o judgment shall be set aside, or new trial granted . . . for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

The defendant has failed to show a substantial miscarriage of justice. As this court has stated previously, "Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant." *State v. Tiff*, 199 Neb. 519, 529, 260 N.W.2d 296, 302 (1977).

In the present case the prosecutor's statements did not directly relate to the guilt or innocence of defendant, nor did they impair defendant's right to a fair trial. As Justice Brennan of the U.S. Supreme Court has stated, "an objection followed by admonition or instruction is typically presumed to be sufficient to dispel prejudice." *United States v. Young*, ____ U.S. ____, 105 S. Ct. 1038, 1051 n.2, 84 L. Ed. 2d 1 (1985) (Brennan, J., concurring in part and dissenting in part). Since the statements were stricken from the record, the jury was admonished to disregard the prosecutor's comments, and the jury was instructed not to consider such comments as evidence, the trial court did not abuse its discretion.

Lastly, the defendant assigns as error the fact that he was denied credit for presentence jail time by the trial court. Ross was sentenced for assault by a confined person, a violation of § 28-932, but the sentence was enhanced under Neb. Rev. Stat. § 29-2221 (Reissue 1979), the habitual criminal statute. Ross received the statutory minimum sentence of 10 years upon the finding that he was a habitual criminal.

Sentencing is within the discretion of the trial court, and absent an abuse of that discretion, this court will not modify the sentence imposed. *State v. Bargen,* 219 Neb. 416, 363 N.W.2d 393 (1985). The granting of presentence jail time credit is within the trial court's discretion except where the statutory maximums are exceeded. *Addison v. Parratt,* 208 Neb. 459, 303 N.W.2d 785 (1981); *State v. Knight, ante* p. 666, 371 N.W.2d 317 (1985). This court has repeatedly held that a sentence imposed within statutory limits will not be disturbed on appeal

unless the trial court abused its discretion. *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984).

Section 28-932(2) provides that credit for time spent in custody prior to sentencing shall not be granted "unless the time in custody is solely related to the offense for which the sentence is being imposed under this section."

The defendant is 35 years of age. He has a lengthy record of criminal behavior including crimes of violence and homicide. It was within the discretion of the trial court in this case to deny credit for jail time prior to sentencing.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD E. WRIGHT, APPELLANT.

374 N.W.2d 26

Filed September 20, 1985. No. 85-028.

1. **Motions for New Trial: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 25-1912.01(1) (Cum. Supp. 1984), a motion for a new trial is not required to obtain appellate review of any issue upon which the ruling of the trial court appears in the record.
2. **Pleas: Waiver.** Where a record is entirely barren of any facts so demonstrating, it is impossible to conclude from a plea of guilty that a defendant has voluntarily, knowingly, and intelligently waived his right to remain silent and his right to not testify at trial.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for further proceedings.

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

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

CAPORALE, J.

Defendant, Richard E. Wright, pled guilty to a charge of theft by receiving stolen goods valued at over $300 but less than $1,000 in violation of Neb. Rev. Stat. § 28-517 (Reissue 1979). Upon a plea of guilty he was sentenced to imprisonment for a period of not less than 12 nor more than 16 months and was ordered to pay costs. He appeals the conviction and sentence on the sole ground that the trial court failed to advise him that he had the right to remain silent and to not testify at trial. We reverse and remand for further proceedings.

We first address the State's argument that we do not reach the merits of the issue presented by Wright because he failed to raise the issue in a motion for new trial, citing *State v. Price*, 198 Neb. 229, 252 N.W.2d 165 (1977). *Price* observed that while a motion for new trial was not required in order for this court to acquire jurisdiction of an appeal, the court would nonetheless ordinarily not consider any error not presented to the trial court by such a motion if the error were of such a nature that it could have been corrected.

The argument overlooks the 1982 enactment of Neb. Rev. Stat. § 25-1912.01(1) (Cum. Supp. 1984), which provides: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record."

The record shows that the trial court, following a colloquy with defendant, stated: "I accept the plea of guilty to the charge and find and adjudge Mr. Wright guilty as charged . . . ." This amounts to a ruling by the trial court that Wright's plea was made voluntarily, knowingly, and intelligently. It follows, therefore, that we are being asked to review an issue upon which the ruling of the trial court appears in the record. That being so, the State's argument is without merit.

The substantive issue presented, that is, whether Wright's plea can be said to have been voluntarily, knowingly, and intelligently made in the face of an absence in the record of a waiver of the right to remain silent and the right to not testify at trial, is answered negatively by our recent opinion in *State v. Branch, ante* p. 754, 371 N.W.2d 740 (1985).

Accordingly, the judgment is reversed, defendant's

conviction and sentence are vacated, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROY L. BROWN, APPELLANT.
374 N.W.2d 28

Filed September 20, 1985. No. 85-053.

1. **Trial: Witnesses: Testimony: Appeal and Error.** A trial judge is given latitude and discretion in permitting leading questions of witnesses whose communicative abilities are sharply curtailed, and unless there has been an abuse of such discretion resulting in prejudice and injury to the other party, there is no reversible error.
2. **Self-Defense.** In order to find justification or self-defense, it is necessary that there be a purposeful use of deadly force.
3. **Criminal Law: Assault: Intent: Words and Phrases.** An accidental injury occurs where there is no intent or volition on the part of the actor.

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

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

Robert M. Spire, 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 first degree assault and use of a knife in the commission of a felony. On appeal to this court the defendant assigns as errors that the trial court erred in allowing into evidence a videotaped deposition of the victim, containing a number of leading questions, and in failing to instruct the jury on self-defense and accident. We affirm.

On the night of June 8, 1984, or early morning hours of the 9th, during an argument, Anna Joyner suffered a knife wound which she claimed was caused by the defendant's stabbing her in the shoulder. As a result of that injury, she suffers from some paralysis and is unable to use her hands in order to write. Sometime after her admission to the hospital, because of treatment, including the use of intensive care apparatus, she lost much of the power of articulation.

Because of the condition of the complaining witness, the district court permitted the use of a videotaped deposition. The defendant does not object to the utilization of a deposition as such, but only to the use of leading questions. However, under the peculiar circumstances of this case, and from an examination of the deposition as received in evidence, we believe that the ruling of the trial court was well within its discretion.

Neb. Rev. Stat. § 27-611 (Reissue 1979) provides in part as follows:

> (1) The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth . . . . .
>
> (3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.

Section 27-611 is identical to Fed. R. Evid. 611. The drafters of the rules anticipated the testimonial problem presented in this case in an advisory committee's note:

> The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or *the adult with communication problems*; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been

> manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

(Emphasis supplied.) Fed. Crim. Code & R. 237 (West rev. 1985).

As a general rule, our trial courts have been granted rather broad discretion to allow leading questions.

> Our law is well settled that a trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness a leading question. The discretion is a legal one and subject to proper limitations. See State v. Burton, 174 Neb. 457, 118 N.W.2d 502. As we said in that case, it is usual and proper for the court to permit leading questions in conducting the examination of a witness who is immature, unaccustomed to court proceedings, inexperienced, agitated, terrified, or embarrassed while on the stand, and lacking in comprehension of the questions asked.

State v. Hoffmeyer, 187 Neb. 701, 703, 193 N.W.2d 760, 762 (1972).

In *State v. Burton*, 174 Neb. 457, 118 N.W.2d 502 (1962), the defendant had been charged with indecent fondling of a minor. The court held that it was proper to allow the prosecutor to ask leading questions of two reluctant 9-year-old girls who were embarrassed about their involvement.

The Nebraska exception allowing leading questions on direct examination has developed mainly in recognition of specific personality traits of witnesses: *State v. Burton, supra* (youth); *Campion v. Lattimer*, 70 Neb. 245, 97 N.W. 290 (1903) (dull-wittedness). There appears to be no Nebraska case in which an exception was made due to a physical or communicative handicap.

However, in *Parker v. State*, 172 Ga. App. 540, 323 S.E.2d 826 (1984), the court approved the use of a leading question in the direct examination of a witness who was suffering from a speech impediment. That court said in effect that a judge is given latitude and discretion in permitting leading questions,

and unless there has been an abuse thereof resulting in prejudice and injury, there is no reversible error. See, also, *State ex rel. Bruner v. Sanders*, 256 Iowa 999, 129 N.W.2d 602 (1964).

We find defendant's first assignment of error to be without merit.

According to the defendant's testimony, during the initial stages of his argument with the victim, she picked up a knife, which he took away from her and threw back on the table. The argument continued, and the victim reached for the knife a second time, but once again the defendant took the knife and threw it farther away on the table. Finally, according to the defendant, he picked up the knife a third time and threw it outside.

The defendant also testified that he did not know how the victim got stabbed and that it would be only a guess on his part. On cross-examination, in response to a question as to whether he stabbed the victim, the defendant answered, "And I can honestly say that I didn't do it."

On the basis of this record the defendant insists that he was entitled to an instruction on self-defense and accident. In order to find justification or self-defense, however, it is necessary that there be a purposeful use of deadly force. In *State v. Canby*, 217 Neb. 461, 463, 348 N.W.2d 900, 901 (1984), this court noted:

> Neb. Rev. Stat. §§ 28-1406 et seq. (Reissue 1979) deal with the situations wherein the use of force is justified. Section 28-1409(4) allows, with certain exceptions, the use of deadly force once unlawful force has been used against the actor, if the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnaping, or sexual intercourse compelled by force or threat. Deadly force is defined at § 28-1406(3) to be "force which the actor uses *with the purpose* of causing or which he knows to create a substantial risk of causing death or serious bodily harm." (Emphasis supplied.)

We concluded that the defendant in that case excluded the possibility of self-defense because she claimed that she accidentally and unintentionally stabbed the victim.

There is no support for an instruction on accident. An accident is defined by Webster's Third New International

Dictionary, Unabridged 11 (1981) as: "1 a : an event or condition occurring by chance or arising from unknown or remote causes . . . b : lack of intention or necessity . . . 2 a : a . . . sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result . . . ."

However, defendant denied that he stabbed the victim and denied that she may have fallen on the knife, nor does the medical testimony support any hypothesis that she did. The victim flatly stated that defendant intentionally stabbed her. In any event, the accident theory was essentially set forth in instruction No. 9, which provided in part: " 'Intentionally' means with a purpose, as distinguished from accidentally."

By instruction No. 4, in order for the jury to find defendant guilty, it was required to find that defendant caused serious bodily injury to the victim and that he did so intentionally and knowingly.

There is no prejudicial error appearing in the record, and the judgment of the district court is affirmed.

AFFIRMED.

MIRANDA K. ERB, APPELLANT, V. MERLE J. ERB, APPELLEE.
373 N.W.2d 671

Filed September 20, 1985. No. 85-067.

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

Daniel E. Bryan of Heinisch & Bryan Law Office, for appellant.

Frank J. Daley, Jr., of Germer, Koenig, Murray, Johnson & Daley, for appellee.

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

PER CURIAM.

This appeal involves a domestic relations matter. The petitioner-appellant filed for dissolution of the marriage. The court granted the dissolution, awarded custody of the minor child to appellee, allowed liberal visitation rights to appellant, awarded nominal child support, and divided the couple's property. The appeal assigns as error the award of custody, the division of property, and the absence of an award of alimony. All such actions are matters initially entrusted to the sound discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion, recognizing that 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.

We have so reviewed the record and find the decision of the district court to be correct in all respects. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES D. STRATTON, APPELLANT.

374 N.W.2d 31

Filed September 20, 1985. No. 85-088.

1. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes the word "shall" is considered mandatory, and inconsistent with the idea of discretion.
2. _____: _____. A statute is not open to construction as a matter of course; in the absence of anything to indicate the contrary, words must be given their ordinary meaning.
3. **Statutes: Appeal and Error.** It is not within the province of the Nebraska Supreme Court to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.
4. **Constitutional Law: Legislature: Courts.** The determination of what constitutes a legislative function and what constitutes a judicial one must be made on a case-by-case basis.

5. **Constitutional Law: Criminal Law: Sentences: Legislature.** Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is neither cruelly inhumane nor disproportionate to the crime involved.
6. **Constitutional Law: Criminal Law: Sentences: Courts.** The law places upon judges the primary responsibility for imposing sentences within limits fixed by statute.
7. **Constitutional Law: Criminal Law: Sentences: Legislature: Courts.** The Legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.
8. **Courts.** It is the duty of courts to administer the law as it exists.
9. **Constitutional Law: Criminal Law: Sentences.** The requirement of Neb. Rev. Stat. § 28-1205(3) (Reissue 1979) that sentences imposed for the use of firearms to commit a felony be consecutive to any other sentence imposed does not constitute a violation of the distribution of powers mandated by Neb. Const. art. II, § 1, art. III, § 1, or art. V, § 9.

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

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, O'Donnell & Merritt, P.C., for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

CAPORALE, J.

Defendant, James D. Stratton, appeals from the consecutive sentences imposed following his pleas of guilty to the charge of manslaughter and to the charge of using firearms to commit a felony. He assigns as errors (1) the failure to find the statutory requirement that any sentence imposed for the use of firearms to commit any felony be consecutive to any other sentence constitutes an unconstitutional invasion of the judicial branch of government by the legislative branch; (2) the failure to impose concurrent sentences; and (3) as cruel and unusual, and thus unconstitutional, the requirement of one of the sentences that he serve 2 days of each year of incarceration in solitary confinement. We affirm.

Stratton and the victim, Steven A. Staadts, entertained themselves by spending the afternoon and early evening of

August 25, 1984, drinking at an Ogallala bar. They then left together to go to a birthday party at a trailer house in the same city, and on the way bought 2 gallons of wine and 2 cases of beer.

Nothing eventful happened at the party until Stratton wanted to leave. At that time he approached Staadts, who was talking to a woman outside the trailer. Staadts replied he was not ready to go and told Stratton to leave him alone, as he was talking to his "old lady." Since Staadts had previously introduced another woman as his girl friend, Stratton did not take the reply seriously and again asked Staadts if he was ready to go. This irritated Staadts and prompted the response, in strong language, that Staadts was going to do harm to Stratton. Staadts then, according to Stratton, got out of his chair and hit Stratton in the left eye. Stratton then "popped the knife and come back to port with it and he [Staadts] was on it." Upon further questioning Stratton admitted that he brought the knife forward and it went into Staadts' body.

Although several people were at the party, only one person admitted to actually witnessing the stabbing. This witness had not heard Stratton and Staadts arguing but saw Stratton stand up and take a knife out of his belt sheath. According to the witness, Staadts then stood up with his arms raised and his palms facing front, took a step forward, and lowered his arms. Stratton then "swung the knife" into the left side of Staadts' chest. Stratton removed the knife and Staadts backed up, brought his arms up to his chest, and yelled, "What did you do that for?" Stratton walked quickly to the street and then began running.

The stabbing occurred shortly after midnight, and Staadts died within a few hours. Stratton was arrested a few hours after the incident at the motel where he and his wife were living.

After the trial court accepted the two guilty pleas but before the sentencing hearing, Stratton filed a notice of intent to challenge the constitutionality of the requirement of Neb. Rev. Stat. § 28-1205(3) (Reissue 1979) that any sentence on the use of firearms charge be consecutive to any other sentence. The statute reads, in relevant part, as follows:

> (1) Any person who uses a . . . knife . . . to commit any felony which may be prosecuted in a court of this state . . .

commits the offense of using firearms to commit a felony.

(2) Use of firearms to commit a felony is a Class III felony.

(3) The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed.

The trial court construed "the mandatory language of the statute as not obligatory . . . but as a strong recommendation by the legislature upon the judiciary."

Stratton was then sentenced to imprisonment for not less than 5½ nor more than 16½ years on the use of firearms charge and to a like sentence on the manslaughter charge. The latter sentence requires that during each year of incarceration, Stratton's birthday, August 23, and the anniversary of Staadts' death, August 26, be spent in solitary confinement. The two sentences were ordered to run consecutively.

We agree with Stratton's contention that the direction of § 28-1205(3), that "sentences imposed under the provisions of this section *shall* be consecutive" (emphasis supplied), mandates, if not unconstitutional, that a sentencing court require a sentence for the use of firearms in the commission of a felony be served consecutively to any other sentence imposed.

As a general rule, in the construction of statutes the word "shall" is considered mandatory, and inconsistent with the idea of discretion. *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982); *State ex rel. Smith v. Nebraska Liquor Control Commission*, 152 Neb. 676, 42 N.W.2d 297 (1950). We have held that a statute is not open to construction as a matter of course and that in the absence of anything to indicate the contrary, words must be given their ordinary meaning. Moreover, it is not within our province to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *Sorensen v. Meyer, ante* p. 457, 370 N.W.2d 173 (1985); *Weiner v. State ex rel. Real Estate Comm.*, 214 Neb. 404, 333 N.W.2d 915 (1983). Clearly, the use of the word "shall" in § 28-1205(3) mandates consecutive sentencing. The question is whether, as Stratton argues, such a mandate is

unconstitutional.

The question thus becomes whether, as claimed by Stratton under his first assignment of error, § 28-1205(3) constitutes an unconstitutional intrusion of the legislative branch into a judicial function.

Stratton's argument brings into play three separate provisions of the Nebraska Constitution:

Article II, § 1, which states: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Article III, § 1, which reads in pertinent part: "[T]he legislative authority of the state shall be vested in a Legislature consisting of one chamber."

Article V, § 9, which provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty *and pass such sentence as may be prescribed by law.*" (Emphasis supplied.)

As acknowledged in *Lux v. Mental Health Board of Polk County*, 202 Neb. 106, 274 N.W.2d 141 (1979), the line between that which constitutes a legislative function and that which constitutes a judicial one has not been drawn with precision. The determination must be made on a case-by-case basis.

Although no case directly in point has been cited to us nor found by our independent research, this court has recognized the power of the Legislature to fix criminal penalties.

For example, *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985), involved a 35-year sentence without parole for one twice convicted of sexual assault in the first degree. In holding the sentence not to be cruel and unusual, we observed that the Legislature is not required to select the least severe penalty possible, so long as the penalty selected is neither cruelly inhumane nor disproportionate to the crime involved. *State v. Gamron*, 186 Neb. 249, 250, 182 N.W.2d 425, 426 (1970), notes, in ruling a sentence not excessive, that the "law places the

primary responsibility for imposing sentences after conviction for crime in the judges of the district court *within limits fixed by statute*." (Emphasis supplied.) Again, *State v. Tucker*, 183 Neb. 577, 579, 162 N.W.2d 774, 776 (1968), in holding a sentence not to constitute cruel and unusual punishment, observes, quoting *State, ex rel. Nelson, v. Smith*, 114 Neb. 653, 209 N.W. 328 (1926): " 'The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.' " Further, in *State v. Tatreau*, 176 Neb. 381, 126 N.W.2d 157 (1964), the defendant assigned as error the imposition of a life sentence. This court noted that the penalty imposed was the only one provided by statute, and, thus, the trial court had no discretion in the matter. It observed that it is "the duty of a court to administer the law as it exists." *Id.* at 392, 126 N.W.2d at 163.

Cases from other jurisdictions are also instructive. *State v. Earls*, 69 Or. App. 75, 683 P.2d 1387 (1984), concludes that the separation of powers doctrine does not prevent legislative establishment of a mandatory minimum sentence for conviction of using a firearm in the commission of a felony; *State v. Faunt*, 139 Ariz. 111, 677 P.2d 274 (1984), rules that a statute mandating life imprisonment for one convicted of any felony offense involving use of a deadly weapon if committed while released from confinement does not unconstitutionally restrict judicial power; *State v. Olson*, 325 N.W.2d 13 (Minn. 1982), expressly notes that the power to define criminal conduct and fix its punishment is vested in the legislative branch, whereas the imposition of a sentence within these legislative limits is purely a judicial function; *State v. Mabry*, 96 N.M. 317, 630 P.2d 269 (1981), finds a statute requiring life imprisonment for anyone convicted of a first degree felony to not violate the separation of powers doctrine; *State v. Dickenson*, 229 Kan. 152, 621 P.2d 1002 (1981), holds a statutorily mandated minimum sentence where a firearm is used in the commission of a crime against a person not such a restriction on judicial power as to constitute an impermissible legislative usurpation of the court's discretion; *Wayne Pros v Recorder's Ct Judge*, 92 Mich. App. 433, 285 N.W.2d 318

(1979), finds a felony firearm statute's mandatory sentence provision not to violate the separation of powers clause; *State v. Sittig*, 75 Wis. 2d 497, 249 N.W.2d 770 (1977), states that the legislature was empowered to specify a mandatory minimum term of imprisonment for driving after revocation of a driver's license and that a court's refusal to impose such a sentence would constitute an abuse of discretion and a usurpation of "the legislative field"; *People v Hall*, 396 Mich. 650, 242 N.W.2d 377 (1976), holds the mandatory life sentence requirement of a felony murder statute not to violate due process, equal protection, the guarantee against cruel or unusual punishment, or the separation of powers doctrine; *State v. Dean*, 115 N.H. 520, 345 A.2d 408 (1975), holds that the legislature can constitutionally require the imposition of a mandatory sentence for a habitual offender driving under suspension, and, therefore, statutory language expressing a clear legislative intent that a particular sentence be imposed curtails the judiciary's ability to suspend such a sentence; and *State v. Boisvert*, 348 A.2d 7 (Me. 1975), finds a statutory requirement prohibiting the suspension of a sentence imposed for the unlawful sale of amphetamines and denying probation not to unconstitutionally invade the functions of the judicial branch.

We conclude that § 28-1205(3) does not offend the distribution of powers mandated by the Nebraska Constitution.

That determination necessarily disposes of Stratton's second assignment of error, which mistakenly claims that the trial court erred in imposing consecutive sentences, leaving only the third assignment for our consideration.

Under that assignment Stratton argues that the circumstances of this case render the trial court's requirement that he be placed in solitary confinement on his birthday and on the anniversary of Staadts' death impermissibly cruel and unusual.

Neb. Rev. Stat. § 29-2204 (Reissue 1979) expressly gives the trial court the power to declare whether a convict shall be kept in solitary confinement and, if so, for what period of time. No challenge is made to the constitutionality of the statute itself;

thus, we need only decide whether the application of the statute to this case results in the imposition of an unconstitutionally cruel and unusual punishment.

State v. Brand, 219 Neb. 402, 363 N.W.2d 516 (1985), and *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), have set forth the factors to be considered in making that determination under both the Nebraska and the U.S. Constitutions: (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. Leadinghorse, 192 Neb. 485, 487, 222 N.W.2d 573, 576 (1974), notes that "[r]egardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not a cruel and unusual punishment in the constitutional sense." And as stated in *State v. Tucker*, 183 Neb. 577, 578-79, 162 N.W.2d 774, 775 (1968): "It has been held that while a constitutional provision prohibiting 'cruel and unusual punishment' was intended to prohibit torture and agonizing punishment, it was never intended to abridge the selection by the law-making power of such kind of punishment as it deemed most effective in the suppression of crime."

Stratton has not cited, nor has our independent research disclosed, any case from this or any other jurisdiction which even remotely suggests that requiring a killer to spend 2 days a year in solitary confinement as part of the punishment for having taken a human life is unconstitutionally cruel and unusual. It seems to us impossible to so hold.

Each of Stratton's assignments of error being without merit, the judgment of the trial court is affirmed.

AFFIRMED.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH B. EGGERS, APPELLANT.

374 N.W.2d 36

Filed September 20, 1985. No. 85-089.

1. **Convictions: Circumstantial Evidence.** Direct evidence of a crime is not essential for a conviction, and one may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.
2. _____: _____. In order to convict one on the basis of circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt.
3. **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, and 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 Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Kent E. Florom, Lincoln County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Bernard L. Packett, for appellee.

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

KRIVOSHA, C.J.

Following a trial to a jury, Joseph B. Eggers was found guilty of murder in the second degree in violation of Neb. Rev. Stat. § 28-304 (Reissue 1979). He now appeals from the judgment entered pursuant to the jury verdict. Eggers assigns as his single error that there was insufficient evidence to sustain his conviction. We have reviewed the record and believe that the assignment is without merit. For that reason it is overruled and the judgment affirmed.

The record discloses that on July 14, 1984, at approximately 4:44 p.m., the North Platte Fire Department rescue unit was called to a North Platte home on the report of a baby drowning in a bathtub. Upon arrival the rescue unit found the appellant

Eggers giving mouth-to-mouth resuscitation to the victim, a 3-year-old child. Further efforts by the rescue unit to revive the child were unsuccessful, and after 15 minutes efforts were ceased.

An autopsy was performed on the body of the child. Results of the autopsy disclosed multiple bruises on the face, upper shoulders, thorax, abdomen, and extremities, and a few bruises on the back and buttocks. The report further disclosed severe bruising on the right side of the head, including soft tissue hemorrhage and bruising which had been caused by some form of blunt trauma. An exposure of the brain indicated an area of subdural hemorrhage beneath the membrane of the skull. There were also bruises on the forehead and chin, and abrasions on the nose. The pathologist testified that the bruises on the child's body were deep bruises which were the product of a significant amount of force. The nose abrasion indicated contact with a fairly blunt surface, such as a wall. As a result of the autopsy, the pathologist concluded that death was the result of injury to the brain caused by the head being accelerated for some distance and then stopped by something stationary, such as a floor or a wall.

The State further produced the child's mother, who testified that she and Eggers had been taking amphetamines (speed) for several days prior to July 14, 1984. The mother testified that on July 14, the day the child died, she had twice gotten the child out from underneath a bed and had spanked her for crawling underneath it. She further testified that the second time the child crawled under the bed, she pulled it out from the wall to get the child and the bedframe cracked but did not collapse or fall on the child. When the child, for a third time, crawled under the bed, the mother told Eggers where the child was. According to the mother, Eggers got up from the couch in the living room, went to the bedroom, and pulled the child out from under the bed by her feet and ankles. In a rough manner he then took the child through the living room and to the dining room, where he made her stand in the corner. Still affected by the drugs, the mother lay down on a couch in the living room, where she heard Eggers spanking the child. She testified further that she heard some banging noises which she thought sounded like Eggers

trying to put the child in a closet. At the time the mother heard the banging sounds, she also heard Eggers saying, "Get in there." A short time later she sat up and looked to see where Eggers was. She observed Eggers standing in the dining room with a glass of milk. She fell back asleep to the sound of the child sobbing and sniffling in the dining room. A later examination of the dining room disclosed three oily marks on the wall at approximately the child's head level, indicating that something had been flailed against the wall.

Sometime later the mother was awakened by the sound of persons pounding on the door or window. She awoke, let three friends into the residence, and returned to the child's room, where she lay down on the bed. She was again awakened by one of the guests, and together they all went into the living room. They heard the sound of running water in the bathroom, a tapping sound, and a sound like a toilet seat being put down. Approximately 10 to 15 minutes later, Eggers came out of the bathroom with no shirt on and with wet hair. Two of the guests went into the bathroom after Eggers came out and saw the child in the bathtub. It was then that the emergency personnel were called.

The record discloses that Eggers related a number of different versions of what happened on July 14, 1984. He now argues that the version which he related after the autopsy results were made known was the correct version and should be accepted. According to Eggers' last version of what happened on July 14, 1984, he was lying on the couch in the living room. The child's mother went into the child's room and screamed at her to "get out from underneath that bed." Eggers then heard the bed sliding across the floor and a cracking sound, which was followed by four thuds. According to Eggers, these thuds sounded like something being slammed against the floor. Eggers testified that he heard the mother scream at the child, "You spoiled, rotten little brat, I wish you weren't around anymore." Eggers then went into the bedroom and found the child lying between the bed and the wall with her head and part of her chest under the bed. He pulled the child out from under the bed by her ankles and noticed that she was not moving, nor could she stand up. Eggers claims he then marched the child

into the dining room, where he let go of her and she fell. He then picked her up and propped her in the corner. Within a couple of minutes she fell out of the corner and it was at that time that the guests arrived. Eggers claimed that he then carried the child into the bathroom, where he continued to try to give her CPR. He maintains that he put the child into the bathtub with water in it because he was scared she was dead.

Eggers argues that the motion to dismiss should have been sustained because there is no direct evidence of his having inflicted on the child the physical injury which caused her death and that, therefore, the conviction is based upon speculation and suspicion. Moreover, he argues that his version of the facts is more credible than the version presented by the State through the mother.

It has long been the rule in this jurisdiction that direct evidence of a crime is not essential for a conviction and that one may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). See, also, *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983); *State v. Trimble, ante* p. 639, 371 N.W.2d 302 (1985). Moreover, since *State v. Buchanan, supra*, we have held that in order to convict one on the basis of circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt. There is no question that if the jury believed the evidence presented by the State, it was sufficient to establish guilt beyond a reasonable doubt.

Eggers' real argument is that his evidence should have been believed and the evidence presented by the State, through the mother, disbelieved. That is not a matter for this court to determine. It is not for this court to accept one version of the case over another; that was for the jury. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. See *State v. Evans, supra*. The evidence as presented

by the State was sufficient to establish Eggers' guilt. The evidence showed that the child died as the result of severe blows to the head. The mother's testimony placed Eggers in the dining room with the child when "banging" noises were heard. There was also evidence presented of marks on the walls in the corner of the dining room which indicated that something had been flailed against the walls. By his own admission Eggers placed the child in a bathtub of water because he thought she was dead and was attempting to make it look as though she had drowned. In addition, Eggers admitted at trial that he did not relate to anyone the story of hearing four "thuds" in the bedroom until after the autopsy results, indicating the child died from severe blows to the head, were made known to him. Admittedly, the evidence was in conflict. This conflict was resolved by the jury against Eggers, and the record supports the jury's action in that regard. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN A. POTTER, APPELLANT.

374 N.W.2d 27

Filed September 20, 1985. No. 85-177.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for further proceedings.

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

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

PER CURIAM.

Defendant, Steven A. Potter, pled guilty to a charge of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1979). He was sentenced to imprisonment for a period of 2 to 4 years. He appeals his conviction and sentence on the sole ground that the trial court failed to advise him that he had the right to remain silent and to not testify at trial.

This case presents the same issues as those in *State v. Wright, ante* p. 847, 374 N.W.2d 26 (1985), decided this date, and in this case we rule in the same way and for the same reasons.

Accordingly, the judgment is reversed, defendant's conviction and sentence are vacated, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LORNA K. MANEWAL, APPELLEE, V. GRANT E. MANEWAL, APPELLANT.

374 N.W.2d 39

Filed September 20, 1985. No. 85-194.

Visitation: Appeal and Error. Determinations as to visitation rights in a dissolution of marriage 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; keeping in mind, however, that the trial judge observed and heard the witnesses at some point in the trial and accepted one version of the facts rather than the other.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Herbert M. Sampson III of Sampson & Forney, for appellant.

M. Roger Schneekloth of Reddish & Schneekloth, for appellee.

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

PER CURIAM.

Following a hearing on the application of appellant father, Grant E. Manewal, for modification of a decree of dissolution of marriage seeking a change of appellant's visitation rights with the parties' two minor children because of appellant's transfer to Michigan, the court entered an order modifying the decree to permit appellant to remove the children from Nebraska while exercising specific visitation and made other changes relating to the appellant's change of residence. He appeals, seeking more extensive visitation.

We hold that determinations as to visitation rights in a dissolution of marriage 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; keeping in mind, however, that the trial judge observed and heard the witnesses at some point in the trial and accepted one version of the facts rather than the other.

Further, in visitation matters, the paramount considerations are the best interests and welfare of the children.

After such review in the case, we affirm the judgment of the trial court. Each party shall bear his or her own costs.

AFFIRMED.

DONALD A. KRACL, ALSO KNOWN AS DON A. KRACL, APPELLEE, V. THE AETNA CASUALTY AND SURETY COMPANY, ALSO KNOWN AS AETNA LIFE & CASUALTY OF HARTFORD, CONNECTICUT, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, GREAT PLAINS INSURANCE CO., INC., OMAHA, NEBRASKA, APPELLANTS, FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, LINCOLN, NEBRASKA, APPELLEE.

374 N.W.2d 40

Filed September 27, 1985. No. 84-147.

1. **Appeal and Error.** In an action at law, where a jury has been waived and the evidence is in conflict, this court, in reviewing the judgment, will presume that the controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong. It is not within the province of this court to resolve conflicts in or reweigh the evidence.
2. **Insurance: Motor Vehicles.** Neb. Rev. Stat. § 60-509.01 (Reissue 1984) neither requires nor prohibits the aggregation, or "stacking," of multiple uninsured motorist coverage.
3. **Insurance: Motor Vehicles: Intent.** The legislative policy behind Neb. Rev. Stat. § 60-509.01 (Reissue 1984) was to give a person injured by an uninsured motorist the same protection he or she would have had if injured by one covered by a standard automobile liability policy.
4. **Insurance: Contracts: Intent.** 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.
5. **Insurance: Contracts: Case Overruled.** An insurer may by contract limit its liability as long as it does not violate public policy. Where a provision of a policy of automobile insurance which clearly limits its applicability as to uninsured motorist coverage to the "covered" automobile, to the exclusion of other insured-owned automobiles not covered by that particular policy, such prohibition against "stacking" of coverage does not violate the spirit or the letter of Neb. Rev. Stat. § 60-509.01 (Reissue 1984). To the extent that *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970), *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970), and *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), are contrary to this opinion, they are overruled.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part reversed with directions to dismiss.

Daniel D. Jewell of Jewell, Gatz & Collins, for appellants

Aetna Casualty and Surety Company and The Automobile Insurance Company.

Jeffrey A. Silver, for appellant Great Plains Insurance Co.

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

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

HASTINGS, J.

This case involves two general issues: (1) The legal liability of one motor vehicle operator to the other for damages arising out of an automobile accident; and (2) The question of whether the uninsured motorist coverages of several policies of insurance may be "stacked."

All three insurance company appellants contest the finding of fault on the part of the uninsured motorist, and the resulting liability of them, and, with the exception of Automobile Insurance Company of Hartford, Connecticut, contest the "stacking" of policies. The defendant Farmers Mutual Insurance Company of Nebraska did not appeal.

This litigation arose out of an automobile accident which occurred on March 8, 1981, on Highway 91 in Platte County. It involved the eastbound pickup truck driven by the plaintiff and the westbound automobile driven by Gary Eisenmenger, the uninsured motorist.

At the time of the accident the plaintiff was an adult who lived with his mother and father and who owned the pickup truck, although it was registered in both his and his father's names. That truck was insured in the plaintiff's name by the defendant Automobile Insurance Company of Hartford, Connecticut, which provided for $30,000 of uninsured motorist coverage.

In addition, the following policies of insurance are involved in this litigation: A Great Plains Insurance Co., Inc., policy with $15,000 of uninsured motorist coverage, issued on a 1978 Chevrolet Corvette owned by and titled in the name of the plaintiff; an Aetna Casualty and Surety Company policy providing for $30,000 of uninsured motorist coverage, issued

on a 1979 Ford truck titled in the name of plaintiff's father and himself, and on a 1978 Ford LTD passenger automobile titled in the name of plaintiff's father and mother; and a Farmers Mutual Insurance Company of Nebraska policy which provided for $15,000 of uninsured motorist coverage, issued on a 1972 Ford truck owned by and titled in the name of plaintiff's father.

A jury was waived, and following trial to the court, it made formal "Findings of Fact," concluding that Eisenmenger was an uninsured motorist whose negligence was the sole proximate cause of the accident, that plaintiff was not guilty of contributory negligence, and that plaintiff suffered damages in the amount of $120,000. Judgment was then entered for plaintiff against the defendants Automobile Insurance Company of Hartford, Connecticut, and Aetna Casualty and Surety Company in the amount of $30,000 each, and against the defendants Great Plains Insurance Co., Inc., Omaha, Nebraska, and Farmers Mutual Insurance Company of Nebraska, Lincoln, Nebraska, in the amount of $15,000 each, together with attorney fees totaling $29,632.50, prorated proportionately among the various defendants.

Assigned as errors are the court's findings that the uninsured motorist coverages of Aetna and Great Plains are applicable as to this accident, and the findings that the uninsured motorist was negligent and the plaintiff was not contributorily negligent.

We discuss first the finding as to the tort liability of Eisenmenger. This was a near head-on collision. There was evidence of a considerable amount of drinking of alcoholic beverages by Eisenmenger for several hours preceding the time of the accident. He also testified that he did not remember anything about the events immediately preceding and at the time of the accident.

The testimony of the patrolman who investigated the accident indicated that when he arrived at the scene, plaintiff's pickup truck was sitting on the centerline of the highway, a little bit to the north, facing northeast, and the Eisenmenger automobile was on the south side of the highway, facing more or less northeast. The patrolman also found some skid marks on the highway surface, which he opined were left by the left

front wheel of the Eisenmenger automobile and the right front wheel of the plaintiff's truck. He concluded that the point of impact was the center of the highway.

Plaintiff testified that immediately before the accident he was driving east in the south lane and first saw the Eisenmenger automobile approximately 200 feet away, approaching him in, or just coming out of, the ditch on the south side of the highway. The plaintiff hit his brakes, but the other vehicle veered out of the ditch and hit him.

There was testimony from two of the physicians who had attended or examined plaintiff that plaintiff was not able to, i.e., did not, tell them any of the facts of the accident when questioned at a specific time, although neither party pursued that line of questioning.

An accident reconstruction specialist, called to testify by the plaintiff, gave as his opinion that at the time of the collision both vehicles were in the plaintiff's, or eastbound, lane of traffic, with the Eisenmenger vehicle headed in a northwest direction, apparently from the south side of the highway.

A witness with equally impressive credentials, called by the defendants, gave as his opinion that the automobiles could not have collided in the manner testified to by the first expert but, rather, that the collision occurred at a time when both vehicles were in the north lane, or the lane in which Eisenmenger properly belonged.

In sum, there was competent evidence to support conclusions that the sole proximate cause of the collision was the negligence of the plaintiff, or of Eisenmenger, depending upon whose testimony is believed.

In an action at law, where a jury has been waived and the evidence is in conflict, this court, in reviewing the judgment, will presume that the controverted facts were decided by the trial court in favor of the successful party, and those findings will not be disturbed on appeal unless clearly wrong. It is not within the province of this court to resolve conflicts in or reweigh the evidence. *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983). There is no merit to the assignments of error relating to the relative negligence of the two drivers.

The two policies written by the defendants Aetna and Great

Plains provided nearly identical provisions regarding the exclusion of uninsured motorist coverage. Aetna's policy is as follows: "A. We do not provide Uninsured Motorists Coverage for bodily injury sustained by any person: 1. While **occupying**, or when struck by, any motor vehicle or trailer of any type owned by you or any **family member** which is not insured for this coverage under this policy." The provision contained in the Great Plains policy reads: "Exclusions: This policy does not apply under Part IV: (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile."

The Great Plains policy describes an "insured automobile" as "(a) an automobile described in the policy for which a specific premium charge indicates that coverage is afforded."

These appellants assign as error the district court's decision to allow the uninsured motorist coverage of those two policies of insurance to be "stacked" in order to cover the plaintiff's injuries.

Neb. Rev. Stat. § 60-509.01 (Reissue 1984) provides in pertinent part:

> No policy insuring against loss resulting from liability imposed by law for bodily injury . . . suffered by any person arising out of . . . use of a motor vehicle shall be . . . issued . . . unless coverage is provided . . . in limits for bodily injury . . . set forth in section 60-509 . . . for the protection of persons insured thereunder who are legally entitled to recover damages from . . . operators of uninsured motor vehicles . . . because of bodily injury . . . resulting therefrom; *Provided,* that the named insured shall have the right to reject such coverage; . . . .

This section, however, neither requires nor prohibits the aggregation of multiple uninsured motorist coverage. *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985).

> 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.

Id. at 769-70, 366 N.W.2d at 421.

As the statute neither requires nor prohibits stacking, the question then becomes, What does the language of the insurance policy in question provide? *Charley, supra.*

This shift back to interpreting insurance contracts under the letter of the law is in sharp contrast to earlier cases which seemingly looked to the spirit of the law in interpreting various uninsured motorist provisions. *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970); *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970); *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 (1981).

In these cases § 60-509.01 was viewed as remedial in nature, *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981), and the statute was broadly construed to benefit the innocent victim of the financially irresponsible uninsured motorist. *Protective Fire, supra*; *Eich, supra.* By such broad interpretation in favor of the victim, this court was able to invalidate "other insurance," "proration," or "excess escape" clauses which acted to limit an insurer's liability. Viewing "stacking" as simply an outgrowth of the insured's reasonable expectation of coverage where premiums were paid to protect the accident victims, this court allowed aggregation in an attempt to more fully compensate the victim for his injuries at the hands of an uninsured motorist. *Eich, supra*; *Protective Fire, supra*; *Bose, supra.*

Charley, supra, shifted the focus to earlier case law which reasoned that the policy behind the statute was to give a person injured by an uninsured motorist the same protection he would have had if injured by one covered by a standard automobile liability policy. *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968).

Thus, the party's reasonable expectation of coverage is to be measured not by premiums paid but by the clear terms of the

insurance policy as understood by the reasonable, ordinary man.

> 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).

Charley, supra at 770, 366 N.W.2d at 421.

While *Charley* was written with respect to interpreting one insurance policy insuring two vehicles, whereas here the court is considering several different policies on different vehicles, to distinguish *Charley* as not controlling based on this fact alone is to exalt form over substance.

Looking, then, to the policies which are challenged on appeal, the plaintiff held an insurance policy on his Chevrolet Corvette issued by appellant Great Plains Insurance Co. The policy provided for uninsured motorist coverage for "the named insured and any relative." Coverage, however, did not extend "(a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile." An "insured automobile" was defined *inter alia* as "(a) an automobile described in the policy for which a specific premium charge indicates that coverage is afforded." The policy covered only the Corvette.

The plain terms of the contract extend coverage to the named insured (or relative) while occupying an owned automobile, only if that automobile is specifically covered by the declaration in the policy.

The plaintiff's father carried an insurance policy on his 1979 truck and 1978 Ford LTD from appellant Aetna Casualty and Surety Co. The policy provided uninsured motorist coverage for the insured and any family member or any other person occupying the covered automobile. The plaintiff was a family member. "Covered auto" is defined as "[a]ny vehicle shown in

the Declarations." These vehicles were the 1979 truck and the 1978 Ford LTD.

The exclusion from coverage for uninsured motorist provided: "A. We do not provide Uninsured Motorists Coverage for bodily injury sustained by any person: 1. While **occupying**, or when struck by, any motor vehicle or trailer of any type owned by you or any **family member** which is not insured for this coverage under this policy."

Once again, the language of the contract is clear: no coverage exists as to an owned automobile beyond that found while in the named "covered" automobile. While family members are "covered," coverage does not extend while family members are in other vehicles owned by them or the named insured that are not described in the specific policy.

Referring for a moment to the liability coverage on standard automobile insurance policies, we do not believe that it would be seriously argued that one who was injured because of the negligent operation of insured's auto *A*, insured for $100,000 in a separate policy, could "stack" similar coverages of $100,000 from each of two additional policies insuring insured's autos *B* and *C*, and thereby have available $300,000 of coverage.

Coverage would not be available in this instance from the latter two policies because of the standard exclusions, which read in substance that coverage is not provided "[f]or the ownership, maintenance or use of any vehicle, other than **your covered auto**, which is owned by you [insured] or furnished or available for your regular use," or the policy does not apply "to the ownership, maintenance, operation, use . . . of an automobile . . . acquired by the named insured during the policy period . . . if the named insured has purchased other automobile liability insurance applicable to such automobile . . . ."

These provisions would seem to prohibit "stacking" of liability coverage in those instances, as do the clear terms of the policies in the instant case preclude recovery by the plaintiff here.

Such a conclusion is not contrary to public policy. As noted earlier, there is no public policy requiring stacking. *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985). And as case law has long enunciated, an insurer may by

contract limit its liability as long as it does not violate public policy. *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984).

Further, as the language of a contract is the final expression of the intent of the parties, *Moreland v. Transit Auth. of Omaha*, 217 Neb. 775, 352 N.W.2d 556 (1984), and *Meyers v. Frohm Holdings, Inc.*, 211 Neb. 329, 318 N.W.2d 716 (1982), denying recovery under these two policies does not fly in the face of the reasonable expectations of the parties.

Neither does denial of benefits give a windfall to the insurance company, as earlier cases suggest. See *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970).

> 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.

Charley, supra at 771, 366 N.W.2d at 421-22.

As for the argument the denial of "stacking" affords the victim less than complete recovery for his injuries, *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970), *Protective Fire, supra*, and *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), anyone purchasing uninsured motorist coverage is not limited to the amount stated in Neb. Rev. Stat. § 60-509 (Reissue 1984). The statute states only the minimum amount of coverage required. Any insured is free to negotiate for greater coverage within a given policy. *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976). The mere fact that an insured purchases coverage which is less than adequate to cover the loss, be it uninsured motorist, liability coverage, or physical damage coverage, does not operate to invalidate the policy, nor does it violate public policy.

We hold that where a provision of a policy of automobile insurance clearly limits its applicability as to uninsured motorist coverage to the "covered" automobile, to the exclusion of other insured-owned automobiles not covered by that particular policy, such prohibition against "stacking" of coverage does

not violate the spirit or the letter of § 60-509.01.

Accordingly, the judgments of the district court against the defendants Aetna Casualty and Surety Company and Great Plains Insurance Co., Inc., are reversed, and the cause is remanded with directions to dismiss as to those defendants. The judgment as to the defendant Automobile Insurance Company of Hartford, Connecticut, is affirmed.

To the extent that the holdings in *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970), *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970), and *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), are contrary to this opinion, they are overruled.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS TO DISMISS.

TIMOTHY JAMES HADLEY, APPELLEE, V. MARLAN IDEUS AND SHERRIE L. DUX-IDEUS, HUSBAND AND WIFE, APPELLANTS.

374 N.W.2d 231

Filed September 27, 1985. No. 84-398.

1. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. _____. Where one enters upon and takes possession of land of another under mistake as to the true boundary line, claiming the land as his own to a definite and certain boundary, he acquires title thereto by adverse possession by actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more.
3. _____. Possession of real estate by permission of the owner can never ripen into title by adverse possession unless the change of such possession has been brought home to the true owner.
4. **Adverse Possession: Boundaries.** Where a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of the land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession.
5. **Adverse Possession: Intent.** It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character.

6. _____: _____. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
7. **Equity: Appeal and Error.** The law requires this court in determining an appeal in an equity action involving questions of fact to reach an independent conclusion without reference to the findings of the district court. In determining the weight of the evidence where there is an irreconcilable conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

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

Paul Korslund of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellants.

Fredrick L. Swartz, for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and CHEUVRONT, D.J., and COLWELL, D.J., Retired.

CHEUVRONT, D.J.

This is an action to quiet title by adverse possession brought by the appellee, Timothy James Hadley (Hadley), against the appellants, Marlan Ideus and Sherrie L. Dux-Ideus (Ideus), in the district court for Gage County, Nebraska.

Hadley is the owner of Lot 5, Block 3, Grable and Beachley's Third Addition to the City of Beatrice, Gage County, Nebraska. Ideus is the owner of Lot 4 of said block, lying directly north of Lot 5. The disputed land lies immediately north of the common boundary line between Lots 4 and 5. Following a trial, the district court found that Hadley had acquired the south 3 1/2 feet of Lot 4 by adverse possession and quieted title to said property in Hadley. Ideus has appealed.

The record shows that in 1956 George Woodruff obtained title to Lot 5. At that time Lot 4 was owned by Mattie H. Wickham and was a vacant lot, although there was a fruit cellar located thereon. In 1957 or 1958, having obtained permission from Wickham, Woodruff planted a vegetable garden on Lot 4 and also used the fruit cellar. Woodruff continued to garden this

area for a number of years. Inez Guy, a neighbor who lived behind Woodruff to the west, testified that, to the best of her knowledge, Woodruff did not have a garden on Lot 4 after the mid-1960s, since he shared garden space with her.

In 1964 or 1965 Woodruff erected a fence on Lot 4 which ran from a point near the front, or east, edge of the property to a point near the northeast corner of his garage, a distance of approximately 66.7 feet. The fence was not quite parallel to the common property line, being 3.5 feet north of the line on the east and 2.4 feet north at the end near the garage. Woodruff planted some rosebushes on the south side of the fence, and sometime around 1967 or 1968 planted a row of cedar trees on the line appearing to be a continuation of the fence line, starting behind the garage and running west to a point approximately 10 feet east of the rear lot line. This line extended would appear to terminate at a point on the west line of Lot 4, approximately 1.62 feet north of the common property line.

The fence consisted of square posts with two rails running from post to post, and was painted white. From the time of its construction it has been maintained and painted by Woodruff and his successors in title, including Hadley. Woodruff and his successors also maintained the cedar trees and the grass on both sides of the fence.

Ideus contends that by reason of Woodruff's being allowed to plant a vegetable garden on Lot 4, his use was permissive, and the erection of the fence and planting of the cedar trees and rosebushes was consistent with the original permissive use. Generally, possession of real estate by permission of the owner cannot ripen into title by adverse possession until after a change of position by the one claiming title by possession has been brought home to the true owner. *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983). The question here is whether the construction of the fence was an act or declaration of hostility sufficiently inconsistent with the permissive use to constitute notice of a hostile possession.

There is no direct evidence that the fence was ever used as part of the garden, such as a support for plants. Obviously, it is not the type that would prevent animals from going into the garden area. We conclude that the fence, rosebushes, and cedar

trees were not part of the garden or attendant thereto and are inconsistent with any use of the property for a garden. This particular fence appears to be a boundary fence.

Generally, where a fence is constructed as a boundary line, although it is not the actual boundary line, and the party claims ownership of the land up to the fence for an uninterrupted period of 10 years, such party obtains title to the land by adverse possession. *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981); *Conkey v. Anderson Farms, Inc.*, 205 Neb. 708, 289 N.W.2d 541 (1980).

The general rules with respect to acquiring title by adverse possession are well settled in Nebraska. A party who claims title by adverse possession must prove by a preponderance of the evidence that he and his predecessors in title have been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. *Petsch v. Widger, supra.*

The claim of adverse possession is founded upon the intent of the occupant, such intent being determined by his acts. *Nebraska State Bank v. Gaddis*, 208 Neb. 136, 302 N.W.2d 686 (1981). In *Purdum v. Sherman*, 163 Neb. 889, 893, 895, 81 N.W.2d 331, 334-35 (1957), this court said:

> The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held rather than an intention to hold in accordance with his deed that is controlling. The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto. . . .
>
> . . . .
>
> . . . It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is

barred from action thereafter and the title of the claimant is complete.

The evidence in this case establishes that the boundary-type fence was erected and the rosebushes and cedar trees planted more than 10 years prior to any claim by Ideus. Throughout this period, the fence was painted, the bushes and trees were trimmed and maintained, and the area on both sides of the fence was mowed by Hadley and his predecessors in title. Such acts are such as to be consistent with those performed by owners and constitute evidence of claim of title adverse to Ideus.

Our review of appeals in equity actions requires us to reach an independent conclusion as to disputed facts. However, where there is an irreconcilable conflict on material factual issues, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. *Nebraska State Bank v. Gaddis, supra.*

Applying this standard of review, we conclude that the trial court's finding that the appellee was in actual, continuous, exclusive, notorious, and adverse possession of the disputed strip under a claim of ownership for a full period of 10 years was correct.

Although we conclude that the evidence was sufficient to establish title to the disputed land by adverse possession, as we previously pointed out, that established line did not run parallel to the common boundary line for the full distance from east to west. Therefore, the judgment of the district court is modified to quiet title in the plaintiff to a portion of Lot 4, Block 3, Grable and Beachley's Third Addition to the City of Beatrice, Gage County, Nebraska, described as follows:

> Beginning at a point on the east line of Lot 4, at a point 3.5 feet north of the common boundary line between Lots 4 and 5, thence generally in a westerly direction on a straight line a distance of 66.7 feet to a point 2.4 feet north of said common boundary line, thence continuing on a straight line in a generally westerly direction a distance of 82.3 feet to a point on the west line of Lot 4, 1.62 feet north of said common boundary line, thence south along the west line to said common boundary line, thence east on said common boundary line a distance of 149 feet to

the east line of Lot 4, thence north along said east line a distance of 3.5 feet to the place of beginning.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, GAME AND PARKS CHAPTER, APPELLANT, V. GAME AND PARKS COMMISSION, STATE OF NEBRASKA, APPELLEE.
NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, ROADS CHAPTER, APPELLANT, V. DEPARTMENT OF ROADS, STATE OF NEBRASKA, APPELLEE.

374 N.W.2d 46

Filed September 27, 1985. Nos. 84-519, 84-520.

1. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is not a court but is an administrative body performing a legislative function.
2. **Administrative Law: Legislature.** It is fundamental that in the legislative grant of power to an administrative agency such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act.
3. **Commission of Industrial Relations: Jurisdiction.** The statutory jurisdiction of the Commission of Industrial Relations is to settle pending controversies.
4. _____: _____. The Commission of Industrial Relations has no authority to enter declaratory judgments or exercise other judicial functions.
5. _____: _____. A request for an advisory determination that does not result in the settlement of an industrial dispute is beyond the jurisdiction of the Commission of Industrial Relations.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

Robert Wm. Chapin, Jr., of Mowbray & Chapin, P.C., for appellant.

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

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

WHITE, J.

This is an appeal by the Nebraska Association of Public Employees (NAPE) from two orders of the Commission of Industrial Relations (CIR) dismissing NAPE's amended petitions for lack of subject matter jurisdiction.

NAPE is the certified, exclusive bargaining agent for the employees of the Game and Parks Commission and the Department of Roads. Appellant submitted proposals for the 1984-85 contracts. The appellee also submitted proposals and counterproposals in each case. The parties met several times but failed to reach an agreement, due to conflicting legal opinions regarding what terms could properly be negotiated. On April 5, 1984, the appellant filed a petition with the CIR in each case, requesting that it define the mandatory noneconomic terms and conditions of employment with respect to which the appellee is obligated to bargain under Nebraska's public employment bargaining laws and that the CIR enter a bargaining order for the 1984-85 contract year.

After a preliminary proceeding pursuant to Neb. Rev. Stat. § 48-816 (Reissue 1984), in which the CIR ordered NAPE to show cause why the proceeding should not be dismissed, the appellant submitted amended petitions asserting that the jurisdiction of the CIR was invoked by the rules of the CIR. The CIR dismissed the petitions for lack of subject matter jurisdiction, relying on Neb. Rev. Stat. § 48-837 (Reissue 1984), which, according to the CIR, "requires collective bargaining agreements with state agencies to be submitted for approval by the Legislature at the same legislative session as the budget for that period is adopted by the Legislature." We affirm for different reasons than those relied on by the CIR.

The appellant claims that the CIR erred in dismissing appellant's case for lack of subject matter jurisdiction in accordance with its interpretation of § 48-837. We do not reach that issue.

We have previously said that the CIR is not a court but is an administrative body performing a legislative function. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). An administrative body has no power or authority other than that

specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act. *Transport Workers of America, supra.* See, also, *Slosburg v. City of Omaha*, 183 Neb. 839, 165 N.W.2d 90 (1969).

It is fundamental that in the legislative grant of power to an administrative agency such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act. *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979). See, also, *Transport Workers of America, supra.*

The authority of the CIR is carefully prescribed by statute. Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns. See *University Police Officers Union, supra.* Neb. Rev. Stat. § 48-810 (Reissue 1984) describes the jurisdiction of the CIR and states in part: "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 . . . ." Section 48-837 further states:

> Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing. Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder; *Provided*, that any such agreements with the State of Nebraska or any agency thereof shall cover an annual period coinciding with the annual budgeting period of the state and shall be subject to approval by the Legislature.

The statutory jurisdiction of the CIR is to settle pending controversies, § 48-810. We have said that the CIR has no authority to enter declaratory judgments or exercise other judicial functions. *State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees*, 205 Neb. 107, 286 N.W.2d 433 (1979). A request for an advisory determination that does not result in

the settlement of an industrial dispute is beyond the jurisdiction of the CIR.

In the instant cases the CIR did not have subject matter jurisdiction to hear the cases and properly dismissed them.

AFFIRMED.

CAPORALE, J., not participating.

BOSLAUGH, J., concurs in the result.

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

I concur in the result reached by the majority in this case. I write separately, however, because I believe that the court's failure to refer to our earlier decision of *State Code Agencies Ed. Assn. v. Department of Pub. Insts.*, 219 Neb. 555, 364 N.W.2d 44 (1985), and either to point out how these two cases can be distinguished or to acknowledge that we were in error in our earlier decision and should now overrule that case only adds further confusion to this entire area.

In our earlier decision we concluded by noting at 559, 364 N.W.2d at 46-47: "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." Though we did not consider how the order of the CIR could be enforced in view of the fact that the Legislature had already appropriated the funds for the departments and agencies of the state in the cases before the CIR, we nevertheless concluded that the CIR had jurisdiction to set the wage rate, theoretical or advisory as that act might be.

In the present case we have concluded that the CIR did not have jurisdiction because the matter presented to the CIR in each case would not result in a settlement of an industrial dispute and therefore was advisory in nature. While there may be some distinction between the two, at this moment I have difficulty seeing what that may be. I am inclined, however, to believe that the current decision is correct and that our decision in the earlier case of *State Code Agencies Ed. Assn. v. Department of Pub. Insts., supra,* was in error. In my view we should now resolve that confusion by either acknowledging the conflict or explaining the difference. No one is served by simply ignoring the issue.

T.V. TRANSMISSION, INC., APPELLEE, V. CITY OF LINCOLN, DOING BUSINESS AS LINCOLN ELECTRIC SYSTEM, APPELLANT.

374 N.W.2d 49

Filed September 27, 1985. No. 84-549.

1. **Contracts.** An unambiguous contract is not subject to interpretation or construction.
2. **Contracts: Intent.** In an unambiguous contract the intention of the parties must be determined from its contents alone.
3. _____: _____. An ambiguity exists when an application of the rules of construction leaves uncertain which of two or more meanings represents the true intention of the parties.
4. **Contracts: Courts.** Courts are not free to rewrite a contract for the parties or speculate as to terms which the parties have not seen fit to set out.
5. **Contracts.** An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation.
6. _____. The whole contract must be considered when seeking its meaning.
7. **Contracts: Intent.** The parties are bound by the terms of their contract even though their actual intent may have been different than that expressed in the document.
8. **Administrative Law: Municipal Corporations: Contracts.** A city, in the absence of legislative authorization, has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority.
9. **Municipal Corporations: Contracts.** A municipal corporation's contract is ultra vires when the corporation has no power to make the contract under any circumstances or for any purpose.
10. **Municipal Corporations: Public Utilities.** A city's purchase of an electric system is a nongovernmental business enterprise.
11. **Municipal Corporations: Contracts: Corporations.** In contracts relating to its proprietary interests, a municipal corporation is bound by the same rules as are private corporations.
12. **Public Utilities: Rates.** 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 Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Douglas L. Curry and Mary C. Wickenkamp of Erickson & Sederstrom, P.C., for appellant.

John H. Fullenkamp and Betty L. Egan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

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

PER CURIAM.

T.V. Transmission, Inc., a corporation succeeding to the rights of CATV Company in a contract with the City of Lincoln, doing business as Lincoln Electric System, brought this action seeking a declaration of rights under the contract and an injunction preventing Electric System from treating T.V. Transmission as if it had breached the contract by refusing to agree to a greater pole attachment rental than that initially specified in the contract document. Electric System counterclaimed, seeking a declaration that T.V. Transmission had defaulted on the contract. The district court entered judgment in favor of T.V. Transmission, enjoined Electric System from treating T.V. Transmission as if it had defaulted, and impliedly dismissed Electric System's counterclaim. For the reasons hereinafter stated we affirm.

On September 21, 1967, Electric System, T.V. Transmission's predecessor, and another entered into an agreement whereby the predecessor was given the right to attach certain of its cable television equipment on poles owned by Electric System. The contract states that

> CATV Company shall pay to Electric System for attachment made to poles owned by it . . . a rental at the rate of $3.00 per pole per year attached by CATV Company. The total amount of such rental shall be payable annually in advance with the first such payment to be made on the first day such television system is initially placed in service. Thereafter, rental shall be payable in advance on the anniversary of such first day in an amount equal to the number of poles attached to by CATV Company on such day times $3.00.
>
> The annual rental and/or expense deposit payable by CATV Company under this agreement may be adjusted at any time after five (5) years from the date of this agreement upon the written request of any party hereto. In case of adjustment any new rental or expense deposit agreed upon shall continue in effect for five (5) years

thereafter, at which time such rental and/or expense deposit shall again be subject to review and readjustment upon the written request of any party thereto.

The document further provides that the

agreement shall become effective upon September 1, 1967 and if not terminated in accordance with the provisions of Section 15 shall continue in effect for a term of not less than twenty (20) years. Any party may terminate the agreement at the end of said twenty (20) year period, or at any time thereafter, by giving to the other parties at least twelve (12) months' prior written notice.

The termination provision referred to above recites:

If CATV Company shall fail to pay any rental or other charges agreed to be paid under this agreement, or if CATV Company shall fail to comply with any of the other provisions of this agreement, or default in any of its other obligations in this agreement, and shall fail within thirty (30) days after written notice from . . . Electric System to correct such failure, default or noncompliance . . . Electric System may, at [its] option, forthwith terminate this agreement or the permit covering the poles as to which such default or noncompliance shall have occurred. In the event that . . . Electric System terminate[s] this agreement, in whole or in part, CATV Company shall within thirty (30) days thereafter remove all attachments from . . . Electric System's poles involved and in the event that CATV Company does not remove its attachments within said period of thirty (30) days . . . Electric System may do so, the removal costs to be borne, in any event, by CATV Company.

On July 27, 1981, Electric System advised T.V. Transmission that the former wished to review the contract with a view toward, among other things, establishing a new pole attachment rental charge "prior to the anniversary date in September, 1981."

Efforts to reach an agreement to increase the pole attachment rental to $4.80, as Electric System wished, failed. Thereafter, Electric System notified T.V. Transmission that the latter was in default of the contract. T.V. Transmission then instituted this suit.

Electric System assigns five errors: that the trial court's decision (1) is contrary to law as contravening the intention of the parties, (2) exceeds the court's authority by setting a rate for a public utility, (3) compels the honoring of a contract which is ultra vires, (4) compels discrimination among similar classes of ratepayers, and (5) renders the contract unconscionable.

We begin the analysis of the issues raised by Electric System's first assignment of error by recalling that an unambiguous contract is not subject to interpretation or construction and that in such a contract the intention of the parties must be determined from its contents alone. *Moreland v. Transit Auth. of Omaha*, 217 Neb. 775, 352 N.W.2d 556 (1984); *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983); *Meyers v. Frohm Holdings, Inc.*, 211 Neb. 329, 318 N.W.2d 716 (1982); *Baltes v. Hodges*, 207 Neb. 740, 301 N.W.2d 92 (1981); *Rullman v. LaFrance, Walker, Jackley & Saville*, 206 Neb. 180, 292 N.W.2d 19 (1980).

A literal reading of the contract language establishes that the contractual relationship between Electric System and T.V. Transmission is to exist through at least August 31, 1987, during which time the parties have an opportunity to, by agreement but not unilaterally, increase or decrease the pole attachment rental for a 5-year period at any time from and after September 1, 1972. The parties chose to remain silent on what was to happen if such an adjustment could not be agreed upon. This circumstance, however, does not render the agreement ambiguous.

An ambiguity exists when an application of the rules of construction leaves uncertain which of two or more meanings represents the true intention of the parties. *Meyers v. Frohm Holdings, Inc., supra*. See, also, *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983). Rather than language which permits more than one intention of the parties to be inferred with respect to what is to occur in the absence of a future agreement as to a change in the pole attachment rental, there is no language from which to infer any intent whatsoever. That constitutes a void but not an ambiguity.

Courts are not free to rewrite a contract for the parties or speculate as to terms which the parties have not seen fit to set

out. *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros., supra.*

In *Alward v. United Mineral Products Co.*, 197 Neb. 658, 250 N.W.2d 623 (1977), the plaintiff employee and the defendant company entered into an oral contract whereby the employee was to be paid a base salary plus an incentive bonus of 10 percent of any reduction in plant production costs. This bonus was to be calculated from a formula to be agreed upon later; however, no such agreement was ever reached. In holding for the defendant company in a suit later filed by the employee seeking payment of this bonus, this court stated:

> Without such agreement, no formula could ever become effective. An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.

Id. at 661, 250 N.W.2d at 625.

A lease in *R.A.S., Inc. v. Crowley*, 217 Neb. 811, 813, 351 N.W.2d 414, 415 (1984), provided:

> At the expiration of this Second Supplemental Lease Extension Agreement on May 1, 1983, the second party shall have the privilege of an option for the further extension of this lease for an additional period of 10 years from and after May 1, 1983. Both parties agree that the rental terms and conditions for this lease shall be renegotiated as of May 1, 1983 for the 10 year term beginning on that date. The rental terms and conditions shall be negotiated upon a basis which is satisfactory and acceptable to both parties. Both parties agree to negotiate such terms consistant [sic] with conditions existing on May 1, 1983, to provide rental terms and conditions substantially the same as those now existing, with appropriate adjustments, however, satisfactory to both parties and covering the 10 year term beginning May 1, 1983.

In holding the foregoing provision unenforceable because the lease did not set forth the rent to be paid during the renewal

period and the parties were unable to reach an agreement thereon, the court noted:

> The law does not compel a duty to perform that which one has not contractually agreed to do, either expressly or impliedly. As no binding contract existed, nor is one alleged to be implied in law, we conclude the trial court was correct in declaring the option provision unenforceable.

Id. at 815, 351 N.W.2d at 416.

It is clear, then, that the modification provision before us constitutes nothing more than an agreement to agree in the future. In the absence of such a future agreement, the provision is of no effect and is therefore unenforceable.

The parties do not appear to argue otherwise, but do disagree sharply as to the result of this unenforceability. Electric System argues that the inclusion of the adjustment clause indicates that neither party intended to be bound to a 20-year $3 rental, and, therefore, the contract should terminate. T.V. Transmission, on the other hand, argues that the remainder of the contract remains valid and the unenforceable clause is to be severed.

Keeping in mind that the whole contract must be considered when seeking its meaning, *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983), and *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980), the trial court was correct in determining that, absent an agreed-upon modification by the parties, the contract was to continue for at least 20 years at the $3 rental specified upon execution. Any other interpretation would completely ignore the clause providing for a minimum 20-year duration, as well as the default provision which specifically enumerates when the contract can be terminated before the expiration of that period. Moreover, this reading does nothing to vitiate the clause were the parties to have reached an agreement to change the rental charge.

The parties are bound by the terms of their contract even though their actual intent may have been different than that expressed in the document. *Bass v. Dalton, supra.* Consequently, the first assignment of error is without merit.

In its second assignment of error Electric System argues that the trial court exceeded its authority and invaded the legislative

domain when it set the "rate" Electric System could charge T.V. Transmission. This argument fails for the very basic reason that the trial court did no such thing. Instead of setting anything, the court enforced the contract executed by the parties. It is that contract, not the court, which set the pole attachment rental, whether it be a "rate" or something else. That being so, the second assignment of error fails without any need to study the role of the judiciary in the utility ratesetting process.

Electric System next argues that the reading given the contract by the trial court renders it ultra vires due to the fact that the applicable statutes and municipal code reserve to the Lincoln City Council the authority to set all "rates." It urges that since, absent an agreement between the parties, the contract pole attachment rental cannot be changed until the expiration of the minimum 20-year contractual period, the council's authority to set rates has been usurped by the contract.

For support in making those contentions, Electric System cites *Seidel v. City of Seward*, 178 Neb. 345, 347, 133 N.W.2d 390, 392 (1965), which states that "[a] city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority." A more recent statement of the rule is found in *Gallagher v. City of Omaha*, 189 Neb. 598, 605, 204 N.W.2d 157, 161 (1973): "A city, in the absence of legislative authorization, has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority." However, the facts to which those rules were applied in the foregoing two cases are not in any sense similar to the facts of the case before us. *Seidel* refused to enforce an oral agreement of a single city councilman to locate a disputed boundary other than at its true location. While no city action was involved in *Seidel*, no claim is made in the present case that proper procedures were not followed in negotiating and executing the contract. *Gallagher* held that the statutes relied upon by the city and university did not authorize the university to acquire exclusive use during specified periods of a portion of one of the city's parks. There is no claim in this case that Electric System has no power to allow the use of its poles for a fee. A municipal corporation's contract is ultra vires when the corporation has no power to make the contract under any

circumstances or for any purpose. *Warren v. County of Stanton*, 145 Neb. 220, 15 N.W.2d 757 (1944).

Electric System's argument is really not that it had no power to enter into the contract but that 20 years is too long to have to live with the same terms. In effect, Electric System's argument is that in retrospect it finds it made a bad bargain. As we have seen from the analysis prompted by Electric System's first assignment of error, such a circumstance in and of itself provides no basis for rewriting the agreement.

There may be a point at which a contract for an unreasonably long duration may go beyond the objects for which a municipal corporation was created and therefore be ultra vires, see, 10 E. McQuillin, The Law of Municipal Corporations § 29.10 (3d ed. 1981), and 63 C.J.S. *Municipal Corporations* § 979 b. (1950), but there is no evidence in this case that a minimum period of 20 years is an unreasonably long duration for the particular contract involved.

We must bear in mind that what is involved in this case is the exercise by Electric System of a proprietary, as distinguished from a governmental, function. See *State, ex rel. Consumers Public Power District, v. Boettcher*, 138 Neb. 22, 291 N.W. 709 (1940), which holds that a city's purchase of an electric system is a nongovernmental business enterprise. In contracts relating to its proprietary interests, a municipal corporation is bound by the same rules as are private corporations. See, *State, ex rel. Consumers Public Power District, v. Boettcher, supra*; *Omaha Water Co. v. City of Omaha*, 147 F. 1 (8th Cir. 1906), *appeal dismissed* 207 U.S. 584, 28 S. Ct. 262, 52 L. Ed. 351 (1907).

Electric System's third assignment of error therefore also fails.

In its fourth assignment of error Electric System argues that since it charges the cable television company in Waverly an attachment rental of $4.80 per pole per year, enforcement of the subject contract at $3 per pole forces Electric System to discriminate against similar classes of ratepayers, in violation of the law.

Electric System apparently relies upon Neb. Rev. Stat. § 70-655 (Reissue 1981) and Lincoln Mun. Code § 2.55.070 (1984) for its ratesetting authority.

Section 70-655 states:

> The board of directors of any district organized under or subject to Chapter 70, article 6, shall have the power and be required to fix, establish, and collect adequate rates, tolls, rents, and other charges, for electrical energy, water service, water storage, and for any and all other commodities, services, or facilities sold, furnished, or supplied by the district, which rates, tolls, rents, and charges shall be fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district the benefits of a successful and profitable operation and conduct of the business of the district.

Section 2.55.070 provides:

> The board shall:
>
> . . . .
>
> (b) Purchase and contract for all materials, parts, services, supplies, and equipment required by Lincoln electric system; . . .
>
> . . . .
>
> (d) Do all other acts necessary to carry out the provisions of this ordinance save and except: (1) The matter of establishing rates which authority shall be vested solely in the Lincoln city council . . . .

To begin with, it is not clear, and we need not and therefore do not decide, whether § 70-655 covers the situation presented here or whether it covers only charges made by Electric System to its electric energy consumers. See, *McGinley v. Wheat Belt P.P. Dist.*, 214 Neb. 178, 332 N.W.2d 915 (1983); *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970); *Rutherford v. City of Omaha*, 183 Neb. 398, 160 N.W.2d 223 (1968).

Regardless of whether the requirement of nondiscriminatory charges is pertinent in this case, the fourth assignment of error must nonetheless fail. The plaintiff in *Bleick v. City of Papillion*, 219 Neb. 574, 365 N.W.2d 405 (1985), lived outside the city limits of Papillion but within the boundaries of a sanitary and improvement district. The district entered into a

contract with the city for water and sewer services which permitted the city to charge fees up to twice those charged to city residents for like services. In upholding the contract this court reasoned that as the furnishing of permitted services to persons outside the city limits is contractual and not a duty imposed by statute, "public utilities generally may discriminate, in respect to rates, between consumers within and those outside the municipalities primarily served." *Id.* at 577, 365 N.W.2d at 407.

Electric System, created by the Lincoln Municipal Code, may therefore treat Waverly residents differently than Lincoln residents.

Finally, Electric System argues that the trial court's reading of the contract renders it unconscionable. No such issue was presented to the trial court by Electric System in either its answer, counterclaim, or motion for new trial. It is raised for the first time in Electric System's brief in this court. In a like circumstance, *Guaranteed Foods v. Rison*, 207 Neb. 400, 299 N.W.2d 507 (1980), refused to consider the argument that a contract was unconscionable, citing the well-established rule that defenses not raised or litigated in the trial court cannot be raised for the first time on appeal.

Moreover, there is nothing in the record before us which brings into question the unconscionability of the contract at issue. In discussing the matter of the alleged unconscionability of a contract in the context of Neb. U.C.C. § 2-302 (Reissue 1980), this court, in *Melcher v. Boesch Motor Co.*, 188 Neb. 522, 526, 198 N.W.2d 57, 61 (1972), quoted with approval from the comments to that section as follows:

> "The basic test is whether in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable *under the circumstances existing at the time of the making of the contract*. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."

(Emphasis supplied.)

Admittedly, this is not a Uniform Commercial Code case; consequently, *Melcher* has no direct application. However, in view of the fact that the issue is not properly before us, we need not and do not decide whether a defense based upon the unconscionability of a contract extends to transactions other than for the sale of goods, 14 S. Williston, A Treatise on the Law of Contracts § 1632B (3d ed. 1972), nor do we need concern ourselves with what the precise elements of such a defense might be.

There being no merit to any of Electric System's assignments of error, the judgment of the trial court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IN RE 1983-84 COUNTY TAX LEVY BY BOX BUTTE COUNTY BOARD OF EQUALIZATION.

RAYMOND E. JESSE ET AL., APPELLEES AND CROSS-APPELLANTS, V. BOX BUTTE COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES AND CROSS-APPELLEES, SCHOOL DISTRICT OF HEMINGFORD, BOX BUTTE COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

374 N.W.2d 235

Filed September 27, 1985. No. 84-641.

1. **Final Orders: Appeal and Error.** An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto.
2. **Statutes.** A litigant who invokes the provisions of a statute may not challenge its validity.
3. **Schools and School Districts: Taxation: Appeal and Error.** Neb. Rev. Stat. § 79-4,102(3) (Cum. Supp. 1982) prescribes a specific method to review a levy made for nonresident high school education.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed and remanded for further proceedings.

Thomas A. Danehey of Reddish, Curtiss, Moravek and

Danehey; Laurice M. Margheim; William L. Howland of Bump, Howland and Watson; and G. Randolph Reed, for appellant School Districts.

Walter R. Metz, Jr., of Metz and Metz, for appellees Jesse et al.

Kenneth W. Payne, Box Butte County Attorney, for appellees Board of Equalization et al.

Neal E. Stenberg, for amicus curiae Nebraska Association of School Boards.

David A. Domina of Domina & Gerrard, P.C., for amicus curiae Nebraska Council of School Administrators.

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

BOSLAUGH, J.

This is an appeal from the levy for nonresident high school education made by the county board of equalization of Box Butte County, Nebraska, in 1983, pursuant to Neb. Rev. Stat. § 79-4,102 (Cum. Supp. 1982).

The plaintiffs are residents and taxpayers of Class I school districts (K-8) in Box Butte County. The defendants are the school districts of Alliance, Hemingford, Crawford, and Mitchell, Nebraska, which are Class III school districts (K-12) under Neb. Rev. Stat. § 79-102 (Reissue 1981). The county board of equalization, the county treasurer, and the county superintendent of Box Butte County, Nebraska, are also named as defendants.

Class I school districts by definition do not maintain high schools. See § 79-102(1). Students who are residents of Class I districts may obtain high school educations in Class III districts. See Neb. Rev. Stat. § 79-486 (Reissue 1981). The cost of providing high school education is then divided between the Class I "sending" districts and the Class III "receiving" districts. Section 79-4,102 prescribes a procedure by which a levy is determined, which is then applied to the taxable property in the Class I districts.

Over the years the computation of the cost to be borne by

taxpayers in Class I districts has varied from a flat rate, § 79-4,102 (Cum. Supp. 1967), to per pupil costs, § 79-4,102 (Reissue 1976), to the complex computation found in § 79-4,102 (Cum. Supp. 1982). Section 79-4,102 was again amended in 1984. See § 79-4,102 (Cum. Supp. 1984).

The petition on appeal which was filed in the district court on September 9, 1983, alleged that the action was brought on behalf of all property owners in non-high-school districts in Box Butte County who were similarly situated; that the 1982 amendments to § 79-4,102 (1982 Neb. Laws, L.B. 933) were unconstitutional; that the levy was in excess of the requirements of Box Butte County; and that portions of the levy were for an unlawful and unnecessary purpose. The petition prayed that the district court find that L.B. 933 was unconstitutional; that the illegal and unauthorized portion of the levy be determined; and that the county treasurer be directed to reduce the taxes to be collected pursuant to the levy by eliminating the unauthorized and illegal portion of the levy. The petition also prayed for other additional relief.

In a pretrial order the district court directed that the constitutionality of L.B. 933 would be determined first and that this would constitute "a final order for purposes of appeal to the supreme court." All remaining issues were to be tried after the "order in the first trial has become final."

The parties have stipulated that the levy was "correctly calculated and set in accordance with Section 79-4,102 R.S.Supp, 1982 (LB933)."

After a hearing on the constitutional issues only, the trial court found that the action could be maintained as a class action, that the plaintiffs were not estopped to maintain the action, and that L.B. 933 was unconstitutional in its entirety. Notices of appeal to this court were then filed by the four receiving districts.

Three of the appellees contend that the appeal should be dismissed for lack of a final order because the trial court determined only the constitutional issues and all other issues raised by the pleadings remain undetermined.

Ordinarily, when the trial court has reserved some of the issues for final determination, an order determining only a part

of the issues is not a final order, and an appeal from such an order is premature. In this case the trial court determined that L.B. 933 was unconstitutional in its entirety. The effect of that order, in the absence of an appeal, would be to require that nonresident high school tuition be determined under the statute as it existed prior to the 1982 amendment. It would require a calculation of per pupil costs by the various receiving districts, and there would be no further issues to be determined by the trial court at this time. An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto. *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1963).

We conclude that the decree filed on August 2, 1984, was a final order and this court has obtained jurisdiction of the appeal.

The action was brought by the plaintiffs on behalf of "themselves and for all of the other owners of property in the non-high school districts of Box Butte County, Nebraska, similarly situated." The trial court found that the action could be maintained as a class action.

Although the plaintiffs did not specifically ask for a refund of taxes, the petition refers to "the funds created by the declarations of the Court" and prays that attorney fees be paid from such a fund. The general rule is that an action to recover taxes illegally assessed cannot be maintained as a class action. *Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972), *supp. op.* 188 Neb. 798, 197 N.W.2d 655.

There is also evidence of "potentially conflicting interests within the class" in that some members of the class own property located in both the receiving districts and in the sending districts. A class action must be for the benefit of all members of the class and may be maintained only where there is no conflict of interest among members of the class. *Evans v. Metropolitan Utilities Dist.*, 185 Neb. 464, 176 N.W.2d 679 (1970). Where the record shows the potentiality of conflict of interest among the members of the class, the action may not be maintained as a class action. *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976).

The finding by the trial court that the action could proceed as a class action was erroneous.

The appellants contend that the plaintiffs are estopped from questioning the constitutionality of the statute in an appeal from the levy, because the procedure for the appeal is provided in the statute itself. The trial court found for the plaintiffs on this issue.

> "This court has held many times that a litigant who invokes the provisions of a statute may not challenge its validity; nor seek the benefit and in the same action and at the same time question its constitutionality." *Alumni Control Board v. City of Lincoln*, 179 Neb. 194, 199, 137 N.W.2d 800, 804 (1965).

In re Dissolution of School Dist. No. 22, 216 Neb. 89, 91, 341 N.W.2d 918, 919 (1983). The court further concluded:

> "The plaintiffs in this action have availed themselves of the remedy provided by the statute. They seek the benefit of the statute to obtain a determination that the action of the city was not authorized under the statute. They are, therefore, prevented in this action from questioning the constitutionality of the statute under which they have proceeded. . . ."

In re Dissolution of School Dist. No. 22, supra at 91-92, 341 N.W.2d at 920, quoting *Shields v. City of Kearney*, 179 Neb. 49, 136 N.W.2d 174 (1965).

The plaintiffs argue that the rule stated above should not apply in this case because the appeal was brought pursuant to Neb. Rev. Stat. § 77-1606 (Reissue 1981). Section 77-1606 is a general statute which prescribes a procedure for taking an appeal from a levy made by the county board.

Prior to L.B. 933, there was no special statute providing for an appeal from a levy for nonresident high school education. In 1982 the Legislature amended § 79-4,102 to provide that any taxpayer might appeal from the action of the county board of equalization in resident high school tuition "in the manner provided in sections 77-1606 to 77-1610." By this provision the Legislature prescribed a specific method to review a levy made for nonresident high school education. This provision of § 79-4,102 is now a special statute relating to appeals from such

a levy. The fact that the Legislature chose the procedure prescribed in Neb. Rev. Stat. §§ 77-1606 to 77-1610 (Reissue 1981) is of no more consequence than if the procedure prescribed in some other statute had been adopted by reference.

We conclude that the trial court was in error in finding that the plaintiffs were not estopped from challenging the constitutionality of § 79-4,102 in an appeal brought pursuant to subsection (3) of that section.

It is unnecessary to consider any of the other assignments of error or the issues tendered by the cross-appeal.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROGER KNUDSEN, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

374 N.W.2d 56

Filed September 27, 1985. No. 84-954.

1. **Workmen's Compensation: Appeal and Error.** 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. Such findings of fact, unless clearly wrong, will not be set aside on appeal.
2. _____: _____. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. _____: _____. The Supreme Court is not at liberty to substitute its views for those of the Nebraska Workmen's Compensation Court regarding questions of fact if there is evidence in the record to substantiate the conclusions of the Workmen's Compensation Court. Where the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workmen's Compensation Court.

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

Richard J. Schicker, for appellant.

Randall W. Owens, for appellee.

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

SHANAHAN, J.

Roger Knudsen appeals dismissal of his petition by a three-judge decision after rehearing in the Nebraska Workmen's Compensation Court. We affirm.

Knudsen had been employed by Metropolitan Utilities District of Omaha (MUD) since March 1967 as an automotive analyst. Knudsen's duties included general automotive repair on welders, lawnmowers, and all MUD fleet cars and trucks, as well as assisting other mechanics in diagnosing problems of MUD's vehicles. On June 1, 1977, Knudsen, while repairing a gasoline-operated welder, sustained an injury to his right eye. Knudsen reported the accident to his supervisor and, later, on June 10, saw the company doctor, to whom he made complaint about irritation in the right eye. The doctor's examination disclosed a piece of ferrous material which the physician removed from Knudsen's right eye. There were five subsequent visits by Knudsen to the company doctor for treatment.

In November 1977 Knudsen, still suffering eye irritation, consulted Dr. McIntire, who prescribed medication which eliminated the ocular irritation but who, on account of scar tissue at the site of the injury, could not determine the extent of the damage to Knudsen's eye until an additional 6 months to 1 year had elapsed.

In April 1979 Knudsen again visited Dr. McIntire and complained about a loss of vision in the injured right eye. Dr. McIntire referred Knudsen to Dr. Priluck, who examined Knudsen several times and then recommended a visit to the Mayo Clinic for tests. During Knudsen's visit to the Mayo Clinic in 1980, physicians prescribed bifocals for Knudsen, who returned to Omaha, where he was subsequently examined by Dr. Priluck on five occasions.

Knudsen's vision continued to deteriorate during 1982. In February 1983 Knudsen was examined by Dr. Cox at the University of Nebraska Medical Center. Dr. Cox gave Knudsen an eye examination and diagnosed Knudsen's problem as a

separated lens in his right eye. Dr. Cox also suggested an electroretinogram for Knudsen to determine whether there was a piece of steel causing the lens separation in Knudsen's right eye. After the electroretinogram Dr. Cox referred Knudsen to Dr. Sutton in Lincoln. At the time of his visit to Dr. Sutton in February 1984, Knudsen was seeing triple out of his right eye. Dr. Sutton theorized that the trauma to Knudsen's right eye explained a number of the problems experienced by Knudsen.

MUD accepted Knudsen's claim as compensable under the Nebraska Workmen's Compensation Act and made its last payment of Knudsen's medical expenses in February 1978. Knudsen filed his petition in March 1984. After dismissal of Knudsen's petition at the one-judge hearing, Knudsen requested a rehearing.

At the rehearing, evidence included letters from the various physicians. In his May 14, 1981, letter to MUD's attorney, Dr. Priluck wrote: "At this time, I cannot definitively determine the underlying etiology of this problem." In a January 4, 1982, letter to MUD's attorney, Dr. Priluck stated:

> With respect to the exact etiology of his ocular problem, I cannot still identify the cause of his decreased accommodation with medical certainity [sic]. This case is unusual and clouded by the fact he has seen several different ophthalmologists and a moderate amount of time has elapsed since the injury in 1977.

Dr. McIntire wrote to MUD's attorney on September 30, 1981: "After careful review of my records and this material from the many ophthalmologists he has seen, I do not know the etiology of his decreased accommodation in the right eye."

On February 25, 1983, Dr. Cox wrote to Dr. Priluck: "The question of the etiology of the unilateral lens changes needs to be resolved. I suppose there is a small chance that there was a retained intraocular foreign body from his injury. Certainly we found no evidence on our examination for this." Some months later, on August 15, 1983, Dr. Cox in his letter to Knudsen's attorney expressed the following: "[M]y examination indicates that there is a possibility that his vision problem was related to his injury at work. I do not think this is likely, but without an electroretinogram this condition cannot be excluded as

work-related."

Finally, in a letter to Knudsen's attorney on February 20, 1984, Dr. Cox stated:

> I discussed this case with Dr. Greg Sutton, who is experienced in diseases of the anterior portion of the eye. He agreed to examine Mr. Knudsen for evidence of old trauma. At this point I do not think that his condition in the right eye is related to the injury that he suffered. However, until this condition is diagnosed we cannot absolutely exclude that injury or its treatment as a factor in his difficulties.

Dr. Sutton testified: "We know he did have a trauma at that time and soon a visual problem, and based on my medical knowledge, I would say that there is a very good possibility that the cataracts, the decrease of vision are related to trauma that occurred at about that time."

Dr. Faier, the company doctor and the first physician who examined Knudsen after the accident, wrote to MUD's attorney on August 17, 1984: "My impression is that, 100% that this problem is in no way related to the foreign body injuries, or to the treatment given to mend the eye for this foreign body," and testified at the rehearing: "The foreign body in the external part of his eye did not cause it" (referring to the condition and loss of vision in Knudsen's right eye).

> The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award.

Neb. Rev. Stat. § 48-185 (Reissue 1984).

" 'In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light

most favorable to the successful party.' " *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 154, 342 N.W.2d 198, 200 (1984).

This court stated in *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 711, 320 N.W.2d 111, 115 (1982): "We are not at liberty to substitute our views for those of the Workmen's Compensation Court regarding questions of fact if there is evidence in the record to substantiate its conclusions." Furthermore, "[w]here the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court." *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 435, 350 N.W.2d 7, 10 (1984).

The present case involves a parade of expert witnesses. Evidence from the various physicians fluctuated from Dr. Sutton's opinion that the accident caused Knudsen's injury to the directly opposite opinion given by Dr. Faier, namely, the accident did not cause Knudsen's injury. Sandwiched between the opposite opinions expressed by Dr. Sutton and Dr. Faier were conclusions by other examining physicians who expressed that they were unable to determine the cause of Knudsen's affliction. The record contains sufficient competent evidence to allow the Workmen's Compensation Court to accept one opinion over another. The findings of the Workmen's Compensation Court on rehearing are not clearly wrong and are affirmed. Because Knudsen's claim failed due to a lack of proof of causation, any question about applicability of the statute of limitations need not be answered. The judgment of the Nebraska Workmen's Compensation Court dismissing Knudsen's petition is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERENE CARNEY, APPELLANT.
374 N.W.2d 59

Filed September 27, 1985. No. 84-959.

1. **Criminal Law: Trial: Motions to Dismiss.** A trial court's sustaining of a motion for dismissal or acquittal constitutes a resolution of the issue of guilt.

2. **Criminal Law: Trial: Evidence: Appeal and Error.** It is error for a court to allow the prosecution to set aside its rest and produce additional evidence after a resolution of the issue of guilt is made.
3. **Criminal Law: Trial: Motions to Dismiss.** When a trial judge sustains a motion for acquittal, the judge has finally determined the rights of the parties in the action.
4. **Constitutional Law: Criminal Law: Judgments: Double Jeopardy.** The failure of a court to render a judgment and enter it is not sufficient reason to deprive the defendant of her constitutional rights under the provisions of the double jeopardy clause.
5. **Constitutional Law: Criminal Law: Trial.** To permit a court to entertain additional argument, set aside its ruling, and continue a trial after making a finding that the defendant was not guilty as a matter of law is indistinguishable from permitting a prosecuting attorney to present additional argument after a jury has delivered a verdict.

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

Stephen C. Hansen of Luckey, Sipple, Hansen & Emerson, for appellant.

Robert M. Spire, Attorney General, and Mel Kammerlohr, for appellee.

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

WHITE, J.

This is an appeal from the district court for Colfax County from a jury verdict finding the defendant guilty of taking and exercising control over movable property, a Class IV felony. Defendant's motion for a new trial was denied, and she appeals, alleging a double jeopardy violation. She assigns as error the district court's decision to allow the prosecution to set aside its rest and produce additional evidence after sustaining the defendant's motion to dismiss and motion to acquit.

The defendant was charged with the theft of two items of jewelry from a couple for whom she babysat. She was sentenced to probation, restitution, county jail, public service, a fine, and costs.

At the conclusion of the State's case in chief, and after the State had rested, counsel for the plaintiff and counsel for the defendant met with the judge in his chambers. The court

reporter was present. Counsel for the defendant asked the court to consider two motions: first, a motion to dismiss the charges against the defendant for the reason that the State had failed to prove a prima facie case; and second, a motion to acquit the defendant for failure of the State to prove the defendant guilty beyond a reasonable doubt as a matter of law. The judge responded, "The motion is good, sustained." The State then immediately asked leave to withdraw its rest. The motion was sustained, and the State was allowed to withdraw its rest and then present additional evidence over the objection of defense counsel.

We hold that the trial court's sustaining of the motions for dismissal and acquittal constituted a resolution of the issue of guilt. It was error for the court to allow the prosecution to set aside its rest and produce additional evidence, as such actions subjected the defendant to double jeopardy. We reverse.

When the trial judge sustained defense counsel's motion for acquittal, the judge determined the rights of the parties in the action. This constituted a finding which entitled the defendant to a judgment dismissing the information. A judgment should then have been rendered and entered.

"A finding of fact is not a judgment." *Brounty v. Daniels*, 23 Neb. 162, 164, 36 N.W. 463, 464 (1888). See, *Rumbel v. Ress*, 166 Neb. 839, 91 N.W.2d 36 (1958), *supp. op.* 167 Neb. 359, 92 N.W.2d 904; *Gouger v. County of Sarpy*, 151 Neb. 207, 36 N.W.2d 775 (1949). "As a general rule, decisions, opinions, findings, or verdicts do not constitute a judgment or decree but merely form the basis on which the judgment is subsequently to be rendered." 49 C.J.S. *Judgments* § 4 at 28 (1947).

The granting of the motion finding defendant not guilty as a matter of law resulted in an acquittal. An "acquittal" is a resolution of the factual elements of the offense charged. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977); *United States v. Scott*, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), *reh'g denied* 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 197. The failure of the court to render a judgment and enter it is not sufficient reason to deprive the defendant of her constitutional rights under the provisions of the double jeopardy clause.

Two cases from other jurisdictions present fact patterns similar to this one. In *State v. Hurst*, 367 So. 2d 1180 (La. 1979), the defendant was found guilty of driving while intoxicated. After presenting witnesses and introducing evidence the State rested. Defense counsel moved for acquittal due to insufficiency of evidence. The judge then took a recess, replayed the testimony of one witness, and then granted the motion for directed verdict. Immediately thereafter, the prosecutor prevailed upon the judge to replay the testimony of another witness. The judge then apologized to the State and declared that the motion for directed verdict was denied. Despite defense counsel's objection to the continuation of the trial on the ground of double jeopardy, additional evidence was presented by both sides.

On appeal the court considered the legality of the guilty verdict in light of the trial court's ruling earlier in the trial granting a motion for a judgment of acquittal. Defendant contended that at the moment the trial court ruled "the motion for directed verdict is granted," his jeopardy ended, and any further proceedings against him constituted a violation of double jeopardy provisions of the U.S. Constitution and the Louisiana Constitution. This argument was found to have merit, and the defendant's conviction was reversed in favor of a judgment of acquittal.

In the recent case of *State v. Dowling*, 98 Wash. 2d 542, 656 P.2d 497 (1983), it was undisputed that the trial court initially dismissed a charge of theft against an 11-year-old defendant before later granting the State's motion for reconsideration and then finding the defendant guilty. The decision to dismiss was reached after extensive argument and discussion of the facts. The court concluded that the State had not presented sufficient evidence to overcome the presumption that the defendant was incapable of committing a crime. The judge ruled on the dismissal from the bench in open court. "The judge's oral opinion was neither inadvertent, tentative, nor made subject to further consideration or advisement." *Id.* at 547, 656 P.2d at 500. The appellate court concluded:

> While a formal journal entry is important, a ruling from the bench in open court must be viewed as final in the

> context of a criminal proceeding when such a ruling terminates the case. . . . The constitution does not permit a jury to return a verdict acquitting a defendant, then 4 months later find the same defendant guilty. This same prohibition also applies to a trial judge when he performs the factfinding function of a jury. Once a defendant is acquitted, all further proceedings must end.

Id.

The U.S. Supreme Court in dealing with the issue of former jeopardy has distinguished cases where the basis for dismissal was a factual determination of the guilt or innocence of the accused from cases where the dismissal was based on procedural faults. In *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977), the Court held that an order of acquittal, entered by the trial judge after a mistrial was declared, barred further prosecution, since further prosecution would violate the fifth amendment to the U.S. Constitution. An acquittal was defined as a resolution of some or all of the factual elements of the offense charged. The Court concluded that the trial judge had evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction. This case can be distinguished from *United States v. Scott*, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), *reh'g denied* 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 197, where the dismissal was based on preindictment delay by the prosecution rather than on a judgment relating to the guilt or innocence of the defendant.

The State in its brief relies on Neb. Rev. Stat. § 24-734 (Cum. Supp. 1984), which enumerates the general powers of judges. The statute provides in part that a judge in chambers is authorized to:

> (g) Without notice, make any order and perform any act which may lawfully be made or performed by him or her ex parte in open court in any action or proceeding which is on file in any district of this state;
>
> . . . .
>
> (2) A judgment or order made pursuant to this section shall be deemed effective when (a) the judgment is rendered in accordance with the provisions of subsection

(2) of section 25-1301 or (b) the order made has been pronounced accompanied by the making of a notation on the trial docket by the judge or made at the direction of the judge.

The State misplaces its reliance on § 24-734, since in this case the attorneys and the judge had their conference on the record. While it is true that the hearing of motions and the judge's decision took place in chambers, the pronouncement of the acquittal by the sustaining of defense counsel's motion was clearly communicated to both the defense and the prosecution. Although it is not clear from the record, it appears that the court was in session when the judge made his pronouncement and that the judge and the attorneys merely stepped into chambers for convenience.

Double jeopardy, or former jeopardy, has been addressed both in Nebraska and by the U.S. Supreme Court. "The plea of former jeopardy is an established maxim of the common law, and has been included in the Constitution of the United States as well as ours. The protection afforded is not against the peril of second punishment, but against being tried again for the same offense." *Jeppesen v. State*, 154 Neb. 765, 768, 49 N.W.2d 611, 613 (1951). See, U.S. Const. amend. V; Neb. Const. art. I, § 12. In *United States v. Scott, supra* at 91, the Court stated: "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.' "

To permit a court to entertain additional argument, set aside its ruling, and continue a trial after making a finding that the defendant was not guilty as a matter of law is indistinguishable from permitting a prosecuting attorney to present additional argument after a jury has delivered a verdict. This is consistent with our previous holdings that a sentence validly imposed takes effect from the day it is pronounced. *State v. Sliva*, 208 Neb. 647, 305 N.W.2d 10 (1981); *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981); *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), *overruled on other grounds, State v. Cousins, supra*; *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90

(1973). We hold that a judicial dismissal or acquittal based upon insufficient evidence constitutes a finding as a matter of law which entitles the defendant to a judgment, and the prohibition against double jeopardy prevents further prosecution.

REVERSED.

CHERYL J. BRAUNBECK, APPELLEE AND CROSS-APPELLANT, V. WILLIAM A. BRAUNBECK, APPELLANT AND CROSS-APPELLEE.

374 N.W.2d 63

Filed September 27, 1985. No. 84-975.

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

Howard P. Olsen, Jr., of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

PER CURIAM.

Petitioner-appellee was granted a decree of dissolution of her marriage and was awarded custody of the two minor children of the parties, subject to reasonable rights of visitation by the appellant. The trial court also made provisions relating to a division of the property, including an award of alimony to the appellee, and provided that the appellant pay child support.

Assigned as errors are the granting of child custody to the appellee and the awarding of alimony to her. On cross-appeal the appellee complains that the award of alimony was inadequate and that the failure to award her an attorney fee was in error.

The actions complained of are matters initially entrusted to

the sound discretion of the trial judge, and, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the discretion of the trial judge, *Guggenmos v. Guggenmos,* 218 Neb. 746, 359 N.W.2d 87 (1984), recognizing that 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.

We have so reviewed the record and find the decision of the district court to be correct in all respects. The judgment is affirmed, and the appellee is awarded a fee of $750 for the services of her attorney on this appeal.

AFFIRMED.

RHONDA M. HOSCHAR, APPELLANT, V. LONNIE J. HOSCHAR, APPELLEE.

374 N.W.2d 64

Filed September 27, 1985. No. 85-023.

1. **Modification of Decree: Child Custody.** A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. _____: _____. A decree awarding custody of minor children and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.
3. **Modification of Decree: Child Custody: Proof.** The burden of showing the existence of that material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
4. **Modification of Decree: Child Custody.** If a permanent change of custody is to be made, it should appear to the court that the change of circumstances is more or less permanent or continuous and not merely transitory or temporary.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded with directions to dismiss.

John W. Kocourek, for appellant.

Herbert J. Elworth of Casey & Elworth, for appellee.

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

KRIVOSHA, C.J.

Rhonda M. Hoschar (mother) appeals from an order entered by the district court for Cass County, Nebraska, which changed the custody of her two minor children from herself to their father, Lonnie J. Hoschar (father). The mother has set out several assignments of error. In essence, however, the different assignments of error involve only one issue. That issue is whether there has been a material change of circumstances since the entry of the original decree granting her custody of the children such that the custody of the children should now be changed. We believe that the evidence fails to establish that fact, and the decision of the district court must be reversed and remanded.

The marriage of the parties to this action was dissolved by the district court for Cass County on March 10, 1983. At that time the mother was granted the custody of the two minor children and the father was granted reasonable rights of visitation. The family home was also awarded to the mother, although the home was then in the first stages of foreclosure and the parties were 6 months behind in their house payments. At the hearing on his motion to change the custody of the children, the father sought to introduce evidence in order to establish that the best interests of the children required that the custody of the children be changed from the mother to the father. The difficulty, however, with these efforts was that no evidence was first offered to show that a material change of circumstances had occurred since the entry of the initial decree. It is true that at the time of the subsequent hearing on the motion to change custody, the proceeding to foreclose the mortgage on the home had been completed and the mother was no longer living in the home. However, this was not a material change of circumstances in view of the fact that at the time of the entry of the initial decree the house was in the process of being foreclosed upon. There was evidence of other changes, such as the employment of the parties, but these changes were not so

material as to justify the court in disturbing the earlier decree. Further, the court specifically found that both parents were fit.

The disruption of the marriage itself is difficult enough for children to handle. Their custody, therefore, should not be a continuing "running gun battle." The best interests of the children are not served by constant custody disputes and a shifting of custody control from one parent to the other. Rather, to the extent we can, we should attempt to provide some sense of stability for the children. For that reason we have repeatedly held that a decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. See, *Dennis v. Smith*, 217 Neb. 147, 347 N.W.2d 873 (1984); *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982). By this rule we do not mean that every change, no matter how insignificant, justifies a change in custody. Rather, by material change of circumstances we mean that the evidence must show that something has occurred, which if the trial court had been aware of the existence of these circumstances initially, the trial court in the best interests of the children would have granted their custody to the other parent. " 'A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.' " *Youngberg v. Youngberg*, 193 Neb. 394, 396, 227 N.W.2d 396, 397 (1975).

We do not mean to say that the paramount question is not the best interests of the children, for, indeed, it is. We do mean to say that in response to a motion to modify a custody decree, before the trial court considers what is in the best interests of the children, the court must first find that there has been a material change of circumstances which occurred after the entry of the earlier order granting custody and which affects the best interests of the children. The burden of showing the existence of that material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award. See, *Murray v. Antell*, 361 N.W.2d 466

(Minn. App. 1985); *Miller v. Miller*, 305 N.W.2d 666 (N.D. 1981); *In re Marriage of Link*, 205 N.W.2d 751 (Iowa 1973). And if a permanent change of custody is to be made, it should appear to the court that the change of circumstances is more or less permanent or continuous and not merely transitory or temporary.

In the instant case the trial court made no finding of any material change of circumstance. The court simply determined that the best interests of the children would be served by changing the custody of the children. Absent a finding that there was a material change of circumstances affecting the best interests of the children, the court should have denied the father's request for change of custody. For that reason we must reverse and remand the action with directions to dismiss the application for change of custody filed by the father.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH and HASTINGS, JJ., concur in the result.

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Administrative Law

1. A court reviewing an order of an administrative agency to determine whether there has been due process of law must determine whether there was reasonable notice and an opportunity for fair hearing.
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   Hadley v. Ideus 878
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4. A court reviewing an order of an administrative agency to determine whether there has been due process of law must determine whether there was reasonable notice and an opportunity for fair hearing.
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12. In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it; a jury's verdict will not be disturbed unless it is clearly wrong.
Maloney v. Kaminski 55
13. Jury instructions are to be read as a whole; when they fairly submit the case and did not mislead the jury, there is no prejudicial error.
Maloney v. Kaminski 55
14. It is not error for a trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
Maloney v. Kaminski 55
15. Where a jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is ordinarily not error to either give or refuse to give an instruction on unavoidable accident.
Maloney v. Kaminski 55
16. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record.
Auman v. Toomey 70
17. The right of appeal is statutory, and the time requirements set forth in the statute are mandatory in order for the reviewing court to acquire jurisdiction.
Wood v. Village of Culbertson 94
Moore v. Black 122
Karnes v. Wilkinson Mfg. 150

18. In appeals from the termination of parental rights in a county court sitting as a juvenile court, the Supreme Court reviews such cases de novo on the record.
In re Interest of L.J., J.J., and J.N.J. 102
In re Interest of V.T. and L.T. 256
In re Interest of V.B. and Z.B. 369
19. The term "authenticate," as used in extradition statutes, simply means a statement that the documents are what they purport to be.
Radant v. Vargason 116
20. This court on appeal will reverse a verdict of guilty based on evidence whenever it is so lacking in probative force that the court can say as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt.
State v. Hai Dang 120
State v. Joy 535
State v. Trimble 639
21. Where no other method of appeal is provided, one may obtain judicial review by proceedings in error under Neb. Rev. Stat. §§ 25-1901 et seq. (Reissue 1979).
Moore v. Black 122
22. 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.
State v. Sutton 128
In re Estate of Odineal 168
23. In an appeal from a misdemeanor conviction in county court, where no notice of appeal was filed as required by Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1982), and no bond was deposited as required by Neb. Rev. Stat. § 29-611 (Reissue 1979), the district court lacked jurisdiction to hear an appeal from the county court and, therefore, the Supreme Court has no jurisdiction to hear an appeal from the district court.
State v. Fehncke 135
24. In post conviction proceedings under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), the district court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility.
State v. Terrell 137
25. The Tax Commissioner is not a "person aggrieved" and therefore does not have the right to appeal a decision of the State Board of Equalization and Assessment, as provided by Neb. Rev. Stat. §§ 77-27,127 and 84-917 (Reissue 1981).
Karnes v. Wilkinson Mfg. 150
26. In reviewing a summary judgment this 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.
City Bank & Trust Co. v. Van Andel 152

27. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree appealed from.
Wells v. Bartholomew 210

28. The review of a case involving the enforcement of a noncompete clause by injunctive process is done de novo on the record, and it is necessary for this court to reach an independent conclusion without being influenced by the findings of the trial court, absent conflicting credible evidence.
National Farmers Union Serv. Corp. v. Edwards 231

29. In a juvenile case an adjudication order is an appealable order.
In re Interest of V.T. and L.T. 256

30. The Supreme Court will not take judicial notice of municipal ordinances not properly made a part of the record.
Vrana Paving Co. v. City of Omaha 269

31. The Nebraska Supreme Court reviews equity matters de novo on the record and reaches an independent conclusion without reference to the trial court's findings, subject to the rules that (1) when the evidence on material questions of fact is in irreconcilable conflict, the Nebraska Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite, and (2) the Nebraska Supreme Court is required, where the trial court has viewed the premises, to consider any competent, relevant facts revealed by the view and findings made by the court, provided the record contains competent evidence to support the findings.
Nixon v. Harkins 286
Flansburgh v. Coffey 381
Coniglio v. Hansl 580
Hulse v. Schelkopf 617
Hadley v. Ideus 878

32. The trial court has a broad discretion in regard to the amendment of a pretrial order, and its ruling with respect thereto will not be disturbed absent an abuse of that discretion.
Nixon v. Harkins 286

33. The extent, scope, and course of cross-examination rest within the discretion of the trial court, and the ruling of the trial court with respect thereto will not be disturbed in the absence of an abuse of that discretion.
Nixon v. Harkins 286

34. The findings of fact of a trial court where a jury trial is waived will not be set aside unless clearly wrong.
Omaha World-Herald Co. v. Nielsen 294
35. On appeal, controverted facts will be viewed in the light most favorable to the successful party and that party will be given the benefit of every inference available from the record.
Omaha World-Herald Co. v. Nielsen 294
36. The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Erstrom v. Erstrom 303
37. The disposition of a direct appeal pursuant to Neb. Ct. R. 3B (rev. 1983) is a disposition on the merits.
State v. Sanders 308
38. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when granting relief pursuant to Neb. Ct. R. 3B (rev. 1983) and is not available for further relief pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979).
State v. Sanders 308
39. Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. An instruction stating a general principle in the measurement of damages, broader than is applicable to the case presented and not qualified by other instructions, is erroneous.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
40. Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error to refuse to set aside such verdict.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
41. Where error exists as to only one issue and the judgment is in other respects free from error, the reviewing court may, when remanding the cause for new trial, limit the new trial to the issue affected.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
42. The credibility of witnesses and weight to be given their testimony are solely for the consideration of the jury, and unless clearly wrong, a verdict by the jury based on conflicting evidence will not be set aside.
Schmidt v. J. C. Robinson Seed Co. 344
43. The trial court is given discretion in determining whether or not a witness has qualifications to state his opinion, and such

discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion.
Schmidt v. J. C. Robinson Seed Co. 344
44. In reviewing the record of proceedings in terms of evidence before the Public Service Commission, the Supreme Court examines the record to determine whether there is evidence to sustain the commission's findings and action.
In re Application of Amsberry, Inc. 353
45. In reviewing termination of parental rights cases de novo on the record, this court must give great weight to the findings of the juvenile court in all cases where there is a dispute in the evidence, since the trial court heard and observed the witnesses.
In re Interest of V.B. and Z.B. 369
46. It is the general rule that the confirmation of judicial sales rests largely within the sound discretion of the trial court; consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion. The trial court may not, however, exercise its discretion arbitrarily; its determination is to be one which is sound and equitable in view of all the circumstances and in the interest of fairness and prudence, and with a regard for the rights of all concerned and the stability of judicial sales.
Sherman v. Schulz 375
47. In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
State v. Wood 388
48. It is the province of the Supreme Court, on appeal from a conviction, to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction.
State v. Wood 388
49. If the judgment of the compensation court determining a disability is supported by competent evidence in the record, that conclusion is binding upon us. We are not free to substitute our judgment for that of the compensation court.
Hare v. Watts Trucking Service 403
Gast v. Continental Can Co. 456
50. Appeals under the Nebraska Employment Security Law are reviewed de novo on the record in the Supreme Court.
Norman v. Sorensen 408
51. Although the district court is required to review the determination of the mental health board de novo on the record, this court will not interfere on appeal with the final order made by the district court unless we can say as a matter of law that it is

not supported by clear and convincing evidence.
In re Interest of H.W. 423
In re Interest of Ely 731
52. 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.
Kelly v. Kelly 441
53. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and 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. Benzel 466
State v. Daniels 480
State v. Joy 535
State v. Murphrey 699
State v. Hunt 707
State v. Eggers 862
54. It is incumbent upon the defendant on appeal from a criminal conviction to provide a record which demonstrates prejudicial error.
State v. Benzel 466
55. Any objections to the validity of proceedings in other cases, utilized for enhancement purposes, other than effective assistance of counsel or waiver thereof, must be raised on direct appeal or a separate proceeding to establish the invalidity of the proceedings.
State v. Benzel 466
56. A failure to make a timely objection to closing arguments is equivalent to failing to make an objection at all and waives any right to complain.
State v. Benzel 466
57. Generally speaking, it is not prejudicial error for a prosecutor to make remarks in closing arguments based on deductions and inferences drawn from the evidence.
State v. Benzel 466
58. In determining whether the rights of a defendant have been prejudiced such that a reversal is required, the claim of prejudice must be evaluated in the context of the entire record.
State v. Benzel 466
59. There is no ground for reversal where the error does not result in some demonstrative prejudice.
State v. Benzel 466

60. Where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
State v. Benzel 466
State v. Richter 551
61. A suit to impress a constructive trust is one in equity which this court reviews de novo on the record, giving consideration, where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
Ford v. Jordan 492
62. Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
Ford v. Jordan 492
63. 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.
PWA Farms v. North Platte State Bank 516
Kracl v. Aetna Cas. & Surety Co. 869
64. A party on appeal may not assign the admission of evidence as error where no objection was made thereto in the trial.
PWA Farms v. North Platte State Bank 516
65. Where there is no bill of exceptions, the appellate court is limited to a determination of whether the pleadings support the judgment of the trial court.
In re Estate of Kesting 524
66. Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
State v. White 527
67. In a facial challenge to the overbreadth and vagueness of a law, if we can determine that the prohibition contained in the enactment does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail.
State v. Merithew 530
68. Pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1981), the Supreme Court reviews an agency's decision de novo on the record. Previous decisions of this court holding that the Supreme Court's review of an agency's decision is other than a

review de novo on the record are hereby overruled.
Haeffner v. State 560
69. The appellant, by record presented on appeal, must affirmatively establish the existence of a claimed error.
Forehead v. Galvin 578
70. Where a ruling excluding evidence is made, an offer of proof is generally a prerequisite to our review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
Hulse v. Schelkopf 617
71. This court cannot review the trial court's alleged abuse of discretion in entering a discovery order where there is no evidence in the record to either support or refute a contention that such abuse exists.
Hulse v. Schelkopf 617
72. Evidence which does not appear in the record cannot be considered by this court on appeal.
Hulse v. Schelkopf 617
Chalupa v. Chalupa 704
73. In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, this 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. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, but we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
Walton v. Walton 625
Mettenbrink v. Mettenbrink 650
74. Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case, whether it be to enter an award or cause a dismissal of the claim, may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.
Maxey v. Fremont Department of Utilities 627
Knudsen v. Metropolitan Utilities Dist. 902
75. Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo on the record.
Harris v. Misty Lounge, Inc. 678
76. Upon appeal to this court of the district court's review of an order of the Nebraska Equal Opportunity Commission,

our review is de novo on the record.
Harris v. Misty Lounge, Inc. 678
77. Before error predicated on the giving of an instruction may be considered a ground for reversal, a defendant must show that he was prejudiced by the instruction given.
State v. Murphrey 699
78. Where a pretrial order improperly restricts the issues, the parties are bound by it at trial and on appeal, if no objection has been made, unless it does violence to the issues raised by the petition.
Chalupa v. Chalupa 704
79. 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.
Chalupa v. Chalupa 704
Clark v. Clark 771
80. In considering the best interests of the child so as to determine the question of which parent should have the care and custody of the child, although we review the record de novo, great weight will be given to the fact that the trial court observed the witnesses and their manner of testifying.
Chalupa v. Chalupa 704
81. Harmless error provides no ground for the reversal of a judgment of guilt.
State v. Hunt 707
82. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not a ground for reversal.
State v. Hunt 707
83. A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.
State v. Gregory 778
84. In the absence of an abuse of discretion, a sentence imposed within statutory limits, including the denial of probation, will not be disturbed on appeal.
State v. Gregory 778
85. When a statute is facially challenged as to overbreadth and vagueness, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.
State v. Sinica 792
86. In deciding whether a statute is overbroad, a court should

evaluate the ambiguous as well as unambiguous scope of the enactment. To this extent the vagueness of a law affects overbreadth analysis.
State v. Sinica 792
87. In construing a statute we will presume that the Legislature intended a sensible rather than absurd result, and we will endeavor to interpret the statute in a manner consistent with the Constitution.
State v. Sinica 792
88. In a domestic relations case on appeal, where each party has testified, the burden is on the appellant to have a bill of exceptions prepared containing the testimony and evidence of each party on any of the issues affected by the trial court's decree of dissolution to be presented for review by appellant.
Ward v. Ward 799
89. An action for rescission of a contract is equitable in nature and as such is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Haumont v. Security State Bank 807
90. When reviewing applications for modification of child support, we will consider the fact that these matters are initially entrusted to the sound discretion of the trial court, and, while on appeal such matters will be reviewed de novo on the record, the decision of the trial court will be affirmed in the absence of an abuse of discretion.
Graber v. Graber 816
91. 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.
Masters v. Iowa Beef Processors 835
Knudsen v. Metropolitan Utilities Dist. 902
92. Generally, 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. Ross 843
93. Under the provisions of Neb. Rev. Stat. § 25-1912.01(1) (Cum. Supp. 1984), a motion for a new trial is not required to obtain appellate review of any issue upon which the ruling of the trial

court appears in the record.
State v. Wright 847
94. A trial judge is given latitude and discretion in permitting leading questions of witnesses whose communicative abilities are sharply curtailed, and unless there has been an abuse of such discretion resulting in prejudice and injury to the other party, there is no reversible error.
State v. Brown 849
95. It is not within the province of the Nebraska Supreme Court to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.
State v. Stratton 854
96. Determinations as to visitation rights in a dissolution of marriage 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; keeping in mind, however, that the trial judge observed and heard the witnesses at some point in the trial and accepted one version of the facts rather than the other.
Manewal v. Manewal 867
97. An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto.
In re 1983-84 County Tax Levy 897
98. Neb. Rev. Stat. § 79-4,102(3) (Cum. Supp. 1982) prescribes a specific method to review a levy made for nonresident high school education.
In re 1983-84 County Tax Levy 897
99. The Supreme Court is not at liberty to substitute its views for those of the Nebraska Workmen's Compensation Court regarding questions of fact if there is evidence in the record to substantiate the conclusions of the Workmen's Compensation Court. Where the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workmen's Compensation Court.
Knudsen v. Metropolitan Utilities Dist. 902
100. It is error for a court to allow the prosecution to set aside its rest and produce additional evidence after a resolution of the issue of guilt is made.
State v. Carney 906

Arbitration and Award

A contract to compel parties to arbitrate future disputes and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void. The distinction is whether the agreement to submit to arbitration is entered into before the

dispute arises and before the parties know the nature and extent of their dispute or whether it is entered into after the dispute has arisen and at a time when the parties are aware of the nature of the dispute and have agreed to a method of resolving that dispute.
Overland Constructors v. Millard School Dist. 220

Architects

1. 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. An architect performs professional services, as do lawyers, doctors, accountants, and investment advisers.
Overland Constructors v. Millard School Dist. 220
2. In determining whether an architect is negligent in failing to specifically set out the contractor's responsibility for charges in the contract, the test is whether the architect has exercised that degree of skill and diligence ordinarily exercised under like circumstances by architects in good standing in the same or similar communities.
Overland Constructors v. Millard School Dist. 220
3. The question of whether an architect has failed to perform in accordance with the standards of the profession is a matter which must be proved by expert testimony and cannot be left to lay witnesses.
Overland Constructors v. Millard School Dist. 220

Arrests

1. Absent exigent circumstances, a nonconsensual, warrantless entry to arrest a person within his or her home is presumptively unreasonable and, therefore, unconstitutional.
State v. Hert 447
2. The burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.
State v. Hert 447
3. "Exigent circumstances" are examined in the light of facts known to officers at the time they acted.
State v. Hert 447
4. Exigent circumstances exist when a law enforcement officer has: (1) Probable cause to believe that a suspect has committed a serious offense; (2) A reasonable belief from a present factual basis that the suspect is in the premises to be entered; and (3) Immediately upon concurrence of elements (1) and (2) (probable cause and reasonable belief), a factual basis to reasonably believe that, during the time which would be necessarily

consumed in obtaining an arrest warrant under existing circumstances, there will be danger to the officer or another, evidence will be removed or destroyed, or the suspect will escape.
State v. Hert 447

5. It is an affirmative defense to prosecution under Neb. Rev. Stat. § 28-904 (Cum. Supp. 1984) if the peace officer involved was out of uniform and did not identify himself as a peace officer by showing his credentials to the person whose arrest is attempted.
State v. Daniels 480

Assault

An accidental injury occurs where there is no intent or volition on the part of the actor.
State v. Brown 849

Assignments

1. Generally, the right to receive money due or to become due under an existing contract may be assigned even though the contract itself is not assignable.
Peterson v. Hynes 573
2. A contract to pay money may be assigned by the person to whom the money is payable, unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.
Peterson v. Hynes 573

Attorney Fees

1. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney fees incurred.
In re Estate of Odineal 168
2. The good faith required in Neb. Rev. Stat. § 30-2481 (Reissue 1979) is an ultimate fact for the court's determination upon all of the evidence. There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case.
In re Estate of Odineal 168
3. The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Erstrom v. Erstrom 303

Bankruptcy

Pursuant to 11 U.S.C. §§ 542 and 543 (1982), entities and custodians of

property belonging to the debtor are commanded to deliver over such property to the trustee or, in the case of a Chapter 11 proceeding, to the debtor in possession. Claims of secured parties whose property is delivered to the trustee or debtor in possession are then presented to the bankruptcy court.
Beatrice Nat. Bank v. Mid-America Dairymen 757

Banks and Banking

1. It is elementary that when a check is drawn to the order of a bank and the drawer gives no specific instructions as to the disposition of the funds, the bank is not authorized to pay the proceeds of the check to a stranger to the transaction.
PWA Farms v. North Platte State Bank 516
2. A letter of credit is an engagement by a bank at its customer's request that the bank honor drafts for payment to a beneficiary upon compliance with conditions specified in the letter of credit. The Uniform Commercial Code statutorily obligates the issuer of a letter of credit to honor drafts drawn by the beneficiary in compliance with terms of the credit.
Brown v. United States Nat. Bank 684
3. A cardinal principle regarding letters of credit is that the credit engagement is completely independent of the underlying contract which engenders a letter of credit.
Brown v. United States Nat. Bank 684
4. The material elements of common-law fraud must be established before any relief is available for the "fraud" contemplated by Neb. U.C.C. § 5-114(2) (Reissue 1980).
Brown v. United States Nat. Bank 684
5. The principle of independence regarding a bank's obligation under a letter of credit does not extend to protect fraud by the beneficiary of the letter of credit.
Brown v. United States Nat. Bank 684
6. An issuer of a letter of credit can refuse to honor such instrument if the beneficiary does not strictly comply with the provisions of the letter of credit for drawing upon such letter.
Brown v. United States Nat. Bank 684
7. In documentation for a letter of credit, Neb. U.C.C. §§ 5-101 to 5-117 (Reissue 1980), certify means to make known; to confirm formally as true, accurate, or genuine; to tell positively; to vouch for in writing.
Brown v. United States Nat. Bank 684

Blood, Breath, and Urine Tests

1. Justifiable refusal to take a body fluids test as required by Neb. Rev. Stat. §§ 39-669.08 et seq. (Reissue 1984) depends upon some illegal or unreasonable aspect in the nature of the request

to submit, the test itself, or both.
Bapat v. Jensen 763
2. Nebraska law does not sanction a conditional refusal to take a chemical test of the blood, breath, or urine, and such a refusal is a refusal under Nebraska's implied consent law.
Bapat v. Jensen 763
3. A motor vehicle driver is not entitled to consult a lawyer before taking a chemical test of the blood, breath, or urine, nor is the test required to be delayed by a driver's request that permission be granted to contact a lawyer concerning the requested test. This is because the suspension of a driver's license which results from a test refusal is a remedial, not strictly punitive, measure.
Bapat v. Jensen 763
4. The effect medication may have on the outcome of a body fluids test under the implied consent law may affect its admissibility or credibility as evidence of intoxication, but does not go to the question of whether a person is justified in refusing to take the test.
Bapat v. Jensen 763

Boundaries

Where a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of the land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession.
Hadley v. Ideus 878

Breach of Contract

1. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including the gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
Quad-States, Inc. v. Vande Mheen 161
2. Broadly speaking, the amount recoverable for the breach of a covenant not to compete is the loss sustained by the covenantee as a natural result of the breach.
Quad-States, Inc. v. Vande Mheen 161
3. The fact that the damages flowing from the breach of a covenant not to compete are not susceptible of exact computation will not preclude recovery; however, in order to recover substantial damages, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness; if a plaintiff fails to so do, he can nevertheless, if there is evidence of a specific monetary loss, recover a nominal sum.
Quad-States, Inc. v. Vande Mheen 161
National Farmers Union Serv. Corp. v. Edwards 231

4. The review of a case involving the enforcement of a noncompete clause by injunctive process is done de novo on the record, and it is necessary for this court to reach an independent conclusion without being influenced by the findings of the trial court, absent conflicting credible evidence.
National Farmers Union Serv. Corp. v. Edwards 231

Brokers

Where an insurance broker has negligently failed to obtain adequate insurance coverage for an insured, insured's measure of damages for loss caused thereby is the amount of actual loss as would have been covered by adequate insurance less any amount paid by insurance effectuated by the broker.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319

Burglary

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. Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking.
State v. Sutton 128

Case Disapproved

1. Fraud must be proved in an action at law by a preponderance of the evidence. Language in cases such as *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978), *Kernan v. Modern Woodmen of America*, 120 Neb. 333, 232 N.W. 590 (1930), and *Hampton v. Webster*, 56 Neb. 628, 77 N.W. 50 (1898), that fraud in a law action must be proved by clear and satisfactory evidence, is disapproved.
Tobin v. Flynn & Larsen Implement Co. 259
2. Fraud in an equity case must be proved by "clear and convincing" or "clear and satisfactory" evidence. Language in cases such as *Saffer v. Saffer*, 133 Neb. 528, 274 N.W. 479 (1937), that fraud in an equity action must be proved by a preponderance of the evidence, is disapproved.
Tobin v. Flynn & Larsen Implement Co. 259

Case Overruled

1. To the extent that *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966), is in conflict with this opinion, it is overruled.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
2. Pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1981), the Supreme Court reviews an agency's decision de novo on the

record. Previous decisions of this court holding that the Supreme Court's review of an agency's decision is other than a review de novo on the record are hereby overruled.
Haeffner v. State 560

3. An insurer may by contract limit its liability as long as it does not violate public policy. Where a provision of a policy of automobile insurance which clearly limits its applicability as to uninsured motorist coverage to the "covered" automobile, to the exclusion of other insured-owned automobiles not covered by that particular policy, such prohibition against "stacking" of coverage does not violate the spirit or the letter of Neb. Rev. Stat. § 60-509.01 (Reissue 1984). To the extent that *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970), *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970), and *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), are contrary to this opinion, they are overruled.
Kracl v. Aetna Cas. & Surety Co. 869

Causes of Action

1. If an injured employee does not have an independent cause of action, the injured employee's spouse cannot maintain an independent cause of action against the injured employee's employer.
Hallett v. George A. Hormel & Co. 387

2. In determining the sufficiency of a demurrer to state a cause of action, the court accepts as true all facts well pleaded, but does not accept as true facts not well pleaded, such as conclusions of law.
Bernstein v. Ainsworth 670

Child Custody

1. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record.
Auman v. Toomey 70

2. In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, this 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. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, but we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
Walton v. Walton 625
Mettenbrink v. Mettenbrink 650

3. In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.
Walton v. Walton 625
Mettenbrink v. Mettenbrink 650
4. 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.
Mettenbrink v. Mettenbrink 650
Hoschar v. Hoschar 913
5. The best interests of the child include, but are not limited to, the general health, welfare, and social behavior of the child. Neb. Rev. Stat. § 42-364(1)(c) (Reissue 1984).
Mettenbrink v. Mettenbrink 650
6. 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.
Chalupa v. Chalupa 704
Clark v. Clark 771
7. In considering the best interests of the child so as to determine the question of which parent should have the care and custody of the child, although we review the record de novo, great weight will be given to the fact that the trial court observed the witnesses and their manner of testifying.
Chalupa v. Chalupa 704
8. The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
Clark v. Clark 771
9. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child.
Clark v. Clark 771
10. A decree awarding custody of minor children and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the

best interests of the children.
Hoschar v. Hoschar 913
11. The burden of showing the existence of that material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
Hoschar v. Hoschar 913
12. If a permanent change of custody is to be made, it should appear to the court that the change of circumstances is more or less permanent or continuous and not merely transitory or temporary.
Hoschar v. Hoschar 913

Child Support

1. A court may modify child support becoming due in the future because of a material change in circumstances, of a nature requiring modifications in the best interests of the children, occurring after the entry of the dissolution decree.
Ohler v. Ohler 272
2. A "material change in circumstances" involves an alteration and passage from one condition to another and requires consideration of a variety of factors or circumstances, including the obligated parent's financial means, the needs of the child or children for whom the support is to be paid, the good or bad faith motive of the obligated parent in sustaining a reduction of means, and the permanence of the change.
Ohler v. Ohler 272
3. A "material change in circumstances" in modification of child support cases is analogous to the "good cause" required to support a modification of alimony.
Ohler v. Ohler 272
4. Incarceration resulting in the reduction or elimination of income or assets does not constitute such a material change in circumstances as to warrant the temporary termination of a child support obligation.
Ohler v. Ohler 272
5. Child support payments are not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.
Graber v. Graber 816
6. When reviewing applications for modification of child support, we will consider the fact that these matters are initially entrusted to the sound discretion of the trial court, and, while on appeal such matters will be reviewed de novo on the record, the decision of the trial court will be affirmed in the absence of an abuse of discretion.
Graber v. Graber 816

Circumstantial Evidence

1. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
   State v. Trimble 639
   State v. Eggers 862
2. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
   State v. Trimble 639
3. Direct evidence of a crime is not essential for a conviction, and one may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.
   State v. Eggers 862

Claims

1. Prejudgment interest is not recoverable on an unliquidated claim.
   Nixon v. Harkins 286
2. A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery.
   Nixon v. Harkins 286
3. A claim is liquidated where the evidence, if believed, makes it possible to compute the amount due with exactness without reliance upon opinion or discretion.
   Nixon v. Harkins 286

Collateral Attack

Unless void, the determination of state and county officers or boards of officers who act judicially in matters of administration is not subject to collateral attack.
Moore v. Black 122

Collateral Estoppel

In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or

which came into being after, the first proceeding.
In re Interest of V.B. and Z.B. 369

Commission of Industrial Relations

1. The Commission of Industrial Relations is not a court but is an administrative body performing a legislative function.
NAPE v. Game & Parks Comm. 883
2. The statutory jurisdiction of the Commission of Industrial Relations is to settle pending controversies.
NAPE v. Game & Parks Comm. 883
3. The Commission of Industrial Relations has no authority to enter declaratory judgments or exercise other judicial functions.
NAPE v. Game & Parks Comm. 883
4. A request for an advisory determination that does not result in the settlement of an industrial dispute is beyond the jurisdiction of the Commission of Industrial Relations.
NAPE v. Game & Parks Comm. 883

Constitutional Law

1. It is the obligation of the judiciary to declare a statute invalid where it arbitrarily and unreasonably violates the Constitution.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
2. For a plea of guilty to be voluntary, the record must affirmatively show the defendant was apprised of his constitutional rights against self-incrimination, to trial by jury, and to confrontation, and waived them.
State v. Predmore 336
3. A waiver of one's constitutional rights cannot be presumed from a silent record.
State v. Predmore 336
4. While an item-by-item recitation of constitutional rights is not required, the record must show that the court examined the defendant personally to ensure that the defendant knows his rights and understands the consequences of a guilty plea.
State v. Predmore 336
5. In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time.
State v. Predmore 336
6. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
State v. Predmore 336
7. A written petition to enter a plea of guilty is not a substitute for

the requirement that the trial court address each defendant personally and ascertain that the defendant understands his rights and is making a voluntary and intelligent waiver of them.
State v. Predmore 336
8. Absent exigent circumstances, a nonconsensual, warrantless entry to arrest a person within his or her home is presumptively unreasonable and, therefore, unconstitutional.
State v. Hert 447
9. In a facial challenge to the overbreadth and vagueness of a law, if we can determine that the prohibition contained in the enactment does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail.
State v. Merithew 530
10. The words "carelessly or without due caution" are synonymous with the common-law words of "negligently or without due care," and as such are not unconstitutionally vague.
State v. Merithew 530
11. Abolition of the privilege preventing a spouse from testifying about any confidential communication made by one spouse to the other in crimes of violence, Neb. Rev. Stat. § 27-505 (Cum. Supp. 1984), does not constitute special legislation and does not grant a special privilege in violation of Neb. Const. art. III, § 18, nor does it offend concepts of due process and equal protection.
State v. Hunt 707
12. Classification for purposes of legislation is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.
State v. Hunt 707
13. Classification for the purpose of legislation must be real and not illusive; it cannot be based on distinctions without a substantial difference.
State v. Hunt 707
14. This court does not sit as a superlegislature to review the wisdom of legislative acts.
State v. Hunt 707
15. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
State v. Hunt 707
16. A person may have standing to facially challenge an enactment for overbreadth because it may reach a substantial amount of constitutionally protected conduct.
State v. Sinica 792

17. The right to privacy protected by the fourteenth amendment includes a right to freedom of choice in marriage and family decisions.
State v. Sinica 792
18. Parents have a fundamental liberty interest protected by the due process guarantees of the fourteenth amendment in the care, custody, and management of their children.
State v. Sinica 792
19. When a statute is facially challenged as to overbreadth and vagueness, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.
State v. Sinica 792
20. Child abuse is not a constitutionally protected activity.
State v. Sinica 792
21. Although there are some recognized exceptions which may justify a warrantless search, as a general rule, searches and seizures inside a home without a warrant are presumptively unreasonable and in violation of an individual's rights guaranteed under the fourth amendment to the U.S. Constitution.
State v. Hinchey 825
22. In terms that apply equally to seizures of property and to seizures of persons, the fourth amendment to the U.S. Constitution has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.
State v. Hinchey 825
23. One governing principle, justified by history and by current experience, has consistently been followed: Except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.
State v. Hinchey 825
24. The determination of what constitutes a legislative function and what constitutes a judicial one must be made on a case-by-case basis.
State v. Stratton 854
25. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is neither cruelly inhumane nor disproportionate to the crime involved.
State v. Stratton 854
26. The law places upon judges the primary responsibility for imposing sentences within limits fixed by statute.
State v. Stratton 854
27. The Legislature is clothed with the power of defining crimes and

misdemeanors and fixing their punishment; its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.
State v. Stratton 854
28. The requirement of Neb. Rev. Stat. § 28-1205(3) (Reissue 1979) that sentences imposed for the use of firearms to commit a felony be consecutive to any other sentence imposed does not constitute a violation of the distribution of powers mandated by Neb. Const. art. II, § 1, art. III, § 1, or art. V, § 9.
State v. Stratton 854
29. The failure of a court to render a judgment and enter it is not sufficient reason to deprive the defendant of her constitutional rights under the provisions of the double jeopardy clause.
State v. Carney 906
30. To permit a court to entertain additional argument, set aside its ruling, and continue a trial after making a finding that the defendant was not guilty as a matter of law is indistinguishable from permitting a prosecuting attorney to present additional argument after a jury has delivered a verdict.
State v. Carney 906

Contracts

1. As a general rule, an infant does not have the capacity to bind himself absolutely by contract.
Webster Street Partnership v. Sheridan 9
2. The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others.
Webster Street Partnership v. Sheridan 9
3. The policy of the law is to discourage adults from contracting with an infant; they cannot complain if, as a consequence of violating that rule, they are unable to enforce their contracts.
Webster Street Partnership v. Sheridan 9
4. A contract to compel parties to arbitrate future disputes and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void. The distinction is whether the agreement to submit to arbitration is entered into before the dispute arises and before the parties know the nature and extent of their dispute or whether it is entered into after the dispute has arisen and at a time when the parties are aware of the nature of the dispute and have agreed to a method of resolving that dispute.
Overland Constructors v. Millard School Dist. 220
5. In determining whether an architect is negligent in failing to specifically set out the contractor's responsibility for charges in the contract, the test is whether the architect has exercised that degree of skill and diligence ordinarily exercised under like

circumstances by architects in good standing in the same or similar communities.
Overland Constructors v. Millard School Dist. 220
6. There can be no ambiguity in a contract unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.
National Farmers Union Serv. Corp. v. Edwards 231
T.V. Transmission v. City of Lincoln 887
7. Where contract language is plain and unambiguous, the court will not read an ambiguity into it in order to construe it against the one who prepared the contract.
National Farmers Union Serv. Corp. v. Edwards 231
8. Covenants not to compete, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.
National Farmers Union Serv. Corp. v. Edwards 231
9. Where a noncompete clause is overly broad, it may be found unreasonable to enforce.
National Farmers Union Serv. Corp. v. Edwards 231
10. A party cannot proceed on a theory of recovery which is premised upon the existence of a contract and at the same time proceed alternatively on a theory which is premised on the lack of a contract.
Tobin v. Flynn & Larsen Implement Co. 259
11. One who has been induced to enter into an agreement by virtue of a material misrepresentation may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract.
Tobin v. Flynn & Larsen Implement Co. 259
12. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.
Heimbouch v. Victorio Ins. Serv., Inc. 279
T.V. Transmission v. City of Lincoln 887

13. In a declaratory judgment action on a contract, the court may not only construe the contract but it is authorized to enter judgment for the amount due thereunder in the light of the interpretation made.
Heimbouch v. Victorio Ins. Serv., Inc. 279
14. The district court clearly has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract.
Heimbouch v. Victorio Ins. Serv., Inc. 279
15. A suit for the specific performance of a contract is equitable in nature.
Nixon v. Harkins 286
16. Under Nebraska law the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless it is in writing. Neb. U.C.C. § 2-201(1) (Reissue 1980).
Omaha World-Herald Co. v. Nielsen 294
17. Modifications of contracts for the sale of goods for the price of $500 or more must generally be in writing.
Omaha World-Herald Co. v. Nielsen 294
18. A distributorship agreement for the sale of newspapers for a price greater than $500 was within the statute of frauds.
Omaha World-Herald Co. v. Nielsen 294
19. A contract between a husband and wife to make reciprocal or mutual wills is valid and enforceable.
McKinnon v. Baker 314
20. Introductory recitals in a contract are generally not a part of the operative contract. If the contract proper is ambiguous, such recitals may be of value in construing the same; but if the contract provisions are clear and unambiguous, the recitals have no effect or application.
McKinnon v. Baker 314
21. Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy.
Mayer v. Howard 328
22. To be void as against public policy, a contract should be quite clearly repugnant to the public conscience.
Mayer v. Howard 328
23. A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract or a condition which must be fulfilled before a duty to perform an existing contract arises.
Schmidt v. J. C. Robinson Seed Co. 344
24. A condition subsequent is one that may occur, and if it does, it permits a party to avoid the obligations of a contract.
Schmidt v. J. C. Robinson Seed Co. 344
25. In the case of a condition subsequent, the happening of which is

to defeat the cause of action and terminate liability under the contract, the burden of proof rests on the party claiming the condition to establish facts entitling that party to a release of his obligations under the contract.
Schmidt v. J. C. Robinson Seed Co. 344
26. A contract will be construed against the party preparing it when there is a question as to its meaning.
Schmidt v. J. C. Robinson Seed Co. 344
27. Under Neb. U.C.C. § 1-102(3) (Reissue 1980) the provisions of the act may be varied by agreement when done so in good faith.
Reilly v. First Nat. Bank & Trust Co. 443
28. The remedies of rescission and damages are inconsistent, since the former is based on disaffirmance and the latter upon affirmance of the contract.
Boris v. Heyd 569
29. To be allowed as a setoff on a claim for damages, the basis for the setoff must be pled and proved.
Boris v. Heyd 569
30. Generally, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are legally one instrument and will be construed together as if they were as much one in form as they are in substance.
Peterson v. Hynes 573
31. Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties.
Peterson v. Hynes 573
32. Generally, the right to receive money due or to become due under an existing contract may be assigned even though the contract itself is not assignable.
Peterson v. Hynes 573
33. A contract to pay money may be assigned by the person to whom the money is payable, unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.
Peterson v. Hynes 573
34. There is a clear and classic distinction between an option and a so-called "right of first refusal"; the option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, where the right of first refusal has no binding effect unless the offeror decides to sell. The option gives a clear right to the option-holder to purchase upon specified terms and conditions, regardless of the wishes of the option-giver, whereas the "right of refusal" or

"preemption" is conditioned upon the willingness of the owners to sell; it can be enforced by specific performance only where such willingness can be proved.
Coniglio v. Hansl 580
35. In order for an option to become effective, there must be a clear indication by the offerees that the option is being exercised, coupled with an offer on their part to perform the necessary conditions.
Coniglio v. Hansl 580
36. Promoters of a corporation occupy a relationship of trust and confidence toward the corporation to be formed, as well as to each other, and the law requires the promoters to act with good faith as required from other fiduciaries.
Lustgarten v. Jones 585
37. In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.
Lustgarten v. Jones 585
38. On rescission of a contract, rights and duties which have accrued under the rescinded contract are terminated and nullified.
Lustgarten v. Jones 585
39. Rescission of a contract by a subsequent agreement of the parties requires as much a meeting of the parties' minds as does making a contract.
Lustgarten v. Jones 585
40. Inasmuch as formation of a contract can be prevented by duress exerted upon a party to the contract, likewise, duress may prevent an effective rescission of an existing agreement. However, the burden of proving duress is placed upon the party alleging it.
Lustgarten v. Jones 585
41. To be rescinded on account of duress, an agreement must be obtained by pressure brought to bear upon a party to a contract, and must be unjust, unconscionable, or illegal.
Lustgarten v. Jones 585
42. Upon default of payment by the vendee in an executory land contract, the vendor may sue to foreclose the land contract in the same manner as foreclosing a real estate mortgage.
Carman v. Gibbs 603
43. After foreclosure of an executory land contract, the vendor in that contract may sue the vendee for a deficiency judgment.
Carman v. Gibbs 603
44. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Roth v. Farmers Mut. Ins. Co. 612
Kracl v. Aetna Cas. & Surety Co. 869
45. The insurance policy should be given meaning and effect

according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense.
Roth v. Farmers Mut. Ins. Co. 612
Kracl v. Aetna Cas. & Surety Co. 869
46. A cardinal principle regarding letters of credit is that the credit engagement is completely independent of the underlying contract which engenders a letter of credit.
Brown v. United States Nat. Bank 684
47. If an offer prescribes the place, time, or manner of acceptance, its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time, or manner of acceptance, another method of acceptance is not precluded.
Overman v. Brown 788
48. An offeror is entitled to prescribe an exclusive method of acceptance of an offer, but when the offer as fairly interpreted merely suggests without explicitly directing a particular method of acceptance, the offer can be accepted in any reasonable manner.
Overman v. Brown 788
49. Acceptance of an offer may be made in several different ways, and ordinarily need not be express or formal, but may be shown by words, conduct, or acquiescence indicating agreement.
Overman v. Brown 788
50. The act constituting the alleged acceptance of an offer must be judged by whether that communication by the offeree would lead a reasonable person to conclude that the offer has been accepted.
Overman v. Brown 788
51. An action for rescission of a contract is equitable in nature and as such is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Haumont v. Security State Bank 809
52. Where a parent or other relative is induced to execute an instrument by threats and fear of criminal punishment of a child or relative, the instrument is the result of duress and the contract may be voided.
Haumont v. Security State Bank 809
53. When a party seeks to rescind a contract by his or her own act, notice of such action must be given the other party; but when the aid of a court is sought for that purpose, the bringing of the

action is sufficient disaffirmance for the purpose of the action.
Haumont v. Security State Bank 809
54. When the aid of an equity court is sought to rescind a contract, the rescission is effected by the decree of the court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument and renders it as though it does not exist.
Haumont v. Security State Bank 809
55. Because rescission is not accomplished "in equity" until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money which was received from the defendant.
Haumont v. Security State Bank 809
56. An offer of restitution is not necessary where receipt of any benefit is denied by the plaintiff and the good faith of the defendant is challenged.
Haumont v. Security State Bank 809
57. An insurer may by contract limit its liability as long as it does not violate public policy. Where a provision of a policy of automobile insurance which clearly limits its applicability as to uninsured motorist coverage to the "covered" automobile, to the exclusion of other insured-owned automobiles not covered by that particular policy, such prohibition against "stacking" of coverage does not violate the spirit or the letter of Neb. Rev. Stat. § 60-509.01 (Reissue 1984). To the extent that *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970), *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970), and *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), are contrary to this opinion, they are overruled.
Kracl v. Aetna Cas. & Surety Co. 869
58. In an unambiguous contract the intention of the parties must be determined from its contents alone.
T.V. Transmission v. City of Lincoln 887
59. Courts are not free to rewrite a contract for the parties or speculate as to terms which the parties have not seen fit to set out.
T.V. Transmission v. City of Lincoln 887
60. An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation.
T.V. Transmission v. City of Lincoln 887

61. The whole contract must be considered when seeking its meaning.
T.V. Transmission v. City of Lincoln 887
62. The parties are bound by the terms of their contract even though their actual intent may have been different than that expressed in the document.
T.V. Transmission v. City of Lincoln 887
63. A city, in the absence of legislative authorization, has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority.
T.V. Transmission v. City of Lincoln 887
64. A municipal corporation's contract is ultra vires when the corporation has no power to make the contract under any circumstances or for any purpose.
T.V. Transmission v. City of Lincoln 887
65. In contracts relating to its proprietary interests, a municipal corporation is bound by the same rules as are private corporations.
T.V. Transmission v. City of Lincoln 887

Conversion

1. A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
PWA Farms v. North Platte State Bank 516
2. A negotiable instrument can be the subject of conversion.
PWA Farms v. North Platte State Bank 516
3. The measure of damages for conversion is the market value of the converted property on the date of conversion.
PWA Farms v. North Platte State Bank 516
4. Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time.
Roth v. Farmers Mut. Ins. Co. 612

Convictions

1. 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.
State v. Sutton 128
State v. Murphrey 699
2. In order to successfully attack a conviction because of ineffective assistance of counsel, it is necessary that the defendant prove that prejudice resulted to him because of such ineffectiveness.
State v. Pearson 183

3. In the review of the evidence in a criminal case, this court does not weigh the evidence or pass upon the credibility of witnesses, and we will sustain the verdict if, in taking the view of the evidence most favorable to the State, there is sufficient evidence to support it.
State v. Wood 388
State v. Daniels 480
4. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and 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. Benzel 466
State v. Joy 535
State v. Hunt 707
State v. Eggers 862
5. A conviction may be sustained if the guilt of the defendant is established beyond a reasonable doubt from all the evidence in the case, including such reasonable inferences as seem justified in the light of the trier of facts' own experience.
State v. Benzel 466
6. A conviction may be supported by the uncorroborated testimony of an accomplice.
State v. Joy 535
7. Harmless error provides no ground for the reversal of a judgment of guilt.
State v. Hunt 707
8. Improper admission of evidence does not constitute reversible error where the evidence is cumulative and there is other competent evidence to support the conviction.
State v. Thierstein 766
9. A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.
State v. Gregory 778
10. Direct evidence of a crime is not essential for a conviction, and one may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.
State v. Eggers 862
11. In order to convict one on the basis of circumstantial evidence, the State is not required to disprove every hypothesis but that of guilt.
State v. Eggers 862

Corporations

1. A corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation unless (1) the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) the transaction amounts to a consolidation or merger of the purchasing and selling corporations; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction has been entered into fraudulently to escape liability for the obligations of the selling corporation.
   Timmerman v. American Trencher, Inc. 175
2. Commonality of officers, directors, or stockholders is an important consideration in determining whether a purchasing corporation is but a continuation of the corporate entity of a selling corporation.
   Timmerman v. American Trencher, Inc. 175
3. The fact that a purchasing corporation continues the business operations of a selling corporation does not, in and of itself, establish that the purchasing corporation is a continuation of the corporate entity of the selling corporation.
   Timmerman v. American Trencher, Inc. 175
4. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority.
   PWA Farms v. North Platte State Bank 516
5. Promoters of a corporation occupy a relationship of trust and confidence toward the corporation to be formed, as well as to each other, and the law requires the promoters to act with good faith as required from other fiduciaries.
   Lustgarten v. Jones 585
6. A corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation; however, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority.
   Mueller v. Union Pacific Railroad 742
7. In contracts relating to its proprietary interests, a municipal corporation is bound by the same rules as are private corporations.
   T.V. Transmission v. City of Lincoln 887

Corroboration

In a prosecution for attempted first degree sexual assault, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be

corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
State v. Rubek 537

Costs

1. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney fees incurred.
In re Estate of Odineal 168
2. The good faith required in Neb. Rev. Stat. § 30-2481 (Reissue 1979) is an ultimate fact for the court's determination upon all of the evidence. There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case.
In re Estate of Odineal 168

Counties

1. A county board is without authority, in the absence of a grant, to perform the duties which are part of the official duties of other officials or boards.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431
2. Although the county board is given the right to approve the salary set by the elected official, the county board may not act arbitrarily or capriciously.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431
3. Except for the county assessor, whose authority regarding the setting of wages, and therefore the terms and conditions of employment, has been transferred to the county board, the elected county official is the proper person to represent the county in connection with negotiations involving employees of the elected official's office and the employees' bargaining representatives pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984).
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

Court Rules

A technical violation of a local court rule which has been waived by opposing counsel may not be raised in this court.
Hanika v. Rawley 45

Courts

1. In an appeal from a misdemeanor conviction in county court, where no notice of appeal was filed as required by Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1982), and no bond was deposited as required by Neb. Rev. Stat. § 29-611 (Reissue

1979), the district court lacked jurisdiction to hear an appeal from the county court and, therefore, the Supreme Court has no jurisdiction to hear an appeal from the district court.
State v. Fehncke 135

2. It is the obligation of the judiciary to declare a statute invalid where it arbitrarily and unreasonably violates the Constitution.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242

3. Courts of this state do not render advisory opinions, but simply decide cases and controversies.
Vrana Paving Co. v. City of Omaha 269

4. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

5. Generally, a document from a court may be authenticated by either the clerk or deputy clerk of that court.
State v. Benzel 466

6. A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony.
State v. Rubek 537

7. Generally speaking, adequate representation by counsel for the respective parties and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protects the children's interests and renders unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children.
Chalupa v. Chalupa 704

8. The determination of what constitutes a legislative function and what constitutes a judicial one must be made on a case-by-case basis.
State v. Stratton 854

9. The law places upon judges the primary responsibility for imposing sentences within limits fixed by statute.
State v. Stratton 854

10. The Legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.
State v. Stratton 854

11. It is the duty of courts to administer the law as it exists.
State v. Stratton 854
12. Courts are not free to rewrite a contract for the parties or speculate as to terms which the parties have not seen fit to set out.
T.V. Transmission v. City of Lincoln 887

Criminal Law

1. A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
State v. Sutton 128
2. Ordinarily, evidence tending to prove an alibi does not destroy the sufficiency of the evidence to support a finding of guilt, but only presents conflicting evidence on a question of fact.
State v. Sutton 128
3. A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
State v. Pearson 183
4. The standard for determining whether an attorney adequately represented a criminal defendant is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. He is also required to conscientiously protect the interests of the client.
State v. Pearson 183
5. Where it is apparent that the lesser sentence imposed upon a codefendant is erroneous, the sentencing court is not required to reduce all more severe though properly imposed sentences just to obtain uniformity.
State v. Morrow 247
6. In order to show ineffectiveness of counsel, it must be shown that trial counsel failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law in the area and that such lawyer failed to conscientiously protect the interests of the client.
State v. Brown 305
7. A decision to call, or not call, a particular witness, made by counsel as a matter of trial strategy, even if that choice may prove to be ineffective, does not without more sustain a finding of ineffectiveness of counsel.
State v. Brown 305
8. Imprisonment for life is the minimum penalty for first degree murder.
State v. Boyer 312

9. In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time.
State v. Predmore 336
10. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
State v. Predmore 336
11. In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
State v. Wood 388
12. Criminal attempt may be defined in part as intentionally engaging in conduct which, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the commission of the crime.
State v. Benzel 466
13. Even though a gun be unloaded and thereby incapable of causing death or injury, a person may be guilty of attempted murder or assault if the person pulling the trigger believes the gun to be loaded.
State v. Benzel 466
14. A defendant is not entitled to additional peremptory challenges because the indictment or information charges separate offenses in separate counts.
State v. Benzel 466
15. In determining whether the rights of a defendant have been prejudiced such that a reversal is required, the claim of prejudice must be evaluated in the context of the entire record.
State v. Benzel 466
16. In a criminal prosecution the law requires that the criminal statute must be reasonably clear and definite, setting forth standards that are not so uncertain as to be left to conjecture the conduct proscribed.
State v. Merithew 530
17. The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law.
State v. Merithew 530
18. The discharge of one accused of crime by an examining magistrate following a preliminary hearing does not bar the refiling of the same or different charges before another magistrate.
State v. Rubek 537

19. A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony.
State v. Rubek 537
20. Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. The proper rule is that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.
State v. Trimble 639
21. The granting of credit for jail time served while awaiting sentence is within the sound discretion of the court.
State v. Knight 666
State v. Ross 843
22. Refusing to grant credit for jail time served while awaiting sentence may not be used to impose minimum sentences in excess of one-third of the maximum term, as provided in Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981).
State v. Knight 666
State v. Ross 843
23. A prosecutor states a case as contemplated by Neb. Rev. Stat. § 29-2016 (Reissue 1979) when he or she outlines the nature of the proceeding against the defendant.
State v. Hunt 707
24. Harmless error provides no ground for the reversal of a judgment of guilt.
State v. Hunt 707
25. Abolition of the privilege preventing a spouse from testifying about any confidential communication made by one spouse to the other in crimes of violence, Neb. Rev. Stat. § 27-505 (Cum. Supp. 1984), does not constitute special legislation and does not grant a special privilege in violation of Neb. Const. art. III, § 18, nor does it offend concepts of due process and equal protection.
State v. Hunt 707
26. An accidental injury occurs where there is no intent or volition on the part of the actor.
State v. Brown 849
27. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is neither cruelly inhumane nor disproportionate to the crime involved.
State v. Stratton 854
28. The law places upon judges the primary responsibility for

imposing sentences within limits fixed by statute.
State v. Stratton 854
29. The Legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.
State v. Stratton 854
30. The requirement of Neb. Rev. Stat. § 28-1205(3) (Reissue 1979) that sentences imposed for the use of firearms to commit a felony be consecutive to any other sentence imposed does not constitute a violation of the distribution of powers mandated by Neb. Const. art. II, § 1, art. III, § 1, or art. V, § 9.
State v. Stratton 854
31. A trial court's sustaining of a motion for dismissal or acquittal constitutes a resolution of the issue of guilt.
State v. Carney 906
32. It is error for a court to allow the prosecution to set aside its rest and produce additional evidence after a resolution of the issue of guilt is made.
State v. Carney 906
33. When a trial judge sustains a motion for acquittal, the judge has finally determined the rights of the parties in the action.
State v. Carney 906
34. The failure of a court to render a judgment and enter it is not sufficient reason to deprive the defendant of her constitutional rights under the provisions of the double jeopardy clause.
State v. Carney 906
35. To permit a court to entertain additional argument, set aside its ruling, and continue a trial after making a finding that the defendant was not guilty as a matter of law is indistinguishable from permitting a prosecuting attorney to present additional argument after a jury has delivered a verdict.
State v. Carney 906

Crops

Crops standing on the land, whether matured or not, pass with the land to the surviving joint tenant and are not an asset of the estate of the deceased tenant subject to administration.
In re Estate of Kennedy 212

Damages

1. A damages award by a jury will not be set aside as exorbitant unless it is so clearly excessive as to indicate that it was the result of passion, prejudice, mistake, or disregard of the evidence or applicable rules of law.
Wellman v. Birkel 1
2. The measure of damages in a replevin action when the property is not returned is the value of the property, together with

interest, from the date of the unlawful taking.
Wellman v. Birkel 1
3. When the property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.
Wellman v. Birkel 1
4. When error exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, a reviewing court may, when remanding a cause for a new trial, limit the new trial to such issue.
Jeffres v. Countryside Homes 26
5. When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone would not have caused the result.
Maloney v. Kaminski 55
6. A wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value.
Maloney v. Kaminski 55
7. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss in a wrongful death case; such loss must be determined upon a consideration of the circumstances of each case.
Maloney v. Kaminski 55
8. There is no requirement in a wrongful death case that there be evidence of the dollar value of companionship, counseling, or advice.
Maloney v. Kaminski 55
9. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including the gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
Quad-States, Inc. v. Vande Mheen 161
10. Broadly speaking, the amount recoverable for the breach of a covenant not to compete is the loss sustained by the covenantee as a natural result of the breach.
Quad-States, Inc. v. Vande Mheen 161
11. The fact that the damages flowing from the breach of a covenant not to compete are not susceptible of exact computation will not preclude recovery; however, in order to recover substantial damages, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness; if a plaintiff fails to so do, he

can nevertheless, if there is evidence of a specific monetary loss, recover a nominal sum.
Quad-States, Inc. v. Vande Mheen 161
National Farmers Union Serv. Corp. v. Edwards 231
12. It is the duty of a trial court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture.
Quad-States, Inc. v. Vande Mheen 161
13. When an employee sues and recovers damages from a third party for injuries received, an employer is statutorily entitled to subrogation for amounts paid to the injured employee as workmen's compensation payments. Neb. Rev. Stat. § 48-118 (Reissue 1984).
Turner v. Metro Area Transit 189
14. Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. An instruction stating a general principle in the measurement of damages, broader than is applicable to the case presented and not qualified by other instructions, is erroneous.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
15. Where an insurance broker has negligently failed to obtain adequate insurance coverage for an insured, insured's measure of damages for loss caused thereby is the amount of actual loss as would have been covered by adequate insurance less any amount paid by insurance effectuated by the broker.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
16. Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error to refuse to set aside such verdict.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
17. The measure of damages for conversion is the market value of the converted property on the date of conversion.
PWA Farms v. North Platte State Bank 516
18. The remedies of rescission and damages are inconsistent, since the former is based on disaffirmance and the latter upon affirmance of the contract.
Boris v. Heyd 569
19. To be allowed as a setoff on a claim for damages, the basis for the setoff must be pled and proved.
Boris v. Heyd 569
20. Ordinarily, an action for damages is the appropriate remedy for the breach of an employment contract.
Mueller v. Union Pacific Railroad 742

Death Penalty

A death sentence cannot be imposed absent the existence of at least one

of the aggravating circumstances set forth in Neb. Rev. Stat. § 29-2523 (Reissue 1979).
State v. Hunt 707

Debtors and Creditors

1. Upon the death of one joint tenant, the land passes to the surviving tenant free from the debts of the deceased joint tenant.
In re Estate of Kennedy 212
2. A gift of a debt not evidenced by a written document may be made without delivery of any writing by the donor.
Guardian State Bank & Trust Co. v. Jacobson 235
3. A debtor in possession has all the power of a trustee and holds title to property as a fiduciary for creditors.
Beatrice Nat. Bank v. Mid-America Dairymen 757
4. Pursuant to 11 U.S.C. §§ 542 and 543 (1982), entities and custodians of property belonging to the debtor are commanded to deliver over such property to the trustee or, in the case of a Chapter 11 proceeding, to the debtor in possession. Claims of secured parties whose property is delivered to the trustee or debtor in possession are then presented to the bankruptcy court.
Beatrice Nat. Bank v. Mid-America Dairymen 757
5. The term "lien" in 11 U.S.C. § 362(a)(4) (1982) is used to include any consensual security interest in personal property. This section is designed to protect the debtor against harassment and possible frustration of any rehabilitation by prejudicial disposition of the assets of the estate before injunctive relief can be obtained.
Beatrice Nat. Bank v. Mid-America Dairymen 757
6. The procedure to be followed to obtain an "execution warrant" should be similar to that prescribed by Neb. Rev. Stat. §§ 29-830 to 29-835 (Reissue 1979), which provide for the issuance of "inspection warrants." Such an execution warrant should be issued only by a judge of a court of record upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution.
State v. Hinchey 825

Decedents' Estates

1. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney fees incurred.
   In re Estate of Odineal 168
2. The good faith required in Neb. Rev. Stat. § 30-2481 (Reissue 1979) is an ultimate fact for the court's determination upon all of the evidence. There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case.
   In re Estate of Odineal 168
3. The general rule is that a personal representative cannot deal with the estate's assets for personal profit or gain.
   In re Estate of Kennedy 212
4. Upon the death of one joint tenant, the land passes to the surviving tenant free from the debts of the deceased joint tenant.
   In re Estate of Kennedy 212
5. Crops standing on the land, whether matured or not, pass with the land to the surviving joint tenant and are not an asset of the estate of the deceased tenant subject to administration.
   In re Estate of Kennedy 212
6. Federal estate taxes are to be apportioned among the persons interested in the estate.
   In re Estate of Kennedy 212
7. Generally, statements made by a deceased person against his pecuniary interest are admissible against the personal representative of the deceased.
   Guardian State Bank & Trust Co. v. Jacobson 235
8. In the absence of an allegation that a decedent's property is necessary for purposes of administration, as required by Neb. Rev. Stat. § 30-2470 (Reissue 1979), a personal representative has no authority to take possession or control of a decedent's property.
   In re Estate of Kesting 524

Declaratory Judgments

1. A declaratory judgment action is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court.
   Moore v. Black 122
2. Ordinarily, an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.
   Moore v. Black 122
3. A declaratory judgment determines the rights of the parties in a justiciable controversy and is binding on any further

adjudication between the parties as to the rights so declared.
Heimbouch v. Victorio Ins. Serv., Inc. 279
4. In a declaratory judgment action on a contract, the court may not only construe the contract but it is authorized to enter judgment for the amount due thereunder in the light of the interpretation made.
Heimbouch v. Victorio Ins. Serv., Inc. 279
5. The district court clearly has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract.
Heimbouch v. Victorio Ins. Serv., Inc. 279

Demurrer

1. Objection to jurisdiction of the court over subject matter may be raised by demurrer.
Wood v. Village of Culbertson 94
2. A demurrer admits all well-pleaded facts.
Bernstein v. Ainsworth 670
3. In determining the sufficiency of a demurrer to state a cause of action, the court accepts as true all facts well pleaded, but does not accept as true facts not well pleaded, such as conclusions of law.
Bernstein v. Ainsworth 670
Overman v. Brown 788
4. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Overman v. Brown 788

Depositions

Where a party clearly changes his deposition testimony at trial on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, his trial testimony stands discredited as a matter of law, and he is bound by the admissions made at the deposition.
Nixon v. Harkins 286

Directed Verdict

1. On a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
Maloney v. Kaminski 55
Quad-States, Inc. v. Vande Mheen 161
2. It is only where there is a total failure of competent proof in a

criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
State v. Rubek 537

Discrimination

1. An individual case of discrimination based on the employee's filing of a discrimination charge before the Nebraska Equal Opportunity Commission will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's firing. Third, should the defendant carry that burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
Harris v. Misty Lounge, Inc. 678
2. A showing by an employee that he or she was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal.
Harris v. Misty Lounge, Inc. 678

Divorce

1. Where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of a default hearing need not be given to such party.
Tejral v. Tejral 264
2. Dissolution of marriage cases are equitable in nature.
Ohler v. Ohler 272
3. The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
Clark v. Clark 771
4. In a domestic relations case on appeal, where each party has testified, the burden is on the appellant to have a bill of exceptions prepared containing the testimony and evidence of each party on any of the issues affected by the trial court's decree

of dissolution to be presented for review by appellant.
Ward v. Ward 799

Double Jeopardy

The failure of a court to render a judgment and enter it is not sufficient reason to deprive the defendant of her constitutional rights under the provisions of the double jeopardy clause.
State v. Carney 906

Drunk Driving

A nonexpert witness may testify from his observation as to whether or not another is intoxicated, and the weight and sufficiency is for a jury to decide.
State v. Daniels 480

Due Process

1. A court reviewing an order of an administrative agency to determine whether there has been due process of law must determine whether there was reasonable notice and an opportunity for fair hearing.
Bockbrader v. Department of Insts. 17
2. There must be a hearing before an impartial board at some time before an order of dismissal from an administrative agency becomes effective, to ensure due process of law.
Bockbrader v. Department of Insts. 17
3. Due process requires a pretermination hearing to determine whether there are reasonable grounds to believe that the charges against a tenured public employee are true and support the proposed action.
Bockbrader v. Department of Insts. 17
4. A tenured public employee is entitled to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond at a pretermination hearing.
Bockbrader v. Department of Insts. 17

Duress

1. To constitute business duress there must be an application of such pressure or constraint as compels a person to go against his or her will and takes away his or her free agency, destroying the power of refusing to comply with the unjust demands of another.
Haumont v. Security State Bank 809
2. Where a parent or other relative is induced to execute an instrument by threats and fear of criminal punishment of a child or relative, the instrument is the result of duress and the contract may be voided.
Haumont v. Security State Bank 809

Easements

1. The law treats a claim of prescriptive right with disfavor. Such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established.
   Simacek v. York County Rural P.P. Dist. 484
2. A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
   Simacek v. York County Rural P.P. Dist. 484
3. A permissive use is not adverse and cannot ripen into an easement.
   Simacek v. York County Rural P.P. Dist. 484
4. If a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate.
   Simacek v. York County Rural P.P. Dist. 484

Effectiveness of Counsel

1. 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. Manchester 41
   State v. Pearson 183
   State v. Brown 305
2. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
   State v. Manchester 41
   State v. Pearson 183
3. A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
   State v. Pearson 183
4. The defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
   State v. Pearson 183
5. Failure of counsel to request a jury instruction which finds support in the record may constitute ineffective assistance of counsel, which may require the granting of relief only if it appears that the defendant was prejudiced by counsel's conduct.
   State v. Pearson 183
6. A decision to call, or not call, a particular witness, made by

counsel as a matter of trial strategy, even if that choice may prove to be ineffective, does not without more sustain a finding of ineffectiveness of counsel.
State v. Brown 305

Election of Remedies

1. A party may not plead alternative theories of recovery which are inconsistent in the sense that he or she cannot logically choose one theory without renouncing the other; he or she must elect between them.
Tobin v. Flynn & Larsen Implement Co. 259
2. A party cannot proceed on a theory of recovery which is premised upon the existence of a contract and at the same time proceed alternatively on a theory which is premised on the lack of a contract.
Tobin v. Flynn & Larsen Implement Co. 259
3. One who has been induced to enter into an agreement by virtue of a material misrepresentation may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract.
Tobin v. Flynn & Larsen Implement Co. 259
4. A party must proceed on alternative, consistent theories at the same time or forever forgo one theory or the other.
Tobin v. Flynn & Larsen Implement Co. 259

Employer and Employee

1. The Nebraska Wage Payment and Collection Act applies only to actions to recover wages due an employee for labor or services performed for an employer.
Heimbouch v. Victorio Ins. Serv., Inc. 279
2. Transportation rendered to an employee by an employer either incident to the employment contract or because of the custom of the employee's job operates to bring the employee within the scope of his employment during the time of the transportation.
Kopfman v. Freedom Drilling Co. 323
3. Acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope of the employment.
Kopfman v. Freedom Drilling Co. 323
4. If an injured employee does not have an independent cause of action, the injured employee's spouse cannot maintain an independent cause of action against the injured employee's employer.
Hallett v. George A. Hormel & Co. 387

Employment Contracts

1. In the absence of any contractual or statutory restrictions on the employer's right to discharge an employee, the employer may lawfully discharge an employee for whatever cause the employer chooses.
   Smith v. City of Omaha 217
2. Where an employee seeks the protection of a contract to avoid discharge, the burden is on the employee to prove such contract.
   Smith v. City of Omaha 217
3. Ordinarily, an action for damages is the appropriate remedy for the breach of an employment contract.
   Mueller v. Union Pacific Railroad 742
4. When the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may discharge an employee whenever it chooses, with or without cause.
   Mueller v. Union Pacific Railroad 742
5. Under some circumstances the termination-at-will rule is subject to modification by promises outside the employment agreement itself.
   Mueller v. Union Pacific Railroad 742

Employment Security Law

1. Appeals under the Nebraska Employment Security Law are reviewed de novo on the record in the Supreme Court.
   Norman v. Sorensen 408
2. In voluntary termination cases under the Nebraska Employment Security Law, the burden of proof is on the employee to prove that the employee's leaving was for good cause.
   Norman v. Sorensen 408
3. The Employment Security Law provides cash benefits to workers who have been employed in covered employment but who become unemployed and are not otherwise disqualified.
   Sorensen v. Meyer 457
4. The Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished.
   Sorensen v. Meyer 457
5. The requirement of Neb. Rev. Stat. § 48-628(e) (Reissue 1984), that a lump sum severance allowance be prorated, is intended to prevent a claimant from receiving double payments for the same period of time in the form of unemployment benefits and severance compensation.
   Sorensen v. Meyer 457
6. The provision of Neb. Rev. Stat. § 48-627(e) (Reissue 1984), that a claimant earn a certain amount of wages during any

benefit year and during each of two quarters thereof, is intended to prevent a claimant from electing to simply collect unemployment benefits rather than work.
Sorensen v. Meyer 457
7. A lump sum severance allowance paid to a claimant is not to be prorated to the calendar quarters immediately following the date of payment in order to determine whether the monetary eligibility requirements of Neb. Rev. Stat. § 48-627(e) (Reissue 1984) have been met.
Sorensen v. Meyer 457
8. The phrase "to leave work voluntarily" has been defined to mean to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
Montclair Nursing Center v. Wills 547
9. The burden of proof under Neb. Rev. Stat. § 48-628(a)(1) (Reissue 1984) is upon the employee to show that he or she left his or her employment for good cause.
Montclair Nursing Center v. Wills 547
10. A change in hours, absent some compelling circumstances, does not rise to the level of good cause within the meaning of Neb. Rev. Stat. § 48-628(a)(1) (Reissue 1984).
Montclair Nursing Center v. Wills 547
11. Where there is no competent medical evidence offered to substantiate a claim that an employee's health would be affected by a change in hours, the claimant has failed to meet his or her burden of proving that termination was for good cause because of health reasons.
Montclair Nursing Center v. Wills 547
12. An employer may change an employee's hours of employment without giving the employee good cause to terminate the employment, absent some evidence that the shift change was done for some improper purpose.
Montclair Nursing Center v. Wills 547

Entrapment

1. In order to substantiate the defense of entrapment, it must be shown that the government induced the defendant to commit the crime charged and that defendant's predisposition to commit the crime was such that defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
State v. Pearson 183
2. Merely because a police officer has afforded a defendant a favorable opportunity for commission of a crime already conceptualized in the accused's mind, it is not entrapment.
State v. Pearson 183
3. The defense of entrapment is comprised of two essential

elements: (1) The defendant must not have been predisposed to commit the crime; and (2) The defendant must have been improperly induced by law enforcement officers to commit the crime.
State v. Pearson 183
4. If the defendant has submitted no more than a scintilla of credible evidence tending to prove entrapment, the question of entrapment then becomes one of fact to be decided by the jury.
State v. Pearson 183

Equal Opportunity Commission

1. Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo on the record.
Harris v. Misty Lounge, Inc. 678
2. Upon appeal to this court of the district court's review of an order of the Nebraska Equal Opportunity Commission, our review is de novo on the record.
Harris v. Misty Lounge, Inc. 678
3. An individual case of discrimination based on the employee's filing of a discrimination charge before the Nebraska Equal Opportunity Commission will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's firing. Third, should the defendant carry that burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
Harris v. Misty Lounge, Inc. 678
4. A showing by an employee that he or she was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal.
Harris v. Misty Lounge, Inc. 678

Equity

1. Dissolution of marriage cases are equitable in nature.
Ohler v. Ohler 272
2. One who comes into equity must come with clean hands.
Ohler v. Ohler 272
3. Equity will refuse to aid a litigant who violates a statute directly connected with the matter in litigation.
Ohler v. Ohler 272
4. A suit for the specific performance of a contract is equitable in nature.
Nixon v. Harkins 286

5. The Nebraska Supreme Court reviews equity matters de novo on the record and reaches an independent conclusion without reference to the trial court's findings, subject to the rules that (1) when the evidence on material questions of fact is in irreconcilable conflict, the Nebraska Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite, and (2) the Nebraska Supreme Court is required, where the trial court has viewed the premises, to consider any competent, relevant facts revealed by the view and findings made by the court, provided the record contains competent evidence to support the findings.
Nixon v. Harkins 286
Flansburgh v. Coffey 381
Hulse v. Schelkopf 617
Hadley v. Ideus 878

6. An action to determine the priority of liens is equitable in nature.
Reilly v. First Nat. Bank & Trust Co. 443

7. A suit to impress a constructive trust is one in equity which this court reviews de novo on the record, giving consideration, where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
Ford v. Jordan 492

8. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of legal title for the benefit of the grantor.
Ford v. Jordan 492

9. A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal sanctions.
State ex rel. Douglas v. Wiener 502

10. Generally, in order to be entitled to the equitable remedy of an accounting, it is necessary to show a fiduciary or trust relationship between the parties or a complicated series of accounts making the remedy at law inadequate.
Lustgarten v. Jones 585

11. When a defendant in an equity action moves for a dismissal at the close of the plaintiff's evidence, he thereby admits to be true

plaintiff's evidence and every inference favorable to the plaintiff which may fairly and reasonably be drawn therefrom; where the plaintiff has made a prima facie case, the motion to dismiss is to be overruled.
Hulse v. Schelkopf 617

12. An action for rescission of a contract is equitable in nature and as such is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Haumont v. Security State Bank 809

13. When the aid of an equity court is sought to rescind a contract, the rescission is effected by the decree of the court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument and renders it as though it does not exist.
Haumont v. Security State Bank 809

14. Because rescission is not accomplished "in equity" until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money which was received from the defendant.
Haumont v. Security State Bank 809

15. An offer of restitution is not necessary where receipt of any benefit is denied by the plaintiff and the good faith of the defendant is challenged.
Haumont v. Security State Bank 809

Estoppel

1. While estoppel may not be used to create a title to real estate, the doctrine may be used in defense of title.
Hanika v. Rawley 45

2. Equitable estoppel generally is such conduct by a party that it would be fraudulent or a fraud upon the rights of another for that party afterward to repudiate and to set up claims inconsistent with it.
Hanika v. Rawley 45

3. Where silence enables one to acquire an unfair advantage over another in the settlement of property rights, it is that person's duty to speak.
Hanika v. Rawley 45

4. The burden of proof rests on the party who pleads an estoppel to establish the facts upon which the estoppel is based.
Redick v. Redick 86

5. Among the elements necessary to be proved to establish the defense of estoppel are: 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; and 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.
Redick v. Redick 86

6. Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
Grand Lodge I.O.O.F. v. Marvin 197

7. A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him.
Mayer v. Howard 328

8. Equitable estoppel requires the coexistence of two separate sets of elements. As to the party estopped, there must be (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 that party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct would 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 party who seeks to invoke the benefit of estoppel, there must be (1) lack of knowledge and of the means of acquiring knowledge of the truth of the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) 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.
O'Neill Prod. Credit Assn. v. Mellor 555

Evidence

1. In testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party.
Wellman v. Birkel 1

2. In a case tried to the court, the presumption obtains that the trial court, in arriving at its decision, considered only such evidence as was competent and relevant.
Jeffres v. Countryside Homes 26
State v. Thierstein 766
3. It is the province of the trier of the facts to harmonize the testimony insofar as that is possible and, in case of conflicts, to decide as to the weight to be given the testimony of the witnesses.
Jeffres v. Countryside Homes 26
4. In a trial de novo, evidence which should not have been admitted by the trial court will be disregarded by this court in arriving at its decision.
Hanika v. Rawley 45
5. Substantial evidence is that which would justify a court in refusing to direct a verdict when the conclusion sought would be one of fact for the jury.
Hanika v. Rawley 45
6. A jury is not required to accept as absolutely true every statement of a witness, even though such is not contradicted by direct evidence; the persuasiveness of uncontradicted testimony can be destroyed in other ways.
Maloney v. Kaminski 55
7. The sudden emergency doctrine is to be submitted to the jury where there is evidence that a wrong course of action was pursued, from the results of which the actor is to be excused because of the stress and shortness of time under which the decision was made.
Maloney v. Kaminski 55
8. Where the testimony is conflicting as to whether the range of vision rule is applicable or whether another factual version of how the accident occurred is supported by the evidence, then it becomes the duty of the court to submit both factual issues to the jury.
Maloney v. Kaminski 55
9. There is no requirement in a wrongful death case that there be evidence of the dollar value of companionship, counseling, or advice.
Maloney v. Kaminski 55
10. Proof of contradictory extrajudicial statements of a witness may be received in evidence for the purpose of assisting the jury in estimating the credibility of the witness, but unless otherwise admissible, such statements may not be utilized as substantive evidence of the facts declared.
State v. Marco 96
11. A party is not permitted to get before the jury, under the guise of impeachment, an extrajudicial statement of a witness by calling

him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.
State v. Marco 96
12. The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
State v. Marco 96
13. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable extrajudicial statement the witness had made.
State v. Marco 96
14. Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded.
State v. Marco 96
15. 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. Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking.
State v. Sutton 128
16. Robbery is committed when property is taken from a person through the use of force, violence, or intimidation. It is not necessary that the property be taken from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control.
State v. Sutton 128
17. A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
State v. Sutton 128
18. Ordinarily, evidence tending to prove an alibi does not destroy the sufficiency of the evidence to support a finding of guilt, but only presents conflicting evidence on a question of fact.
State v. Sutton 128
19. Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court, on the motion of the

defendant, to dismiss the action.
Quad-States, Inc. v. Vande Mheen 161
20. It is the duty of a trial court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture.
Quad-States, Inc. v. Vande Mheen 161
21. The good faith required in Neb. Rev. Stat. § 30-2481 (Reissue 1979) is an ultimate fact for the court's determination upon all of the evidence. There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case.
In re Estate of Odineal 168
22. The question of whether an architect has failed to perform in accordance with the standards of the profession is a matter which must be proved by expert testimony and cannot be left to lay witnesses.
Overland Constructors v. Millard School Dist. 220
23. Generally, statements made by a deceased person against his pecuniary interest are admissible against the personal representative of the deceased.
Guardian State Bank & Trust Co. v. Jacobson 235
24. "Clear and satisfactory" evidence is the same as "clear and convincing" evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
Tobin v. Flynn & Larsen Implement Co. 259
25. Where the review is de novo, the Nebraska Supreme Court will disregard incompetent, irrelevant, and immaterial evidence admitted over proper objection.
Nixon v. Harkins 286
26. Where a party clearly changes his deposition testimony at trial on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, his trial testimony stands discredited as a matter of law, and he is bound by the admissions made at the deposition.
Nixon v. Harkins 286
27. Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.
Nixon v. Harkins 286
28. If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic

evidence is neither necessary nor generally allowed.
State v. Johnson 392
29. The object of the evidentiary standard in medical disputes in workmen's compensation cases is the elicitation of substantial evidence leading to the direct conclusion of an employment-related disability.
Hare v. Watts Trucking Service 403
30. No extrinsic authentication is required for admissibility of a copy of an official record certified by its authorized custodian—a court reporter—who has complied with the rules of the Supreme Court as to certification.
State v. Benzel 466
31. Failure to object to an offer of evidence waives the objection.
State v. Daniels 480
PWA Farms v. North Platte State Bank 516
32. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
Ford v. Jordan 492
Hulse v. Schelkopf 617
33. Where a ruling excluding evidence is made, an offer of proof is generally a prerequisite to our review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
Hulse v. Schelkopf 617
34. Evidence which does not appear in the record cannot be considered by this court on appeal.
Hulse v. Schelkopf 617
35. Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. The proper rule is that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.
State v. Trimble 639
36. Abolition of the privilege preventing a spouse from testifying about any confidential communication made by one spouse to the other in crimes of violence, Neb. Rev. Stat. § 27-505 (Cum. Supp. 1984), does not constitute special legislation and does not grant a special privilege in violation of Neb. Const. art. III, § 18, nor does it offend concepts of due process and equal protection.
State v. Hunt 707
37. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not a ground for reversal.
State v. Hunt 707
State v. Thierstein 766

38. Evidence which would be inadmissible in criminal proceedings is inadmissible in hearings before a mental health board.
In re Interest of Ely 731
39. The case files prepared by social workers for use in child dependency cases are, by statute, privileged and are not subject to discovery as a matter of right.
In re Interest of S.W. 734
40. In the absence of a showing of good cause, the refusal to permit discovery of case files prepared by social workers for use in child dependency cases is not an abuse of discretion.
In re Interest of S.W. 734
41. The purchase of a medical practice by another physician does not in any way affect the confidential physician-patient privilege that exists between the patient and the vendor physician.
Clark v. Clark 771
42. The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
Clark v. Clark 771
43. The determination as to the admissibility of the evidence to which a waiver of privilege applies is to be initially entrusted to the sound discretion of the trial court.
Clark v. Clark 771
44. 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.
Masters v. Iowa Beef Processors 835
45. In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award.
Masters v. Iowa Beef Processors 835
46. Generally, 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. Ross 843
47. It is error for a court to allow the prosecution to set aside its rest and produce additional evidence after a resolution of the issue of guilt is made.
State v. Carney 906

Executors and Administrators

The general rule is that a personal representative cannot deal with the estate's assets for personal profit or gain.
In re Estate of Kennedy 212

Expert Witnesses

1. The value of an expert's opinion is no stronger than the facts upon which it is based.
Hare v. Watts Trucking Service 403
2. A trial court may, either on its own motion or in response to an objection, require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion.
Forehead v. Galvin 578

Extradition and Detainers

1. Once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed that an offense occurred and that the accused committed it, no further judicial inquiry may be had on that issue in the asylum state.
Radant v. Vargason 116
2. Once the governor of an asylum state has granted extradition, a court of that state, considering release on habeas corpus, can do no more than decide (1) whether the extradition documents on their face are in order, (2) whether the petitioner has been charged with a crime in the demanding state, (3) whether the petitioner is the person named in the request for extradition, and (4) whether the petitioner is a fugitive.
Radant v. Vargason 116
3. In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers, and if together they meet statutory requirements, that is sufficient.
Radant v. Vargason 116
4. The term "authenticate," as used in extradition statutes, simply means a statement that the documents are what they purport to be.
Radant v. Vargason 116
5. In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state.
Radant v. Vargason 116

Extrajudicial Statements

1. A party is not permitted to get before the jury, under the guise of impeachment, an extrajudicial statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.
   State v. Marco 96
2. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable extrajudicial statement the witness had made.
   State v. Marco 96

Fees

1. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney fees incurred.
   In re Estate of Odineal 168
2. The good faith required in Neb. Rev. Stat. § 30-2481 (Reissue 1979) is an ultimate fact for the court's determination upon all of the evidence. There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case.
   In re Estate of Odineal 168

Final Orders

1. The power to decide usually implies the power to reconsider.
   Bockbrader v. Department of Insts. 17
2. An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto.
   In re 1983-84 County Tax Levy 897

Foreclosure

1. Upon default of payment by the vendee in an executory land contract, the vendor may sue to foreclose the land contract in the same manner as foreclosing a real estate mortgage.
   Carman v. Gibbs 603
2. After foreclosure of an executory land contract, the vendor in that contract may sue the vendee for a deficiency judgment.
   Carman v. Gibbs 603

Fraud

1. Equitable estoppel generally is such conduct by a party that it would be fraudulent or a fraud upon the rights of another for

that party afterward to repudiate and to set up claims inconsistent with it.
Hanika v. Rawley 45
2. One who has been induced to enter into an agreement by virtue of a material misrepresentation may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract.
Tobin v. Flynn & Larsen Implement Co. 259
3. Fraud must be proved in an action at law by a preponderance of the evidence. Language in cases such as *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978), *Kernan v. Modern Woodmen of America*, 120 Neb. 333, 232 N.W. 590 (1930), and *Hampton v. Webster*, 56 Neb. 628, 77 N.W. 50 (1898), that fraud in a law action must be proved by clear and satisfactory evidence, is disapproved.
Tobin v. Flynn & Larsen Implement Co. 259
4. Fraud in an equity case must be proved by "clear and convincing" or "clear and satisfactory" evidence. Language in cases such as *Saffer v. Saffer*, 133 Neb. 528, 274 N.W. 479 (1937), that fraud in an equity action must be proved by a preponderance of the evidence, is disapproved.
Tobin v. Flynn & Larsen Implement Co. 259
5. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus, if one person procures legal title to property from another by fraud or misrepresentation or, by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.
Hulse v. Schelkopf 617
6. The material elements of common-law fraud must be established before any relief is available for the "fraud" contemplated by Neb. U.C.C. § 5-114(2) (Reissue 1980).
Brown v. United States Nat. Bank 684
7. The principle of independence regarding a bank's obligation under a letter of credit does not extend to protect fraud by the beneficiary of the letter of credit.
Brown v. United States Nat. Bank 684
8. The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the

representation, and (5) injury or damage resulting from such reliance.
Mueller v. Union Pacific Railroad 742
9. Fraud may be predicated on a representation concerning a future event or acts to be done in the future if such representations are falsely and fraudulently made with an intent to deceive.
Mueller v. Union Pacific Railroad 742

Gifts

1. The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.
Guardian State Bank & Trust Co. v. Jacobson 235
2. A gift of a debt not evidenced by a written document may be made without delivery of any writing by the donor.
Guardian State Bank & Trust Co. v. Jacobson 235

Good Cause

1. A "material change in circumstances" in modification of child support cases is analogous to the "good cause" required to support a modification of alimony.
Ohler v. Ohler 272
2. In voluntary termination cases under the Nebraska Employment Security Law, the burden of proof is on the employee to prove that the employee's leaving was for good cause.
Norman v. Sorensen 408
3. The burden of proof under Neb. Rev. Stat. § 48-628(a)(1) (Reissue 1984) is upon the employee to show that he or she left his or her employment for good cause.
Montclair Nursing Center v. Wills 547
4. A change in hours, absent some compelling circumstances, does not rise to the level of good cause within the meaning of Neb. Rev. Stat. § 48-628(a)(1) (Reissue 1984).
Montclair Nursing Center v. Wills 547
5. Where there is no competent medical evidence offered to substantiate a claim that an employee's health would be affected by a change in hours, the claimant has failed to meet his or her burden of proving that termination was for good cause because of health reasons.
Montclair Nursing Center v. Wills 547
6. An employer may change an employee's hours of employment without giving the employee good cause to terminate the

employment, absent some evidence that the shift change was done for some improper purpose.
Montclair Nursing Center v. Wills 547

Governmental Subdivisions

1. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal or public corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
2. A resident taxpayer, without showing any interest or injury peculiar to himself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
3. To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show such a demand would be useless.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504

Guardians Ad Litem

1. The appointment of a guardian ad litem is a matter involving the discretionary powers of the court.
Chalupa v. Chalupa 704
2. Generally speaking, adequate representation by counsel for the respective parties and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protects the children's interests and renders unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children.
Chalupa v. Chalupa 704

Guardians and Conservators

1. Before one may be subject to the control of a conservator, the requirements of the statute concerning the appointment of a conservator must be met.
In re Estate of Wagner 32
2. A guardian should not be appointed either of the person or property of an adult simply because he is aged or infirm or because his mind is to some extent impaired by age or disease.
In re Estate of Wagner 32

Habeas Corpus

1. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record.
Auman v. Toomey 70
2. In an action to procure a writ of habeas corpus, the guilt or

innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state.
Radant v. Vargason 116

Habitual Criminals

Any objections to the validity of proceedings in other cases, utilized for enhancement purposes, other than effective assistance of counsel or waiver thereof, must be raised on direct appeal or a separate proceeding to establish the invalidity of the proceedings.
State v. Benzel 466

Hearsay

1. To fall within the "business records" exception, a threefold test must be met. First, the recorded activity must occur within the ordinary course of business. Second, the record must have been produced at or near the time of the transaction in question. Third, the record must be authenticated by a custodian or other qualified witness.
Omaha World-Herald Co. v. Nielsen 294
2. A trial court has broad discretion to rule on the foundational requirements of hearsay evidence under Neb. Rev. Stat. § 27-803(5) (Reissue 1979).
Omaha World-Herald Co. v. Nielsen 294
3. Under Neb. Rev. Stat. § 27-803(5) (Reissue 1979), questions as to the authenticity or credibility of evidence go to the weight of the evidence.
Omaha World-Herald Co. v. Nielsen 294
4. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1979)) are satisfied.
State v. Johnson 392
5. Under the provisions of Neb. Rev. Stat. § 27-801 (Reissue 1979), evidence of a consistent statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
State v. Gregory 778

Homicide

1. Imprisonment for life is the minimum penalty for first degree murder.
State v. Boyer 312

2. In a murder case the question of premeditation is for the jury to determine. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. The time needed for premeditation may be so short as to be instantaneous; the intent to kill may be formed at any moment before the homicide is committed.
State v. Benzel 466

Impeachment

1. A party is not permitted to get before the jury, under the guise of impeachment, an extrajudicial statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.
State v. Marco 96
2. The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
State v. Marco 96
3. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable extrajudicial statement the witness had made.
State v. Marco 96
4. Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded.
State v. Marco 96
5. If an attack on a witness' credibility through use of an inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends strongly to disprove that the testimony was the result of contrivance.
State v. Johnson 392
6. If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic evidence is neither necessary nor generally allowed.
State v. Johnson 392

Implied Consent Law

1. Justifiable refusal to take a body fluids test as required by Neb. Rev. Stat. §§ 39-669.08 et seq. (Reissue 1984) depends upon

some illegal or unreasonable aspect in the nature of the request to submit, the test itself, or both.
Bapat v. Jensen 763
2. Nebraska law does not sanction a conditional refusal to take a chemical test of the blood, breath, or urine, and such a refusal is a refusal under Nebraska's implied consent law.
Bapat v. Jensen 763
3. A motor vehicle driver is not entitled to consult a lawyer before taking a chemical test of the blood, breath, or urine, nor is the test required to be delayed by a driver's request that permission be granted to contact a lawyer concerning the requested test. This is because the suspension of a driver's license which results from a test refusal is a remedial, not strictly punitive, measure.
Bapat v. Jensen 763
4. The effect medication may have on the outcome of a body fluids test under the implied consent law may affect its admissibility or credibility as evidence of intoxication, but does not go to the question of whether a person is justified in refusing to take the test.
Bapat v. Jensen 763

Indictments and Informations

1. A defendant is not entitled to additional peremptory challenges because the indictment or information charges separate offenses in separate counts.
State v. Benzel 466
2. The discharge of one accused of crime by an examining magistrate following a preliminary hearing does not bar the refiling of the same or different charges before another magistrate.
State v. Rubek 537
3. An examining magistrate's refusal to bind a defendant over does not bar refiling the identical charges.
State v. Rubek 537

Injunction

1. A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal sanctions.
State ex rel. Douglas v. Wiener 502
2. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal or public corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504

3. A resident taxpayer, without showing any interest or injury peculiar to himself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
4. To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show such a demand would be useless.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
5. An injunction is an extraordinary remedy which is available when there is no adequate remedy at law and where there is a real and imminent danger of irreparable injury.
Mueller v. Union Pacific Railroad 742

Insurance

1. Where an insurance broker has negligently failed to obtain adequate insurance coverage for an insured, insured's measure of damages for loss caused thereby is the amount of actual loss as would have been covered by adequate insurance less any amount paid by insurance effectuated by the broker.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
2. An insurer may limit its own liability as long as it does not violate public policy.
Roth v. Farmers Mut. Ins. Co. 612
3. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Roth v. Farmers Mut. Ins. Co. 612
4. The insurance policy should be given meaning and effect according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense.
Roth v. Farmers Mut. Ins. Co. 612
5. Neb. Rev. Stat. § 60-509.01 (Reissue 1984) neither requires nor prohibits the aggregation, or "stacking," of multiple uninsured motorist coverage.
Kracl v. Aetna Cas. & Surety Co. 869
6. The legislative policy behind Neb. Rev. Stat. § 60-509.01 (Reissue 1984) was to give a person injured by an uninsured motorist the same protection he or she would have had if injured by one covered by a standard automobile liability policy.
Kracl v. Aetna Cas. & Surety Co. 869
7. 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.
Kracl v. Aetna Cas. & Surety Co. 869

8. An insurer may by contract limit its liability as long as it does not violate public policy. Where a provision of a policy of automobile insurance which clearly limits its applicability as to uninsured motorist coverage to the "covered" automobile, to the exclusion of other insured-owned automobiles not covered by that particular policy, such prohibition against "stacking" of coverage does not violate the spirit or the letter of Neb. Rev. Stat. § 60-509.01 (Reissue 1984). To the extent that *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 181 N.W.2d 839 (1970), *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970), and *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), are contrary to this opinion, they are overruled.
Kracl v. Aetna Cas. & Surety Co. 869

Intent

1. A contract will be construed against the party preparing it when there is a question as to its meaning.
Schmidt v. J. C. Robinson Seed Co. 344
2. The language of a statute should be considered in determining the intent of the Legislature.
Sorensen v. Meyer 457
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.
Sorensen v. Meyer 457
4. Since the Legislature is presumed to have intended every provision of a statute to have a meaning, this court will give effect, if possible, to every word, clause, and sentence thereof.
Sorensen v. Meyer 457
5. In determining legislative intent it is necessary to examine a statute as a whole, in light of its objects and purposes.
Sorensen v. Meyer 457
6. In a murder case the question of premeditation is for the jury to determine. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. The time needed for premeditation may be so short as to be instantaneous; the intent to kill may be formed at any moment before the homicide is committed.
State v. Benzel 466
7. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Roth v. Farmers Mut. Ins. Co. 612
8. The insurance policy should be given meaning and effect according to the sense of the terms which the parties have used,

and if they are clear they should be taken in their plain and ordinary sense.
Roth v. Farmers Mut. Ins. Co. 612
9. In construing a statute we will presume that the Legislature intended a sensible rather than absurd result, and we will endeavor to interpret the statute in a manner consistent with the Constitution.
State v. Sinica 792
10. An accidental injury occurs where there is no intent or volition on the part of the actor.
State v. Brown 849
11. The legislative policy behind Neb. Rev. Stat. § 60-509.01 (Reissue 1984) was to give a person injured by an uninsured motorist the same protection he or she would have had if injured by one covered by a standard automobile liability policy.
Kracl v. Aetna Cas. & Surety Co. 869
12. 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.
Kracl v. Aetna Cas. & Surety Co. 869
13. It is the visible and hostile possession, with an intention to possess land occupied under a belief that it belongs to the possessor, that constitutes its adverse character.
Hadley v. Ideus 878
14. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered; and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
Hadley v. Ideus 878
15. In an unambiguous contract the intention of the parties must be determined from its contents alone.
T.V. Transmission v. City of Lincoln 887
16. An ambiguity exists when an application of the rules of construction leaves uncertain which of two or more meanings represents the true intention of the parties.
T.V. Transmission v. City of Lincoln 887
17. The parties are bound by the terms of their contract even though their actual intent may have been different than that expressed in the document.
T.V. Transmission v. City of Lincoln 887

Investigative Stops

Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity.
State v. Daniels 480

Joint Tenancy

1. Upon the death of one joint tenant, the land passes to the surviving tenant free from the debts of the deceased joint tenant.
In re Estate of Kennedy 212
2. Crops standing on the land, whether matured or not, pass with the land to the surviving joint tenant and are not an asset of the estate of the deceased tenant subject to administration.
In re Estate of Kennedy 212

Judges

A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
State v. Terrell 137

Judgments

1. The findings of fact of a trial court where a jury trial is waived will not be set aside unless clearly wrong.
Omaha World-Herald Co. v. Nielsen 294
2. Where error exists as to only one issue and the judgment is in other respects free from error, the reviewing court may, when remanding the cause for new trial, limit the new trial to the issue affected.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
3. Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
Ford v. Jordan 492
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.
PWA Farms v. North Platte State Bank 516
5. The procedure to be followed to obtain an "execution warrant" should be similar to that prescribed by Neb. Rev. Stat. §§ 29-830 to 29-835 (Reissue 1979), which provide for the issuance of "inspection warrants." Such an execution warrant should be issued only by a judge of a court of record upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property

subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution.
State v. Hinchey 825

6. The failure of a court to render a judgment and enter it is not sufficient reason to deprive the defendant of her constitutional rights under the provisions of the double jeopardy clause.
State v. Carney 906

Judicial Notice

The Supreme Court will not take judicial notice of municipal ordinances not properly made a part of the record.
Vrana Paving Co. v. City of Omaha 269

Judicial Sales

1. A judicial sale in a partition action is not binding until the entire transaction has been approved by the court.
Sherman v. Schulz 375

2. It is the general rule that the confirmation of judicial sales rests largely within the sound discretion of the trial court; consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion. The trial court may not, however, exercise its discretion arbitrarily; its determination is to be one which is sound and equitable in view of all the circumstances and in the interest of fairness and prudence, and with a regard for the rights of all concerned and the stability of judicial sales.
Sherman v. Schulz 375

Juries

1. A jury is not required to accept as absolutely true every statement of a witness, even though such is not contradicted by direct evidence; the persuasiveness of uncontradicted testimony can be destroyed in other ways.
Maloney v. Kaminski 55

2. The credibility of a witness and the weight to be given to his testimony are issues for the jury to resolve.
Maloney v. Kaminski 55

3. Proximate causation is generally a question for the jury; only where but one inference can be drawn is it proper for the court to decide the issue.
Maloney v. Kaminski 55

4. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss in a wrongful death case; such loss must be determined upon a consideration of the circumstances of each case.
Maloney v. Kaminski 55
5. The Nebraska Supreme Court will interfere with a wrongful death verdict only where it results from passion and prejudice on the part of a jury.
Maloney v. Kaminski 55
6. A party, in selection of a jury, ordinarily has no right to examine a juror out of the presence of all other jurors, absent a showing of prejudice.
State v. Benzel 466
7. A defendant is not entitled to additional peremptory challenges because the indictment or information charges separate offenses in separate counts.
State v. Benzel 466
8. The general rule is that remarks of the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
State v. Benzel 466
9. It is presumed that a jury followed the instructions given in arriving at its verdict.
State v. Murphrey 699

Jurisdiction

1. The power to decide usually implies the power to reconsider.
Bockbrader v. Department of Insts. 17
2. The right of appeal is statutory, and the time requirements set forth in the statute are mandatory in order for the reviewing court to acquire jurisdiction.
Wood v. Village of Culbertson 94
Moore v. Black 122
3. Objection to jurisdiction of the court over subject matter may be raised by demurrer.
Wood v. Village of Culbertson 94
4. In an appeal from a misdemeanor conviction in county court, where no notice of appeal was filed as required by Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1982), and no bond was deposited as required by Neb. Rev. Stat. § 29-611 (Reissue 1979), the district court lacked jurisdiction to hear an appeal from the county court and, therefore, the Supreme Court has no jurisdiction to hear an appeal from the district court.
State v. Fehncke 135
5. The right of appeal is statutory and the requirements of a particular statute are mandatory and must be complied with

before the appellate court acquires jurisdiction of the subject matter of an action.
Karnes v. Wilkinson Mfg. 150
6. The district court clearly has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract.
Heimbouch v. Victorio Ins. Serv., Inc. 279
7. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.
In re Interest of W.C.O. 417
8. The jurisdiction of the State arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants.
In re Interest of W.C.O. 417
9. A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony.
State v. Rubek 537
10. Generally speaking, adequate representation by counsel for the respective parties and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protects the children's interests and renders unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children.
Chalupa v. Chalupa 704
11. The statutory jurisdiction of the Commission of Industrial Relations is to settle pending controversies.
NAPE v. Game & Parks Comm. 883
12. The Commission of Industrial Relations has no authority to enter declaratory judgments or exercise other judicial functions.
NAPE v. Game & Parks Comm. 883
13. A request for an advisory determination that does not result in the settlement of an industrial dispute is beyond the jurisdiction of the Commission of Industrial Relations.
NAPE v. Game & Parks Comm. 883

Juror Qualifications

1. A juror who opposes the death penalty may still be eligible to serve as a juror in a capital case as long as such juror is able to and does swear to decide guilt or innocence on the evidence and law as given in the jury instructions.
State v. Benzel 466

2. A juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his or her own personal view and obey the law of the state must be excused for cause.
State v. Benzel 466

Jury Instructions

1. Jury instructions are to be read as a whole; when they fairly submit the case and did not mislead the jury, there is no prejudicial error.
Maloney v. Kaminski 55
State v. Rubek 537
2. It is not error for a trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
Maloney v. Kaminski 55
3. It is the duty of the trial court to instruct the jury only on issues which are pled and which find support in the evidence.
Maloney v. Kaminski 55
4. Where a jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is ordinarily not error to either give or refuse to give an instruction on unavoidable accident.
Maloney v. Kaminski 55
5. The sudden emergency doctrine is to be submitted to the jury where there is evidence that a wrong course of action was pursued, from the results of which the actor is to be excused because of the stress and shortness of time under which the decision was made.
Maloney v. Kaminski 55
6. Where the testimony is conflicting as to whether the range of vision rule is applicable or whether another factual version of how the accident occurred is supported by the evidence, then it becomes the duty of the court to submit both factual issues to the jury.
Maloney v. Kaminski 55
7. It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it.
State v. Pearson 183
8. Failure of counsel to request a jury instruction which finds support in the record may constitute ineffective assistance of counsel, which may require the granting of relief only if it appears that the defendant was prejudiced by counsel's conduct.
State v. Pearson 183
9. Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages

should be assessed. An instruction stating a general principle in the measurement of damages, broader than is applicable to the case presented and not qualified by other instructions, is erroneous.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
10. It is error for a court to instruct on lesser-included offenses where the offenses so instructed on are not in reality lesser-included offenses.
State v. Murphrey 699
11. Before error predicated on the giving of an instruction may be considered a ground for reversal, a defendant must show that he was prejudiced by the instruction given.
State v. Murphrey 699

Juvenile Courts

1. In a juvenile case an adjudication order is an appealable order.
In re Interest of V.T. and L.T. 256
2. The standard of review in a juvenile proceeding is de novo upon the record.
In re Interest of V.T. and L.T. 256
3. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.
In re Interest of W.C.O. 417
4. The jurisdiction of the State arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants.
In re Interest of W.C.O. 417
5. The case files prepared by social workers for use in child dependency cases are, by statute, privileged and are not subject to discovery as a matter of right.
In re Interest of S.W. 734
6. In the absence of a showing of good cause, the refusal to permit discovery of case files prepared by social workers for use in child dependency cases is not an abuse of discretion.
In re Interest of S.W. 734

Labor and Labor Relations

1. Absent the existence of a labor organization as defined by the provisions of Neb. Rev. Stat. § 48-801(6) (Reissue 1984), the statutes make it relatively clear that in most instances the elected officials are authorized in the first instance to hire their own employees, set their salaries, and prescribe their terms and conditions of employment.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

2. Except for the county assessor, whose authority regarding the setting of wages, and therefore the terms and conditions of employment, has been transferred to the county board, the elected county official is the proper person to represent the county in connection with negotiations involving employees of the elected official's office and the employees' bargaining representatives pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984).
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

Landlord and Tenant

1. In order to impose liability on a landlord regarding injuries sustained by a tenant, a duty must exist.
C.S. v. Sophir 51
2. Whether a duty exists on the part of a landlord to a tenant is ultimately a question of fairness.
C.S. v. Sophir 51
3. Factors to consider in imposing a duty on a landlord to a tenant include weighing the relationship of the parties against the nature of the risk and the public interest in the proposed solution, as well as the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on a defendant.
C.S. v. Sophir 51
4. Landlords are not insurers that a tenant will be protected at all times.
C.S. v. Sophir 51
5. There is no duty to warn of a known danger.
C.S. v. Sophir 51
6. The duty of a landlord toward its tenants may be compared with that of a possessor of land who holds it open for public entry; i.e., there is a duty to exercise reasonable care toward the patrons. Such care may require giving a warning or providing greater protection where there is a likelihood third persons will endanger the safety of visitors. However, that rule does not require a party in the position of a landlord or possessor of land to anticipate the unforeseeable independent acts of third persons, not reasonably anticipated.
C.S. v. Sophir 51
7. One of several coowners of real property can lease his or her own interest to third persons.
Kresha v. Kresha 598

Leases

1. One of several coowners of real property can lease his or her own interest to third persons.
Kresha v. Kresha 598

2. One who acquires property covered by an existing lease of which he or she has knowledge acquires the property subject to the existing lease.
Kresha v. Kresha 598

Legislature

1. A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are allowed where they are made applicable to all persons of the same class similarly situated.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
2. A regulation valid when made may become arbitrary by reason of later events.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
3. The Legislature, under the guise of regulation, may not indulge in the destruction of lawful competition.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
4. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431
5. The language of a statute should be considered in determining the intent of the Legislature.
Sorensen v. Meyer 457
6. 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.
Sorensen v. Meyer 457
7. Since the Legislature is presumed to have intended every provision of a statute to have a meaning, this court will give effect, if possible, to every word, clause, and sentence thereof.
Sorensen v. Meyer 457
8. In determining legislative intent it is necessary to examine a statute as a whole, in light of its objects and purposes.
Sorensen v. Meyer 457
9. In construing a statute we will presume that the Legislature intended a sensible rather than absurd result, and we will endeavor to interpret the statute in a manner consistent with the Constitution.
State v. Sinica 792
10. The determination of what constitutes a legislative function and what constitutes a judicial one must be made on a case-by-case basis.
State v. Stratton 854

11. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is neither cruelly inhumane nor disproportionate to the crime involved.
State v. Stratton 854
12. The Legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.
State v. Stratton 854
13. It is fundamental that in the legislative grant of power to an administrative agency such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act.
NAPE v. Game & Parks Comm. 883

Lesser-Included Offenses

1. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
State v. Murphrey 699
2. It is error for a court to instruct on lesser-included offenses where the offenses so instructed on are not in reality lesser-included offenses.
State v. Murphrey 699

Liability

1. The privilege of infancy will not enable an infant to escape liability in all cases and under all circumstances. For example, it is well established that an infant is liable for the value of necessaries furnished him.
Webster Street Partnership v. Sheridan 9
2. Articles are not necessaries for an infant if he has a parent or guardian who is able and willing to supply them, and an infant residing with and being supported by his parent according to his station in life is not absolutely liable for things which under other circumstances would be considered necessaries.
Webster Street Partnership v. Sheridan 9
3. When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone would not have caused the result.
Maloney v. Kaminski 55
4. No person is liable on an instrument unless his signature appears thereon.
PWA Farms v. North Platte State Bank 516
5. An insurer may limit its own liability as long as it does not violate

public policy.
Roth v. Farmers Mut. Ins. Co. 612

6. A corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation; however, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority.
Mueller v. Union Pacific Railroad 742

Liens

An action to determine the priority of liens is equitable in nature.
Reilly v. First Nat. Bank & Trust Co. 443

Limitations of Actions

1. A mistake of law does not excuse a late filing for workmen's compensation benefits so as to toll the statute of limitations.
Maxey v. Fremont Department of Utilities 627
2. Payment of wages or reimbursement of medical expense by an employer under an employee benefit plan or group health insurance agreement does not constitute remuneration in lieu of workmen's compensation benefits so as to toll the statute of limitations, unless, by the conduct of the employer, it may reasonably be inferred that such payments were made with an intent that payment constitute compensation and a conscious recognition of liability for compensation benefits on the part of the employer.
Maxey v. Fremont Department of Utilities 627
3. Where an injury is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee.
Maxey v. Fremont Department of Utilities 627
4. Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations begins to run.
Maxey v. Fremont Department of Utilities 627
5. The mere fact that an employee did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable.
Maxey v. Fremont Department of Utilities 627

Marriage

The right to privacy protected by the fourteenth amendment includes a right to freedom of choice in marriage and family decisions.
State v. Sinica 792

Medical Assistance

The State of Nebraska may not categorically refuse to provide periodontal treatment to a medicaid patient if such treatment is required.
Kirk v. Dunning 359

Medical Malpractice

In a malpractice action the burden is on the plaintiff to prove the generally recognized medical standard involved, that there was a deviation from that standard by the defendant, and that such deviation was the proximate cause of the plaintiff's injury.
Saporta v. State 142

Mental Health

1. Fulfilling the requirement of Neb. Rev. Stat. § 83-1025 (Reissue 1981) of the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), that the petition for commitment shall include a description of the behavior constituting the basis for commitment does not require the naming of witnesses or the recitation of testimony.
In re Interest of H.W. 423
2. For commitment under the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), the burden is on the petitioner to establish by clear and convincing evidence both mental illness and dangerousness of the committee.
In re Interest of H.W. 423
3. Although the district court is required to review the determination of the mental health board de novo on the record, this court will not interfere on appeal with the final order made by the district court unless we can say as a matter of law that it is not supported by clear and convincing evidence.
In re Interest of H.W. 423
In re Interest of Ely 731
4. Evidence which would be inadmissible in criminal proceedings is inadmissible in hearings before a mental health board.
In re Interest of Ely 731
5. The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
Clark v. Clark 771

Minors

1. As a general rule, an infant does not have the capacity to bind himself absolutely by contract.
Webster Street Partnership v. Sheridan 9

2. The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others.
Webster Street Partnership v. Sheridan 9
3. The policy of the law is to discourage adults from contracting with an infant; they cannot complain if, as a consequence of violating that rule, they are unable to enforce their contracts.
Webster Street Partnership v. Sheridan 9
4. The privilege of infancy will not enable an infant to escape liability in all cases and under all circumstances. For example, it is well established that an infant is liable for the value of necessaries furnished him.
Webster Street Partnership v. Sheridan 9
5. Articles are not necessaries for an infant if he has a parent or guardian who is able and willing to supply them, and an infant residing with and being supported by his parent according to his station in life is not absolutely liable for things which under other circumstances would be considered necessaries.
Webster Street Partnership v. Sheridan 9
6. Generally speaking, adequate representation by counsel for the respective parties and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protects the children's interests and renders unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children.
Chalupa v. Chalupa 704
7. Parents have a fundamental liberty interest protected by the due process guarantees of the fourteenth amendment in the care, custody, and management of their children.
State v. Sinica 792
8. The term "cruelly punished" as used in Neb. Rev. Stat. § 28-707(1)(b) (Cum. Supp. 1984) has acquired a relatively widely accepted connotation in the law and is capable of an easily understood meaning, as distinguished from the reasonable discipline of a child allowed by the common law and protected by the Constitution.
State v. Sinica 792
9. Child abuse is not a constitutionally protected activity.
State v. Sinica 792

Miranda Rights

A prosecutor's reference to the defendant's failure to make an exculpatory statement before the defendant is in custody does not violate the defendant's right to remain silent.
State v. Gregory 778

Modification of Decree

1. A court may modify child support becoming due in the future because of a material change in circumstances, of a nature requiring modifications in the best interests of the children, occurring after the entry of the dissolution decree.
Ohler v. Ohler 272
2. A "material change in circumstances" involves an alteration and passage from one condition to another and requires consideration of a variety of factors or circumstances, including the obligated parent's financial means, the needs of the child or children for whom the support is to be paid, the good or bad faith motive of the obligated parent in sustaining a reduction of means, and the permanence of the change.
Ohler v. Ohler 272
3. A "material change in circumstances" in modification of child support cases is analogous to the "good cause" required to support a modification of alimony.
Ohler v. Ohler 272
4. Incarceration resulting in the reduction or elimination of income or assets does not constitute such a material change in circumstances as to warrant the temporary termination of a child support obligation.
Ohler v. Ohler 272
5. 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.
Kelly v. Kelly 441
6. In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, this 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. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, but we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
Walton v. Walton 625
Mettenbrink v. Mettenbrink 650
7. In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.
Walton v. Walton 625
Mettenbrink v. Mettenbrink 650

8. 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.
Mettenbrink v. Mettenbrink 650
9. Child support payments are not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.
Graber v. Graber 816
10. Any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not arise to the level to justify a change or modification of the order.
Graber v. Graber 816
11. When reviewing applications for modification of child support, we will consider the fact that these matters are initially entrusted to the sound discretion of the trial court, and, while on appeal such matters will be reviewed de novo on the record, the decision of the trial court will be affirmed in the absence of an abuse of discretion.
Graber v. Graber 816
12. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
Hoschar v. Hoschar 913
13. A decree awarding custody of minor children and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.
Hoschar v. Hoschar 913
14. The burden of showing the existence of that material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
Hoschar v. Hoschar 913
15. If a permanent change of custody is to be made, it should appear to the court that the change of circumstances is more or less permanent or continuous and not merely transitory or temporary.
Hoschar v. Hoschar 913

Motions for Mistrial

1. The general rule is that remarks of the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
State v. Benzel 466

2. Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
State v. Ross 843

Motions for New Trial

1. Application for a new trial must be made within 10 days after the verdict, report, or decision is rendered.
Wells v. Bartholomew 210
2. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree appealed from.
Wells v. Bartholomew 210
3. Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error to refuse to set aside such verdict.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
4. A motion for a new trial based on newly discovered evidence may be sustained only if the moving party could not, with reasonable diligence, have discovered and produced the evidence at trial.
Reilly v. First Nat. Bank & Trust Co. 443
5. Under the provisions of Neb. Rev. Stat. § 25-1912.01(1) (Cum. Supp. 1984), a motion for a new trial is not required to obtain appellate review of any issue upon which the ruling of the trial court appears in the record.
State v. Wright 847

Motions to Dismiss

1. Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court, on the motion of the defendant, to dismiss the action.
Quad-States, Inc. v. Vande Mheen 161
2. When a defendant in an equity action moves for a dismissal at the close of the plaintiff's evidence, he thereby admits to be true plaintiff's evidence and every inference favorable to the plaintiff which may fairly and reasonably be drawn therefrom; where the plaintiff has made a prima facie case, the motion to dismiss is to be overruled.
Hulse v. Schelkopf 617
3. A trial court's sustaining of a motion for dismissal or acquittal constitutes a resolution of the issue of guilt.
State v. Carney 906
4. When a trial judge sustains a motion for acquittal, the judge has finally determined the rights of the parties in the action.
State v. Carney 906

Motions to Suppress

1. Failure to include minimization language as provided by Neb. Rev. Stat. § 86-705(6) (Reissue 1981) in an order to permit the interception of wire or oral communication when statutory guidelines have been supplied and when there exists a means of measuring compliance with minimization provisions of the statute is not fatal and does not warrant suppression of evidence.
   State v. White 527
2. No evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused.
   State v. White 527
3. Defendants seeking to suppress evidence obtained pursuant to wiretap because of the failure to comply with minimization requirements must do more than identify individual calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap.
   State v. White 527
4. Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
   State v. White 527
5. One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid.
   State v. White 527

Motor Carriers

The burden is on the applicant for a certificate of public convenience and necessity to show that the proposed service is required by public convenience and necessity.
In re Application of Amsberry, Inc. 353

Motor Vehicles

1. In order for the unavoidable accident doctrine to be invoked, there must exist (1) a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose, and (3) a need for instant decision.
   Maloney v. Kaminski 55
2. The sudden emergency doctrine is to be submitted to the jury where there is evidence that a wrong course of action was pursued, from the results of which the actor is to be excused because of the stress and shortness of time under which the decision was made.
   Maloney v. Kaminski 55
3. Where the testimony is conflicting as to whether the range of vision rule is applicable or whether another factual version of

how the accident occurred is supported by the evidence, then it becomes the duty of the court to submit both factual issues to the jury.
Maloney v. Kaminski 55
4. Neb. Rev. Stat. § 60-509.01 (Reissue 1984) neither requires nor prohibits the aggregation, or "stacking," of multiple uninsured motorist coverage.
Kracl v. Aetna Cas. & Surety Co. 869
5. The legislative policy behind Neb. Rev. Stat. § 60-509.01 (Reissue 1984) was to give a person injured by an uninsured motorist the same protection he or she would have had if injured by one covered by a standard automobile liability policy.
Kracl v. Aetna Cas. & Surety Co. 869

Municipal Corporations

1. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal or public corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
2. A resident taxpayer, without showing any interest or injury peculiar to himself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
3. To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show such a demand would be useless.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
4. A city, in the absence of legislative authorization, has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority.
T.V. Transmission v. City of Lincoln 887
5. A municipal corporation's contract is ultra vires when the corporation has no power to make the contract under any circumstances or for any purpose.
T.V. Transmission v. City of Lincoln 887
6. A city's purchase of an electric system is a nongovernmental business enterprise.
T.V. Transmission v. City of Lincoln 887
7. In contracts relating to its proprietary interests, a municipal corporation is bound by the same rules as are private corporations.
T.V. Transmission v. City of Lincoln 887

Necessaries

1. The privilege of infancy will not enable an infant to escape liability in all cases and under all circumstances. For example, it

is well established that an infant is liable for the value of necessaries furnished him.
Webster Street Partnership v. Sheridan 9
2. The meaning of the term "necessaries" cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact, to be determined in each case from the particular facts and circumstances in such case. A number of factors must be considered before a court can conclude whether a particular product or service is a necessary.
Webster Street Partnership v. Sheridan 9
3. Articles are not necessaries for an infant if he has a parent or guardian who is able and willing to supply them, and an infant residing with and being supported by his parent according to his station in life is not absolutely liable for things which under other circumstances would be considered necessaries.
Webster Street Partnership v. Sheridan 9

Negligence

1. In order to impose liability on a landlord regarding injuries sustained by a tenant, a duty must exist.
C.S. v. Sophir 51
2. Whether a duty exists on the part of a landlord to a tenant is ultimately a question of fairness.
C.S. v. Sophir 51
3. Factors to consider in imposing a duty on a landlord to a tenant include weighing the relationship of the parties against the nature of the risk and the public interest in the proposed solution, as well as the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on a defendant.
C.S. v. Sophir 51
4. Landlords are not insurers that a tenant will be protected at all times.
C.S. v. Sophir 51
5. There is no duty to warn of a known danger.
C.S. v. Sophir 51
6. The duty of a landlord toward its tenants may be compared with that of a possessor of land who holds it open for public entry; i.e., there is a duty to exercise reasonable care toward the patrons. Such care may require giving a warning or providing greater protection where there is a likelihood third persons will endanger the safety of visitors. However, that rule does not require a party in the position of a landlord or possessor of land to anticipate the unforeseeable independent acts of third persons, not reasonably anticipated.
C.S. v. Sophir 51
7. It is not sufficient that the negligence charged furnishes only a

condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury.
C.S. v. Sophir 51

8. A plaintiff has the burden of proving the defendant was negligent; merely establishing that an accident happened does not prove negligence.
Maloney v. Kaminski 55

9. When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone would not have caused the result.
Maloney v. Kaminski 55

10. An act of God is a manifestation of nature so unusual and extraordinary that it could not under normal conditions have been reasonably anticipated or expected.
Maloney v. Kaminski 55

11. In order for the unavoidable accident doctrine to be invoked, there must exist (1) a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose, and (3) a need for instant decision.
Maloney v. Kaminski 55

12. The sudden emergency doctrine is to be submitted to the jury where there is evidence that a wrong course of action was pursued, from the results of which the actor is to be excused because of the stress and shortness of time under which the decision was made.
Maloney v. Kaminski 55

13. Where the testimony is conflicting as to whether the range of vision rule is applicable or whether another factual version of how the accident occurred is supported by the evidence, then it becomes the duty of the court to submit both factual issues to the jury.
Maloney v. Kaminski 55

14. In determining whether an architect is negligent in failing to specifically set out the contractor's responsibility for charges in the contract, the test is whether the architect has exercised that degree of skill and diligence ordinarily exercised under like circumstances by architects in good standing in the same or similar communities.
Overland Constructors v. Millard School Dist. 220

15. The question of whether an architect has failed to perform in accordance with the standards of the profession is a matter which must be proved by expert testimony and cannot be left to

lay witnesses.
Overland Constructors v. Millard School Dist. 220
16. A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him.
Mayer v. Howard 328

Negotiable Instruments

1. A negotiable instrument can be the subject of conversion.
PWA Farms v. North Platte State Bank 516
2. It is elementary that when a check is drawn to the order of a bank and the drawer gives no specific instructions as to the disposition of the funds, the bank is not authorized to pay the proceeds of the check to a stranger to the transaction.
PWA Farms v. North Platte State Bank 516
3. No person is liable on an instrument unless his signature appears thereon.
PWA Farms v. North Platte State Bank 516

New Trial

When error exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, a reviewing court may, when remanding a cause for a new trial, limit the new trial to such issue.
Jeffres v. Countryside Homes 26

Notice

1. A court reviewing an order of an administrative agency to determine whether there has been due process of law must determine whether there was reasonable notice and an opportunity for fair hearing.
Bockbrader v. Department of Insts. 17
2. Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral, Neb. U.C.C. § 9-504(3) (Reissue 1980), is a condition precedent to a secured creditor's right to recover a deficiency.
City Bank & Trust Co. v. Van Andel 152
Havelock Bank v. McArthur 364
Allis-Chalmers Corp. v. Haumont 509
3. A debtor's right to notice under Neb. U.C.C. § 9-504(3) (Reissue 1980) may be waived by conduct after default amounting to waiver or estoppel.
City Bank & Trust Co. v. Van Andel 152
4. Where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice

of hearing, notice of a default hearing need not be given to such party.
Tejral v. Tejral 264
5. The failure to give the requisite notice is an absolute bar to recovery.
Havelock Bank v. McArthur 364
Allis-Chalmers Corp. v. Haumont 509
6. A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980).
Allis-Chalmers Corp. v. Haumont 509
7. When a party seeks to rescind a contract by his or her own act, notice of such action must be given the other party; but when the aid of a court is sought for that purpose, the bringing of the action is sufficient disaffirmance for the purpose of the action.
Haumont v. Security State Bank 809

Nuisances

1. The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself.
Flansburgh v. Coffey 381
2. Ordinarily, a legitimate business enterprise is not a nuisance per se, but may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation.
Flansburgh v. Coffey 381
3. The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live and enjoy the home, or such as to reduce the value of the residential property.
Flansburgh v. Coffey 381
4. To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities.
Flansburgh v. Coffey 381
5. In the absence of evidence to the contrary, there is a presumption that a plaintiff in an action for the abatement of a nuisance has ordinary sensibilities.
Flansburgh v. Coffey 381

Offers to Buy or Sell

1. If an offer prescribes the place, time, or manner of acceptance, its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time, or manner of acceptance, another method of acceptance is not precluded.
Overman v. Brown 788

2. An offeror is entitled to prescribe an exclusive method of acceptance of an offer, but when the offer as fairly interpreted merely suggests without explicitly directing a particular method of acceptance, the offer can be accepted in any reasonable manner.
Overman v. Brown 788
3. Acceptance of an offer may be made in several different ways, and ordinarily need not be express or formal, but may be shown by words, conduct, or acquiescence indicating agreement.
Overman v. Brown 788
4. The act constituting the alleged acceptance of an offer must be judged by whether that communication by the offeree would lead a reasonable person to conclude that the offer has been accepted.
Overman v. Brown 788

Option to Purchase

1. There is a clear and classic distinction between an option and a so-called "right of first refusal"; the option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, where the right of first refusal has no binding effect unless the offeror decides to sell. The option gives a clear right to the option-holder to purchase upon specified terms and conditions, regardless of the wishes of the option-giver, whereas the "right of refusal" or "preemption" is conditioned upon the willingness of the owners to sell; it can be enforced by specific performance only where such willingness can be proved.
Coniglio v. Hansl 580
2. In order for an option to become effective, there must be a clear indication by the offerees that the option is being exercised, coupled with an offer on their part to perform the necessary conditions.
Coniglio v. Hansl 580

Ordinances

The Supreme Court will not take judicial notice of municipal ordinances not properly made a part of the record.
Vrana Paving Co. v. City of Omaha 269

Other Acts

1. Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
State v. Hunt 707
2. Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) is subject to the overriding protection of Neb. Rev. Stat. § 27-403 (Reissue

1979), which states that evidence of other acts must be excluded if, among other things, the probative value of the evidence of other acts is substantially outweighed by the danger of unfair prejudice to the defendant.
State v. Hunt 707

3. Whether other acts are sufficiently similar to the one charged in the particular case on trial so as to render evidence of the other acts such as to have probative value is a matter left to the discretion of the trial court.
State v. Hunt 707

Parental Rights

1. The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
Auman v. Toomey 70
2. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
Auman v. Toomey 70
3. A relinquishment conditioned upon the retention of some parental rights is invalid.
Auman v. Toomey 70
4. A change of attitude subsequent to signing a relinquishment is insufficient to invalidate it.
Auman v. Toomey 70
5. In appeals from the termination of parental rights in a county court sitting as a juvenile court, the Supreme Court reviews such cases de novo on the record.
In re Interest of L.J., J.J., and J.N.J. 102
In re Interest of V.B. and Z.B. 369
6. To justify termination of parental rights under the provisions of Neb. Rev. Stat. § 43-292(2) (Reissue 1984), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child.
In re Interest of L.J., J.J., and J.N.J. 102
7. While there is no requirement that a juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be reasonable and conducted under the direction of the juvenile court.
In re Interest of L.J., J.J., and J.N.J. 102
In re Interest of V.B. and Z.B. 369
8. Where parental rights are terminated on a certain date, the effective date of the termination shall not be made effective at a

later date.
In re Interest of L.J., J.J., and J.N.J. 102
9. In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or which came into being after, the first proceeding.
In re Interest of V.B. and Z.B. 369
10. An order terminating parental rights must be based upon clear and convincing evidence and should only be issued as a last resort and when no reasonable alternative exists.
In re Interest of V.B. and Z.B. 369
11. In reviewing termination of parental rights cases de novo on the record, this court must give great weight to the findings of the juvenile court in all cases where there is a dispute in the evidence, since the trial court heard and observed the witnesses.
In re Interest of V.B. and Z.B. 369
12. The termination of parental rights must be given serious consideration, and, if possible, the parents should be given the opportunity to correct their behavior. A child must not be made to await uncertain parental maturity.
In re Interest of V.B. and Z.B. 369
13. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.
In re Interest of W.C.O. 417
14. The jurisdiction of the State arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants.
In re Interest of W.C.O. 417
15. A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.
In re Interest of S.W. 734
16. When the natural parent cannot rehabilitate herself in a reasonable time after the adjudication hearing and the prognosis is poor not only for purposes of rehabilitation but also for correcting the conditions of neglect and dependency, the best interests of the child require that a final disposition be made

without delay.
In re Interest of S.W. 734
17. Parents have a fundamental liberty interest protected by the due process guarantees of the fourteenth amendment in the care, custody, and management of their children.
State v. Sinica 792

Parol Evidence

Generally, parol evidence is admissible for the purpose of explaining and showing the true nature of the transaction between the parties.
Peterson v. Hynes 573

Partition

A judicial sale in a partition action is not binding until the entire transaction has been approved by the court.
Sherman v. Schulz 375

Perjury

If an attack on a witness' credibility through use of an inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends strongly to disprove that the testimony was the result of contrivance.
State v. Johnson 392

Physicians and Surgeons

1. The purchase of a medical practice by another physician does not in any way affect the confidential physician-patient privilege that exists between the patient and the vendor physician.
Clark v. Clark 771
2. The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
Clark v. Clark 771

Pleadings

1. The burden of proof rests on the party who pleads an estoppel to establish the facts upon which the estoppel is based.
Redick v. Redick 86
2. A prayer for equitable relief has no place or role in a law action.
Tobin v. Flynn & Larsen Implement Co. 259
3. Fulfilling the requirement of Neb. Rev. Stat. § 83-1025 (Reissue 1981) of the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), that the petition for

commitment shall include a description of the behavior constituting the basis for commitment does not require the naming of witnesses or the recitation of testimony.
In re Interest of H.W. 423
4. To be allowed as a setoff on a claim for damages, the basis for the setoff must be pled and proved.
Boris v. Heyd 569
5. A demurrer admits all well-pleaded facts.
Bernstein v. Ainsworth 670
6. In determining the sufficiency of a demurrer to state a cause of action, the court accepts as true all facts well pleaded, but does not accept as true facts not well pleaded, such as conclusions of law.
Bernstein v. Ainsworth 670
7. A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented.
Mueller v. Union Pacific Railroad 742
8. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.
Mueller v. Union Pacific Railroad 742
9. On a motion for judgment on the pleadings, the court may consider all the pleadings and give judgment for the party entitled thereto.
Mueller v. Union Pacific Railroad 742
10. The making of a motion for judgment on the pleadings is not, however, a waiver of the right to trial of an issue of fact.
Mueller v. Union Pacific Railroad 742
11. The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
Clark v. Clark 771
12. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Overman v. Brown 788

Pleas

1. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post

conviction relief.
State v. Terrell 137
2. For a plea of guilty to be voluntary, the record must affirmatively show the defendant was apprised of his constitutional rights against self-incrimination, to trial by jury, and to confrontation, and waived them.
State v. Predmore 336
3. A waiver of one's constitutional rights cannot be presumed from a silent record.
State v. Predmore 336
4. While an item-by-item recitation of constitutional rights is not required, the record must show that the court examined the defendant personally to ensure that the defendant knows his rights and understands the consequences of a guilty plea.
State v. Predmore 336
5. In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time.
State v. Predmore 336
6. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
State v. Predmore 336
7. A written petition to enter a plea of guilty is not a substitute for the requirement that the trial court address each defendant personally and ascertain that the defendant understands his rights and is making a voluntary and intelligent waiver of them.
State v. Predmore 336
8. A plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant.
State v. Richter 551
9. The record must affirmatively show the defendant entered his plea understandingly and voluntarily.
State v. Richter 551
10. The factual basis for a plea may be determined by inquiry of the defendant or county attorney, or by examination of the presentence investigation.
State v. Richter 551
11. At the time of entering a plea of guilty to a crime, it is sufficient to establish that the defendant entered his plea of guilty knowingly, intelligently, and voluntarily, insofar as knowledge of the possible penalty for the crime, if defendant understood the penalty for the crime from information other than that given

to him by the judge receiving his plea.
State v. Fischer 664
12. It is impossible to conclude from a record entirely barren of any facts demonstrating that defendant understood his various rights that the defendant voluntarily and intelligently gave them up by pleading guilty.
State v. Branch 754
State v. Wright 847

Police Officers and Sheriffs

1. Merely because a police officer has afforded a defendant a favorable opportunity for commission of a crime already conceptualized in the accused's mind, it is not entrapment.
State v. Pearson 183
2. "Exigent circumstances" are examined in the light of facts known to officers at the time they acted.
State v. Hert 447
3. Exigent circumstances exist when a law enforcement officer has: (1) Probable cause to believe that a suspect has committed a serious offense; (2) A reasonable belief from a present factual basis that the suspect is in the premises to be entered; and (3) Immediately upon concurrence of elements (1) and (2) (probable cause and reasonable belief), a factual basis to reasonably believe that, during the time which would be necessarily consumed in obtaining an arrest warrant under existing circumstances, there will be danger to the officer or another, evidence will be removed or destroyed, or the suspect will escape.
State v. Hert 447
4. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity.
State v. Daniels 480
5. It is an affirmative defense to prosecution under Neb. Rev. Stat. § 28-904 (Cum. Supp. 1984) if the peace officer involved was out of uniform and did not identify himself as a peace officer by showing his credentials to the person whose arrest is attempted.
State v. Daniels 480

Political Subdivisions

1. A county board is without authority, in the absence of a grant, to perform the duties which are part of the official duties of other officials or boards.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431
2. Although the county board is given the right to approve the salary set by the elected official, the county board may not act arbitrarily or capriciously.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

3. Except for the county assessor, whose authority regarding the setting of wages, and therefore the terms and conditions of employment, has been transferred to the county board, the elected county official is the proper person to represent the county in connection with negotiations involving employees of the elected official's office and the employees' bargaining representatives pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984).
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

Post Conviction

1. A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
State v. Manchester 41
State v. Brown 305
State v. Boyer 312
2. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution.
State v. Manchester 41
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. Manchester 41
State v. Terrell 137
State v. Pearson 183
State v. Brown 305
4. In post conviction proceedings under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), the district court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility.
State v. Terrell 137
5. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief.
State v. Terrell 137
6. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when granting relief pursuant to Neb. Ct. R. 3B (rev. 1983) and is not available for further relief pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979).
State v. Sanders 308

Prejudgment Interest

1. 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.
   Jeffres v. Countryside Homes 26
   Guardian State Bank & Trust Co. v. Jacobson 235
   Nixon v. Harkins 286
2. A claim is liquidated where the evidence, if believed, makes it possible to compute the amount due with exactness without reliance upon opinion or discretion.
   Nixon v. Harkins 286
3. Prejudgment interest is allowable where the amount of the claim is liquidated. A claim is liquidated where no reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery. If either of the requirements of the rule is not met, the claim is unliquidated and prejudgment interest is not allowed.
   Peterson v. Hynes 573

Preliminary Hearings

1. The discharge of one accused of crime by an examining magistrate following a preliminary hearing does not bar the refiling of the same or different charges before another magistrate.
   State v. Rubek 537
2. A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony.
   State v. Rubek 537
3. An examining magistrate's refusal to bind a defendant over does not bar refiling the identical charges.
   State v. Rubek 537

Presumptions

1. Where the law of a sister state is not pled nor proved, it is presumed to be the same as the law of this jurisdiction.
   Redick v. Redick 86
2. In the absence of evidence to the contrary, there is a presumption that a plaintiff in an action for the abatement of a nuisance has ordinary sensibilities.
   Flansburgh v. Coffey 381
3. The burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.
   State v. Hert 447

4. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority.
PWA Farms v. North Platte State Bank 516
5. It is presumed that a jury followed the instructions given in arriving at its verdict.
State v. Murphrey 699
6. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant.
State v. Thierstein 766

Pretrial Conferences

1. The trial court has a broad discretion in regard to the amendment of a pretrial order, and its ruling with respect thereto will not be disturbed absent an abuse of that discretion.
Nixon v. Harkins 286
2. Where a pretrial order improperly restricts the issues, the parties are bound by it at trial and on appeal, if no objection has been made, unless it does violence to the issues raised by the petition.
Chalupa v. Chalupa 704

Pretrial Motions

1. This court cannot review the trial court's alleged abuse of discretion in entering a discovery order where there is no evidence in the record to either support or refute a contention that such abuse exists.
Hulse v. Schelkopf 617
2. A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented.
Mueller v. Union Pacific Railroad 742
3. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.
Mueller v. Union Pacific Railroad 742
4. On a motion for judgment on the pleadings, the court may consider all the pleadings and give judgment for the party entitled thereto.
Mueller v. Union Pacific Railroad 742
5. The making of a motion for judgment on the pleadings is not, however, a waiver of the right to trial of an issue of fact.
Mueller v. Union Pacific Railroad 742

Principal and Agent

1. An agent may not borrow money and bind his principal for its repayment, unless such authority is expressly conferred or is necessarily implied by the authority granted.
   PWA Farms v. North Platte State Bank 516
2. As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent.
   Mueller v. Union Pacific Railroad 742
3. Apparent authority is such authority as the agent seems to have by reason of the authority he actually has.
   Mueller v. Union Pacific Railroad 742
4. A principal is bound by, and liable for, the acts which an agent does within his or her actual or apparent authority.
   Mueller v. Union Pacific Railroad 742

Prior Convictions

Any objections to the validity of proceedings in other cases, utilized for enhancement purposes, other than effective assistance of counsel or waiver thereof, must be raised on direct appeal or a separate proceeding to establish the invalidity of the proceedings.
State v. Benzel 466

Prior Statements

1. Proof of contradictory extrajudicial statements of a witness may be received in evidence for the purpose of assisting the jury in estimating the credibility of the witness, but unless otherwise admissible, such statements may not be utilized as substantive evidence of the facts declared.
   State v. Marco 96
2. The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
   State v. Marco 96
3. Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded.
   State v. Marco 96
4. If an attack on a witness' credibility through use of an inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends strongly to disprove that the testimony was the result of contrivance.
   State v. Johnson 392

5. If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic evidence is neither necessary nor generally allowed.
State v. Johnson 392
6. Under the provisions of Neb. Rev. Stat. § 27-801 (Reissue 1979), evidence of a consistent statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
State v. Gregory 778

Proof

1. 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. Manchester 41
2. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
State v. Manchester 41
State v. Pearson 183
3. A plaintiff has the burden of proving the defendant was negligent; merely establishing that an accident happened does not prove negligence.
Maloney v. Kaminski 55
4. The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
Auman v. Toomey 70
5. The burden of proof rests on the party who pleads an estoppel to establish the facts upon which the estoppel is based.
Redick v. Redick 86
6. To justify termination of parental rights under the provisions of Neb. Rev. Stat. § 43-292(2) (Reissue 1984), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child.
In re Interest of L.J., J.J., and J.N.J. 102
7. 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. Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking.
State v. Sutton 128

8. Robbery is committed when property is taken from a person through the use of force, violence, or intimidation. It is not necessary that the property be taken from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control.
State v. Sutton 128
9. A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
State v. Sutton 128
10. Ordinarily, evidence tending to prove an alibi does not destroy the sufficiency of the evidence to support a finding of guilt, but only presents conflicting evidence on a question of fact.
State v. Sutton 128
11. In a post conviction proceeding the petitioner has the burden of establishing the basis for relief.
State v. Terrell 137
12. In a malpractice action the burden is on the plaintiff to prove the generally recognized medical standard involved, that there was a deviation from that standard by the defendant, and that such deviation was the proximate cause of the plaintiff's injury.
Saporta v. State 142
13. The fact that the damages flowing from the breach of a covenant not to compete are not susceptible of exact computation will not preclude recovery; however, in order to recover substantial damages, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness; if a plaintiff fails to so do, he can nevertheless, if there is evidence of a specific monetary loss, recover a nominal sum.
Quad-States, Inc. v. Vande Mheen 161
14. The defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Pearson 183
15. In order to substantiate the defense of entrapment, it must be shown that the government induced the defendant to commit the crime charged and that defendant's predisposition to commit the crime was such that defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
State v. Pearson 183
16. If the defendant has submitted no more than a scintilla of

credible evidence tending to prove entrapment, the question of entrapment then becomes one of fact to be decided by the jury.
State v. Pearson 183
17. Where an employee seeks the protection of a contract to avoid discharge, the burden is on the employee to prove such contract.
Smith v. City of Omaha 217
18. The question of whether an architect has failed to perform in accordance with the standards of the profession is a matter which must be proved by expert testimony and cannot be left to lay witnesses.
Overland Constructors v. Millard School Dist. 220
19. In order to recover substantial damages flowing from a breach of a covenant not to compete, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness, although, failing to do so, if there is evidence of a specific monetary loss, recovery of a nominal sum may be had.
National Farmers Union Serv. Corp. v. Edwards 231
20. Fraud must be proved in an action at law by a preponderance of the evidence. Language in cases such as *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978), *Kernan v. Modern Woodmen of America*, 120 Neb. 333, 232 N.W. 590 (1930), and *Hampton v. Webster*, 56 Neb. 628, 77 N.W. 50 (1898), that fraud in a law action must be proved by clear and satisfactory evidence, is disapproved.
Tobin v. Flynn & Larsen Implement Co. 259
21. Fraud in an equity case must be proved by "clear and convincing" or "clear and satisfactory" evidence. Language in cases such as *Saffer v. Saffer*, 133 Neb. 528, 274 N.W. 479 (1937), that fraud in an equity action must be proved by a preponderance of the evidence, is disapproved.
Tobin v. Flynn & Larsen Implement Co. 259
22. "Clear and satisfactory" evidence is the same as "clear and convincing" evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
Tobin v. Flynn & Larsen Implement Co. 259
23. The person seeking post conviction relief has the burden of establishing a basis for relief, and the findings of the district court will not be disturbed on appeal unless they are clearly wrong.
State v. Brown 305
24. In the case of a condition subsequent, the happening of which is to defeat the cause of action and terminate liability under the contract, the burden of proof rests on the party claiming the

condition to establish facts entitling that party to a release of his obligations under the contract.
Schmidt v. J. C. Robinson Seed Co. 344
25. The burden is on the applicant for a certificate of public convenience and necessity to show that the proposed service is required by public convenience and necessity.
In re Application of Amsberry, Inc. 353
26. In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or which came into being after, the first proceeding.
In re Interest of V.B. and Z.B. 369
27. In voluntary termination cases under the Nebraska Employment Security Law, the burden of proof is on the employee to prove that the employee's leaving was for good cause.
Norman v. Sorensen 408
28. For commitment under the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), the burden is on the petitioner to establish by clear and convincing evidence both mental illness and dangerousness of the committee.
In re Interest of H.W. 423
29. The burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.
State v. Hert 447
30. No extrinsic authentication is required for admissibility of a copy of an official record certified by its authorized custodian—a court reporter—who has complied with the rules of the Supreme Court as to certification.
State v. Benzel 466
31. The law treats a claim of prescriptive right with disfavor. Such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established.
Simacek v. York County Rural P.P. Dist. 484
32. A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
Simacek v. York County Rural P.P. Dist. 484

33. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
Ford v. Jordan 492
Hulse v. Schelkopf 617
34. A conviction may be supported by the uncorroborated testimony of an accomplice.
State v. Joy 535
35. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
State v. Trimble 639
36. At the time of entering a plea of guilty to a crime, it is sufficient to establish that the defendant entered his plea of guilty knowingly, intelligently, and voluntarily, insofar as knowledge of the possible penalty for the crime, if defendant understood the penalty for the crime from information other than that given to him by the judge receiving his plea.
State v. Fischer 664
37. An individual case of discrimination based on the employee's filing of a discrimination charge before the Nebraska Equal Opportunity Commission will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's firing. Third, should the defendant carry that burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
Harris v. Misty Lounge, Inc. 678
38. A showing by an employee that he or she was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal.
Harris v. Misty Lounge, Inc. 678
39. Aggravating circumstance (1)(b) of Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not exist unless the murder was committed for the purpose of concealing the commission of a crime, or for the purpose of concealing the identity of the perpetrator of a crime.
State v. Hunt 707
40. Aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not exist unless the method of killing itself

entails something more than the ordinary circumstances which attend any death-dealing violence.
State v. Hunt 707
41. In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award.
Masters v. Iowa Beef Processors 835
42. The burden of showing the existence of that material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
Hoschar v. Hoschar 913

Property

1. While estoppel may not be used to create a title to real estate, the doctrine may be used in defense of title.
Hanika v. Rawley 45
2. Where silence enables one to acquire an unfair advantage over another in the settlement of property rights, it is that person's duty to speak.
Hanika v. Rawley 45
3. The Nebraska Right to Farm Act, Neb. Rev. Stat. §§ 2-4401 through 2-4404 (Reissue 1983), applies only where there has been a change in land use or occupancy of land in and about the locality of such farm or farm operation, not where the change has taken place on the farm itself.
Flansburgh v. Coffey 381
4. The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live and enjoy the home, or such as to reduce the value of the residential property.
Flansburgh v. Coffey 381
5. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of legal title for the benefit of the grantor.
Ford v. Jordan 492
6. A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
PWA Farms v. North Platte State Bank 516
7. The measure of damages for conversion is the market value of the converted property on the date of conversion.
PWA Farms v. North Platte State Bank 516

8. In the absence of an allegation that a decedent's property is necessary for purposes of administration, as required by Neb. Rev. Stat. § 30-2470 (Reissue 1979), a personal representative has no authority to take possession or control of a decedent's property.
In re Estate of Kesting 524
9. One of several coowners of real property can lease his or her own interest to third persons.
Kresha v. Kresha 598
10. One who acquires property covered by an existing lease of which he or she has knowledge acquires the property subject to the existing lease.
Kresha v. Kresha 598
11. The owner of personalty is qualified to express an opinion of its value solely because of his status as owner.
Kristensen v. Reese 668
12. The procedure to be followed to obtain an "execution warrant" should be similar to that prescribed by Neb. Rev. Stat. §§ 29-830 to 29-835 (Reissue 1979), which provide for the issuance of "inspection warrants." Such an execution warrant should be issued only by a judge of a court of record upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution.
State v. Hinchey 825

Property Division

The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Erstrom v. Erstrom 303

Prosecuting Attorneys

1. The general rule is that remarks of the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
State v. Benzel 466

2. Generally speaking, it is not prejudicial error for a prosecutor to make remarks in closing arguments based on deductions and inferences drawn from the evidence.
State v. Benzel 466
3. A prosecutor states a case as contemplated by Neb. Rev. Stat. § 29-2016 (Reissue 1979) when he or she outlines the nature of the proceeding against the defendant.
State v. Hunt 707
4. A prosecutor's reference to the defendant's failure to make an exculpatory statement before the defendant is in custody does not violate the defendant's right to remain silent.
State v. Gregory 778
5. Once a witness' character for truthfulness has been attacked, the prosecution may, under the provisions of Neb. Rev. Stat. § 27-608 (Reissue 1979), adduce rebuttal evidence on that issue.
State v. Gregory 778
6. Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
State v. Ross 843

Proximate Cause

1. Proximate causation is generally a question for the jury; only where but one inference can be drawn is it proper for the court to decide the issue.
Maloney v. Kaminski 55
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.
Maloney v. Kaminski 55
3. In a malpractice action the burden is on the plaintiff to prove the generally recognized medical standard involved, that there was a deviation from that standard by the defendant, and that such deviation was the proximate cause of the plaintiff's injury.
Saporta v. State 142
4. Conduct is not a cause of an event if the event would have occurred without the questioned conduct.
Saporta v. State 142

Public Officers and Employees

1. Due process requires a pretermination hearing to determine whether there are reasonable grounds to believe that the charges against a tenured public employee are true and support the proposed action.
Bockbrader v. Department of Insts. 17
2. A tenured public employee is entitled to notice of the charges

against him, an explanation of the employer's evidence, and an opportunity to respond at a pretermination hearing.
Bockbrader v. Department of Insts. 17

3. The Tax Commissioner is not a "person aggrieved" and therefore does not have the right to appeal a decision of the State Board of Equalization and Assessment, as provided by Neb. Rev. Stat. §§ 77-27,127 and 84-917 (Reissue 1981).
Karnes v. Wilkinson Mfg. 150

4. A county board is without authority, in the absence of a grant, to perform the duties which are part of the official duties of other officials or boards.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

5. Absent the existence of a labor organization as defined by the provisions of Neb. Rev. Stat. § 48-801(6) (Reissue 1984), the statutes make it relatively clear that in most instances the elected officials are authorized in the first instance to hire their own employees, set their salaries, and prescribe their terms and conditions of employment.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

6. Although the county board is given the right to approve the salary set by the elected official, the county board may not act arbitrarily or capriciously.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

7. Except for the county assessor, whose authority regarding the setting of wages, and therefore the terms and conditions of employment, has been transferred to the county board, the elected county official is the proper person to represent the county in connection with negotiations involving employees of the elected official's office and the employees' bargaining representatives pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984).
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431

Public Policy

1. Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy.
Mayer v. Howard 328

2. To be void as against public policy, a contract should be quite clearly repugnant to the public conscience.
Mayer v. Howard 328

Public Service Commission

In reviewing the record of proceedings in terms of evidence before the Public Service Commission, the Supreme Court examines the record to determine whether there is evidence to sustain the commission's findings and action.
In re Application of Amsberry, Inc. 353

Public Utilities

1. A city's purchase of an electric system is a nongovernmental business enterprise.
   T.V. Transmission v. City of Lincoln 887
2. Public utilities generally may discriminate, in respect to rates, between consumers within and those outside the municipalities primarily served.
   T.V. Transmission v. City of Lincoln 887

Rates

Public utilities generally may discriminate, in respect to rates, between consumers within and those outside the municipalities primarily served.
T.V. Transmission v. City of Lincoln 887

Real Estate

1. Upon default of payment by the vendee in an executory land contract, the vendor may sue to foreclose the land contract in the same manner as foreclosing a real estate mortgage.
   Carman v. Gibbs 603
2. After foreclosure of an executory land contract, the vendor in that contract may sue the vendee for a deficiency judgment.
   Carman v. Gibbs 603
3. The owner and occupiers of a residence do not impliedly warrant the habitability of such house on sale to another.
   Bernstein v. Ainsworth 670

Rebuttal Evidence

1. Once a witness' character for truthfulness has been attacked, the prosecution may, under the provisions of Neb. Rev. Stat. § 27-608 (Reissue 1979), adduce rebuttal evidence on that issue.
   State v. Gregory 778
2. Under the provisions of Neb. Rev. Stat. § 27-801 (Reissue 1979), evidence of a consistent statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
   State v. Gregory 778
3. Competent testimony which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
   State v. Gregory 778

Records

1. Neb. Rev. Stat. § 27-1002 (Reissue 1979) states the best evidence rule as currently applied in Nebraska: the original is required unless an exception applies.
   Omaha World-Herald Co. v. Nielsen 294

2. Neb. Rev. Stat. § 27-1003 (Reissue 1979) permits a duplicate to be admitted unless its authenticity is questioned or its admission would be unfair to the opposing party.
Omaha World-Herald Co. v. Nielsen 294
3. To fall within the "business records" exception, a threefold test must be met. First, the recorded activity must occur within the ordinary course of business. Second, the record must have been produced at or near the time of the transaction in question. Third, the record must be authenticated by a custodian or other qualified witness.
Omaha World-Herald Co. v. Nielsen 294
4. A trial court has broad discretion to rule on the foundational requirements of hearsay evidence under Neb. Rev. Stat. § 27-803(5) (Reissue 1979).
Omaha World-Herald Co. v. Nielsen 294
5. Under Neb. Rev. Stat. § 27-803(5) (Reissue 1979), questions as to the authenticity or credibility of evidence go to the weight of the evidence.
Omaha World-Herald Co. v. Nielsen 294
6. It is incumbent upon the defendant on appeal from a criminal conviction to provide a record which demonstrates prejudicial error.
State v. Benzel 466
7. No extrinsic authentication is required for admissibility of a copy of an official record certified by its authorized custodian—a court reporter—who has complied with the rules of the Supreme Court as to certification.
State v. Benzel 466
8. Generally, a document from a court may be authenticated by either the clerk or deputy clerk of that court.
State v. Benzel 466
9. Where there is no bill of exceptions, the appellate court is limited to a determination of whether the pleadings support the judgment of the trial court.
In re Estate of Kesting 524
10. The appellant, by record presented on appeal, must affirmatively establish the existence of a claimed error.
Forehead v. Galvin 578
11. This court cannot review the trial court's alleged abuse of discretion in entering a discovery order where there is no evidence in the record to either support or refute a contention that such abuse exists.
Hulse v. Schelkopf 617

12. Evidence which does not appear in the record cannot be considered by this court on appeal.
Hulse v. Schelkopf 617
13. Where evidence or rulings do not appear in the record, they cannot be considered on appeal.
Chalupa v. Chalupa 704
14. In a domestic relations case on appeal, where each party has testified, the burden is on the appellant to have a bill of exceptions prepared containing the testimony and evidence of each party on any of the issues affected by the trial court's decree of dissolution to be presented for review by appellant.
Ward v. Ward 799

Recusal

A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
State v. Terrell 137

Releases

1. A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him.
Mayer v. Howard 328
2. In the case of a condition subsequent, the happening of which is to defeat the cause of action and terminate liability under the contract, the burden of proof rests on the party claiming the condition to establish facts entitling that party to a release of his obligations under the contract.
Schmidt v. J. C. Robinson Seed Co. 344

Replevin

1. The measure of damages in a replevin action when the property is not returned is the value of the property, together with interest, from the date of the unlawful taking.
Wellman v. Birkel 1
2. When the property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.
Wellman v. Birkel 1
3. Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
Ford v. Jordan 492

Res Judicata

In determining whether a change of circumstances exists so as to

modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or which came into being after, the first proceeding.
In re Interest of V.B. and Z.B. 369

Rescission

1. The remedies of rescission and damages are inconsistent, since the former is based on disaffirmance and the latter upon affirmance of the contract.
Boris v. Heyd 569
2. In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.
Lustgarten v. Jones 585
3. On rescission of a contract, rights and duties which have accrued under the rescinded contract are terminated and nullified.
Lustgarten v. Jones 585
4. Rescission of a contract by a subsequent agreement of the parties requires as much a meeting of the parties' minds as does making a contract.
Lustgarten v. Jones 585
5. Inasmuch as formation of a contract can be prevented by duress exerted upon a party to the contract, likewise, duress may prevent an effective rescission of an existing agreement. However, the burden of proving duress is placed upon the party alleging it.
Lustgarten v. Jones 585
6. To be rescinded on account of duress, an agreement must be obtained by pressure brought to bear upon a party to a contract, and must be unjust, unconscionable, or illegal.
Lustgarten v. Jones 585
7. An action for rescission of a contract is equitable in nature and as such is reviewable by this court de novo on the record. However, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.
Haumont v. Security State Bank 809
8. When a party seeks to rescind a contract by his or her own act, notice of such action must be given the other party; but when the aid of a court is sought for that purpose, the bringing of the

action is sufficient disaffirmance for the purpose of the action.
Haumont v. Security State Bank 809
9. When the aid of an equity court is sought to rescind a contract, the rescission is effected by the decree of the court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument and renders it as though it does not exist.
Haumont v. Security State Bank 809
10. Because rescission is not accomplished "in equity" until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money which was received from the defendant.
Haumont v. Security State Bank 809
11. An offer of restitution is not necessary where receipt of any benefit is denied by the plaintiff and the good faith of the defendant is challenged.
Haumont v. Security State Bank 809

Restitution

1. Because rescission is not accomplished "in equity" until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money which was received from the defendant.
Haumont v. Security State Bank 809
2. An offer of restitution is not necessary where receipt of any benefit is denied by the plaintiff and the good faith of the defendant is challenged.
Haumont v. Security State Bank 809

Restrictive Covenants

1. Broadly speaking, the amount recoverable for the breach of a covenant not to compete is the loss sustained by the covenantee as a natural result of the breach.
Quad-States, Inc. v. Vande Mheen 161
2. The fact that the damages flowing from the breach of a covenant not to compete are not susceptible of exact computation will not preclude recovery; however, in order to recover substantial damages, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness; if a plaintiff fails to so do, he can nevertheless, if there is evidence of a specific monetary loss, recover a nominal sum.
Quad-States, Inc. v. Vande Mheen 161
National Farmers Union Serv. Corp. v. Edwards 231
3. The review of a case involving the enforcement of a noncompete

clause by injunctive process is done de novo on the record, and it is necessary for this court to reach an independent conclusion without being influenced by the findings of the trial court, absent conflicting credible evidence.
National Farmers Union Serv. Corp. v. Edwards 231

4. Covenants not to compete, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.
National Farmers Union Serv. Corp. v. Edwards 231
5. Where a noncompete clause is overly broad, it may be found unreasonable to enforce.
National Farmers Union Serv. Corp. v. Edwards 231

Right to Counsel

1. A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
State v. Pearson 183
2. A motor vehicle driver is not entitled to consult a lawyer before taking a chemical test of the blood, breath, or urine, nor is the test required to be delayed by a driver's request that permission be granted to contact a lawyer concerning the requested test. This is because the suspension of a driver's license which results from a test refusal is a remedial, not strictly punitive, measure.
Bapat v. Jensen 763
3. The right to counsel attaches at such time as criminal proceedings are initiated.
Bapat v. Jensen 763

Robbery

Robbery is committed when property is taken from a person through the use of force, violence, or intimidation. It is not necessary that the property be taken from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control.
State v. Sutton 128

Rules of Evidence

1. Neb. Rev. Stat. § 27-1002 (Reissue 1979) states the best evidence

rule as currently applied in Nebraska: the original is required unless an exception applies.
Omaha World-Herald Co. v. Nielsen 294
2. Neb. Rev. Stat. § 27-1003 (Reissue 1979) permits a duplicate to be admitted unless its authenticity is questioned or its admission would be unfair to the opposing party.
Omaha World-Herald Co. v. Nielsen 294
3. To fall within the "business records" exception, a threefold test must be met. First, the recorded activity must occur within the ordinary course of business. Second, the record must have been produced at or near the time of the transaction in question. Third, the record must be authenticated by a custodian or other qualified witness.
Omaha World-Herald Co. v. Nielsen 294
4. A trial court has broad discretion to rule on the foundational requirements of hearsay evidence under Neb. Rev. Stat. § 27-803(5) (Reissue 1979).
Omaha World-Herald Co. v. Nielsen 294
5. Under Neb. Rev. Stat. § 27-803(5) (Reissue 1979), questions as to the authenticity or credibility of evidence go to the weight of the evidence.
Omaha World-Herald Co. v. Nielsen 294
6. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1979)) are satisfied.
State v. Johnson 392
7. A "proceeding" contemplated by Rule 801(4)(a)(i) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979)) is a formal action before a judicial tribunal, as well as an action before a quasi-judicial officer or board, invoked to enforce or protect a right.
State v. Johnson 392
8. A trial court may, either on its own motion or in response to an objection, require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion.
Forehead v. Galvin 578
9. Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
State v. Hunt 707
10. Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) is subject to the

overriding protection of Neb. Rev. Stat. § 27-403 (Reissue 1979), which states that evidence of other acts must be excluded if, among other things, the probative value of the evidence of other acts is substantially outweighed by the danger of unfair prejudice to the defendant.
State v. Hunt 707

Rules of the Supreme Court

1. The disposition of a direct appeal pursuant to Neb. Ct. R. 3B (rev. 1983) is a disposition on the merits.
State v. Sanders 308
2. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when granting relief pursuant to Neb. Ct. R. 3B (rev. 1983) and is not available for further relief pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979).
State v. Sanders 308

Sales

1. Under Nebraska law the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless it is in writing. Neb. U.C.C. § 2-201(1) (Reissue 1980).
Omaha World-Herald Co. v. Nielsen 294
2. Modifications of contracts for the sale of goods for the price of $500 or more must generally be in writing.
Omaha World-Herald Co. v. Nielsen 294
3. A distributorship agreement for the sale of newspapers for a price greater than $500 was within the statute of frauds.
Omaha World-Herald Co. v. Nielsen 294
4. A security interest continues in the proceeds of the sale of collateral only if the proceeds can be identified.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593
5. A secured creditor's right to proceeds under Neb. U.C.C. § 9-306 (Reissue 1980) is generally dependent on the ability to trace and identify the fund as his property.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593
6. The burden is upon the secured party claiming a lien on proceeds from the sale of collateral to trace and identify proceeds received by the debtor from the disposition of secured collateral.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593

Schools and School Districts

Neb. Rev. Stat. § 79-4,102(3) (Cum. Supp. 1982) prescribes a specific method to review a levy made for nonresident high school education.
In re 1983-84 County Tax Levy 897

Search and Seizure

1. One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid.
   State v. White 527
2. Although there are some recognized exceptions which may justify a warrantless search, as a general rule, searches and seizures inside a home without a warrant are presumptively unreasonable and in violation of an individual's rights guaranteed under the fourth amendment to the U.S. Constitution.
   State v. Hinchey 825
3. In terms that apply equally to seizures of property and to seizures of persons, the fourth amendment to the U.S. Constitution has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.
   State v. Hinchey 825
4. One governing principle, justified by history and by current experience, has consistently been followed: Except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.
   State v. Hinchey 825

Secured Transactions

1. Neb. U.C.C. art. 9 (Reissue 1980), unless otherwise excluded, applies to any transaction (regardless of its form) which is intended to create a security interest in personal property.
   Allis-Chalmers Corp. v. Haumont 509
2. The entire disposition of collateral by a secured party must be viewed as one transaction, and every aspect of that transaction must be in accord with the requirements of the Uniform Commercial Code.
   Allis-Chalmers Corp. v. Haumont 509
3. If a creditor wishes a deficiency judgment, he must comply with the law in each transaction in which collateral is liquidated.
   Allis-Chalmers Corp. v. Haumont 509

Security Interests

1. Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral, Neb. U.C.C. § 9-504(3) (Reissue 1980), is a condition precedent to a secured creditor's right to recover a deficiency.
   City Bank & Trust Co. v. Van Andel 152
   Havelock Bank v. McArthur 364
   Allis-Chalmers Corp. v. Haumont 509

2. A debtor's right to notice under Neb. U.C.C. § 9-504(3) (Reissue 1980) may be waived by conduct after default amounting to waiver or estoppel.
City Bank & Trust Co. v. Van Andel 152
3. The failure to give the requisite notice is an absolute bar to recovery.
Havelock Bank v. McArthur 364
4. Neb. U.C.C. art. 9 (Reissue 1980), unless otherwise excluded, applies to any transaction (regardless of its form) which is intended to create a security interest in personal property.
Allis-Chalmers Corp. v. Haumont 509
5. A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980).
Allis-Chalmers Corp. v. Haumont 509
6. A security interest continues in the proceeds of the sale of collateral only if the proceeds can be identified.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593
7. A secured creditor's right to proceeds under Neb. U.C.C. § 9-306 (Reissue 1980) is generally dependent on the ability to trace and identify the fund as his property.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593
8. The burden is upon the secured party claiming a lien on proceeds from the sale of collateral to trace and identify proceeds received by the debtor from the disposition of secured collateral.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593
9. A person buying farm products from a person engaged in farming operations does not take the product free of the security interest created by the seller.
Beatrice Nat. Bank v. Mid-America Dairymen 757
10. Pursuant to 11 U.S.C. §§ 542 and 543 (1982), entities and custodians of property belonging to the debtor are commanded to deliver over such property to the trustee or, in the case of a Chapter 11 proceeding, to the debtor in possession. Claims of secured parties whose property is delivered to the trustee or debtor in possession are then presented to the bankruptcy court.
Beatrice Nat. Bank v. Mid-America Dairymen 757
11. The term "lien" in 11 U.S.C. § 362(a)(4) (1982) is used to include any consensual security interest in personal property. This section is designed to protect the debtor against harassment and possible frustration of any rehabilitation by prejudicial disposition of the assets of the estate before injunctive relief can be obtained.
Beatrice Nat. Bank v. Mid-America Dairymen 757

Self-Defense

In order to find justification or self-defense, it is necessary that there be a purposeful use of deadly force.
State v. Brown 849

Sentences

1. Where it is apparent that the lesser sentence imposed upon a codefendant is erroneous, the sentencing court is not required to reduce all more severe though properly imposed sentences just to obtain uniformity.
State v. Morrow 247
2. Imprisonment for life is the minimum penalty for first degree murder.
State v. Boyer 312
3. Where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
State v. Benzel 466
State v. Richter 551
4. In an indeterminate sentence the minimum sentence may not exceed one-third the maximum sentence permitted by law.
State v. Benzel 466
5. The granting of credit for jail time served while awaiting sentence is within the sound discretion of the court.
State v. Knight 666
6. Refusing to grant credit for jail time served while awaiting sentence may not be used to impose minimum sentences in excess of one-third of the maximum term, as provided in Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981).
State v. Knight 666
7. A death sentence cannot be imposed absent the existence of at least one of the aggravating circumstances set forth in Neb. Rev. Stat. § 29-2523 (Reissue 1979).
State v. Hunt 707
8. In the absence of an abuse of discretion, a sentence imposed within statutory limits, including the denial of probation, will not be disturbed on appeal.
State v. Gregory 778
9. The granting of presentence jail time credit is within the trial court's discretion except where the statutory maximums are exceeded.
State v. Ross 843
10. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is neither cruelly inhumane nor disproportionate to the crime involved.
State v. Stratton 854
11. The law places upon judges the primary responsibility for imposing sentences within limits fixed by statute.
State v. Stratton 854

12. The Legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.
State v. Stratton 854
13. The requirement of Neb. Rev. Stat. § 28-1205(3) (Reissue 1979) that sentences imposed for the use of firearms to commit a felony be consecutive to any other sentence imposed does not constitute a violation of the distribution of powers mandated by Neb. Const. art. II, § 1, art. III, § 1, or art. V, § 9.
State v. Stratton 854

Service of Process

Where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of a default hearing need not be given to such party.
Tejral v. Tejral 264

Sexual Assault

In a prosecution for attempted first degree sexual assault, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
State v. Rubek 537

Social Security

The State of Nebraska may not categorically refuse to provide periodontal treatment to a medicaid patient if such treatment is required.
Kirk v. Dunning 359

Specific Performance

1. A suit for the specific performance of a contract is equitable in nature.
Nixon v. Harkins 286
2. There is a clear and classic distinction between an option and a so-called "right of first refusal"; the option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, where the right of first refusal has no binding effect unless the offeror decides to sell. The option gives a clear right to the option-holder to purchase upon specified terms and conditions, regardless of the

wishes of the option-giver, whereas the "right of refusal" or "preemption" is conditioned upon the willingness of the owners to sell; it can be enforced by specific performance only where such willingness can be proved.
Coniglio v. Hansl 580
3. In order to support a claim for specific performance, the evidence in support of such claim must be clear, satisfactory, and unequivocal.
Coniglio v. Hansl 580

Standing

1. Before a person can invoke the jurisdiction of the court, he must have standing to sue, which is having some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
2. A person may have standing to facially challenge an enactment for overbreadth because it may reach a substantial amount of constitutionally protected conduct.
State v. Sinica 792
3. In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to the conduct of others.
State v. Sinica 792

Statute of Frauds

A distributorship agreement for the sale of newspapers for a price greater than $500 was within the statute of frauds.
Omaha World-Herald Co. v. Nielsen 294

Statutes

1. Where the law of a sister state is not pled nor proved, it is presumed to be the same as the law of this jurisdiction.
Redick v. Redick 86
2. When an employee sues and recovers damages from a third party for injuries received, an employer is statutorily entitled to subrogation for amounts paid to the injured employee as workmen's compensation payments. Neb. Rev. Stat. § 48-118 (Reissue 1984).
Turner v. Metro Area Transit 189
3. A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are allowed where they are made applicable to all persons of the same class similarly situated.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
4. A regulation valid when made may become arbitrary by reason

of later events.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
5. The Legislature, under the guise of regulation, may not indulge in the destruction of lawful competition.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
6. It is the obligation of the judiciary to declare a statute invalid where it arbitrarily and unreasonably violates the Constitution.
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
7. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature.
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431
8. The language of a statute should be considered in determining the intent of the Legislature.
Sorensen v. Meyer 457
9. In construing a statute this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
Sorensen v. Meyer 457
10. Statutory language should be given its plain and ordinary meaning, and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning.
Sorensen v. Meyer 457
11. 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.
Sorensen v. Meyer 457
12. Since the Legislature is presumed to have intended every provision of a statute to have a meaning, this court will give effect, if possible, to every word, clause, and sentence thereof.
Sorensen v. Meyer 457
13. In determining legislative intent it is necessary to examine a statute as a whole, in light of its objects and purposes.
Sorensen v. Meyer 457
14. In a facial challenge to the overbreadth and vagueness of a law, if we can determine that the prohibition contained in the enactment does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail.
State v. Merithew 530
15. In a criminal prosecution the law requires that the criminal

statute must be reasonably clear and definite, setting forth standards that are not so uncertain as to be left to conjecture the conduct proscribed.
State v. Merithew 530
16. The definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law.
State v. Merithew 530
17. Abolition of the privilege preventing a spouse from testifying about any confidential communication made by one spouse to the other in crimes of violence, Neb. Rev. Stat. § 27-505 (Cum. Supp. 1984), does not constitute special legislation and does not grant a special privilege in violation of Neb. Const. art. III, § 18, nor does it offend concepts of due process and equal protection.
State v. Hunt 707
18. Classification for purposes of legislation is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.
State v. Hunt 707
19. Classification for the purpose of legislation must be real and not illusive; it cannot be based on distinctions without a substantial difference.
State v. Hunt 707
20. This court does not sit as a superlegislature to review the wisdom of legislative acts.
State v. Hunt 707
21. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
State v. Hunt 707
22. A death sentence cannot be imposed absent the existence of at least one of the aggravating circumstances set forth in Neb. Rev. Stat. § 29-2523 (Reissue 1979).
State v. Hunt 707
23. Aggravating circumstance (1)(b) of Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not exist unless the murder was committed for the purpose of concealing the commission of a crime, or for the purpose of concealing the identity of the perpetrator of a crime.
State v. Hunt 707
24. Aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not exist unless the method of killing itself entails something more than the ordinary circumstances which attend any death-dealing violence.
State v. Hunt 707

25. A person may have standing to facially challenge an enactment for overbreadth because it may reach a substantial amount of constitutionally protected conduct.
State v. Sinica 792
26. When a statute is facially challenged as to overbreadth and vagueness, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.
State v. Sinica 792
27. In deciding whether a statute is overbroad, a court should evaluate the ambiguous as well as unambiguous scope of the enactment. To this extent the vagueness of a law affects overbreadth analysis.
State v. Sinica 792
28. The term "cruelly punished" as used in Neb. Rev. Stat. § 28-707(1)(b) (Cum. Supp. 1984) has acquired a relatively widely accepted connotation in the law and is capable of an easily understood meaning, as distinguished from the reasonable discipline of a child allowed by the common law and protected by the Constitution.
State v. Sinica 792
29. In construing a statute we will presume that the Legislature intended a sensible rather than absurd result, and we will endeavor to interpret the statute in a manner consistent with the Constitution.
State v. Sinica 792
30. In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to the conduct of others.
State v. Sinica 792
31. As a general rule, in the construction of statutes the word "shall" is considered mandatory, and inconsistent with the idea of discretion.
State v. Stratton 854
32. A statute is not open to construction as a matter of course; in the absence of anything to indicate the contrary, words must be given their ordinary meaning.
State v. Stratton 854
33. It is not within the province of the Nebraska Supreme Court to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.
State v. Stratton 854
34. A litigant who invokes the provisions of a statute may not challenge its validity.
In re 1983-84 County Tax Levy 897

Subrogation

1. When an employee sues and recovers damages from a third party for injuries received, an employer is statutorily entitled to subrogation for amounts paid to the injured employee as workmen's compensation payments. Neb. Rev. Stat. § 48-118 (Reissue 1984).
   Turner v. Metro Area Transit 189
2. When an employee settles with a third party for injuries received, waiver of an employer's statutory right to subrogation for future payments of benefits will not be inferred absent a showing of either an agreement by the employer to a settlement, which by its terms excludes reimbursement for future benefits paid, or other such action intentionally and voluntarily relinquishing that right.
   Turner v. Metro Area Transit 189
3. Mere receipt by the employer of its subrogated interest for compensation benefits paid does not waive its right to future payments or offsets.
   Turner v. Metro Area Transit 189

Summary Judgment

1. 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. If there is a genuine issue of fact, summary judgment may not be granted.
   City Bank & Trust Co. v. Van Andel 152
   Timmerman v. American Trencher, Inc. 175
2. In reviewing a summary judgment this 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.
   City Bank & Trust Co. v. Van Andel 152
3. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; therefore, that party must 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.
   City Bank & Trust Co. v. Van Andel 152
4. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.
   City Bank & Trust Co. v. Van Andel 152
5. Evidence adduced by cross-examination of an affiant in an earlier summary judgment proceeding cannot be considered an affidavit within the meaning of Neb. Rev. Stat. § 25-1332

(Reissue 1979).
First Nat. Bank v. Greene Bldg. & Supply 205
6. Where no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom exists and the moving party is entitled to judgment as a matter of law, summary judgment should be granted.
Mayer v. Howard 328
O'Neill Prod. Credit Assn. v. Mellor 555
7. A party is entitled to summary judgment if there is no genuine issue of material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
Roth v. Farmers Mut. Ins. Co. 612
8. The party who moves for summary judgment has the burden of establishing that there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, as well as the burden of establishing that the movant is entitled to judgment as a matter of law.
Mueller v. Union Pacific Railroad 742
9. Summary judgment is appropriate when there is no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
Beatrice Nat. Bank v. Mid-America Dairymen 757

Tape Recordings

Conversations in which one party has consented to the recording of the conversation are not "oral communications" within the meaning of communication interception statutes.
State v. Manchester 41

Taxation

1. The Tax Commissioner is not a "person aggrieved" and therefore does not have the right to appeal a decision of the State Board of Equalization and Assessment, as provided by Neb. Rev. Stat. §§ 77-27,127 and 84-917 (Reissue 1981).
Karnes v. Wilkinson Mfg. 150
2. Federal estate taxes are to be apportioned among the persons interested in the estate.
In re Estate of Kennedy 212
3. A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal or public corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
4. A resident taxpayer, without showing any interest or injury

peculiar to himself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
5. To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show such a demand would be useless.
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. 504
6. Neb. Rev. Stat. § 79-4,102(3) (Cum. Supp. 1982) prescribes a specific method to review a levy made for nonresident high school education.
In re 1983-84 County Tax Levy 897

Tenancy in Common

One of several coowners of real property can lease his or her own interest to third persons.
Kresha v. Kresha 598

Termination of Employment

1. In the absence of any contractual or statutory restrictions on the employer's right to discharge an employee, the employer may lawfully discharge an employee for whatever cause the employer chooses.
Smith v. City of Omaha 217
2. Where an employee seeks the protection of a contract to avoid discharge, the burden is on the employee to prove such contract.
Smith v. City of Omaha 217
3. When the employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may discharge an employee whenever it chooses, with or without cause.
Mueller v. Union Pacific Railroad 742
4. Under some circumstances the termination-at-will rule is subject to modification by promises outside the employment agreement itself.
Mueller v. Union Pacific Railroad 742

Testimony

1. A nonexpert witness may testify from his observation as to whether or not another is intoxicated, and the weight and sufficiency is for a jury to decide.
State v. Daniels 480
2. Under the provisions of Neb. Rev. Stat. § 27-801 (Reissue 1979), evidence of a consistent statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is consistent with his testimony and is offered to rebut an express

or implied charge against him of recent fabrication or improper influence or motive.
State v. Gregory 778
3. Competent testimony which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
State v. Gregory 778
4. A trial judge is given latitude and discretion in permitting leading questions of witnesses whose communicative abilities are sharply curtailed, and unless there has been an abuse of such discretion resulting in prejudice and injury to the other party, there is no reversible error.
State v. Brown 849

Time

1. The right of appeal is statutory, and the time requirements set forth in the statute are mandatory in order for the reviewing court to acquire jurisdiction.
Wood v. Village of Culbertson 94
Moore v. Black 122
2. Application for a new trial must be made within 10 days after the verdict, report, or decision is rendered.
Wells v. Bartholomew 210
3. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree appealed from.
Wells v. Bartholomew 210

Trial

1. In a case tried to the court, the presumption obtains that the trial court, in arriving at its decision, considered only such evidence as was competent and relevant.
Jeffres v. Countryside Homes 26
State v. Thierstein 766
2. It is the province of the trier of the facts to harmonize the testimony insofar as that is possible and, in case of conflicts, to decide as to the weight to be given the testimony of the witnesses.
Jeffres v. Countryside Homes 26
3. Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court, on the motion of the defendant, to dismiss the action.
Quad-States, Inc. v. Vande Mheen 161
4. It is the duty of a trial court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and

conjecture.
Quad-States, Inc. v. Vande Mheen 161
5. Where a party clearly changes his deposition testimony at trial on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, his trial testimony stands discredited as a matter of law, and he is bound by the admissions made at the deposition.
Nixon v. Harkins 286
6. Neb. Rev. Stat. § 27-1002 (Reissue 1979) states the best evidence rule as currently applied in Nebraska: the original is required unless an exception applies.
Omaha World-Herald Co. v. Nielsen 294
7. Neb. Rev. Stat. § 27-1003 (Reissue 1979) permits a duplicate to be admitted unless its authenticity is questioned or its admission would be unfair to the opposing party.
Omaha World-Herald Co. v. Nielsen 294
8. To fall within the "business records" exception, a threefold test must be met. First, the recorded activity must occur within the ordinary course of business. Second, the record must have been produced at or near the time of the transaction in question. Third, the record must be authenticated by a custodian or other qualified witness.
Omaha World-Herald Co. v. Nielsen 294
9. A trial court has broad discretion to rule on the foundational requirements of hearsay evidence under Neb. Rev. Stat. § 27-803(5) (Reissue 1979).
Omaha World-Herald Co. v. Nielsen 294
10. Under Neb. Rev. Stat. § 27-803(5) (Reissue 1979), questions as to the authenticity or credibility of evidence go to the weight of the evidence.
Omaha World-Herald Co. v. Nielsen 294
11. Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. An instruction stating a general principle in the measurement of damages, broader than is applicable to the case presented and not qualified by other instructions, is erroneous.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
12. The credibility of witnesses and weight to be given their testimony are solely for the consideration of the jury, and unless clearly wrong, a verdict by the jury based on conflicting evidence will not be set aside.
Schmidt v. J. C. Robinson Seed Co. 344
13. The trial court is given discretion in determining whether or not a witness has qualifications to state his opinion, and such discretion will not ordinarily be disturbed on appeal unless there

is an abuse of that discretion.
Schmidt v. J. C. Robinson Seed Co. 344
14. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1979)) are satisfied.
State v. Johnson 392
15. No extrinsic authentication is required for admissibility of a copy of an official record certified by its authorized custodian—a court reporter—who has complied with the rules of the Supreme Court as to certification.
State v. Benzel 466
16. A party, in selection of a jury, ordinarily has no right to examine a juror out of the presence of all other jurors, absent a showing of prejudice.
State v. Benzel 466
17. A defendant is not entitled to additional peremptory challenges because the indictment or information charges separate offenses in separate counts.
State v. Benzel 466
18. A failure to make a timely objection to closing arguments is equivalent to failing to make an objection at all and waives any right to complain.
State v. Benzel 466
19. The general rule is that remarks of the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
State v. Benzel 466
20. Generally speaking, it is not prejudicial error for a prosecutor to make remarks in closing arguments based on deductions and inferences drawn from the evidence.
State v. Benzel 466
21. Failure to object to an offer of evidence waives the objection.
State v. Daniels 480
PWA Farms v. North Platte State Bank 516
22. When a defendant in an equity action moves for a dismissal at the close of the plaintiff's evidence, he thereby admits to be true plaintiff's evidence and every inference favorable to the plaintiff which may fairly and reasonably be drawn therefrom; where the plaintiff has made a prima facie case, the motion to dismiss is to be overruled.
Hulse v. Schelkopf 617
23. Where a ruling excluding evidence is made, an offer of proof is generally a prerequisite to our review on appeal unless it is

apparent from the context within which the question was asked that the answer would have been material and competent.
Hulse v. Schelkopf 617
24. This court cannot review the trial court's alleged abuse of discretion in entering a discovery order where there is no evidence in the record to either support or refute a contention that such abuse exists.
Hulse v. Schelkopf 617
25. Where a pretrial order improperly restricts the issues, the parties are bound by it at trial and on appeal, if no objection has been made, unless it does violence to the issues raised by the petition.
Chalupa v. Chalupa 704
26. A prosecutor states a case as contemplated by Neb. Rev. Stat. § 29-2016 (Reissue 1979) when he or she outlines the nature of the proceeding against the defendant.
State v. Hunt 707
27. Abolition of the privilege preventing a spouse from testifying about any confidential communication made by one spouse to the other in crimes of violence, Neb. Rev. Stat. § 27-505 (Cum. Supp. 1984), does not constitute special legislation and does not grant a special privilege in violation of Neb. Const. art. III, § 18, nor does it offend concepts of due process and equal protection.
State v. Hunt 707
28. The case files prepared by social workers for use in child dependency cases are, by statute, privileged and are not subject to discovery as a matter of right.
In re Interest of S.W. 734
29. In the absence of a showing of good cause, the refusal to permit discovery of case files prepared by social workers for use in child dependency cases is not an abuse of discretion.
In re Interest of S.W. 734
30. A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented.
Mueller v. Union Pacific Railroad 742
31. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted.
Mueller v. Union Pacific Railroad 742
32. On a motion for judgment on the pleadings, the court may consider all the pleadings and give judgment for the party entitled thereto.
Mueller v. Union Pacific Railroad 742

33. The making of a motion for judgment on the pleadings is not, however, a waiver of the right to trial of an issue of fact.
Mueller v. Union Pacific Railroad 742
34. Improper admission of evidence does not constitute reversible error where the evidence is cumulative and there is other competent evidence to support the conviction.
State v. Thierstein 766
35. The determination as to the admissibility of the evidence to which a waiver of privilege applies is to be initially entrusted to the sound discretion of the trial court.
Clark v. Clark 771
36. Once a witness' character for truthfulness has been attacked, the prosecution may, under the provisions of Neb. Rev. Stat. § 27-608 (Reissue 1979), adduce rebuttal evidence on that issue.
State v. Gregory 778
37. Generally, 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. Ross 843
38. Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
State v. Ross 843
39. A trial judge is given latitude and discretion in permitting leading questions of witnesses whose communicative abilities are sharply curtailed, and unless there has been an abuse of such discretion resulting in prejudice and injury to the other party, there is no reversible error.
State v. Brown 849
40. A trial court's sustaining of a motion for dismissal or acquittal constitutes a resolution of the issue of guilt.
State v. Carney 906
41. It is error for a court to allow the prosecution to set aside its rest and produce additional evidence after a resolution of the issue of guilt is made.
State v. Carney 906
42. When a trial judge sustains a motion for acquittal, the judge has finally determined the rights of the parties in the action.
State v. Carney 906
43. To permit a court to entertain additional argument, set aside its ruling, and continue a trial after making a finding that the defendant was not guilty as a matter of law is indistinguishable from permitting a prosecuting attorney to present additional argument after a jury has delivered a verdict.
State v. Carney 906

Trusts

1. A suit to impress a constructive trust is one in equity which this court reviews de novo on the record, giving consideration, where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
   Ford v. Jordan 492
2. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of legal title for the benefit of the grantor.
   Ford v. Jordan 492
3. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
   Ford v. Jordan 492
4. The existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case.
   Ford v. Jordan 492
5. Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus, if one person procures legal title to property from another by fraud or misrepresentation or, by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.
   Hulse v. Schelkopf 617
6. Grounds for imposing a constructive trust must be proved by clear, satisfactory, and convincing evidence.
   Hulse v. Schelkopf 617

Undue Influence

1. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence.
   In re Estate of Wagner 32
2. It is not mere influence that the court is to be concerned with, but undue influence as defined by the law.
   In re Estate of Wagner 32

Uniform Commercial Code

1. Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral, Neb. U.C.C. § 9-504(3) (Reissue 1980), is a condition precedent to a secured creditor's right to recover a deficiency.
City Bank & Trust Co. v. Van Andel 152
Havelock Bank v. McArthur 364
Allis-Chalmers Corp. v. Haumont 509
2. A debtor's right to notice under Neb. U.C.C. § 9-504(3) (Reissue 1980) may be waived by conduct after default amounting to waiver or estoppel.
City Bank & Trust Co. v. Van Andel 152
3. Under Nebraska law the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless it is in writing. Neb. U.C.C. § 2-201(1) (Reissue 1980).
Omaha World-Herald Co. v. Nielsen 294
4. Modifications of contracts for the sale of goods for the price of $500 or more must generally be in writing.
Omaha World-Herald Co. v. Nielsen 294
5. A distributorship agreement for the sale of newspapers for a price greater than $500 was within the statute of frauds.
Omaha World-Herald Co. v. Nielsen 294
6. The failure to give the requisite notice is an absolute bar to recovery.
Havelock Bank v. McArthur 364
Allis-Chalmers Corp. v. Haumont 509
7. Under Neb. U.C.C. § 1-102(3) (Reissue 1980) the provisions of the act may be varied by agreement when done so in good faith.
Reilly v. First Nat. Bank & Trust Co. 443
8. Neb. U.C.C. art. 9 (Reissue 1980), unless otherwise excluded, applies to any transaction (regardless of its form) which is intended to create a security interest in personal property.
Allis-Chalmers Corp. v. Haumont 509
9. A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980).
Allis-Chalmers Corp. v. Haumont 509
10. The entire disposition of collateral by a secured party must be viewed as one transaction, and every aspect of that transaction must be in accord with the requirements of the Uniform Commercial Code.
Allis-Chalmers Corp. v. Haumont 509
11. If a creditor wishes a deficiency judgment, he must comply with the law in each transaction in which collateral is liquidated.
Allis-Chalmers Corp. v. Haumont 509
12. A security interest continues in the proceeds of the sale of collateral only if the proceeds can be identified.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593

13. A secured creditor's right to proceeds under Neb. U.C.C. § 9-306 (Reissue 1980) is generally dependent on the ability to trace and identify the fund as his property.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593
14. The burden is upon the secured party claiming a lien on proceeds from the sale of collateral to trace and identify proceeds received by the debtor from the disposition of secured collateral.
Norfolk Prod. Credit Assn. v. Bank of Norfolk 593
15. A letter of credit is an engagement by a bank at its customer's request that the bank honor drafts for payment to a beneficiary upon compliance with conditions specified in the letter of credit. The Uniform Commercial Code statutorily obligates the issuer of a letter of credit to honor drafts drawn by the beneficiary in compliance with terms of the credit.
Brown v. United States Nat. Bank 684
16. A cardinal principle regarding letters of credit is that the credit engagement is completely independent of the underlying contract which engenders a letter of credit.
Brown v. United States Nat. Bank 684
17. The material elements of common-law fraud must be established before any relief is available for the "fraud" contemplated by Neb. U.C.C. § 5-114(2) (Reissue 1980).
Brown v. United States Nat. Bank 684
18. The principle of independence regarding a bank's obligation under a letter of credit does not extend to protect fraud by the beneficiary of the letter of credit.
Brown v. United States Nat. Bank 684
19. An issuer of a letter of credit can refuse to honor such instrument if the beneficiary does not strictly comply with the provisions of the letter of credit for drawing upon such letter.
Brown v. United States Nat. Bank 684
20. In documentation for a letter of credit, Neb. U.C.C. §§ 5-101 to 5-117 (Reissue 1980), certify means to make known; to confirm formally as true, accurate, or genuine; to tell positively; to vouch for in writing.
Brown v. United States Nat. Bank 684
21. A person buying farm products from a person engaged in farming operations does not take the product free of the security interest created by the seller.
Beatrice Nat. Bank v. Mid-America Dairymen 757
22. A debtor in possession has all the power of a trustee and holds title to property as a fiduciary for creditors.
Beatrice Nat. Bank v. Mid-America Dairymen 757
23. Pursuant to 11 U.S.C. §§ 542 and 543 (1982), entities and custodians of property belonging to the debtor are commanded to deliver over such property to the trustee or, in the case of a

Chapter 11 proceeding, to the debtor in possession. Claims of secured parties whose property is delivered to the trustee or debtor in possession are then presented to the bankruptcy court.
Beatrice Nat. Bank v. Mid-America Dairymen 757

24. The term "lien" in 11 U.S.C. § 362(a)(4) (1982) is used to include any consensual security interest in personal property. This section is designed to protect the debtor against harassment and possible frustration of any rehabilitation by prejudicial disposition of the assets of the estate before injunctive relief can be obtained.
Beatrice Nat. Bank v. Mid-America Dairymen 757

Valuation

The owner of personalty is qualified to express an opinion of its value solely because of his status as owner.
Kristensen v. Reese 668

Vendor and Vendee

1. Upon default of payment by the vendee in an executory land contract, the vendor may sue to foreclose the land contract in the same manner as foreclosing a real estate mortgage.
Carman v. Gibbs 603

2. After foreclosure of an executory land contract, the vendor in that contract may sue the vendee for a deficiency judgment.
Carman v. Gibbs 603

3. The owner and occupiers of a residence do not impliedly warrant the habitability of such house on sale to another.
Bernstein v. Ainsworth 670

Verdicts

1. In testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party.
Wellman v. Birkel 1

2. A damages award by a jury will not be set aside as exorbitant unless it is so clearly excessive as to indicate that it was the result of passion, prejudice, mistake, or disregard of the evidence or applicable rules of law.
Wellman v. Birkel 1

3. A jury verdict will not be reversed on appeal unless it is clearly erroneous.
Wellman v. Birkel 1

4. In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it; a jury's verdict will not be disturbed unless it is clearly wrong.
Maloney v. Kaminski 55

5. The Nebraska Supreme Court will interfere with a wrongful death verdict only where it results from passion and prejudice on the part of a jury.
Maloney v. Kaminski 55
6. This court on appeal will reverse a verdict of guilty based on evidence whenever it is so lacking in probative force that the court can say as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt.
State v. Hai Dang 120
State v. Joy 535
State v. Trimble 639
7. Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error to refuse to set aside such verdict.
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
8. It is presumed that a jury followed the instructions given in arriving at its verdict.
State v. Murphrey 699

Visitation

Determinations as to visitation rights in a dissolution of marriage 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; keeping in mind, however, that the trial judge observed and heard the witnesses at some point in the trial and accepted one version of the facts rather than the other.
Manewal v. Manewal 867

Wages

The Nebraska Wage Payment and Collection Act applies only to actions to recover wages due an employee for labor or services performed for an employer.
Heimbouch v. Victorio Ins. Serv., Inc. 279

Waiver

1. A technical violation of a local court rule which has been waived by opposing counsel may not be raised in this court.
Hanika v. Rawley 45
2. A debtor's right to notice under Neb. U.C.C. § 9-504(3) (Reissue 1980) may be waived by conduct after default amounting to waiver or estoppel.
City Bank & Trust Co. v. Van Andel 152
3. When an employee settles with a third party for injuries received, waiver of an employer's statutory right to subrogation for future payments of benefits will not be inferred absent a showing of either an agreement by the employer to a settlement, which by its terms excludes reimbursement for future benefits

paid, or other such action intentionally and voluntarily relinquishing that right.
Turner v. Metro Area Transit 189
4. Mere receipt by the employer of its subrogated interest for compensation benefits paid does not waive its right to future payments or offsets.
Turner v. Metro Area Transit 189
5. For a plea of guilty to be voluntary, the record must affirmatively show the defendant was apprised of his constitutional rights against self-incrimination, to trial by jury, and to confrontation, and waived them.
State v. Predmore 336
6. A waiver of one's constitutional rights cannot be presumed from a silent record.
State v. Predmore 336
7. A written petition to enter a plea of guilty is not a substitute for the requirement that the trial court address each defendant personally and ascertain that the defendant understands his rights and is making a voluntary and intelligent waiver of them.
State v. Predmore 336
8. A failure to make a timely objection to closing arguments is equivalent to failing to make an objection at all and waives any right to complain.
State v. Benzel 466
9. Failure to object to an offer of evidence waives the objection.
State v. Daniels 480
10. The making of a motion for judgment on the pleadings is not, however, a waiver of the right to trial of an issue of fact.
Mueller v. Union Pacific Railroad 742
11. The filing of a petition in a marriage dissolution action which also seeks custody of a child of the marriage places the fitness of the petitioner in issue and operates as a waiver of the physician-patient privilege as to the mental health of the petitioner.
Clark v. Clark 771
12. The determination as to the admissibility of the evidence to which a waiver of privilege applies is to be initially entrusted to the sound discretion of the trial court.
Clark v. Clark 771
13. Where a record is entirely barren of any facts so demonstrating, it is impossible to conclude from a plea of guilty that a defendant has voluntarily, knowingly, and intelligently waived his right to remain silent and his right to not testify at trial.
State v. Wright 847

Warrants

The procedure to be followed to obtain an "execution warrant" should

be similar to that prescribed by Neb. Rev. Stat. §§ 29-830 to 29-835 (Reissue 1979), which provide for the issuance of "inspection warrants." Such an execution warrant should be issued only by a judge of a court of record upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution.
State v. Hinchey 825

Warranty

The owner and occupiers of a residence do not impliedly warrant the habitability of such house on sale to another.
Bernstein v. Ainsworth 670

Waters

1. As defined by Neb. Rev. Stat. § 31-202 (Reissue 1984), a watercourse is "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook."
Belsky v. County of Dodge 76
2. Floodwaters are those that spill over banks of a stream during high water, flow over adjacent lands in the stream's flood plain, and return to the stream at a point or points downstream.
Belsky v. County of Dodge 76
3. 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.
Belsky v. County of Dodge 76
4. The flow of surface waters in any well-defined course, whether it be a ditch, swale, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land, cannot be interfered with or arrested to the injury of a neighboring proprietor.
Belsky v. County of Dodge 76
5. One building a structure across a natural drainway has a continuing duty to provide natural passage for water reasonably anticipated to move in the drainway occupied by the

obstruction.
Belsky v. County of Dodge 76

Weapons

Even though a gun be unloaded and thereby incapable of causing death or injury, a person may be guilty of attempted murder or assault if the person pulling the trigger believes the gun to be loaded.
State v. Benzel 466

Wills

1. The execution of reciprocal or mutual wills, without more, does not bar their subsequent modification or revocation.
McKinnon v. Baker 314
2. A contract between a husband and wife to make reciprocal or mutual wills is valid and enforceable.
McKinnon v. Baker 314

Wiretaps

1. No order entered under the provisions of Neb. Rev. Stat. § 86-705 (Reissue 1981) to permit the interception of wire communications may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of authorization, nor in any event longer than 30 days.
State v. White 527
2. Failure to include minimization language as provided by Neb. Rev. Stat. § 86-705(6) (Reissue 1981) in an order to permit the interception of wire or oral communication when statutory guidelines have been supplied and when there exists a means of measuring compliance with minimization provisions of the statute is not fatal and does not warrant suppression of evidence.
State v. White 527
3. For the purposes of a wiretap, minimization is to be judged on a case-by-case analysis of the reasonableness of the government's conduct under the facts and circumstances present.
State v. White 527
4. Whether government agents acted reasonably in a wiretap case is affected by a number of factors, including the nature and scope of an alleged conspiracy, the government's reasonable expectations of the character of conversations they will be intercepting, and the extent of ongoing judicial supervision over surveillance.
State v. White 527
5. Defendants seeking to suppress evidence obtained pursuant to wiretap because of the failure to comply with minimization requirements must do more than identify individual calls which they contend should not have been intercepted; they must

establish a pattern of interception of innocent conversations which developed over the period of the wiretap.
State v. White 527

Witnesses

1. It is the province of the trier of the facts to harmonize the testimony insofar as that is possible and, in case of conflicts, to decide as to the weight to be given the testimony of the witnesses.
Jeffres v. Countryside Homes 26
2. A jury is not required to accept as absolutely true every statement of a witness, even though such is not contradicted by direct evidence; the persuasiveness of uncontradicted testimony can be destroyed in other ways.
Maloney v. Kaminski 55
3. The credibility of a witness and the weight to be given to his testimony are issues for the jury to resolve.
Maloney v. Kaminski 55
4. Proof of contradictory extrajudicial statements of a witness may be received in evidence for the purpose of assisting the jury in estimating the credibility of the witness, but unless otherwise admissible, such statements may not be utilized as substantive evidence of the facts declared.
State v. Marco 96
5. A party is not permitted to get before the jury, under the guise of impeachment, an extrajudicial statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.
State v. Marco 96
6. The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
State v. Marco 96
7. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable extrajudicial statement the witness had made.
State v. Marco 96
8. The extent, scope, and course of cross-examination rest within the discretion of the trial court, and the ruling of the trial court with respect thereto will not be disturbed in the absence of an abuse of that discretion.
Nixon v. Harkins 286
9. Where a party clearly changes his deposition testimony at trial

on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, his trial testimony stands discredited as a matter of law, and he is bound by the admissions made at the deposition.
Nixon v. Harkins 286
10. The credibility of witnesses and weight to be given their testimony are solely for the consideration of the jury, and unless clearly wrong, a verdict by the jury based on conflicting evidence will not be set aside.
Schmidt v. J. C. Robinson Seed Co. 344
11. The trial court is given discretion in determining whether or not a witness has qualifications to state his opinion, and such discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion.
Schmidt v. J. C. Robinson Seed Co. 344
12. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1979)) are satisfied.
State v. Johnson 392
13. If an attack on a witness' credibility through use of an inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends strongly to disprove that the testimony was the result of contrivance.
State v. Johnson 392
14. If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic evidence is neither necessary nor generally allowed.
State v. Johnson 392
15. A nonexpert witness may testify from his observation as to whether or not another is intoxicated, and the weight and sufficiency is for a jury to decide.
State v. Daniels 480
16. The owner of personalty is qualified to express an opinion of its value solely because of his status as owner.
Kristensen v. Reese 668
17. The purchase of a medical practice by another physician does not in any way affect the confidential physician-patient privilege that exists between the patient and the vendor physician.
Clark v. Clark 771
18. Once a witness' character for truthfulness has been attacked, the prosecution may, under the provisions of Neb. Rev. Stat.

§ 27-608 (Reissue 1979), adduce rebuttal evidence on that issue.
State v. Gregory 778
19. Generally, 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. Ross 843
20. A trial judge is given latitude and discretion in permitting leading questions of witnesses whose communicative abilities are sharply curtailed, and unless there has been an abuse of such discretion resulting in prejudice and injury to the other party, there is no reversible error.
State v. Brown 849

Words and Phrases

1. The meaning of the term "necessaries" cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact, to be determined in each case from the particular facts and circumstances in such case. A number of factors must be considered before a court can conclude whether a particular product or service is a necessary.
Webster Street Partnership v. Sheridan 9
2. An act of God is a manifestation of nature so unusual and extraordinary that it could not under normal conditions have been reasonably anticipated or expected.
Maloney v. Kaminski 55
3. As defined by Neb. Rev. Stat. § 31-202 (Reissue 1984), a watercourse is "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook."
Belsky v. County of Dodge 76
4. Floodwaters are those that spill over banks of a stream during high water, flow over adjacent lands in the stream's flood plain, and return to the stream at a point or points downstream.
Belsky v. County of Dodge 76
5. 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.
Belsky v. County of Dodge 76
6. 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. An architect performs professional services, as do lawyers, doctors, accountants, and investment advisers.
Overland Constructors v. Millard School Dist. 220

7. "Clear and satisfactory" evidence is the same as "clear and convincing" evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
Tobin v. Flynn & Larsen Implement Co. 259
8. A "material change in circumstances" involves an alteration and passage from one condition to another and requires consideration of a variety of factors or circumstances, including the obligated parent's financial means, the needs of the child or children for whom the support is to be paid, the good or bad faith motive of the obligated parent in sustaining a reduction of means, and the permanence of the change.
Ohler v. Ohler 272
9. A "material change in circumstances" in modification of child support cases is analogous to the "good cause" required to support a modification of alimony.
Ohler v. Ohler 272
10. A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract or a condition which must be fulfilled before a duty to perform an existing contract arises.
Schmidt v. J. C. Robinson Seed Co. 344
11. A condition subsequent is one that may occur, and if it does, it permits a party to avoid the obligations of a contract.
Schmidt v. J. C. Robinson Seed Co. 344
12. A "proceeding" contemplated by Rule 801(4)(a)(i) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979)) is a formal action before a judicial tribunal, as well as an action before a quasi-judicial officer or board, invoked to enforce or protect a right.
State v. Johnson 392
13. Exigent circumstances exist when a law enforcement officer has: (1) Probable cause to believe that a suspect has committed a serious offense; (2) A reasonable belief from a present factual basis that the suspect is in the premises to be entered; and (3) Immediately upon concurrence of elements (1) and (2) (probable cause and reasonable belief), a factual basis to reasonably believe that, during the time which would be necessarily consumed in obtaining an arrest warrant under existing circumstances, there will be danger to the officer or another, evidence will be removed or destroyed, or the suspect will escape.
State v. Hert 447
14. Criminal attempt may be defined in part as intentionally engaging in conduct which, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of

conduct intended to culminate in the commission of the crime.
State v. Benzel 466
15. A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980).
Allis-Chalmers Corp. v. Haumont 509
16. A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
PWA Farms v. North Platte State Bank 516
17. The words "carelessly or without due caution" are synonymous with the common-law words of "negligently or without due care," and as such are not unconstitutionally vague.
State v. Merithew 530
18. The phrase "to leave work voluntarily" has been defined to mean to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
Montclair Nursing Center v. Wills 547
19. There is a clear and classic distinction between an option and a so-called "right of first refusal"; the option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, where the right of first refusal has no binding effect unless the offeror decides to sell. The option gives a clear right to the option-holder to purchase upon specified terms and conditions, regardless of the wishes of the option-giver, whereas the "right of refusal" or "preemption" is conditioned upon the willingness of the owners to sell; it can be enforced by specific performance only where such willingness can be proved.
Coniglio v. Hansl 580
20. Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time.
Roth v. Farmers Mut. Ins. Co. 612
21. Payment of medical and hospital expenses when made with reference to a compensable claim constitutes payment of compensation within the meaning of the workmen's compensation laws.
Maxey v. Fremont Department of Utilities 627
22. Payments for lost time made in lieu of compensation benefits for an undisputed job-related injury constitute payment of compensation.
Maxey v. Fremont Department of Utilities 627
23. The best interests of the child include, but are not limited to, the general health, welfare, and social behavior of the child. Neb.

Rev. Stat. § 42-364(1)(c) (Reissue 1984).
Mettenbrink v. Mettenbrink 650
24. A letter of credit is an engagement by a bank at its customer's request that the bank honor drafts for payment to a beneficiary upon compliance with conditions specified in the letter of credit. The Uniform Commercial Code statutorily obligates the issuer of a letter of credit to honor drafts drawn by the beneficiary in compliance with terms of the credit.
Brown v. United States Nat. Bank 684
25. In documentation for a letter of credit, Neb. U.C.C. §§ 5-101 to 5-117 (Reissue 1980), certify means to make known; to confirm formally as true, accurate, or genuine; to tell positively; to vouch for in writing.
Brown v. United States Nat. Bank 684
26. The term "lien" in 11 U.S.C. § 362(a)(4) (1982) is used to include any consensual security interest in personal property. This section is designed to protect the debtor against harassment and possible frustration of any rehabilitation by prejudicial disposition of the assets of the estate before injunctive relief can be obtained.
Beatrice Nat. Bank v. Mid-America Dairymen 757
27. The term "cruelly punished" as used in Neb. Rev. Stat. § 28-707(1)(b) (Cum. Supp. 1984) has acquired a relatively widely accepted connotation in the law and is capable of an easily understood meaning, as distinguished from the reasonable discipline of a child allowed by the common law and protected by the Constitution.
State v. Sinica 792
28. To constitute business duress there must be an application of such pressure or constraint as compels a person to go against his or her will and takes away his or her free agency, destroying the power of refusing to comply with the unjust demands of another.
Haumont v. Security State Bank 809
29. An accident under the Nebraska Workmen's Compensation Act shall be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
Masters v. Iowa Beef Processors 835
30. An accidental injury occurs where there is no intent or volition on the part of the actor.
State v. Brown 849
31. As a general rule, in the construction of statutes the word "shall" is considered mandatory, and inconsistent with the idea of discretion.
State v. Stratton 854

32. A statute is not open to construction as a matter of course; in the absence of anything to indicate the contrary, words must be given their ordinary meaning.
State v. Stratton 854

Workmen's Compensation

1. When an employee sues and recovers damages from a third party for injuries received, an employer is statutorily entitled to subrogation for amounts paid to the injured employee as workmen's compensation payments. Neb. Rev. Stat. § 48-118 (Reissue 1984).
Turner v. Metro Area Transit 189
2. When an employee settles with a third party for injuries received, waiver of an employer's statutory right to subrogation for future payments of benefits will not be inferred absent a showing of either an agreement by the employer to a settlement, which by its terms excludes reimbursement for future benefits paid, or other such action intentionally and voluntarily relinquishing that right.
Turner v. Metro Area Transit 189
3. Mere receipt by the employer of its subrogated interest for compensation benefits paid does not waive its right to future payments or offsets.
Turner v. Metro Area Transit 189
4. Transportation rendered to an employee by an employer either incident to the employment contract or because of the custom of the employee's job operates to bring the employee within the scope of his employment during the time of the transportation.
Kopfman v. Freedom Drilling Co. 323
5. Acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope of the employment.
Kopfman v. Freedom Drilling Co. 323
6. Violation of statute or commission of crime does not affect a workmen's compensation claim when the illegal feature of the conduct was not the causative factor in producing the injury.
Kopfman v. Freedom Drilling Co. 323
7. The object of the evidentiary standard in medical disputes in workmen's compensation cases is the elicitation of substantial evidence leading to the direct conclusion of an employment-related disability.
Hare v. Watts Trucking Service 403
8. If the judgment of the compensation court determining a disability is supported by competent evidence in the record, that

conclusion is binding upon us. We are not free to substitute our judgment for that of the compensation court.
Hare v. Watts Trucking Service 403
9. The Supreme Court is bound by the findings of the compensation court where there is sufficient competent evidence in the record to support the judgment.
Gast v. Continental Can Co. 456
10. Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case, whether it be to enter an award or cause a dismissal of the claim, may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.
Maxey v. Fremont Department of Utilities 627
11. Payment of medical and hospital expenses when made with reference to a compensable claim constitutes payment of compensation within the meaning of the workmen's compensation laws.
Maxey v. Fremont Department of Utilities 627
12. Payments for lost time made in lieu of compensation benefits for an undisputed job-related injury constitute payment of compensation.
Maxey v. Fremont Department of Utilities 627
13. A mistake of law does not excuse a late filing for workmen's compensation benefits so as to toll the statute of limitations.
Maxey v. Fremont Department of Utilities 627
14. Payment of wages or reimbursement of medical expense by an employer under an employee benefit plan or group health insurance agreement does not constitute remuneration in lieu of workmen's compensation benefits so as to toll the statute of limitations, unless, by the conduct of the employer, it may reasonably be inferred that such payments were made with an intent that payment constitute compensation and a conscious recognition of liability for compensation benefits on the part of the employer.
Maxey v. Fremont Department of Utilities 627
15. Where an injury is latent and progressive, the statute of limitations is tolled until it becomes reasonably apparent, or should have become apparent to the employee, that a compensable disability is present, and the burden of proving the latent and progressive nature of the injury is on the employee.
Maxey v. Fremont Department of Utilities 627
16. Knowledge that there is a compensable disability, and not awareness of the full extent thereof, is the factor which controls in determining when the statute of limitations begins to run.
Maxey v. Fremont Department of Utilities 627

17. The mere fact that an employee did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable.
Maxey v. Fremont Department of Utilities 627
18. 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.
Masters v. Iowa Beef Processors 835
19. An accident under the Nebraska Workmen's Compensation Act shall be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
Masters v. Iowa Beef Processors 835
20. In order to sustain the burden of proving an accident as well as causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award.
Masters v. Iowa Beef Processors 835
21. 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. Such findings of fact, unless clearly wrong, will not be set aside on appeal.
Knudsen v. Metropolitan Utilities Dist. 902
22. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
Knudsen v. Metropolitan Utilities Dist. 902
23. The Supreme Court is not at liberty to substitute its views for those of the Nebraska Workmen's Compensation Court regarding questions of fact if there is evidence in the record to substantiate the conclusions of the Workmen's Compensation Court. Where the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workmen's Compensation Court.
Knudsen v. Metropolitan Utilities Dist. 902

Wrongful Death

1. A wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value.
Maloney v. Kaminski 55
2. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss in a wrongful death case; such loss must be

determined upon a consideration of the circumstances of each case.
Maloney v. Kaminski 55
3. There is no requirement in a wrongful death case that there be evidence of the dollar value of companionship, counseling, or advice.
Maloney v. Kaminski 55
4. The Nebraska Supreme Court will interfere with a wrongful death verdict only where it results from passion and prejudice on the part of a jury.
Maloney v. Kaminski 55