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ROBERT M. YOUNG ET AL., APPELLANTS AND CROSS-APPELLEES, V. ROBERT A. LACY ET AL., APPELLEES AND CROSS-APPELLANTS.

378 N.W.2d 192

Filed December 20, 1985. No. 84-705.

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 a claim of ownership for a full 10-year period.
2. _____. Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period.
3. _____. The sufficiency of the possession in an adverse possession case depends upon the character of the land and the use that can reasonably be made of it.
4. _____. Title may not be quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period.
5. _____. The use and possession of property with the permission of the owner can never ripen into title by adverse possession without some change in the nature of the possession being brought home to the true owner.
6. **Injunction.** Injunctive relief is a discretionary remedy dependent upon the circumstances of the case.
7. _____. Injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.

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

Robert M. Young, pro se, and, on brief, Harry R. Meister of Brenner & Meister Law Office, for appellants.

John K. Sorensen of Wright & Sorensen, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and WOLF, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This is an appeal in an action to quiet title to a portion of Lot 8, Lakeside Addition, located in Government Lot 4, Section 20, Township 23 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska.

The trial court dismissed the plaintiffs' petition and also dismissed the defendants' cross-petition for injunctive relief.

We review the record de novo without reference to the findings made by the lower court. However, when the evidence

is in conflict, we give weight to the fact that the trial court had the opportunity to observe the demeanor of the witnesses and view the property in dispute. *Martin v. Kozuszek*, 216 Neb. 705, 345 N.W.2d 26 (1984); *Mack v. Luebben*, 215 Neb. 832, 341 N.W.2d 335 (1983).

The plaintiffs, Robert M. Young and Inez L. Young, are the owners of Lots 14, 15, and 16, which lie immediately to the east of that portion of Lot 8 which is in controversy. The defendants are persons who have a record interest in the disputed property.

Lakeside Addition was platted in 1964 by the developers, Leo and Helen Rychecky and George and Arlene Lemley. A number of the lots platted by the developers were designated as "road lots" and were intended to be used as roads by all of the owners and tenants of other lots in the addition. Paragraph 4 of the "Restrictions," filed by the developers at the same time as the plat, provides as follows:

> 4. It is further understood and agreed by all parties to whom these Lots are conveyed, including the grantors hereto, that Lots 8, 13, 17, 21, 12, and 22 are platted to be used as roads by the owners and tenants only of the Lots numbered as 18, 19, 20, 14, 15, 16, 9, 10, 11, 7, 23, 1, 2, 3, 4, 5, and 6 of said Lakeside Addition; and in addition thereto the grantors do not warrant or promise in any way to pay the costs of developing, improving, or the upkeep of any of said private roads. It is further understood that any of the owners or tenants of said described lots in this paragraph have the authority because of said ownership to enforce this restriction as to the members of the general public who may use or attempt to use said private roads.

The restrictions further provide that "all of the foregoing Restrictions shall run with the land and shall be binding upon the innure [sic] to the benefit of all grantees of lots within the subdivision whether immediate or remote . . . ."

Lot 8 is a large, irregularly shaped lot, the west boundary of which is the centerline of a spillway referred to as the north inlet of Lake Minatare. The evidence shows Lot 8 was designed so as to give property owners in the addition direct access to the lake and provide incentive for prospective buyers to purchase property in the addition.

The plaintiff Robert Young purchased Lot 14 in Lakeside Addition from Leo and Helen Rychecky on March 11, 1970. Lot 14 is bounded on the north by Road Lot 17, on the east by Lot 15, on the south by Road Lot 13, and on the west by Lot 8. Lot 14 lies directly east of the center one-third portion of Lot 8 which is designated as "8B" in a survey made for purposes of this litigation. Lot 8B is the only tract in dispute in this litigation. Its boundaries are the north line of Road Lot 17 extended to the west, the centerline of the north inlet of Lake Minatare, the south line of Road Lot 13 extended to the west, and the west line of Road Lots 13 and 17 and the west line of Lot 14.

The surveyor testified that he was instructed as to how to divide Lot 8 and that there was no discernible boundary or noticeable division between any portions of Lot 8.

The deed to Young recited that the property was subject to existing easements, rights-of-way, reservations, and restrictions of record, but the testimony is in conflict as to whether there was any discussion concerning Lot 8 at the time. Young, and later both he and his wife, has resided in a cabin on Lot 14 from 1970 to the present time.

The defendants Robert and Glenda Lacy first purchased property in Lakeside Addition in 1977. In 1982 the Lacys became concerned about the use of the road lots by various tenants in the addition, so they approached the record owner, Raymond Townsend, who did not live in Lakeside Addition. The Lacys thought that the road lots should be owned by someone living in the addition, so they asked Townsend to transfer title to them, which was done. In December of 1982 the Lacys delivered a letter to all property owners in the addition, stating that they were now the record owners of the road lots and advising the property owners of the restrictions which were still applicable to the road lots. All property owners were requested to remove any personal property that had been placed on the road lots.

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 a claim of ownership for a full 10-year period. *Steinfeldt v.*

Klusmire, 218 Neb. 736, 359 N.W.2d 81 (1984). Furthermore, title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984). It is clear from the record in this case that the plaintiffs failed to meet this burden of proof.

The plaintiffs place much emphasis on their extensive testimony that they used Lot 8B from 1970 until the time of trial for the purposes for which the land was suitable. There is no dispute that Lot 8B was adaptable for limited purposes such as parking or as access to the north inlet of Lake Minatare. The plaintiffs argue that their use of the property for these purposes and as their "front yard" should be sufficient possession to give them title.

The sufficiency of the possession in an adverse possession case depends upon the character of the land and the use that can reasonably be made of it. *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981). But, under the facts and circumstances in this case, possession and use of the land for the purposes for which it is suitable alone is not sufficient to acquire title by adverse possession as against the other property owners in Lakeside Addition.

There is much testimony in the record from other residents of Lakeside Addition concerning their own unhindered use of Lot 8B during the period of 1970 to 1982 for various purposes including parking and as access to Lake Minatare. Raymond Townsend testified that he used Lot 8, including Lot 8B, repeatedly from 1965 to 1980. Stan Brethour testified that he parked in front of the stairway on 8B probably three or four times a week in 1974 and that this use continued every year up to 1980. In 1976 Brethour asked Young about fishing from Lot 8B and Young replied, "Don't ask me, I don't own it." Robert Datel testified that he used Lot 8B for parking when he went fishing, as did Robert Lacy.

While the law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property for the purposes for which it is adapted, there must be an element of exclusivity under a claim of ownership. *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). Title may not be

quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period. *Oliver v. Thomas*, 173 Neb. 36, 112 N.W.2d 525 (1961); *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983). There must be evidence of the intention of the claimant to appropriate and use the property as his own to the exclusion of all others. The record fails to show exclusive possession or use by the plaintiffs.

The record further shows that the plaintiffs' use of Lot 8 was permissive. The use and possession of property with the permission of the owner can never ripen into title by adverse possession without some change in the nature of the possession being brought home to the true owner. *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983); *Guynan v. Guynan*, 208 Neb. 775, 305 N.W.2d 882 (1981); *McDermott v. Boman*, 165 Neb. 429, 86 N.W.2d 62 (1957). See, also, *Field v. City of Lincoln*, 85 Neb. 781, 124 N.W. 468 (1910).

The plaintiffs, as owners of Lot 14, had the right to use Road Lots 8, 13, 17, 21, 12, and 22, as did all other property holders in Lakeside Addition. This right was granted by the restrictions filed with the plat that were made known to all purchasers of property in the addition. There is no evidence, other than their own testimony, that the Youngs ever expressed any claim of right adverse to their permissive use. Even then, Young testified that he never told any of the owners of property in Lakeside Addition that he owned 8B.

Lot 8 was an unenclosed, weedy area used mainly by the property owners of Lakeside Addition for parking cars while fishing or boating at Lake Minatare. The plaintiffs' use of the property was similar to that of the other property owners in Lakeside Addition. Their use was not exclusive nor adverse to the interests of the defendants or their predecessors in title. The plaintiffs' use of Lot 8B as their "front yard" was with the permission of the title owners, and the plaintiffs did not acquire title by adverse possession.

The defendants' cross-petition or counterclaim sought an injunction preventing the plaintiffs from interfering with the defendants' use of the property in dispute and preventing the plaintiffs from storing personal property upon the land in

dispute. The defendants have cross-appealed from the judgment dismissing their cross-petition.

The defendants' principal complaint involves a quantity of logs which the plaintiffs placed upon the property in 1982. While Young did testify that he would not move the large pile of logs he had placed in the center of Lot 8B, that was before disposition of the suit to quiet title.

Injunctive relief is a discretionary remedy dependent upon the circumstances of the case. *Peters v. Langrehr*, 188 Neb. 480, 197 N.W.2d 698 (1972). Injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Steffen v. County of Cuming*, 195 Neb. 442, 238 N.W.2d 890 (1976).

We think the record does not contain a sufficient showing that the plaintiffs will continue to violate the restrictions so as to justify a permanent injunction at this time.

The judgment of the district court is affirmed.

AFFIRMED.

CONNIE J. REZAC, APPELLEE, V. DARLAN J. REZAC, APPELLANT.
378 N.W.2d 196

Filed December 20, 1985. No. 84-731.

1. **Alimony: Property Division.** The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.
2. **Alimony: Property Division: Appeal and Error.** The fixing of alimony or distribution of property rests in the sound discretion of the district court, and in the absence of an abuse of discretion, will not be disturbed on appeal.
3. **Property Division: Appeal and Error.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.

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

Richard A. Dudden of Padley & Dudden, P.C., for appellant.

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

BOSLAUGH, CAPORALE, and GRANT, JJ., and WOLF, D.J., and COLWELL, D.J., Retired.

WOLF, D.J.

This is an appeal by the respondent from the decree of dissolution entered by the district court for Keith County. At the time of the trial in April of 1984, the parties had been married 18½ years and had two sons, ages 17 and 15. At trial the husband was 53 years of age and the wife 38 years of age. Within 3 weeks after trial the trial judge issued a memorandum opinion fixing values for various properties and debts of the parties, making division of the property and debts including a judgment in favor of the petitioner and against the respondent in the amount of $60,000 as part of the property division, placed custody of the two children in the father respondent, as recommended by both parties, required no child support of the petitioner, awarded the petitioner alimony of $500 per month for a period of 36 months, and charged costs to the respondent, including an allowance toward petitioner's attorney fees in the amount of $1,000.

No issue is raised by the respondent as to the alimony, assessment of costs, awarding of attorney fees, or the custody and support provisions.

The appeal is limited to the division of property and allocation of debts by the court, and the respondent assigns as error: (1) Including the appreciated value of stock in Front Street, Inc., in the marital estate; (2) Including the stock in Pro-Ag, Inc., and Petro-Lewis, Inc., and the 1984 Ford van in the marital estate; (3) Including the land and building rented by the Animal Clinic West O Street, P.C., in the marital estate; (4) Awarding Connie $10,000 for her interest in a life insurance policy; and (5) Placing a value of $200,000 upon a condominium located in Steamboat Springs, Colorado.

The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case, and the

courts will consider all pertinent facts in reaching an award that is just and equitable. *Hanisch v. Hanisch*, 195 Neb. 204, 237 N.W.2d 407 (1976).

The fixing of alimony or distribution of property rests in the sound discretion of the district court, and in the absence of an abuse of discretion, will not be disturbed upon appeal. *Phillips v. Phillips*, 200 Neb. 253, 263 N.W.2d 447 (1978).

This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. *Blome v. Blome*, 201 Neb. 687, 271 N.W.2d 466 (1978).

The respondent, according to the evidence, owned approximately 47 percent of the outstanding stock of Front Street, Inc. This was purchased by the respondent in 1964, prior to the marriage, at a cost of $23,700. The stock ownership of the respondent remained the same percentage until the trial. The court valued that stock at $120,000. During the marriage, the corporation made substantial improvements to the commercial tourist attraction, including a Putt-Putt Golf Course and an enlarged kitchen. These improvements were paid for by the corporation. No additional money investments were made in Front Street by the parties during the marriage. If the respondent's ownership was nominal and there was an increase in the value of the stock during the marriage, or if the increase in value of the stock was strictly an inflationary increase, he would have a good argument that the stock should be viewed as continuing and separate ownership during the marriage and at the time of dissolution. The trial court is justified, however, in treating it differently when the percentage of ownership is substantial and improvements or additions are made to the corporate assets through application of corporate income which would otherwise be distributed to the party during the marriage. In this case, had the corporation not made substantial investments in improving its facility, the value of the stock may have remained about the same but this respondent would have received additional income resulting in marital assets which would be subject to division at the time of the dissolution. For that reason we find no error in the court's using the appreciated value of the stock at the time of the dissolution for the purpose of property division.

The respondent owned a 51-percent (or a 52-percent) interest in Animal Clinic West O Street, P.C., at the time of dissolution. The Animal Clinic stock of the respondent was valued by the trial court at $26,000. In addition, the trial court valued the Pro-Ag stock in the sum of $2,000, the Petro-Lewis stock in the amount of $10,000, and the 1984 Ford van in the amount of $13,500. Technically speaking, those assets were owned by the corporation and not individually by the respondent. The result of the inclusion of these values as part of the assets distributed to the respondent was to value the Animal Clinic stock of the respondent at $51,500. Although this court finds that such personal property was not includable in the estate for the purposes of division, the net result is a valuation of the clinic stock of the respondent at $51,500, which does not appear prejudicial to the respondent in view of the fact that he sold 48 percent of the stock of the clinic in 1981 for $57,600. In view of that evidence the total value of the clinic stock of the respondent is not overvalued and there is no error.

The clinic and land were valued by the trial court at $130,000. This land and clinic were bought during the marriage, but the respondent suggests that it was purchased with proceeds of the sale of other property owned by the respondent prior to the marriage. By this assignment of error the respondent is suggesting that the trial court trace premarital property through disposition and reinvestment during the marriage so as to preserve the separate character for the newly acquired property. If this were done, it would result in the party's having credit for the value of the property brought into the marriage and then a duplicate credit for the property acquired from those proceeds. Tracing property is generally an unworkable proposition because the parties have a tendency to suggest tracing only when there is an improvement in value. Although some courts find a justifiable reason for limited tracing of prior owned property, it is not error to restrict the credit to the identical property which is retained during the marriage or to the value of the property at the time of the marriage or when disposed of during the marriage.

The respondent objected to the "awarding" to Connie Rezac the sum of $10,000 for her interest in the life insurance policy.

Actually, what the court did in this case was to accept the petitioner's statement that the value of her insurance policy prior to her marriage was $10,000, and this was a part of the credit of $17,400 given to the petitioner as value of the property brought by her into the marriage. The trial court awarded her that life insurance policy but assigned no value to it as a part of the distribution. In this respect respondent is right in that the $10,000 should not have been a credit to the petitioner against property awarded to her, since she received the same property upon division without allocating a value. In determining whether an adjustment should be made for this item, the reviewing court needs to look at the entire picture and determine whether similar omissions were made with respect to the other party before adjusting the division based upon one example. In reviewing the credit situation we find that the evidence shows that the respondent had debts in 1965, prior to the marriage, of $49,740, as shown in exhibit 62. This figure was not taken into account by the trial court in making the division of the property, and it more than offsets any advantage obtained by the petitioner by the $10,000 credit.

The respondent objects to the $200,000 valuation placed by the court upon the Colorado condominium property. The evidence as to the value of the condominium was in dispute. The wife placed the value of $236,000 on the condominium. The husband valued it at $150,000. Under those circumstances there is no error in the court's making a finding of value of $200,000.

Based upon a review of the entire evidence, this court finds that the net distribution to the petitioner, after eliminating the $10,000 credit but including the $60,000 judgment award, is in the sum of $118,603.59, while the net award to the respondent, after subtracting the judgment award, is $182,058.87. This difference between the amounts awarded each party is not disproportionate, considering that the respondent will also pay $18,000 in alimony and assume full financial responsibility for the minor children.

This court therefore holds that the division of property and debts by the trial court does not indicate any abuse of discretion and the decree of dissolution should be affirmed.

The respondent shall pay the costs in this court together with an allowance of $1,000 toward the petitioner's attorney fees.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID K. HARRISON, APPELLANT.

378 N.W.2d 199

Filed December 20, 1985. No. 85-123.

1. **Trial: Evidence: Juries.** It is the province of the trial court, not the jury, to determine the admissibility of evidence. Once the trial court has made a determination as to admissibility, the jury is not required to reexamine that ruling.
2. _____: _____: _____. It is the jury's province to weigh the evidence and judge the credibility of witnesses and their testimony. The jury has the right to credit or reject any part or the whole of the testimony heard.
3. **Jury Instructions: Evidence.** A requested jury instruction which directs the attention of the jury to and unduly emphasizes a part of the evidence is erroneous and should be refused.
4. **Trial: Hearsay: Evidence.** A declaration offered to show the defendant's state of mind which is too remote in point of time should be excluded as lacking probative value.
5. **Evidence: Appeal and Error.** Generally, any error in excluding evidence that is cumulative is nonprejudicial.
6. **Jury Instructions: Homicide: Evidence.** In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance.

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

James Martin Davis, for appellant.

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

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

BOSLAUGH, J.

The defendant, David K. Harrison, was convicted of first degree murder for the June 4, 1984, shooting death of his wife, Maria F. Harrison, and sentenced to life imprisonment.

The defendant and his wife had separated in January of 1984. Their marriage was troubled by infidelity and by fights which sometimes became physical in nature. On Saturday, June 2, 1984, the couple fought at Susan Domek's home. Domek, the defendant's sister, testified that during that fight Maria placed the defendant's gun to her head and threatened to take her own life. After being disarmed by the defendant, Maria left the house, taking the couple's two daughters with her. She was to have returned the children later that day so that the defendant could take them swimming, but did not do so.

The defendant made several attempts to locate the children that night by making phone calls and by going to Maria's mother's home as well as to the home of mutual friends. The friends' home was located directly behind Maria's mother's home. One of the residents there, Linda Heriger, testified that Maria was at the house that night and hid in a closet when the defendant arrived. Heriger described the defendant as upset, apparently because he could not find Maria. Heriger also testified that the defendant told her that the longer Maria stayed away, the madder he was getting and that Maria "would be dead meat" the next time he saw her.

On the following day, Sunday, June 3, 1984, when the defendant returned to the Heriger home looking for Maria, she again hid in a closet. The defendant returned to Heriger's residence later that afternoon and Maria avoided him by returning to the closet. Maria stayed with Heriger that evening until 10:30 p.m., when she returned to her mother's home.

On Monday, June 4, 1984, the defendant went to Maria's mother's home, arriving at approximately 8:45 a.m. Susan Domek testified that his stated intention for going there was to pick up his daughters.

The defendant's version of what transpired that morning is

as follows. Maria allowed him into the house when he knocked on the back door. Once inside, the defendant asked Maria why she was taking the girls around strange men. When Maria ignored him, he began to hit her. She then went to the bathroom. He followed her there to change his pants. When the defendant began emptying his pockets to change his pants, she grabbed for a gun as he was removing it from his pants pocket. A struggle ensued and the gun accidentally discharged, striking Maria. The defendant then dialed 911 for help.

At trial there was expert testimony by Marcellus Deats, a specialist in firearm identification, that to fire the gun involved in the shooting, the hammer would have had to have been pulled back with the thumb to its fullest "rearward" point and then fired by pulling the trigger. Deats also testified that his tests of the gun showed no malfunctions but that the gun could be made to accidentally discharge by "a blow on the weapon hammer while it was seated on a cartridge." The defendant testified that the gun had previously accidentally discharged.

There was also testimony by Dr. Jerry Wilson Jones, the pathologist who performed the autopsy on Maria Harrison, that the characteristics of the gunshot wound to Maria's head were "unequivocally" those of a tight contact wound, meaning that the muzzle of the weapon was held tightly against the skin at the time of discharge.

The defendant's first assignment of error on appeal is that the district court erred in refusing to give his proposed instruction No. 6 on excited utterances.

At trial, evidence and testimony were adduced to show that the defendant had consistently maintained that the shooting was an accident. The defense emphasizes the fact that the defendant's first words to the 911 emergency operator were "Sir, I accidentally shot and killed my wife, please hurry." The first police officer on the scene testified that the defendant was hysterical. When asked what had happened, the defendant responded that he and his wife had argued and that his gun had accidentally discharged, striking her. The defendant also told the officer that his wife was still alive and that he wanted the officer to help her.

A paramedic who arrived on the scene testified that he was

met outside the house by the defendant, who implored him to "Help her, help her. She's still alive." In subsequent contacts with police officers investigating the shooting that morning, the defendant, who remained hysterical, continued to repeat the claim that Maria had grabbed for the gun and that he had not meant to kill her.

The requested instruction, which states the rationale for the admission of excited utterances, was as follows:

> During the course of this trial hearsay evidence, consisting of out of Court statements, has been adduced. Hearsay is a statement other than a statement made in Court at trial offered into evidence to prove the truth of the matter asserted. Hearsay is generally inadmissible as evidence unless those statements qualify as an exception to the hearsay rule.
>
> An excited utterance is a statement that relates to a startling event or condition made while the declarant was under the stress or excitement caused by an event or condition.
>
> Excited utterances are admissible even though they are hearsay because they may, in themselves, possess circumstantial qualities of trustworthiness, and because circumstances surrounding an incident may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of fabrication.

The defendant contends that without the requested instruction the jury was without proper guidance as to how to deal with his excited utterances and as to the weight they should be accorded.

The trial court was not required to give the requested instruction.

It is the province of the trial court to determine the admissibility of evidence, not that of the jury. *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984). Once the trial court has made a determination as to admissibility, the jury is not required to reexamine that ruling. *State v. Brittain*, 212 Neb. 686, 325 N.W.2d 141 (1982).

It is, however, solely within the jury's province to weigh the

evidence and to judge the credibility of witnesses and their testimony. *State v. Kakela*, 218 Neb. 843, 359 N.W.2d 786 (1984); *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979). The jury, as such, has the right to credit or reject any part or the whole of the testimony heard. *State v. Meadows, supra*; *State v. May*, 174 Neb. 717, 119 N.W.2d 307 (1963), *modified* 175 Neb. 318, 121 N.W.2d 564. A jury instruction which directs the attention of the jury to and unduly emphasizes a part of the evidence should be refused. *Bell v. State*, 159 Neb. 474, 67 N.W.2d 762 (1954).

In the present case the proposed instruction would tend to lead the jury to the conclusion that "excited utterances" are more credible and should be accorded greater weight than other types of evidence. As such, the instruction infringes upon the jury's duty to determine the weight and credibility to be accorded the evidence. Instructions which are likely to confuse or mislead the jury should not be given. *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980).

The defendant next assigns as error the trial court's sustaining of a hearsay objection by the State to testimony by Barry Blessing, the man from whom the defendant obtained the gun 6 to 8 weeks prior to the shooting. Specifically, the State objected to Blessing's testimony as to why the defendant wanted the gun. The defendant's offer of proof was as follows:

> The defendant would expect to ask and the defendant would expect the witness to answer as to why he obtained the gun.
>
> The defendant would ask him: Did you have any conversations with David Harrison concerning why he obtained that gun? And the answer would be that David came back to him and stated that he was worried about the area that he was living in, which was close to Carter Lake, and asked if he could have the gun back for a while.

The defendant maintains that Blessing's testimony was admissible under Neb. Rev. Stat. § 27-803(2) (Reissue 1979), as relating to the defendant's state of mind, to his absence of motive, and to premeditation. Exclusion of this evidence, it is claimed, prevented the defendant from receiving a fair trial. The essence of the defendant's argument is that without

Blessing's testimony the defendant had no evidence from the best witness available to rebut the prosecution's contention that he had obtained the gun to kill his wife.

A declaration offered to show the defendant's state of mind which is too remote in point of time should be excluded as lacking probative value. 2 C. Torcia, Wharton's Criminal Evidence § 307 (13th ed. 1972). In earlier cases we have refused to characterize statements as admissible under § 27-803(2) where they were offered as evidence of the defendant's state of mind at a time not material to the case. *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982) (out-of-court statements not relevant to the defendant's mental state at the time of the alleged crimes are inadmissible hearsay); *State v. Pelton*, 197 Neb. 412, 249 N.W.2d 484 (1977) (statement not within § 27-803(2) exception because defendant's state of mind at the time of the statement was not a material fact).

In the present case the suppressed testimony related to a conversation which occurred 6 to 8 weeks before the shooting. The defendant's state of mind in April of 1984 was irrelevant. It was his state of mind at or about the time of the shooting that was the relevant fact in this case. *State v. Rowe, supra.*

The defendant's final assignment of error relates to the trial court's refusal to give his proposed instruction No. 3, which provides as follows:

> The question of the motive of the defendant to kill Maria Harrison has been raised during the trial. While motive is not an essential element of the crime of 1st Degree Murder, evidence of lack of motive is always permissible as a circumstance favorable to the accused. Such evidence is to be considered by you with the other evidence bearing on the question of guilt or innocence, and is to be given such weight as you believe it to be fairly entitled to.

The defendant's reliance on *Trobough v. State*, 119 Neb. 128, 227 N.W. 443 (1929), is misplaced. In that case this court noted that "while absence of *all evidence* of motive in a case may be conceded to be circumstances favorable to the defendant, still it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance . . . ."

(Emphasis supplied.) *Id.* at 134, 227 N.W. at 445. We did, however, conclude that to the extent there was an absence of evidence as to motive, the jury should be instructed that such is a circumstance to be considered with all others in determining the guilt or innocence of the accused.

This case is similar to *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980). In *Samuels* the defendant was convicted of second degree murder and on appeal complained that the trial court had committed error in failing to give an instruction which was nearly the same as the defendant's proposed instruction No. 3.

As in *Samuels*, the facts in the present case do not require an instruction on motive because there is evidence of motive. The defendant himself testified that the marital problems experienced by the couple were linked to Maria's infidelity. There is evidence that the defendant was greatly angered by not being able to locate his wife on the 2 days preceding the shooting.

Furthermore, the statement in the proposed instruction that evidence as to a lack of motive is a "circumstance favorable to the accused" is objectionable because, as in *Samuels, supra*, it infringes upon the jury's domain to act as the sole arbiter of the credibility and weight to be accorded the evidence. *Egbert v. State*, 113 Neb. 790, 205 N.W. 252 (1925). The district court was, therefore, correct in refusing to give the instruction which would have tended to mislead or confuse the jury. *State v. Samuels, supra.*

There being no error, the judgment is affirmed.

AFFIRMED.

GEORGE ALLAN, ALSO KNOWN AS JOE ALLAN, APPELLANT, V. MASSEY-FERGUSON, INC., A FOREIGN CORPORATION, APPELLEE.
378 N.W.2d 664

Filed December 27, 1985. No. 84-659.

1. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
2. _____. The burden is on the party moving for summary judgment to show that no issues of material fact exist, and unless that party can conclusively do so, the motion must be overruled.
3. _____. In considering a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
4. **Breach of Contract: Limitations of Actions: Time: Causes of Action.** An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
5. **Causes of Action: Breach of Warranty: Time.** A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

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

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

Daniel M. Placzek of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

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

COLWELL, D.J., Retired.

This is an appeal from an order sustaining the defendant-appellee's motion for summary judgment. We reverse and remand for trial.

On September 24, 1975, plaintiff, George Allan, purchased a Massey-Ferguson 750 combine from Brodine, Inc., a dealer for the defendant manufacturer, Massey-Ferguson, Inc.

Massey-Ferguson manufactured and assembled the combine and its parts for delivery to the user. In October 1979 the combine began to malfunction, and on or about October 12, 1979, Allan contacted the Massey-Ferguson dealer in Grand Island and requested that the dealer send someone to inspect the machine. Lacking the personnel to inspect the machine that day, the dealer gave Allan instructions over the telephone. Allan followed the dealer's instructions and discovered an allegedly defective intake manifold gasket which allowed dust-laden air into the engine, causing damage to the engine. As a result of the damage, Allan had the engine repaired at the cost of $4,733.67, which he now claims. In addition, he claims $8,170 in lost custom harvest work.

Allan's petition, filed on October 7, 1981, alleges that Massey-Ferguson placed into the stream of commerce an engine with a gasket configuration that it knew or should have known was defectively designed and assembled so as to result in failure of the gasket sealant. Allan also alleged that Massey-Ferguson expressly and impliedly warranted that the combine was designed and assembled for the purpose of harvesting grains of all kinds and that it would operate under harvest conditions without damage or the necessity of modifications.

Massey-Ferguson answered, specifically denying that it gave Allan any warranties whatsoever and alleging that even if it had, Allan's action was barred by Neb. U.C.C. § 2-725 (Reissue 1980), the Uniform Commercial Code's statute of limitations. In sustaining the defendant's motion for summary judgment, the court specifically found that Allan's action was one for breach of express or implied warranty and concluded that the suit was barred by the 4-year statute of limitations. No finding was directed to the cause of action for negligence. Allan then perfected his appeal to this court.

Massey-Ferguson raises for the first time on appeal the contention that Allan's petition fails to state and number separately a cause of action for negligence as required by Neb. Rev. Stat. § 25-805 (Reissue 1979). This deficiency in pleading, Massey-Ferguson argues, precludes Allan from recovering on a negligence theory. Massey-Ferguson does not contend that

Allan's facts as pleaded fail to state a cause of action for negligence; it claims only that the petition does not separately state and number specific causes of action as required by § 25-805.

Massey-Ferguson's complaint about Allan's petition comes too late. A party may demur to a petition when one of a number of defects appears on the face of the petition. Neb. Rev. Stat. § 25-806 (Reissue 1979). Defects not apparent on the face of the petition are raised in the answer. Neb. Rev. Stat. § 25-808 (Reissue 1979); *Johnson v. Platte Valley Public Power and Irrigation District*, 133 Neb. 97, 274 N.W. 386 (1937). If no objection is taken by either demurrer or answer, the defendant waives its right to object except when the objection is to either the court's jurisdiction or to the petition's failure to state facts sufficient to constitute a cause of action. § 25-808.

Even assuming for the sake of discussion that Massey-Ferguson's objection was timely, we cannot say that Allan's petition does not comport with § 25-805. While we agree that the form of Allan's petition is less than standard, when applying a liberal construction to the pleadings, *George Rose Sodding & Grading Co., Inc. v. City of Omaha*, 187 Neb. 683, 193 N.W.2d 556 (1972), *appeal after remand* 190 Neb. 12, 205 N.W.2d 655 (1973), we find that the petition states separate causes of action for negligence and breach of warranty.

We consider next Allan's contention that § 2-725 does not bar his recovery under a breach of warranty theory. Section 2-725 provides in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that *where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have*

been discovered.

(Emphasis supplied.)

This court interpreted and applied § 2-725 in *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979), holding that an action for breach of warranty in the sale of goods must be commenced within 4 years of tender of delivery, that the failure to discover the breach prevents the running of the statute only when the warranty explicitly extends to future performance, and that an implied warranty cannot explicitly extend to future performance.

In *Celotex* a manufacturer of roofing materials had given a guaranty bond under which it promised to repair leaks in the roof caused by ordinary wear and tear for a period of 20 years. We found that the bond did not constitute a warranty as to the future performance of the goods and held that the discovery exception in § 2-725(2) "applies only where the seller *explicitly* states, for example, that the product will 'last for 10 years.' " (Emphasis in original.) 203 Neb. at 568, 279 N.W.2d at 609.

We refined the *Celotex* rule in *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983), a case involving a purported implied warranty given by a manufacturer of lauan siding. The manufacturer pleaded affirmatively that the action for breach of implied merchantability and fitness for a particular purpose was barred by the statute of limitations in § 2-725. At trial the parties stipulated that the trial court could take judicial notice that siding is ordinarily supposed to "last the life of the house." 214 Neb. at 16, 332 N.W.2d at 214. We found that the seller had given an express oral warranty under Neb. U.C.C. § 2-313 (Reissue 1980) when it represented that the product was "siding" and that the description of the goods as "siding" created an express warranty that explicitly extended to future performance of the siding: "[I]n light of the expectations of the parties, the warranty . . . extended explicitly to future performance." 214 Neb. at 17, 332 N.W.2d at 215. Under these circumstances the buyer's cause of action was found not to accrue until the breach was discovered.

A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are

clear, and that the moving party is entitled to judgment as a matter of law. *Smith v. Baker's Local No. 433 Welfare Fund, ante* p. 215, 375 N.W.2d 922 (1985). The burden is on the party moving for summary judgment to show that no issues of material fact exist, and unless that party can conclusively do so, the motion must be overruled. In considering a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. *Green v. Village of Terrytown*, 189 Neb. 615, 204 N.W.2d 152 (1973).

The record does not provide us the opportunity to review fully the evidence to determine whether genuine issues of material fact exist concerning the application of the statute of limitations to the warranty issue. As we have already stated, Allan alleged breach of express and implied warranties in his petition. In its answer Massey-Ferguson specifically denied that it had given any warranties whatsoever on the combine or its engine. However, there is evidence making reference to an exhibit 6, which is not in the record, referring to a combination sales contract, security agreement, and warranty and creating an inference of other terms or agreements supporting the plaintiff's position. Massey-Ferguson offers no affidavits, admissions, or deposition testimony in support of a prima facie showing that no warranty, or at least a limited warranty, existed so as to preclude Allan as a matter of law from relying upon the § 2-725(2) discovery exception.

We are left to wonder about the existence or scope of any implied or express warranties or any representations made or expectations raised in the course of the transaction. In a summary judgment action any reasonable doubt touching the existence of a material issue of fact will be resolved against the moving party. *Clemens Mobile Homes, Inc., v. Guerdon Industries, Inc.*, 199 Neb. 555, 260 N.W.2d 310 (1977). Because Massey-Ferguson has not met its burden of showing that no genuine issue of material fact exists, thereby entitling it to judgment as a matter of law on the issue of warranty, we reverse and remand to the district court for trial on all issues.

REVERSED AND REMANDED.

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

MARVA L. BLACK, APPELLEE, V. JON S. BLACK, APPELLANT.

378 N.W.2d 849

Filed December 27, 1985. No. 84-697.

1. **Property Division.** The division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably.
2. _____. Ultimately, the test for division of property in a dissolution case is one of reasonableness.
3. _____. There is no mathematical formula by which awards of division of property can be precisely determined, because each depends upon the facts of the particular case.
4. **Property Division: Appeal and Error.** A division of property award will not be disturbed on appeal unless it is patently unfair.
5. **Property Division.** The debts of the parties should be considered in making a property division.
6. _____. Losses as well as gains should be divided equitably between the parties in a dissolution case.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed as modified.

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

Donald C. Sass, for appellee.

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

PER CURIAM.

This is an appeal in a marital dissolution case. On August 10, 1984, the district court dissolved the marriage of Marva L. Black, petitioner, and Jon S. Black, respondent. The respondent was awarded an undivided three-fourths interest in the main asset of the parties, 750 acres of farmland plus improvements. The petitioner was awarded an undivided one-fourth interest in the property. Possession was awarded to the respondent.

The court further ordered the respondent to hold the petitioner harmless for all indebtedness on the property and "should pay to petitioner for her interest in said real estate and in consideration of the contributions she has made toward the purchase of his interest in the sum of $150,000," payable $30,000 on December 1, 1984, and the balance in installments

of $1,000 per month, with rights of acceleration and foreclosure. The costs, including a $2,000 attorney fee, were taxed to the respondent. The respondent has appealed and has assigned as error the division of property and the taxing of attorney fees.

The parties were married June 10, 1976. The petitioner was then 41 and the respondent 34. No children were born of the marriage, but petitioner was the custodial parent of two children from a previous marriage. The petitioner moved out of the parties' residence on November 19, 1983, and filed this action on January 9, 1984.

During the marriage, the respondent was engaged and employed solely in farming. The petitioner did not work full time outside of the home until 1980, when she became a legal secretary. There is ample evidence of petitioner's earnings for the years 1980 to 1983 but no evidence of respondent's earnings or income for any of the years the parties were married.

The petitioner testified and the district court found that she brought substantial assets into the marriage. These assets were derived mainly from her previous marriage and the division of property awarded her when that marriage was dissolved. In that decree she was awarded $132,000 in property settlement, of which she received $81,058 while married to the respondent. Just prior to her marriage to the respondent she received approximately $65,000 in cash from the sale of real estate that had been awarded to her. She received $25,391 in child support during her marriage to respondent. The petitioner further testified that she had $1,000 in cash and some life insurance policies which she cashed for $3,000. It is apparent from the record that all of the funds were either deposited in the joint account of the parties, used to pay off farm indebtedness, or used to purchase various items, including real property.

The record shows that the respondent also brought substantial assets into the marriage. At the time of the marriage the respondent owned a one-third interest in a partnership with his mother, Mildred Black, and his brother, Clarence Black. The partnership owned a 750-acre tract of land in Jefferson County, Nebraska. The respondent and his brother operated a jointly owned hog farm on the property. The district court

found that the fair market value of the property at the time of the parties' marriage was $450,000 and was subject to a $137,000 mortgage. The respondent's one-third interest was thus worth $104,300.

Additionally, the respondent had an undivided one-half interest in farm machinery, which was valued at $23,020 at the time of marriage. Both parties had items of personal property, including motor vehicles, the values of which are not shown in the record.

On August 27, 1976, the respondent's mother, Mildred Black, conveyed her one-third interest in the property to the two sons. The respondent's one-half interest in the property was then worth approximately $156,500.

On August 31, 1976, the parties purchased Clarence Black's one-half interest in the 750-acre property for $140,000 plus assumption of all indebtedness associated with the property. This resulted in the respondent having a three-fourths interest in the property and the petitioner a one-fourth interest. A $50,000 downpayment was made from cash the petitioner had brought into their marriage.

At the time of the decree there was $112,998 due on the mortgage and $118,450 due on the purchase contract.

On April 8, 1977, the parties assigned the purchase contract to the First National Bank of Fairbury, Nebraska, as security for certain loans, but it is not clear from the record whether the loans were preexisting or were made at the time of the assignment. The respondent testified there was indebtedness due the First National Bank of Fairbury, Nebraska, in the amount of $292,246, but the record does not show how that debt relates to the assignment made in 1977.

The district court found that the farmland had a value of $700 an acre, or $525,000. The improvements, consisting mainly of the residence, swimming pool, and various farm buildings, were valued at $120,000. Although the respondent testified that the money which had been borrowed to build the residence has not been repaid, there is no testimony as to which of the debts were incurred for that purpose.

The district court allocated all of the indebtedness of the parties, amounting to $581,081, to the respondent and ordered

that he hold the petitioner harmless with respect thereto.

The decree allocated various items of personal property which were not valued and awarded the respondent the farm machinery valued at $42,000 and the livestock valued at $27,000.

Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. Neb. Rev. Stat. § 42-365 (Reissue 1984). Ultimately, the test is one of reasonableness. *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983). There is no mathematical formula by which such awards can be precisely determined, because each depends upon the facts of the particular case. *McCollister v. McCollister*, 219 Neb. 711, 365 N.W.2d 825 (1985); *Lord v. Lord*, 213 Neb. 557, 330 N.W.2d 492 (1983). A division of property award will not be disturbed on appeal unless it is patently unfair. *Edwards v. Edwards*, 199 Neb. 581, 260 N.W.2d 319 (1977).

As we view the record, the division of the marital estate which was made in this case is patently unfair. The total value of the assets is approximately $714,000. After subtracting the indebtedness, the net value of the marital estate is approximately $132,919.

The debts of the parties should be considered in making a property division. *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984). We have consistently spoken of dividing the *net* marital estate. See, *McCollister v. McCollister, supra*; *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984); *Martin v. Martin*, 215 Neb. 508, 339 N.W.2d 754 (1983); *Grummert v. Grummert*, 195 Neb. 148, 237 N.W.2d 126 (1975); *Kula v. Kula*, 181 Neb. 531, 149 N.W.2d 430 (1967).

The values of the parties' separate contributions to the marriage are almost equal. Petitioner contributed cash totaling approximately $171,500, while respondent brought in property and machinery valued at approximately $179,500. Thus, it is equitable to divide equally the net marital estate, which consists principally of the 750-acre property and the machinery and livestock, minus the indebtedness of the parties. The parties lost substantial amounts of money during the marriage, and the losses as well as the gains should be divided equitably between

the parties. See *Loukota v. Loukota*, 177 Neb. 355, 128 N.W.2d 809 (1964).

Both parties have expressed a willingness to accept an equal division of the proceeds remaining, if any, after a sale of the property and payment of the indebtedness. We think this is an equitable resolution of the matter.

We find no abuse of discretion in regard to the attorney fee awarded to the petitioner by the district court.

The judgment is modified to provide that the respondent shall have the option to acquire title to the real estate and improvements, machinery, and livestock by payment of $66,500 to the clerk of the district court for the benefit of the petitioner within 6 months from the date of the judgment on the mandate of this court. In the event the respondent fails to exercise that option, the real estate and improvements, machinery, and livestock shall, upon the application of either party, be sold as upon execution, and any proceeds remaining after payment of the indebtedness of the parties shall be divided equally between them. The judgment is in all other respects affirmed.

Each party shall pay his or her own costs and attorney fees.

AFFIRMED AS MODIFIED.

JOSEPH B. BERNADT, APPELLEE, V. SUBURBAN AIR, INC., A NEBRASKA CORPORATION, AND JAY A. YODER, APPELLANTS.

378 N.W.2d 852

Filed December 27, 1985. No. 84-739.

1. **Expert Witnesses.** The admission of opinion testimony of an expert is generally discretionary with the trial court, and the determination of its weight is largely a matter for the jury. A general objection as to foundation to a question requesting the opinion of a witness does not reach the issue of the qualification of the witness as an expert.

2. _____. Both the court and opposing counsel are entitled to know that an objection goes to the qualifications of the witness as an expert rather than to the factual foundation for the opinion.
3. _____. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.
4. **Directed Verdict.** A party against whom a directed verdict is requested is entitled to have every controverted fact resolved in favor of that party and to have the benefit of every inference that can reasonably be deduced from the evidence.
5. _____. A court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom.
6. **Appeal and Error.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.

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

William J. Panec, for appellants.

Michael E. Willet and James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellee.

KRIVOSHA, C.J., and CAPORALE, J., and BLUE and OLBERDING, D. JJ., and COLWELL, D.J., Retired.

BLUE, D.J.

On July 26, 1982, Joseph B. Bernadt, plaintiff, employed Jay A. Yoder, defendant, to give him a flight review and check ride in plaintiff's Cessna 182 aircraft. Yoder was an FAA certified flight instructor and an employee of Suburban Air, Inc., defendant. Bernadt and Yoder took off from Pawnee City airport, with Bernadt flying Bernadt's aircraft. Shortly thereafter, the engine of the aircraft misfired and quit operating. Both parties agree that Bernadt was flying the aircraft at the time the engine quit; however, their testimony as to what happened from there on is in conflict.

Bernadt claims that he continued to fly the plane to a point approximately 20 feet above the ground near the emergency landing field and that as they crossed over a fence, Yoder turned the plane to the right, which caused the plane to crash into the ground. Yoder claims that he took control of the aircraft as soon as the engine quit and flew it to within 10 to 20 feet above the ground and that just before they reached a fence, Bernadt

grabbed the control wheel and pulled back on it, causing the plane to stall and crash.

The jury returned a verdict for Bernadt, for damages to his airplane, against Suburban Air, Inc., and its employee, Jay A. Yoder, who have taken this appeal.

The defendants assign the following errors:

1. The Trial Court erred in allowing the witness Charles Thomas to testify as an expert and to give his opinion about the ability to land an aircraft in the emergency landing field where the accident occurred and as to the cause of the accident.

2. The Trial Court erred in permitting the Plaintiff's evidence of an experiment by Plaintiff's expert witness when the facts constituting the basis of the experiment were substantially different than the facts existing at the time of the damage to the Plaintiff's property.

3. The Trial Court erred in permitting the Plaintiff's expert witness to give his opinion in response to an improper hypothetical question.

4. The Trial Court erred in overruling the Defendants' Motion for a directed verdict at the close of the Plaintiff's case.

5. The Trial Court erred in sustaining Plaintiff's Motion in Limine which prevented the Defendant-Appellants from introducing evidence bearing on the credibility of the Plaintiff.

The plaintiff introduced evidence from Charles Thomas, an expert witness. Thomas is an aerial applicator of farm chemicals. He has both a private and a commercial pilot's license and flies daily, with a total of approximately 13,600 hours of flight time. He has flown many types of aircraft and has approximately 200 hours of experience flying a Cessna 182, which is the type owned by plaintiff.

Thomas testified without objection that, after the crash, he landed a Cessna 188 on the field where plaintiff's plane had crashed. The Cessna 188 is a larger plane than the Cessna 182 which was owned by plaintiff. Thomas was asked if he had an opinion whether plaintiff's plane, assuming a southerly wind of 5 m.p.h. and a temperature of 90 to 95°F., could have landed

safely if it had continued in a southerly approach and landed in a southerly direction. The objection was: "And that's objected to for the reason that it's an improper hypothetical question, does not contain all the facts; and there's insufficient foundation, and it's an attempt to draw a comparison without sufficient facts." The objection was overruled, and the witness answered, "That it could have been landed safely."

Thomas was also asked for his opinion as to the cause of the crash. The objection was on the basis of insufficient foundation, speculation, not the proper area of expert testimony, and that it was an improper hypothetical question. The objection was overruled and the witness stated, "When the aircraft is turned that close to the ground it causes it to cartwheel."

Defendants claim that it was error to allow Charles Thomas to testify as an expert witness, in that it was not shown that he was qualified. A review of the evidence reveals that defendants did not object that Thomas did not possess the necessary qualifications to qualify as an expert; only general objections were made in connection with the questions that called for an opinion. In *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985), a fire chief was asked to give his opinion as to the cause of a fire, and the objection was lack of foundation. The court stated that a general objection on foundation does not reach the qualifications of the witness, as the court and opposing counsel are entitled to know that the objection goes to the qualifications of the witness as an expert rather than to the factual foundation for the opinion. The admission of opinion testimony of an expert is generally discretionary with the trial court, and the determination of its weight is largely a matter for the jury. It follows that the defendants' claim that Thomas should not have been permitted to testify as an expert has no basis.

Defendants also claim that it was error to allow testimony of Thomas that he landed on the emergency field. However, the record shows no objection to this testimony; therefore, this assignment of error will not be considered.

Defendants allege that Thomas was allowed to answer an improper hypothetical question which asked for his opinion as to whether plaintiff's plane could have landed. There is no

question that this is a proper subject of expert testimony. Neb. Rev. Stat. § 27-702 (Reissue 1979). It also appears that the hypothetical question was proper. The question referred to a southerly wind of 5 m.p.h. and a temperature of 90 to 95 °F. This fairly reflects the evidence. In *Morris v. Laaker*, 213 Neb. 868, 873, 331 N.W.2d 807, 810 (1983), this court stated:

> However, there is nothing wrong with an expert witness expressing an opinion based on facts "perceived by or made known to him." Neb. Rev. Stat. § 27-703 (Reissue 1979). If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.

Defendants assign as error the overruling of defendants' motion for a directed verdict at the close of the plaintiff's case. It appears that it was not error to refuse to direct a verdict. There was sufficient evidence to sustain a finding for the plaintiff. A party against whom a motion for directed verdict is aimed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. The court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. *Foltz v. Northwestern Bell Tel. Co.*, *ante* p. 201, 376 N.W.2d 301 (1985).

Defendants also claim but do not argue that the trial court erred in sustaining plaintiff's motion in limine. Defendants fail to point out the motion in limine to which this claim is directed. However, a review of the motions in limine that were made by the plaintiff, and sustained in part, allows us to dispose of this assignment by reference to Neb. Rev. Stat. § 27-103 (Reissue 1979): "(1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

No substantial right of the defendants was affected by this ruling.

For the foregoing reasons the judgment of the district court is affirmed.

AFFIRMED.

IMOGENE M. RICHARDS, DOING BUSINESS AS SMOKEHOUSE SALOON, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

378 N.W.2d 667

Filed December 27, 1985. No. 84-788.

1. **Liquor Licenses: Proof.** An applicant for a liquor license before the Nebraska Liquor Control Commission has the burden to show that the granting of such license is or will be required by the present or future public convenience and necessity.
2. **Liquor Licenses.** The Nebraska Liquor Control Commission, while having broad discretion in the granting or denial of an application for a liquor license, must base its findings upon substantial evidence and may not be arbitrary or capricious.
3. **Liquor Licenses: Records: Evidence.** A party-applicant who consents at a hearing upon an application for a liquor license to the receipt into evidence by the Nebraska Liquor Control Commission of proceedings involving a prior application by the same party for the same license may not thereafter complain of the consideration by the commission of such prior proceedings with respect to the pending application.

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

Rebecca E. Miller of Miller Law Office, for appellant.

A. Eugene Crump, Deputy Attorney General, and Terry R. Schaaf, for appellee.

BOSLAUGH, HASTINGS, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

RIST, D.J.

This is an appeal by Imogene M. Richards, doing business as Smokehouse Saloon, from the order of the district court for Lancaster County, Nebraska, affirming the order of the Nebraska Liquor Control Commission denying her application for a retail Class C liquor license in the village of Axtell, Nebraska.

The record reflects that the applicant first applied for such license on May 4, 1983. The village board of Axtell held a special meeting, following which it recommended that the application be denied. On June 29, 1983, the commission notified appellant that it would hold a hearing on July 14, 1983,

to consider the action of the village board recommending denial of the application and whether appellant could demonstrate that such license was required by the present or future public convenience and necessity as required by Neb. Rev. Stat. § 53-132(2)(d) (Cum. Supp. 1982). Following this hearing, the commission, on July 15, 1983, entered its order finding in part that the commission had considered all of the evidence presented pertaining to all of the factors enumerated in § 53-132(3), found that the applicant had not met the burden of establishing that the issuance of the license would satisfy a present or future public convenience and necessity, and denied the application.

Appellant appealed this order to the district court for Lancaster County, Nebraska, which court, after hearing, entered its order on March 26, 1984, affirming the denial of the application. No appeal was taken from this affirmance.

On April 3, 1984, appellant filed a second application with the commission for such license. No public hearing was held thereon by the village board because of a temporary restraining order obtained by appellant in the district court for Kearney County, Nebraska, ostensibly because of a faulty published notice of hearing for such meeting, and no action was taken by the village board with respect to the second application.

A hearing was held by the commission on May 17, 1984, to consider the second application, at which appellant was again represented by counsel. It was stipulated by appellant's counsel and counsel for the village of Axtell and the commission that the entirety of the record concerning the previous application be included in the record of the second hearing for consideration by the commission, and was so received. Additional evidence was also received on behalf of both the appellant and those opposing the granting of the application.

On May 22, 1984, the commission entered its order, which contained the following findings:

1. That the local governing body [of the village] made no recommendation.
2. That a citizens protest was filed against said application.
3. That in a previous application this Commission found

that this license was not required by the present or future public convenience and necessity and this finding was upheld by the Lancaster County District Court.

4. That there does not appear to have been a change in circumstances since the original application sufficient to alter the conclusion as to need previously made.

The commission thereupon denied the second application.

Appellant appealed to the district court for Lancaster County, Nebraska, where hearing was held August 27, 1984. At that hearing appellant offered into evidence the record before the commission on its hearing of the second application, which included not only the proceedings in evidence of that hearing but also all of the records and evidence respecting the hearing on the first application before the commission and the record before the district court for Lancaster County, Nebraska, respecting that first application. All such exhibits were received.

Following the hearing of August 27, 1984, the district court entered its order on September 5, 1984, which, after noting the standard of review and the appellant's burden, found that the commission in considering a previous application by appellant for the same location had determined that appellant failed to carry her burden of proof, which determination had been affirmed by the district court, and that with respect to the second application, the commission had not found sufficient changes in circumstances since the time of the first application to alter or change its previous findings that appellant had not sustained her burden. The court further found in reviewing the evidence presented at the second hearing before the commission that the commission had not acted unreasonably or arbitrarily in denying the second application, and affirmed the commission's denial thereof.

From this latter order appellant now appeals to this court, assigning as error: (1) The trial court erred in finding the record before the commission contained competent evidence upon which denial of the application could be premised. (2) The trial court erred in finding the record before the commission contained competent evidence upon which the commission

could find appellant failed to meet the criteria of § 53-132(2)(d). (3) The trial court erred in failing to find appellant had been denied due process when she had not been given notice or opportunity to present evidence on issues she was required to meet.

At the hearing before the commission, appellant had the burden of proof to show that the issuance of the license is or will be required by the present or future public convenience and necessity. § 53-132(2)(d); *Kerrey's, Inc. v. Neb. Liquor Control Comm.*, 213 Neb. 442, 329 N.W.2d 364 (1983).

A review of the evidence received by the commission at the second hearing shows that Axtell is a village with a mean population slightly in excess of 600 persons; that it was presently served by one establishment with a retail Class C liquor license; that, while the evidence was in dispute, there were letters and testimony at both hearings to the effect that the needs of the community were being met by the present licensee and that there was no present or future necessity for an additional retail liquor establishment; that the proposed location of the appellant's business would create problems of traffic safety; and that additional law enforcement would be required in the village, the present enforcement being inadequate to meet the needs caused by a second licensee. These are matters the commission, by statute, was to consider. Numerous letters of protest to the application were received outlining the matters above referred to, and petitions of protest containing approximately 130 signatures of residents of the village were filed with the commission. As indicated, there was evidence offered contrary to the above positions and claims, but given the fact that by statute the commission was the finder of fact with broad discretion in determining whether a license should be granted, *T & N P Co., Inc. v. Nebraska Liquor Control Commission*, 189 Neb. 708, 204 N.W.2d 809 (1973), and that review in this court is limited to a determination of whether the commission's findings were supported by substantial evidence or were arbitrary or capricious, *McChesney v. City of No. Platte*, 216 Neb. 416, 343 N.W.2d 925 (1984), it cannot be fairly said that there was no substantial evidence to support the commission's findings and order or that

such action was arbitrary or capricious. We therefore find that appellant's first two assignments of error are not sustained by the record.

The third assignment of error is appellant's claim she was denied due process by not being given notice or opportunity to present evidence on issues she was required to meet. This is premised upon her claim that she had no notice the commission would consider its previous record and findings on the first application or those of the district court concerning that application, and was therefore denied an opportunity to meet these issues. The notice of hearing by the commission in the instant case advised appellant it would be held because of a citizens protest and to determine whether or not the appellant could demonstrate the license was required by present or future public convenience and necessity as required by § 53-132.

It is first noted that appellant, at the second commission hearing, concurred and agreed with the submission of the entire record of the first proceeding before the commission and of the district court proceeding concerning the same. In such circumstances appellant can hardly complain of the commission's receiving such record in evidence. Had appellant felt it improper the commission consider such record because of lack of notice or for any other reason, she should have objected to the offer of these proceedings. She did not object, but, instead, agreed to the receipt of the record in evidence, and she cannot now complain of the commission's considering the same, including a review of its previous findings and order.

Secondly, the commission, at the second hearing, gave appellant opportunity to present additional evidence and, after considering both the record of the first proceeding and the additional evidence offered at the second hearing, made its findings that no evidence had been received as would warrant it to now grant the second application. It is clear that the commission in its hearing on the second application reconsidered its findings and order in the first proceeding in light of both the record of that first proceeding as well as the new evidence received in the second proceeding, and did so in compliance with the statute.

No additional burden was placed upon appellant with

respect to her second application. It remained what it had always been. Her burden of proof was to show that the consideration of the record of the first proceeding, to which she consented, together with the additional evidence offered in the second proceeding, was sufficient to meet the burden of proof as required by statute and this court's decision in *Kerrey's, Inc. v. Neb. Liquor Control Comm.*, 213 Neb. 442, 329 N.W.2d 364 (1983). She failed a second time to meet that burden of proof. There is no merit to appellant's third assignment of error.

The order of the district court is affirmed.

AFFIRMED.

JOHN TIWALD, APPELLANT, V. JOHN L. DEWEY, M.D., APPELLEE.
378 N.W.2d 671

Filed December 27, 1985. No. 84-794.

1. **Summary Judgment.** A motion for summary judgment will be sustained whenever 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. **Limitations of Actions: Time.** The time when a statute of limitations commences to run must be determined by the facts of each case.
3. **Causes of Action: Medical Malpractice: Limitations of Actions: Time.** A cause of action for professional malpractice accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action.

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

Michael G. Goodman of Matthews & Cannon, P.C., for appellant.

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

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

BOSLAUGH, J.

This is an appeal in a medical malpractice action brought by

the plaintiff, John Tiwald, against Dr. John L. Dewey, the defendant. The district court sustained the defendant's motion for summary judgment and dismissed the petition. The court specifically found that the cause of action was barred by the 10-year statute of repose, Neb. Rev. Stat. § 25-222 (Reissue 1979), which provides as follows:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

The plaintiff contends that the district court erred in sustaining the defendant's motion for summary judgment because the action was filed within 10 years of the last date of treatment.

The relevant facts are not in dispute. The plaintiff first consulted Dr. Dewey, a specialist in the treatment of allergies, in 1966 for the treatment of his asthma and allergies. The defendant prescribed a course of various treatments for the purpose of alleviating plaintiff's allergies. The course of treatment included roentgen therapy which consisted of exposing the chest, neck, and head of the patient to x rays. The plaintiff underwent such therapy on 15 occasions from June 9, 1966, to July 21, 1969. The plaintiff's last visit to the defendant was on February 13, 1974.

The plaintiff was subsequently diagnosed as having basal cell

skin cancer and had surgical removal of cancerous tissue on three occasions. In June of 1982 the plaintiff's thyroid gland was found to be malignant and was removed.

This action was filed in May of 1983. A second amended petition was filed on August 10, 1983. It alleged there was a causal connection between the x-ray therapy administered by the defendant and the resulting cancers of the skin and thyroid gland. The plaintiff also alleged the defendant was negligent in failing to warn him of the risk involved in the therapy.

Specifically, the second amended petition alleged that the plaintiff's injuries and damages were directly and proximately caused by the negligence of the defendant in the following particulars:

1. The defendant knew or should have known of the ineffectiveness of X-ray exposures for the treatment of asthma;
2. The defendant knew or should have known that said experimental X-ray procedure was never adopted by the medical profession for the treatment of asthma;
3. The defendant knew or should have known that said experimental X-ray procedure inevitably would cause cancer, after the carcinogenic risk of X-rays was widely accepted and publicized by the medical profession;
4. The defendant failed to obtain the informed consent of the plaintiff prior to the commencement of said X-ray exposures;
5. The defendant knew or should have known of the carcinogenic risk of the X-ray therapy and yet failed to warn the plaintiff at any time while plaintiff was under the defendant's care;
6. The defendant knew or should have known of the carcinogenic risk of the X-ray therapy and yet failed to warn the plaintiff at any time subsequent to February 12, 1974.

A motion for summary judgment will be sustained whenever 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. *R.A.S., Inc. v.*

Crowley, 217 Neb. 811, 351 N.W.2d 414 (1984).

The time when a statute of limitations commences to run must be determined by the facts of each case. *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). Since the facts in the present case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.

Section 25-222 provides that a cause of action accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action. In this regard Nebraska follows the occurrence rule. See, *Suzuki v. Holthaus, ante* p. 72, 375 N.W.2d 126 (1985); *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984).

It is clear from a reading of the plaintiff's second amended petition that the act or omission which is the basis of the malpractice claim, and which it is alleged proximately caused his injuries, was the x-ray procedure/therapy administered by the defendant, Dr. Dewey. The plaintiff does not allege that defendant was negligent in any of the drug therapy administered through July 12, 1972, nor in the administration of extract therapy through February 14, 1974, nor in the physical examination conducted February 13, 1974. Since the plaintiff's claim rests entirely on the administration of x-ray therapy by the defendant for treatment of plaintiff's allergies and asthmatic condition, the statute of limitations commenced to run on July 21, 1969, the last date on which x-ray treatment or therapy was administered. Thus, the plaintiff's claim is barred. See, *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982); *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983).

The plaintiff argues that his claim is not barred because Nebraska adopted a continuing treatment exception to the professional negligence statute of limitations in *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941), *Smith v. Dewey, supra*, and *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983). The plaintiff, however, has misinterpreted this exception to Nebraska's occurrence rule.

Williams v. Elias, supra, involved a malpractice suit against a physician who had misdiagnosed the plaintiff patient's injuries

and had continued to treat those injuries under the misdiagnosis. We held that "[i]t was not the error in the diagnosis originally made by defendant but its adherence thereto and course of treatment that brought about the injuries." *Williams, supra* at 662, 1 N.W.2d at 124. We then held that "[t]he treatment and employment should be considered as a whole, and if there occurred therein malpractice, the statute of limitations should begin to run when the treatment ceased." *Williams, supra* at 663, 1 N.W.2d at 124.

In *Williams* there was a continuing course of negligent treatment, as opposed to single or isolated acts of negligence. The malpractice in *Williams* can be characterized as a continuing tort because the physician persisted in continuing and repeating the wrongful treatment because of the incorrect diagnosis. Thus, the statute of limitations did not begin to run until the continuing negligent treatment which was the basis of the plaintiff's claim had ended. See *Tortorello v. Reinfeld*, 6 N.J. 58, 77 A.2d 240 (1950).

In *Smith v. Dewey, supra*, we said, "The 10-year statute of repose provided for in Neb. Rev. Stat. § 25-222 (Reissue 1979) begins to run when the physician's treatment, which the patient claims to have constituted malpractice, ceases, as opposed to simply the termination of the physician-patient relationship." (Syllabus of the court.)

The holdings in *Smith v. Dewey, supra*, and *Lincoln Grain, supra*, are consistent with this interpretation of the *Williams* decision.

The facts alleged in the present case will not support a finding of a continuous negligent course of treatment other than the x-ray treatments administered from June 9, 1966, to July 21, 1969. The x-ray treatments are best characterized as isolated acts of alleged negligence. Where there are isolated acts of negligence, the statute of limitations begins to run at the end of those acts. The running of the statute of limitations is not postponed merely because the physician continues to treat the patient after clearly separable acts of alleged negligence. See 61 Am. Jur. 2d *Physicians, Surgeons, etc.* § 320 (1981).

The judgment of the district court is affirmed.

AFFIRMED.

VERNETTA MAE MARICLE, APPELLEE, V. CHIP LEROY MARICLE, APPELLANT.

378 N.W.2d 855

Filed December 27, 1985. No. 84-893.

1. **Alimony: Child Support: Appeal and Error.** Awards of alimony and child support will not be disturbed on appeal unless the record establishes that the trial court abused its discretion.
2. **Alimony: Property Division.** The ultimate test for the division of property as well as an award of alimony is reasonableness as determined by the facts of each case.
3. **Divorce: Property Division: Torts.** In a proper case the proceeds from the settlement of a personal injury claim may be considered to be a part of the marital estate.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

David L. Herzog, P.C., for appellant.

Larry D. Bird, for appellee.

BOSLAUGH, HASTINGS, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The petitioner, Vernetta Mae Maricle, and the respondent, Chip LeRoy Maricle, were married in 1968. Both parties were attending college at the time and brought few assets into the marriage. The respondent received a degree in agronomy and entered the Air Force. The petitioner received a degree in dietetics but did not complete the required internship at that time. Two children were born of the marriage; Renae in 1975 and Brian in 1978.

On August 2, 1979, the respondent was injured in a truck collision that left him permanently and totally disabled. He was then 32 years of age. In actions for damages arising out of the accident, the parties received a $300,000 settlement. After attorney fees, this sum was divided so that the petitioner received 20-some thousand dollars for loss of consortium and the respondent received the balance. The respondent's mother has been appointed as conservator for the respondent. At the

time of trial the respondent was living with and being cared for by his parents.

The trial court found that the marriage was irretrievably broken and awarded custody of the two minor children to the petitioner. The petitioner was awarded child support of $200 per month per child until the children reach majority, die, or are emancipated, and alimony in the amount of $200 per month for 12 months, and then $100 per month for 48 months.

The petitioner was awarded the residence of the parties, appraised at $65,000, the household goods, a 1979 Oldsmobile automobile, and miscellaneous other personal property, so that she received approximately 36 percent of the total marital estate. The respondent received the farm machinery and equipment and the balance of the property consisting largely of his share of the proceeds from the settlement of the damage actions.

The respondent has appealed and contends that the trial court erred in the award of child support and alimony and in finding that the proceeds from the settlement of the damage actions were a part of the marital estate.

We review the case de novo on the record and reach independent conclusions without reference to the conclusions reached by the trial judge. However, where the evidence is in conflict, this court gives weight to the fact that the trial court observed the witnesses and accepted one version of facts over another. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984); *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980). Awards of alimony and child support will not be disturbed on appeal unless the record establishes that the trial court abused its discretion. *Cagle v. Cagle*, 205 Neb. 747, 290 N.W.2d 192 (1980).

The respondent contends that the funds now held in trust by the conservator for his benefit are not part of the marital estate, and since he has no earning capacity, the order that he pay child support and alimony was in error. He also contends that since appellee has a college degree and is employable, she should be compelled to get a job, pay alimony to him, contribute more to the support of the children, and support herself.

The ultimate test for the division of property as well as an

award of alimony is reasonableness as determined by the facts of each case. *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985); Neb. Rev. Stat. § 42-365 (Reissue 1984).

In determining what assets constitute the marital estate and how the property should be divided, Nebraska, by statute, is an equitable property jurisdiction. § 42-365. Although there are marked differences in the treatment of proceeds from personal injury recoveries, many equitable property jurisdictions consider that the proceeds are part of the marital estate. See 24 Am. Jur. 2d *Divorce and Separation* § 913 (1983). In a case involving similar facts, the Illinois Appellate Court reasoned that since the husband, as a result of his personal injury, was unable to work and therefore satisfy his obligation of support, the settlement would to some extent enable him to provide for his family as he had done prior to his injury. Therefore, the court found that the settlement was part of the marital estate and should be considered in the division of property. *In re Marriage of Gan*, 83 Ill. App. 3d 265, 404 N.E.2d 306 (1980).

In the present case equity requires that the proceeds from the settlement of the damage actions be included in the marital estate. The proceeds were not acquired by gift or inheritance, *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), nor were they assets held in a trust established by a third person, thereby rendering them not a part of the marital estate, *Essex v. Essex*, 195 Neb. 385, 238 N.W.2d 235 (1976). Furthermore, the proceeds from the settlement constitute the main asset and the primary source of income of the parties.

The respondent has a monthly income of around $2,264, of which $1,209 is interest on his share of the proceeds of the settlement. The petitioner receives $161 per month in interest on her share of the proceeds, which is approximately one-half of her total monthly income. Under the facts and the circumstances of this case, we conclude that the proceeds should equitably be included in the marital estate.

The economic circumstances of the parties support the award of child support. In *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985), we approved an award of child support to be paid by a father who was a totally disabled quadriplegic. The opinion states at 174-75, 362 N.W.2d at 56-57:

We agree with the trial court that, under the evidence presented at the hearing, Roger is not at this time capable of earning a wage but that he does have earning capacity within the meaning of § 42-364(3). Obviously, different cases may present different facts with regard to the wage-earning capacity of a person disabled as Roger is. The statute in question, however, does not limit child support payments to be paid only from wages. Section 42-364(3) states in part that "[i]n determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent." It has been the law of this state for many years that, as stated in *Brus v. Brus*, 203 Neb. 161, 164-65, 277 N.W.2d 683, 686 (1979), "[i]n determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account . . . ." That statement should be broadened to include that the circumstances referred to should be consideration of the financial condition of the parent making the child support payments. See, also, *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980); *Lynch v. Lynch*, 195 Neb. 804, 241 N.W.2d 123 (1976); *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975). "Earning capacity" as used in § 42-364(3) means the overall capability of a parent to make child support payments based on the overall situation of the parent making such payments. That overall situation includes moneys available to the parent from all sources, including investment income. The trial court properly determined the amount of child support by taking into consideration the status, character, and situation of the parties and attendant circumstances, including the financial condition of the party making the payments and estimated costs of support of the children.

Neb. Rev. Stat. § 30-2654(3) (Reissue 1979) provides that a conservator "may expend funds of the estate for the support of persons legally dependent on the protected person and others

who are members of the protected person's household who are unable to support themselves, and who are in need of support."

The respondent in this case was awarded the main income-producing asset of the parties. Given his present income and expense, the $400-per-month child support payment can be paid from income. The children's monthly expenses, as testified to by petitioner, are approximately $770. The child support payments and the $426 received monthly from Social Security will adequately meet the necessary expenses of the children.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness, taking into consideration all of the circumstances of the parties as well as the duration of the marriage and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children of the parties in the supported party's custody. § 42-365; *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984).

As we view the record, the award of alimony which was made in this case was not an abuse of discretion. Although the petitioner is 39 years of age and in good health, she has not been able to find substantial employment. At the time of trial she was doing part-time bookkeeping at home, for which she was paid $50 per month.

In order to be qualified to work in the field in which she was educated, it will be necessary for her to complete some future schooling. The award of alimony, which is minimal and for only a limited time, will assist her in making the transition from her former life and, perhaps, enable her to make a substantial increase in her earning capacity.

The record shows that the petitioner made a substantial contribution to the marriage from funds and property received from her parents. The alimony will, to some extent, equalize the division of property without placing an undue burden upon the respondent.

The judgment of the district court is affirmed. Each party shall pay his or her own costs.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NATHAN J. McGEE, APPELLANT.

378 N.W.2d 674

Filed December 27, 1985. No. 85-273.

1. **Indictments and Informations.** Where an indictment or information sets forth the crime in the language of the statute or the equivalent thereof, it is sufficient.
2. **Indictments and Informations: Double Jeopardy.** For an information to be sufficient it must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
3. _____: _____. An indictment or information alone need not be full protection against double jeopardy, because a defendant may allege and prove facts outside the record in support of a plea of former adjudication.

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

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

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

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

KRIVOSHA, C.J.

Nathan J. McGee appeals from a judgment entered by the district court for Buffalo County, Nebraska, finding McGee guilty of criminal nonsupport in violation of Neb. Rev. Stat. § 28-706(1) (Reissue 1979). We affirm.

The marriage between McGee and his former wife was dissolved by decree entered on March 17, 1978. In that decree McGee was ordered to support the minor child of the parties, Angela K. McGee, born March 8, 1977. By the decree the child support was set in the amount of $75 per month. The record further discloses that the last payment made by McGee was in late 1979. The information was filed on March 6, 1984, charging McGee with criminal nonsupport. On June 20, 1984, a felony arrest warrant was issued for McGee on the criminal nonsupport charges and various other offenses not relevant to this appeal. McGee was arrested in Kansas sometime after June

20, 1984. On September 12, 1984, McGee appeared pro se at an arraignment in the county court for Buffalo County, Nebraska. He requested and was assigned a court-appointed attorney and also requested and was granted a preliminary hearing. On October 24, 1984, McGee, together with his counsel, appeared in the county court for Buffalo County, waived his right to a preliminary hearing, and was bound over to the district court for Buffalo County. On February 6, 1985, McGee, together with his court-appointed counsel, appeared in the district court for Buffalo County, Nebraska, where the record reflects he freely, voluntarily, and knowingly entered a plea of guilty to the charge of criminal nonsupport. The record further indicates that at the time of his plea McGee was between $6,000 and $7,000 in arrears in his child support. Following the preparation of a presentence investigation, McGee was sentenced to 5 years' probation. Included in the terms of the probation were requirements that McGee serve 30 days in the county jail of Buffalo County and that he pay child support of $150 per month commencing May 1, 1985, and on the first day of each and every month thereafter until the past due child support had been paid.

McGee now appeals to this court, maintaining that (1) no proper information was filed upon which a conviction by plea or otherwise could be sustained and (2) McGee was denied his constitutional rights under Neb. Const. art. I, §§ 2, 3, 11, and 12, and U.S. Const. amend. XIV.

Turning to the first assignment of error, that no proper information was filed, we believe that the assignment is wholly without merit. The information filed against McGee in the district court for Buffalo County, Nebraska, charged that

> Nathan McGee . . . from October 26, 1979 to March 6, 1984 Feloniously, did then and there intentionally fail, refuse, or neglect to provide proper support which he knew or reasonably should have known he was legally obliged to provide, *to his minor child*. Said support having been ordered by the Buffalo County District Court, Nebraska, *in a decree dated March 17, 1978*, in the District Court of Buffalo County.

(Emphasis supplied.)

Section 28-706(1) provides in part as follows: "Any person who intentionally fails, refuses, or neglects to provide proper support which he knows or reasonably should know he is legally obliged to provide to a . . . minor child . . . commits criminal nonsupport."

While McGee's argument as to the defect in the information is somewhat obscure, it is apparently his position that by having failed to include the name of the minor child in the information, the information is somehow defective.

We believe McGee is in error. We have repeatedly held that where an indictment or information sets forth the crime in the language of the statute or the equivalent thereof, it is sufficient. See *Buckley v. State*, 131 Neb. 752, 269 N.W. 892 (1936). See, also, *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984); *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). There cannot be any serious argument made here that the information did not charge McGee substantially in the language of the statute.

Additionally, we have held that for an information to be sufficient it must "inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense." *State v. Dreifurst*, 204 Neb. 378, 381, 282 N.W.2d 51, 53 (1979). No serious argument can be made that the complaint here failed to sufficiently advise McGee of the charge made against him or to render a conviction a bar to any later prosecution for the same offense.

To begin with, the information specifically charged him with failing to support his "minor child." No contention is made that there is more than one child. Therefore, to suggest that by having failed to name the single child the complaint is defective is wholly without merit. Had McGee been unhappy or dissatisfied with the specific language of the information, he was obligated to seek a more specific statement. See, *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959); *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985). We noted in *State v. Abraham*, 189 Neb. 728, 730, 205 N.W.2d 342, 344 (1973):

> [I]f the information . . . was not sufficiently specific to

> satisfy the [defendant, he was] afforded a remedy by motion to quash. It must be presumed that [he was] aware of the nature and cause of the charges against [him] since [he was] willing to proceed . . . on the general issue without further clarification of the charges being requested.

It is clear beyond question that McGee was fully advised as to which child it was he was charged with nonsupport, it being his only child of this marriage. Moreover, the information identified the child as that child named in the decree dated March 17, 1978.

In addition, there is no question but that both the information and the evidence are sufficient to bar any further prosecution for the same offense. If, for some reason, McGee was again charged with the same offense for the same child, all he need do is plead this particular case and the evidence presented to the court in support of the conviction and it would constitute a bar to any subsequent action.

As we noted in *State v. Piskorski, supra* at 546, 357 N.W.2d at 209:

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

> information or indictment, as well as constitutional requirements.

We went on to say at 548, 357 N.W.2d at 210-11:

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

McGee's claim, therefore, that the information was not sufficient so as to bar a subsequent action because the child's name was not included is simply without any basis at all. There is no question but that McGee can easily adduce evidence to establish that he had but one child for whom he was ordered by the decree of March 17, 1978, to pay child support.

As to McGee's second assignment of error, we are unable to comprehend what his claim is. Neb. Const. art. I, § 3, provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Article I, § 2, prohibits slavery or involuntary servitude other than for punishment of crime. Article I, § 11, requires that in all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation and to have a copy thereof, to meet the witnesses against him face to face, to have process to compel the attendance of witnesses in his behalf, and to a speedy public trial by impartial jury of the county or district in which the offense is alleged to have been committed. Article I, § 12, provides that no person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense. In view of the fact that McGee has cited these sections to us but has not favored us with argument as to how they have any application to his case, and in view of the fact that the record does not disclose any such violations, we must reject out of hand McGee's second assignment of error.

The judgment and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK D. FLETCHER, APPELLANT.

378 N.W.2d 859

Filed December 27, 1985. No. 85-282.

1. **Criminal Law: Jury Instructions: Witnesses: Case Disapproved.** The instruction previously authorized by *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), requiring a jury to consider an undercover agent's testimony with care greater than that given a disinterested witness' testimony, is disapproved and has been supplanted by NJI 1.41 concerning a witness' credibility and weight to be given a witness' testimony.
2. **Trial: Appeal and Error.** Only issues properly presented to and passed upon by the district court may be raised on appeal to the Supreme 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.
3. **Criminal Law: Indictments and Informations.** The general rule which is followed by the Supreme Court is that where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count.

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

Richard Scott, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

SHANAHAN, J.

Jack D. Fletcher appeals his conviction and sentence in the district court for Red Willow County regarding delivery of an exceptionally hazardous drug (amobarbital). We affirm.

Fletcher, age 65 and a resident of Indianola, was self-employed in the business of repairing and cleaning septic tanks. For various health problems, Fletcher received a variety of prescription drugs, including Lilly's F14, a yellow capsule containing ephedrine and Amytal. A two-count information charged Fletcher with delivery of an exceptionally hazardous drug (amobarbital) to Olive Trobaugh on December 11, 1983,

and possession of that drug on December 30, 1983, with intent to deliver such controlled substance, all contrary to Neb. Rev. Stat. § 28-416(2)(a) (Cum. Supp. 1984).

On December 4, 1983, Olive Trobaugh, incarcerated in the Red Willow County jail and awaiting arraignment on charges of auto theft and assault on a police officer, requested a meeting with the Red Willow County attorney and police. During that conversation, Trobaugh stated she knew some local people trafficking in drugs and offered to serve as an undercover agent in exchange for reduction or dismissal of charges pending against her. Although the county attorney made no promise regarding the charges, Trobaugh was released from jail and contacted Fletcher to purchase some "yellows" from him.

Before going to Fletcher's house on December 11, Trobaugh met with law enforcement officers, who placed a microphone on Trobaugh so that conversations with her might be electronically monitored. Trobaugh testified that during her visit at Fletcher's residence, she had a conversation with Fletcher, who asked "if I had the money, and I asked him if he had the stuff." Although the initially agreed transaction was payment of $120 for 130 "yellows," Trobaugh had only $100 and asked Fletcher to give her a "break because it was around the holidays." Fletcher responded that he would "double them ["yellows"] beings it's Christmas," accepted $100 from Trobaugh, and handed her 260 yellow capsules in a brown paper sack. Later, Trobaugh delivered the paper sack and the yellow capsules to the police. The State did not offer the tape recording of the conversation between Trobaugh and Fletcher. No police officer testified during Fletcher's trial.

The State called pharmacists and a physician to establish the ingredients or composition of the yellow capsules which Trobaugh had obtained from Fletcher. The "yellows" were identified as capsules of Lilly's F14 containing 25 milligrams of ephedrine sulfate and 50 milligrams of Amytal—a trade name for amobarbital. Ephedrine is not a narcotic but is a stimulant used to dilate bronchial tubes to make the exchange of air easier in one suffering from an "acute flareup of asthma." To alleviate fear of an asthmatic unable to breathe during a bronchial spasm and somewhat counteract anxiety as an effect of the ephedrine,

Amytal, a "hypnotic," was used as a sedative. It was virtually impossible for a layman to separate the ephedrine from the Amytal (amobarbital) found in Lilly's F14. Amobarbital is a Schedule II controlled substance and an exceptionally hazardous drug, according to Nebraska statutes. See Neb. Rev. Stat. §§ 28-405(d)(1) [Schedule II] and 28-401(35)(d) (Cum. Supp. 1984).

Fletcher requested the following instruction: "In weighing the testimony of persons employed to find evidence against the accused, you should exercise greater care than in the case of a witness who is wholly disinterested." The court rejected Fletcher's requested instruction and, instead, instructed the jury as follows:

> You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider:
>
> 1. Their interest in the result of the suit, if any;
>
> 2. Their conduct and demeanor while testifying;
>
> 3. Their apparent fairness or bias or relationship to the parties, if any such appears;
>
> 4. Their opportunity for seeing or knowing the things about which they have testified;
>
> 5. Their ability to remember and relate accurately the occurrences referred to in their evidence;
>
> 6. The extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses;
>
> 7. The reasonableness or unreasonableness of their statements;
>
> 8. All other evidence, facts, and circumstances proved tending to corroborate or contradict such witnesses.

Fletcher was acquitted of criminally possessing amobarbital on December 30 but was convicted of criminally delivering that drug to Trobaugh on December 11 in violation of § 28-416(1)(a) and (2)(a). After giving Fletcher credit for 102 days—the aggregate of the time confined in the county jail awaiting trial and custodial time during evaluation by the Department of Correctional Services—and after a presentence investigation and report, the court sentenced Fletcher to imprisonment for a

term of 1 year in the Nebraska Penal and Correctional Complex.

Fletcher contends the district court committed five errors, namely: (1) Refusal of Fletcher's tendered instruction regarding Trobaugh's credibility and weight to be given to her testimony as an informant; (2) Admitting into evidence the tape recording of the conversation between Trobaugh and Fletcher, evidence obtained in violation of Fletcher's constitutional guarantee against an unreasonable search; (3) Insufficient evidence to sustain the conviction; (4) Inconsistent verdicts; and (5) An excessive sentence.

In claiming that his tendered instruction should have been given regarding credibility of an undercover agent and the weight to be accorded an undercover agent's testimony, Fletcher relies on a statement found in *State v. Goff*, 174 Neb. 548, 559, 118 N.W.2d 625, 632 (1962): " 'Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested.' " (Citing *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955).) In Fletcher's case, however, the court gave an instruction in the language of NJI 1.41 as far as applicable to Trobaugh's credibility and the weight to be given by the jury to her testimony. We note that *State v. Goff, supra*, antedates adoption of Nebraska Jury Instructions [NJI] (West 1969). With the background about Trobaugh's involvement in obtaining evidence against Fletcher, the instruction given by the court (NJI 1.41) adequately informed the jury concerning factors affecting Trobaugh's credibility and weight to be given to her testimony as an undercover agent. NJI 1.41 has supplanted the instruction previously authorized in *State v. Goff, supra*, which is disapproved. Under the circumstances there was no error by the district court in refusing Fletcher's requested instruction.

Next, Fletcher complains that the tape recording of Trobaugh's conversation with him was improperly admitted into evidence. Although the tape recording was marked as an exhibit, the bill of exceptions does not indicate or reflect that

such tape recording was offered by the State and received into evidence. Furthermore, regarding Trobaugh's testimony, Fletcher's counsel asserted that Trobaugh was on probation (a situation not substantiated by the record) and directed the court's attention to Neb. Rev. Stat. § 29-2262.01 (Reissue 1979), which provides:

> A person placed on probation by a court of the State of Nebraska or an inmate of any jail or correctional or penal facility who has been released on parole shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision.

In further remarks to the court, Fletcher's counsel stated: "This talk about the exclusionary rule, it's nice to listen to, but that's not what we're talking about. . . . We are not alleging anything under the Fourth or Fifth Amendment. What we are alleging is that the statute says she [Trobaugh] is incompetent to testify." Thus, at trial Fletcher contended that Trobaugh, on probation while acting as an undercover agent for police, was statutorily incompetent to be a witness against Fletcher. See Rule 601 (general rule of competency) of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-601 (Reissue 1979). Consequently, no question about Fletcher's constitutional guarantee against an unreasonable search was raised during trial regarding the tape-recorded conversation.

> [O]nly 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.

Haeffner v. State, 220 Neb. 560, 564, 371 N.W.2d 658, 661 (1985). Fletcher does not assign error to the district court's ruling that Trobaugh was a competent witness in the prosecution of Fletcher. Rather, for the first time on appeal Fletcher raises a question about the constitutional permissibility of the tape recording. Because an issue concerning constitutionally permissible evidence was not raised

during Fletcher's trial, we must disregard Fletcher's alleged error regarding the tape recording.

Fletcher's argument concerning insufficiency of evidence to sustain his conviction is based on the quantity of Amytal contained in the "yellows" delivered to Trobaugh, that is, the small quantity of amobarbital in each capsule precludes abuse of the drug. Section 28-405(d) [Schedule II] provides in part:

> *Any* material, *compound*, *mixture*, or *preparation which contains any quantity* of the following substances having a potential for abuse associated with a depressant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designations: (1) Amobarbital . . . .

(Emphasis supplied.)

Fletcher's argument is a reproduction of the argument presented in *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976), where the defendant argued that the State must prove that the quantity of the controlled substance had a potential for abuse. In *Jennings* this court stated: "[I]t is not necessary in a prosecution for possession of amphetamines for the State to prove that the defendant possessed an amount of the substances sufficient to create a potential for abuse associated with a stimulant effect on the central nervous system." *Id.* at 438, 238 N.W.2d at 480. Further, after recognizing the Legislature's prerogative regarding a prohibition based on quantity or quality of a controlled substance, this court stated in *Jennings*: "The phrase [substances having a potential for abuse] serves as an indication of what kind of substances the Legislature may add to Schedule II(c) in the future." *Id.* at 440, 238 N.W.2d at 481. We find the quality of a controlled substance, amobarbital, rather than the quantity of the substance, is determinative in the prosecution of the criminal charge against Fletcher, as was the situation in *Jennings*. Therefore, there was sufficient evidence that the substance delivered by Fletcher in violation of law was a hazardous drug.

In his next to the last assignment of error, Fletcher claims that acquittal on the charge of possessing a hazardous drug on December 30 is inconsistent with his conviction for delivering a hazardous drug to Trobaugh on December 11.

> The general rule which is followed by this court is that where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count.

State v. Eagle Deer, 205 Neb. 249, 251, 286 N.W.2d 770, 771 (1980).

The gravamen in each count of the information was distinct. The first count pertained to criminal delivery of a controlled substance on December 11, while the second count concerned prohibited criminal possession of a controlled substance on December 30. Acquittal regarding the offense alleged to have occurred on December 30 is not inconsistent with conviction of the offense alleged on December 11. Therefore, Fletcher's penultimate assignment of error is without merit.

In his final assignment of error Fletcher complains about the sentence imposed upon conviction, imprisonment for a term of 1 year in the Nebraska Penal and Correctional Complex. Before imposing sentence the district court considered Fletcher's age, health, absence of a prior criminal record, and information from Fletcher's friends and neighbors. The district court commented that the sentence imposed should not be one which would "diminish the consequences of the crime, will not deprecate the feeling in the community, will provide a proper punishment with a fair treatment" and, therefore, imposed a sentence of imprisonment for a term of 1 year. Granting probation, as opposed to imposing a sentence of incarceration, is a matter left to the sound discretion of the trial court, and, absent a showing of abuse, the trial court's denial of probation will not be disturbed on appeal. *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982). Criminal delivery of an exceptionally hazardous drug, here, amobarbital, is a Class II felony punishable by a term of imprisonment of 1 year to 50 years. See § 28-416(2)(a) and Neb. Rev. Stat. § 28-105(1) (Reissue 1979). Under the circumstances we find no abuse of discretion by the district court in the sentence imposed upon Fletcher.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

LYDIA HAUG, APPELLANT, V. M & N'S AUTO COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE.

378 N.W.2d 864

Filed January 3, 1986. No. 84-694.

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

Lydia Haug, pro se.

James J. Stumpf of Harris, Feldman Law Offices, for appellee.

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

PER CURIAM.

Appellant, Lydia Haug, brought an action against appellee, M & N's Auto Company, Inc., a Nebraska corporation, seeking, among other things, to recover possession of her 1963 Ford Falcon Sprint convertible automobile and to recover damages for its loss of use and diminution of its value. M & N counterclaimed, seeking a judgment for its charges or a lien on the automobile and ongoing storage charges.

Haug had received an estimate of the cost of repairing rust damage on her 1963 Ford Falcon Sprint convertible automobile from M & N. Before such repairs were undertaken the automobile was involved in a collision. Haug then asked M & N to repair both the rust and collision damage. Although M & N did so, disputes arose between the parties concerning a variety of matters. As a consequence, Haug refused to pay M & N's charges, and M & N retained possession of the automobile.

On the basis of conflicting evidence the trial court entered judgment that M & N have and recover from Haug the sum of $1,932, to be paid by September 20, 1984; that M & N retain possession of the automobile until payment; and that if payment was not made as aforesaid, M & N have a lien pursuant to the provisions of Neb. Rev. Stat. § 52-201 (Reissue 1984).

Our review of the record reveals each of Haug's assignments of error to be without merit. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY L. PARKER, APPELLANT.

379 N.W.2d 259

Filed January 3, 1986. No. 85-379.

1. **Criminal Law: Juries: Verdicts.** Where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act and need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in the violation.
2. **Criminal Law: Jury Instructions: Juries: Verdicts.** Where a single crime may be committed under a number of different theories, the defendant is not entitled to an instruction that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

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

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

KRIVOSHA, C.J.

This appeal presents to the court a case of first impression and concerns the question as to whether an individual charged with violating Neb. Rev. Stat. § 39-669.07 (Reissue 1984) (operating a motor vehicle while under the influence) is entitled to have the jury instructed that before the defendant may be found guilty on one of two possible theories, the jury must unanimously agree on at least one of the theories set out in the statute. The trial court refused to give such an instruction, and, on appeal, the district court for Lancaster County, Nebraska, approved the trial court's refusal. We believe that both courts were correct, and we therefore affirm the conviction and sentence.

The appellant, Jerry L. Parker, was arraigned in the municipal court of the city of Lincoln, Nebraska, for driving

while intoxicated in violation of § 39-669.07. Following Parker's demand for a jury trial, trial was had and a six-person jury returned a general verdict of guilty. Parker was sentenced to 7 days in jail, assessed a $200 fine, and his driver's license was suspended for a period of 6 months.

The complaint charged, in the language of the statute, that on August 26, 1984, Parker operated or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor or of any drug or while he had .10 percent or more by weight of alcohol in his body fluid. Following the presentation of evidence to the jury, Parker requested the municipal court to instruct the jury as follows:

> To find the defendant guilty you must reach a unanimous verdict. In this case, the state asserts two theories of guilt. You may not find the defendant guilty under either theory unless you unanimously agree that the state has proven all of the material elements related to that theory. If you have a reasonable doubt about either theory, as to that theory you must find the defendant not guilty.

The municipal court refused to give the tendered instruction.

Parker has assigned but a single error, to wit, that "[t]he trial court erred in failing to instruct the jury on the defendant's right to a unanimous verdict." By that assignment we take it to mean that the trial court erred in failing to give to the jury defendant's proposed instruction. No issue is raised about the sufficiency of the evidence, and for that reason we need not discuss it. Suffice it to say that there was more than sufficient evidence under either theory, if believed by the jury, to sustain the conviction.

Parker's claim of error is based upon his argument that before one may be convicted of violating a state statute, the jury must reach a unanimous verdict. With that we have no quarrel. See, *Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979); *United States v. Smedes*, 760 F.2d 109 (6th Cir. 1985). The difficulty with Parker's argument is that it fails to make a distinction between the offense and the various theories upon which proof of the offense may be established. In *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974), we analyzed in detail whether violation of what is now § 39-669.07 was but a

single offense or whether, in fact, there were three separate offenses, to wit, (1) operating a motor vehicle while under the influence of alcohol, (2) operating a motor vehicle while under the influence of drugs, or (3) operating a motor vehicle with more than .10 percent of alcohol in the blood. We concluded, after careful analysis, that what is now § 39-669.07 and what was formerly Neb. Rev. Stat. § 39-727 (Cum. Supp. 1972) define but one offense. We then concluded that this single unlawful act can be the result of three different conditions. We concluded by saying in *Weidner, supra* at 168, 219 N.W.2d at 746: "It matters not that the facts evidencing each of the three conditions may well be different. Thus, we conclude that any conviction under section [39-669.07] is a conviction for the same offense." We have consistently followed that reasoning in each and every case raising that same issue in this court. See, *State v. Wenzel*, 215 Neb. 395, 338 N.W.2d 772 (1983); *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982); *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977), *overruled on other grounds, State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980).

Other states with nearly identical statutes have reached the same conclusion. In *State v. Bratthauer*, 354 N.W.2d 774, 776 (Iowa 1984), the Iowa Supreme Court, presented with the identical question involving a nearly identical statute, said: "Like premeditated murder and felony murder, each theory will independently support a conviction, but the theories will not together support more than one conviction. Accordingly, we find that the statute defines a single offense committable in alternative ways rather than multiple offenses." See, also, *State v. Franco*, 96 Wash. 2d 816, 639 P.2d 1320 (1982).

Where, as here, a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act and need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in the violation.

Appellant has cited us the case of *People v. Parker*, 159 Cal. App. 3d 903, 205 Cal. Rptr. 767 (1984) (apparently no relation), in support of his position. A reading of the California decision of *People v. Parker*, however, only points out the reason why

appellant's claim of error is without merit. In the case of *People v. Parker*, the defendant was charged with several crimes, including grand theft. Following trial, a jury convicted the defendant of grand theft. As in the present case, the California Parker also argued that the trial court was required to give the jury an instruction similar to the type requested by Parker in the instant case. In rejecting that argument the California Court of Appeal said at 205 Cal. Rptr. at 773:

> The evidence in a theft prosecution often supports conviction under more than one form of theft. . . . In such cases, the jury is not required to agree on the particular form of theft that was committed. [Citations omitted.] Once the jury agrees the defendant has committed grand theft, disagreements over the precise point when the defendant developed a fraudulent intent are unimportant. When presented with a similar situation, the court in *People v. Broes* (1956) 138 Cal.App.2d 843, 292 P.2d 556, held that "[a]bsent a finding by the jury that appellant acted in good faith and with honest intentions, all the inferences as to his motives would support only a conclusion of guilt of grand theft and it was of no consequence that some of the jurors might believe that appellant intended to cheat the complainants in the beginning and others might believe that he decided to steal the money after he got his hands on it. The verdict, of course, is a rejection of the claim that appellant's conduct was free from fraudulent intentions."

Similarly, in the instant case it does not matter whether some of the jurors believed that Parker was operating a motor vehicle while impaired by alcohol and some believed that Parker operated a motor vehicle when he had .10 percent or more by weight of alcohol in his body fluid. What the jury had to unanimously determine was that he was operating a motor vehicle while under the influence of alcohol. Where a single crime may be committed under a number of different theories, the defendant is not entitled to an instruction that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty. The judgment of the district court

affirming the action of the municipal court of the city of Lincoln is in all respects affirmed.

AFFIRMED.

CLEO D. EARL, APPELLANT AND CROSS-APPELLEE, V. MAX A. EARL, APPELLEE AND CROSS-APPELLANT.

379 N.W.2d 261

Filed January 10, 1986. No. 84-598.

1. **Property Division: Attorney Fees: Appeal and Error.** The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
2. **Alimony.** It is an abuse of discretion to award alimony in excess of the earning capacity of the paying party.

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

E. Scott Dosek, for appellant.

Russell S. Daub of Daub, Swanson & Stickman, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and WOLF, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Cleo D. Earl, appellant and cross-appellee, filed a petition for dissolution of her marriage to Max A. Earl, appellee and cross-appellant. Following trial on April 27, 1984, a decree of dissolution was entered on June 5, 1984. The decree included the following property distribution, with the values determined by the court:

Petitioner/Wife	
Family Residence	$ 70,000
Household Goods	15,000
Impala Automobile	1,000
Savings Account	19,000
IRA	4,600
Property Settlement	75,000
Total	$184,600

Respondent/Husband	
Mr. Clutch	$ 75,000
Keystone Insurance	4,000
Accounts Receivable to Keystone	20,000
Life Insurance	5,000
1977 Piper Airplane	14,000
IRA	4,600
Lien Companies	125,000
	$247,600
Less Debts	- 34,000
Total	$213,600

The decree further ordered respondent to "pay for the support and maintenance of the Petitioner the sum of $1,500.00 per month for a period of 121 months, commencing on the first day of June, 1984 . . .; that said payments for support and maintenance shall not be terminable upon the death or remarriage of Petitioner . . . ." The respondent was also ordered to obtain and maintain life insurance in a face amount sufficient to secure payment of the property settlement and alimony awards.

Both parties filed motions for new trial and both were overruled. Both parties timely appealed to this court. Appellant, Cleo, assigns as errors the division of property in that the Lien companies were valued at only $125,000, in that only $75,000 was awarded to her, and in that it was error not to award the Lien companies to Cleo. Appellee, Max, assigns as error the excessiveness of the alimony award.

The parties were married May 24, 1949. Neither party brought substantial assets to the marriage. Seven children were born to the marriage, all of whom were of legal age at the time of the dissolution proceedings. Cleo was 56 and Max was 58 at the time of the trial.

Cleo was employed for the first 8 months after their marriage. Following that job, Cleo took on the responsibilities of caring for the parties' children. Cleo had attained sophomore status in college at the time of the trial, but had no declared major and no job prospects. Although never

employed by the two family businesses, the Lien companies, Cleo held 50 percent of the stock in the two businesses.

The parties purchased a house in 1955, and the family lived there from that time. Cleo remained in the home at the time of trial. While there is no encumbrance on the house, it is in need of some repairs. The home was titled in the name of Cleo only at the time of the proceedings. When the house was purchased, it apparently was placed in both Max's and Cleo's names. At a later date, when a car dealership operated by Max filed bankruptcy, the house was placed in Cleo's name alone to protect it during the bankruptcy proceedings. Cleo placed a value of approximately $60,000 on the house. Her expert witness, a real estate appraiser and broker, appraised the value of the house and land at $64,800. Max placed a value of $80,000 on the home.

Cleo inherited $17,500 in January of 1976. She invested the money by loaning it to the parties' children, at interest. At the time of trial Cleo testified that she controlled various accounts in the amount of $56,500, and that amount consisted of both marital and nonmarital property: $17,000 in marital property and $39,500 nonmarital property resulting from the $17,500 Cleo inherited and the interest thereon. During the marriage, Max inherited $5,064.96.

Both parties have IRAs, apparently in equal amounts of approximately $4,600. There was disagreement in the testimony regarding the value of the household goods. As well, there were differing opinions regarding the value of the family businesses known as the Lien companies. A witness hired by Cleo valued the businesses at $288,953. Max valued the companies at $150,000 combined.

Max received a high school education. Max had a $5,000 cash value in life insurance policies. Out of marital assets, Max invested $75,743.84 in a business known as Mr. Clutch. This business was operated with his brother. Max's testimony indicates that the status of this investment is uncertain. Max testified that he made a "risk" investment in Mr. Clutch International (Mr. Clutch) by giving his brother $75,743.84. The investment had not yielded any return to Max at the time of the proceedings. Mr. Clutch is an automobile transmission

repair business. Max testified that the business venture was seeking "to be the holding company to receive royalties from [the] sale of franchies [sic] for Mr. Clutch." The money invested in Mr. Clutch was from marital assets, except for $14,000 which Max borrowed.

Max operated a car dealership until it went through bankruptcy. Max is also a licensed insurance agent, active in Keystone Insurance. Keystone was started by Max when he split with another insurance agency in which he was a partner. The income has recently decreased. Max testified about the business and its future that Keystone "will more than likely have no value, because the insurance company will not continue with the minimal amount of premium that I have, they can't afford it." Keystone, a proprietorship, loaned money to the Lien companies.

Lien Chemical Company of Omaha, Inc. (Lien Chemical), was started in 1965 when Max assumed a $14,000 debt, but Max did not begin to actively operate the business until 1969. Lien Termite and Pest Control, Inc. (Lien Pest Control), was begun by Max in approximately 1974. Only the chemical company is a franchise. The companies are separate corporations with separate books, but they file a combined tax return. Lien Chemical is a restroom sanitation service, catering to commercial establishments. Lien Pest Control checks for termites and other pests in residences and commercial businesses. Three of the parties' children are full-time employees of the businesses. While Lien Chemical has recently suffered some economic difficulties and had to pull out of one location and drastically cut back in three others, Lien Pest Control has experienced an increase, so that there has been some overall consistency.

While Max obtains some income from Keystone Insurance, the primary source of income is from the Lien companies. The record indicates that Max's income from the Lien companies never exceeded approximately $35,000 and ran anywhere from approximately $15,000 to around $35,000 in the most recent years.

We held in *Erstrom v. Erstrom*, 220 Neb. 303, 369 N.W.2d 637 (1985), 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. See, also, *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). Upon a de novo review of the record in this case, we find no abuse of discretion in the division of property.

Appellant, Cleo, asserts that it was error not to award her the two family businesses known as the Lien companies. The record clearly shows that the trial judge did not err in his determination in this matter. The record indicates that Cleo had no knowledge of the businesses and little or no qualification to manage them, while Max managed them in virtually every detail and had the practical qualifications to manage them.

Cleo also assigns as error the court's valuation of the Lien companies at $125,000. We cannot say that the trial judge abused his discretion when considering all of the relevant evidence regarding this valuation. The court's valuation is supported by the evidence.

Finally, Cleo assigns error in awarding her $75,000 in property settlement. This clearly is not an abuse of discretion when one views the division of property as a whole. As we held in *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984), awards may properly vary between one-third and one-half. The award in this case falls within those guidelines. We therefore affirm the division of property ordered by the trial court.

Appellee, Max, filed a cross-appeal challenging the award of alimony as excessive and unreasonable. We agree and order that it be reduced to $750 per month for 121 months, terminable on the death of Cleo. Our review of an alimony award is also de novo on the record. *Erstrom v. Erstrom, supra*; *Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985).

In *Gleason v. Gleason, supra*, we stated that it was an abuse of discretion for the trial court to award alimony in excess of the earning capacity of the paying party. In the case at bar the trial judge has awarded nonterminable alimony of $1,500 per month for 121 months. The facts indicate that Max has not made over $35,000 per year. The decree also orders that the $75,000

property settlement is payable in equal amounts each month for 10 years ($625 per month) at 9 percent interest per annum. The amount Max would be required to pay under the decree would be $2,125 per month, excluding interest and excluding the costs of life insurance that he is required to carry to cover the property settlement and alimony. Such a payment would be beyond Max's capabilities. Even assuming an overstatement of Max's monthly living expenses and an understatement of income, meeting a $2,125 payment per month would be beyond Max's earning capacity as shown in the record. We therefore reduce the amount of alimony awarded to $750 per month.

Respondent in his cross-appeal assigned as error "the amount of alimony" awarded and did not challenge the trial court's order requiring defendant to "maintain life insurance in a face amount sufficient to secure payment of the property settlement and alimony awards" nor the length and conditions of the alimony payments. Accordingly, those portions of the court's order are affirmed.

Costs are taxed to appellant.

AFFIRMED AS MODIFIED.

DONALD R. WIETJES, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

379 N.W.2d 734

Filed January 17, 1986. Nos. 84-489, 84-569.

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

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

A. Eugene Crump, Deputy Attorney General, and Jill Gradwohl, for appellee.

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

PER CURIAM.

Donald R. Wietjes appeals a judgment of the district court for Buffalo County affirming an order of the Department of Motor Vehicles revoking Wietjes' driver's license for failure to comply with the provisions of the Nebraska implied consent law. See Neb. Rev. Stat. § 39-669.08 (Reissue 1984).

On the evening of August 14, 1983, Officer Treena Christner was called to the intersection of 39th Street and Avenue N in Kearney to investigate a possible hit-and-run accident. As she arrived at the intersection, Christner observed a small blue automobile parked north of the intersection and ascertained that the vehicle had been involved in an accident. Christner spoke with the driver of the blue automobile, who, when asked "which direction the other vehicle went," directed Christner's attention to Wietjes' brown pickup which was then traveling west on 39th Street. Christner, after observing Wietjes pull the pickup into an alley abutting 39th Street, drove her police cruiser into the alley, approached Wietjes' truck, and asked Wietjes to produce his driver's license. While Wietjes was searching for his license, Christner detected the smell of "alcohol coming from his person" and observed that his "eyes were very bloodshot." Suspecting that Wietjes might be intoxicated, Christner conducted two field sobriety tests on Wietjes, who displayed he was unable to touch his finger to his nose and could not touch his heel to his toe as he "unsteadily" attempted to walk a straight line.

Christner arrested Wietjes for driving while under the influence of alcohol and transported him to the Buffalo County detention center. At the detention facility Christner read Wietjes an "Implied Consent Advisement" form, which Wietjes eventually signed. When asked to take a breath test, however, Wietjes refused and stated: "I didn't do anything wrong so I don't have to take this test." Wietjes was cited for his refusal to take the test.

On October 27, 1983, the Department of Motor Vehicles revoked Wietjes' motor vehicle operator's license for Wietjes'

unreasonable refusal to consent to a chemical test. The department's order of revocation was subsequently affirmed by the district court for Buffalo County.

In his appeal to this court, Wietjes claims the following errors: Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is an illegal delegation of a quasi-judicial duty by the director of the Department of Motor Vehicles to the deputy director of that department; § 39-669.16 is unconstitutional due to vagueness and ambiguity (*reasonable* in reference to a motorist's refusal is not defined by statute or regulation of the Department of Motor Vehicles) and on account of delegation of legislative power to the executive branch to define *reasonable*; and absence of *Miranda* warnings before a request to submit to a chemical test prevents revocation by the Department of Motor Vehicles for refusal to submit to such test. All the preceding assignments of error are identical to the claims raised, resolved, and rejected in *Fulmer v. Jensen, post* p. 582, 379 N.W.2d 736 (1986). We see no need in further elaborating on the principles enunciated in *Fulmer*.

Wietjes also argues, as an issue of fact, that Christner did not have reasonable grounds to believe that Wietjes was operating his truck while under the influence of alcohol.

Under § 39-669.08(2) an officer cannot validly request an individual to submit to a chemical test unless such officer has "reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor." However, on appeal to the district court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish that the arresting officer did not have reasonable grounds to request a chemical test. See *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975). In determining whether the licensee has met such a burden, this court, on appeal, reviews the findings of the district court de novo. *Mackey v. Director of Department of Motor Vehicles, supra*.

Officer Christner noted that Wietjes displayed two of the typical signs of intoxication—Wietjes' eyes were bloodshot and

his body reeked of alcoholic beverage. Wietjes had difficulty walking and failed two simple field sobriety tests. Wietjes, moreover, offers no legitimate and plausible explanation for his failure to properly perform the tests. Reviewing the record de novo, we conclude Wietjes has not satisfied his burden of establishing that Christner had no reasonable grounds to believe Wietjes was driving a motor vehicle while under the influence of alcoholic liquor.

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

AFFIRMED.

ROCKE D. FULMER, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

379 N.W.2d 736

Filed January 17, 1986. Nos. 84-490, 84-544.

1. **Administrative Law: Statutes.** The authority to delegate discretionary and quasi-judicial powers to agency subordinates is implied where the powers bestowed upon an agency head are impossible of personal execution.
2. **Constitutional Law: Statutes.** The constitutional requirement of reasonable certainty in statutory language is satisfied by the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.
3. **Implied Consent Law: Blood, Breath, and Urine Tests: Words and Phrases.** The term "reasonable," as applied to refusals to submit to a chemical test under the implied consent law, is an ordinary term which finds adequate interpretation in common usage and understanding.
4. **Constitutional Law: Legislature: Statutes.** While the Legislature cannot delegate its lawmaking powers, it can make laws which become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.
5. **Implied Consent Law: Miranda Rights: Blood, Breath, and Urine Tests.** There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law.
6. **Implied Consent Law: Constitutional Law: Evidence: Self-Incrimination.** Evidence obtained in the implied consent context is not testimonial or communicative in nature and does not fall within the privilege against self-incrimination.

7. **Implied Consent Law: Blood, Breath, and Urine Tests: Right to Counsel.** Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
8. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.
9. **Implied Consent Law: Blood, Breath, and Urine Tests: Arrests: Probable Cause.** Reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test.

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

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

A. Eugene Crump, Deputy Attorney General, and Jill Gradwohl, for appellee.

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

PER CURIAM.

The plaintiff, Rocke D. Fulmer, has appealed from the order of the district court affirming the order of the director of the Department of Motor Vehicles suspending his motor vehicle operator's license under the implied consent law.

The record shows that on September 1, 1983, Fulmer was approached by Gloria Martin, a Kearney, Nebraska, police officer who had just received a radio dispatch reporting a theft at the Holiday Inn. The dispatch identified a white El Camino-type vehicle as having been involved in the theft and that it had last been seen traveling northbound on Central Avenue. Shortly after receiving the radio transmission, Officer Martin observed the Fulmer vehicle, which matched the description and license plate number given in the radio dispatch. The Fulmer car was then located approximately 50 feet from the public roadway on private property with its headlights on.

As Officer Martin approached, she observed Fulmer and a woman in the vehicle. Fulmer, after producing his license and registration, was asked to return to the Holiday Inn to clear up the theft matter. Officer Martin testified that at this time she

was not aware that Fulmer might be under the influence of alcohol. She attributed his dullness and silence to the pending police investigation.

Fulmer agreed to return to the motel after being advised that his vehicle was suspected to have been involved in the theft. As Officer Martin followed Fulmer, she observed that he was driving very slowly and appeared not to know where he was going. She stopped him after he had passed both access roads to the motel. Upon approaching the vehicle, Officer Martin shined her flashlight in the window and observed a six-pack of beer on the floor. She also observed Fulmer's eyes to be bloodshot and watery, and noticed a strong odor of alcohol on his breath. When asked what the problem was, Fulmer responded that he was not from the Kearney area, although his driver's license indicated that he was. He was then asked to step from his vehicle, which he did with difficulty. After performing poorly on three field sobriety tests, Fulmer was arrested for driving while intoxicated and transported to a detention center.

At the center Fulmer was read an implied consent advisement postarrest form. When he refused to submit to a test after signing the form, he was subsequently cited for the refusal.

A show cause hearing was held on October 20, 1983, before a hearing officer for the Department of Motor Vehicles. An order revoking Fulmer's motor vehicle operator's license for unreasonably refusing to consent to a body fluid test was entered on October 27, 1983.

On appeal the district court rejected Fulmer's claims that Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is unconstitutional in placing the burden upon the appellant to prove that a refusal was reasonable and because there are no established guidelines as to what constitutes a reasonable refusal. The court then sustained the State's motion to dismiss the appeal, holding that Fulmer had not sustained his burden of showing that his refusal was reasonable. Fulmer's motion for new trial was overruled.

Fulmer's first claim on appeal is that the district court erred in refusing to hold that the appellee, Holly Jensen, had illegally delegated her quasi-judicial functions as the director of the Department of Motor Vehicles by allowing the deputy director to determine whether Fulmer's license should be revoked

pursuant to § 39-669.16. The appellant claims that Jensen may not delegate the power vested in her by § 39-669.16, because the power is quasi-judicial in nature and delegated solely to her.

The record shows that the show cause implied consent hearing was had before a hearing officer as provided by statute. The hearing officer then summarized the testimony from a tape recording and delivered a synopsis to the deputy director's secretary. The appellee, Jensen, testified that the decision whether to revoke Fulmer's license was delegated to the deputy director. However, the October 27, 1983, order revoking Fulmer's license, and the certificate of service attached thereto, both bear Director Jensen's signature.

Neb. Rev. Stat. § 60-1503 (Reissue 1984) specifically provides, "The Director of Motor Vehicles shall have authority to employ such personnel, including legal, and technical advisors as may be necessary to carry out the duties of his office." Director Jensen testified that the Department of Motor Vehicles reviews up to 1,600 implied consent cases a year, making it impossible for her to personally review every case.

The authority to delegate discretionary and quasi-judicial powers to agency subordinates is implied where the powers bestowed upon an agency head "are impossible of personal execution." 2 Am. Jur. 2d *Administrative Law* § 223 at 53 (1962). See, also, *Brown Group, Inc. v. Admin. Hearing Com'n*, 649 S.W.2d 874 (Mo. 1983); *Kiernan v. Bronstein*, 73 Misc. 2d 629, 342 N.Y.S.2d 977 (1973).

As stated in 2 Am. Jur. 2d, *supra* § 224 at 54-55: "[T]he law does not preclude practicable administrative procedure in obtaining the aid of assistants in the department, apparently to any extent so long as the agency does not abdicate its power and responsibility and preserves for itself the right to make the final decision." The authority of the director to delegate her implied consent revocation duties is fairly implied by § 60-1503. We conclude that the appellee director did not unlawfully delegate her responsibilities under § 39-669.16.

Fulmer next maintains that § 39-669.16 is unconstitutionally vague and ambiguous because a reasonable refusal is not adequately defined in the statute or in department regulations.

The constitutional requirement of reasonable certainty in

statutory language "is satisfied by the use of ordinary terms [to express ideas] which find adequate interpretation in common usage and understanding." *Roth v. School Dist. of Scottsbluff*, 213 Neb. 545, 548, 330 N.W.2d 488, 491 (1983). See, also, *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984).

In *Gleason v. Gleason*, 218 Neb. 629, 633, 357 N.W.2d 465, 468 (1984), we recognized the difficulty inherent in determining "reasonable" alimony, due to the fact that "[t]he standard of reasonableness by its very nature defies clear and specific quantification inasmuch as the determination of reasonableness is directly tied to the virtually unique circumstances of each case." The same can be said of the reasonableness of refusal determination. This court has previously noted that "an attempt to give a specific meaning to the word 'reasonable' is 'trying to count what is not number, and measure what is not space.' " *Altschuler v. Coburn*, 38 Neb. 881, 890, 57 N.W. 836, 838 (1894).

The term "reasonable," as applied to refusals to submit to a chemical test under the implied consent law, is an ordinary term which finds adequate interpretation in common usage and understanding. When the reasonableness standard is applied to specific circumstances, it provides an adequate guide to persons of ordinary intelligence.

Fulmer claims further that § 39-669.16 unconstitutionally delegates legislative power to the executive branch because the statute fails to define the term "reasonable." While the Legislature cannot delegate its lawmaking powers, it can make laws which "become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend." *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 590, 290 N.W. 451, 457 (1940). This is what the Legislature did in enacting § 39-669.16, and, as such, the statute does not constitute an unconstitutional delegation of legislative powers.

Fulmer cites no authority to support his additional claim that the Administrative Procedures Act, Neb. Rev. Stat. ch. 84, art. 9 (Reissue 1981), requires that the appellee promulgate rules and regulations defining the term "reasonable" as used in

§ 39-669.16.

Additionally, there was no impropriety, as claimed by the appellant, in the hearing officer's destruction of the tape recordings of the implied consent hearings. Section 39-669.16 clearly provides that the appellee is empowered to appoint a hearing officer who is to report the evidence to the director. The tape recording is used for the limited purpose of assisting the hearing officer in making a written report to the director, and the recording is not required by statute to be a part of that report.

Fulmer next asserts error in the district court's failure to reverse the revocation order because the appellant was not given the *Miranda* warnings prior to the request that he submit to a chemical test, and because he was denied his sixth amendment right to counsel prior to his refusal.

We adhere to our previous determination that there is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law. *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). Evidence obtained in the implied consent context is not testimonial or communicative in nature and does not fall within the privilege against self-incrimination. *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *State v. Manley*, 189 Neb. 415, 202 N.W.2d 831 (1972); *State v. Oleson*, 180 Neb. 546, 143 N.W.2d 917 (1966).

Also, we adhere to our previous holdings that under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney. See, *Bapat v. Jensen*, 220 Neb. 763, 371 N.W.2d 742 (1985); *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984); *Winter v. Peterson*, 208 Neb. 785, 305 N.W.2d 803 (1981); *Wiseman v. Sullivan, supra*.

Fulmer's final contention is that the revocation order should have been reversed because Officer Martin did not have probable cause to initially contact him and did not have reasonable grounds to request that he submit to a chemical test of his blood, breath, or urine.

Fulmer's challenge to the initial contact is without merit. Although Officer Martin, at the time of the first contact, may not have had probable cause to arrest Fulmer, Martin's approach was a permissible stop under the guidelines of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

In *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), the Court noted that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." Acknowledging the elusive nature of the concept of cause sufficient to justify a stop, the Court outlined certain guidelines:

> But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Cortez, supra at 417-18. See, also, *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983). In this case it is clear that Officer Martin, acting on the facts learned through the radio dispatch, together with her own observations that Fulmer's vehicle was parked with its lights on near the road it was last seen traveling on after the theft, had a particularized and objective basis for suspecting that Fulmer was involved in the theft.

Fulmer attacks this conclusion, citing *State v. Benson*, 198 Neb. 14, 17, 251 N.W.2d 659, 661 (1977), where we held that "[a] reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message." The factual foundation in this case is supplied by the testimony that the other passenger in the Fulmer car was involved in the theft.

The claim that Officer Martin had no reasonable grounds to request Fulmer to submit to a chemical test is without merit. Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984) provides:

> Any law enforcement officer who has been duly authorized to make arrests for violations of traffic laws of

> this state or of ordinances of any city or village may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor to submit to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her body fluid, when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor.

We have interpreted this section to mean that reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test. *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975).

The appealing licensee has the burden to prove that the arresting officer did not have reasonable grounds to request a chemical test once the State has made out a prima facie case for revocation by affidavit to the Department of Motor Vehicles. *Mackey, supra*. From our review of the record de novo, we conclude that Fulmer did not satisfy that burden.

The record shows that Officer Martin made contact with Fulmer on private property shortly after a radio dispatch that a car like Fulmer's had been involved in a theft. Fulmer's license plate number matched that reported in the dispatch. Fulmer was parked with his headlights on in a driveway adjacent to the public roadway on which his vehicle had been reported to be traveling. These facts suggest that the appellant had been driving on the public roadway just prior to Officer Martin's initial contact.

In *State v. Lichti*, 219 Neb. 894, 367 N.W.2d 138 (1985), we held that under Neb. Rev. Stat. § 39-604(1) (Reissue 1984), a person driving in response to a lawful order by a law enforcement officer is engaged in privileged conduct for which he cannot be punished. While Officer Martin could not have based her request to Fulmer to submit to a chemical test solely on her observations of his driving after asking him to return to the motel, the facts at the time of her initial contact gave her

reasonable grounds to suspect that Fulmer had been driving on a public highway.

The second stop was initiated because Fulmer, by missing both access roads to the motel, had not complied with Officer Martin's lawful order. At that point the officer became cognizant of facts suggesting that Fulmer was under the influence of intoxicating liquor. There was a six-pack of beer on the floorboard of Fulmer's car, his eyes were bloodshot and watery, and when Officer Martin leaned into the car to ask why he had missed the exits, she detected a strong odor of alcoholic beverage about his breath. Fulmer responded that he had missed the exits because he was not from the area, although his license showed otherwise. He then had difficulty stepping from the vehicle and in performing three field sobriety tests. At that point we conclude that Officer Martin had reasonable grounds to conclude that Fulmer had previously been driving a vehicle while under the influence of intoxicating liquor and, therefore, properly requested the appellant to submit to a chemical test of his blood, breath, or urine.

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

AFFIRMED.

CHADRON ENERGY CORPORATION, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, GORDON C. SHAFFER, JR., AND MARIAN SHAFFER, APPELLEES, LESLIE KLEMAN, APPELLEE AND CROSS-APPELLANT, V. FIRST NATIONAL BANK OF OMAHA, A NATIONAL BANK, APPELLEE AND CROSS-APPELLANT.

379 N.W.2d 742

Filed January 17, 1986. No. 84-553.

1. **Actions: Pleadings.** The fact that a petition may have initially sought equitable relief is not binding. A petition in equity may be changed by amendment into an action at law, or vice versa, and it may be amended to seek redress in the form of damages as well as equitable relief.
2. **Uniform Commercial Code: Sales: Security Interests: Judgments: Damages.**

Not only does Neb. U.C.C. § 9-504(3) (Reissue 1980) and the requirement that a security interest must be sold in a commercially reasonable manner affect the right of a creditor to obtain a deficiency judgment but, likewise, the failure to sell a security interest in a commercially reasonable manner affords to a debtor the right to sue for damages for any surplus which the debtor does not realize by reason of the creditor's having failed to dispose of the property in a commercially reasonable manner.

3. **Uniform Commercial Code: Sales: Security Interests: Damages.** Even though a sale may produce a surplus, if in fact a sale in a commercially reasonable manner would have produced a larger surplus, the failure of the debtor to sell the security in a commercially reasonable manner has caused the debtor damages which the debtor has a right to recover in a proper action.
4. **Uniform Commercial Code: Security Interests.** The fact that collateral may be transferred voluntarily or involuntarily as provided by Neb. U.C.C. § 9-311 (Reissue 1980) does not destroy or adversely affect a prior perfected security interest.
5. _____: _____. In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place.
6. **Uniform Commercial Code: Security Interests: Words and Phrases.** A security interest is defined as an interest in property which secures payment of performance of an obligation. If the underlying obligation ceases to exist, so does the interest securing it.
7. **Uniform Commercial Code: Property: Security Interests: Conversion.** Where property is subject to a security interest, an exercise of dominion or control over the property which is inconsistent with the rights of the secured party constitutes, as to him, a conversion of the property, and there may be conversion of the property by a secured party where his acts are in defiance of the rights of others in the property.
8. **Uniform Commercial Code: Security Interests: Conversion: Damages.** The measure of damages for conversion is the market value of the converted property at the time of the conversion.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for a new trial.

W. Scott Davis of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellant.

Alan E. Peterson of Cline, Williams, Wright, Johnson & Oldfather, and Douglas F. Duchek, for appellees Shaffer.

Michael O. Johanns and Lavern R. Holdeman of Peterson Nelson Johanns Morris & Holdeman, for appellee Kleman.

James B. Cavanagh of Erickson & Sederstrom, P.C., for appellee Bank.

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

KRIVOSHA, C.J.

The appellant, Chadron Energy Corporation (Chadron Energy), owner of the stock of First National Bank of Chadron (First National-Chadron), a national bank corporation, appeals from an order entered by the district court for Douglas County, Nebraska, finding that Chadron Energy is not entitled to recover damages from the First National Bank of Omaha (First National-Omaha), though First National-Omaha allegedly failed to sell the stock of First National-Chadron in a commercially reasonable manner as required by Neb. U.C.C. § 9-504(3) (Reissue 1980). The basis for the district court's ruling was that because the stock sold for more than Chadron Energy owed to First National-Omaha, no deficiency was created, and, therefore, the issue as to whether the stock was sold in a commercially reasonable manner was moot. First National-Omaha has further cross-appealed, maintaining that the judgment entered by the district court in favor of three former stockholders of First National-Chadron, Gordon C. Shaffer, Jr., Marian Shaffer, and Leslie G. Kleman, was in error. That judgment was based upon a finding by the district court that First National-Omaha had converted stock held by First National-Omaha as bailee for the Shaffers and Kleman. Shaffers and Kleman claimed an interest in the stock as security for a debt owed to them by the group that had purchased Shaffers' and Kleman's bank stock in First National-Chadron.

The record contains evidence concerning a host of transactions both directly and indirectly involved in the issues before this court. We have, however, attempted to isolate those facts which are relevant to the issues presented to us on appeal and will, therefore, not consider certain evidence found in the record but not relevant to the issues presented.

In March of 1979 the First National Bank of Chadron was a national bank corporation with its principal place of business in Chadron, Nebraska. At that time there were issued and

outstanding 2,000 shares of capital stock in First National-Chadron, of which the appellees Gordon C. Shaffer, Jr., and his wife, Marian Shaffer, held 1,185 shares and the appellee Leslie G. Kleman held 630 shares. The remaining shares were held by other stockholders whose interests are not involved in this appeal. On March 6, 1979, six individuals represented by George Wulf (the Wulf Group) entered into a stock purchase agreement with the Shaffers and Kleman. The sale price for the stock was $5 million, part of which was to be paid to the Shaffers and Kleman in cash at the time of the closing and the balance to be represented by notes from the Wulf Group and secured by the stock in First National-Chadron. In order to obtain the necessary cash to make the downpayment, the Wulf Group borrowed $2.1 million from First National-Omaha. Shaffers then received $860,000 in cash and notes totaling $2,102,500, and Kleman received $1,180,000 in cash and notes totaling $395,000. Both the loan from First National-Omaha and the notes given to the Shaffers and Kleman were to be secured by the stock in First National-Chadron. By agreement among all parties, First National-Omaha was designated as the senior lienholder and Shaffers and Kleman as junior lienholders. Individual notes executed by the members of the Wulf Group to First National-Omaha were due in 1 year, at which time First National-Omaha was to be paid in full, thereby causing the lien of the Shaffers and Kleman to become a first security interest in the stock. The stock was physically delivered to First National-Omaha, which assured the Shaffers and Kleman in writing that "[w]e will not release such collateral from our possession until you have notified us that your security interest has been released or discharged." First National-Omaha received six individual stock certificates, each issued in the name of one of the six members of the Wulf Group.

Later in 1979, the individuals in the Wulf Group formed a corporation under the name of First of Chadron Bank Corporation, and on or about January 30, 1980, received the approval of the Federal Reserve Bank of Kansas City to become a one-bank holding company and to acquire the capital stock of First National-Chadron. The holding company's name was

later changed to Chadron Energy Corporation.

Beginning in March of 1980, when the notes of the Wulf Group to First National-Omaha became due, and continuing throughout the summer of 1980, both First National of Omaha and the Shaffers and Kleman granted the Wulf Group various extensions on the loans, which were not being paid regularly. Finally, a public offering of the holding company stock in Chadron Energy was conducted during the summer of 1980. The purpose of this transaction was to acquire sufficient funds from the public offering to allow Chadron Energy to purchase the First National-Chadron bank stock from the Wulf Group. The Wulf Group, in turn, would pay off their debts to First National-Omaha and Shaffers and Kleman and recover the stock being held as collateral. Unfortunately, the public offering did not even produce sufficient funds to pay off the debt to First National-Omaha, and other arrangements had to be made to complete the sale of the stock from the Wulf Group to Chadron Energy.

Even after giving First National-Omaha the proceeds of the public offering, the Wulf Group did not succeed in totally reducing their $2.1 million debt to First National-Omaha. The Wulf Group thus sought to have Chadron Energy assume their loans with First National-Omaha by rewriting them in the amount of $660,000, in the name of the holding company, and then discharging the individual debts of the Wulf Group. First National-Omaha was agreeable to this arrangement but insisted that, before the transaction could be completed, both the Shaffers and Kleman would have to consent to the transference of the stock from the names of the six individuals in the Wulf Group to the holding company. The plan was that once all of this was accomplished, the single stock certificate in the name of the holding company would then be returned to First National-Omaha, which would continue to hold the certificate in its possession as security for its loan and as security for the debt due the Shaffers and Kleman.

Shaffers and Kleman, however, refused to sign the consent forms, and although there was some testimony that an assumption agreement was executed by Chadron Energy to First National-Omaha, no such executed assumption

agreement was ever produced. Instead, it appears that First National-Omaha accepted a new note from Chadron Energy, delivered the six stock certificates to the original owners, and permitted the stock to be reregistered in a single certificate in the name of Chadron Energy. When all of this was completed, a new note, signed by Chadron Energy, and the stock certificate, now in the name of Chadron Energy, were returned to First National-Omaha. The loans to the six individuals held by First National-Omaha were, in effect, marked "paid," and the notes were returned to each of the six individuals.

On October 3, 1982, First National-Omaha notified Chadron Energy that it was in default for nonpayment on its loan, in the total amount of $720,767.10. When they became aware of the impending auction sale of the stock of First National-Chadron, First National-Chadron, its holding company, Chadron Energy, and the Shaffers filed a petition to restrain the sale. They were granted a temporary restraining order but did not post the required bond. First National-Omaha, therefore, conducted the auction of the bank stock on the morning of October 29, 1982, and sold the stock for $1,410,000. First National-Chadron then dismissed itself from the lawsuit, and Chadron Energy and the Shaffers proceeded against First National-Omaha for damages, Shaffers maintaining that the stock in which they had a security interest had been converted by First National-Omaha, and Chadron Energy maintaining that the stock was not sold in a commercially reasonable manner. Several weeks later, Kleman, for the first time, discovered that the stock in which he claimed a security interest had been sold and joined Shaffers in seeking damages for conversion.

Following the trial, the district court found that when First National-Omaha returned the six individual certificates to the individual members of the Wulf Group and permitted the certificates to be canceled and the stock transferred into the name of the holding company, First National-Omaha converted the stock of the Shaffers and Kleman. For that reason, and since it found that the value of the stock in November of 1980 was worth at least the amount of the Shaffers' lien, the district court entered judgment against First

National-Omaha and in favor of Shaffers in the amount of the debt then owing from the Wulf Group to the Shaffers. With regard to the claim made by Kleman, the district court found that notes executed to Kleman by Wulf and one other member of the Wulf Group had been transferred by Kleman to a trust and were now being held by a trustee. For that reason the district court found that Kleman was no longer the real party in interest with regard to these two notes and therefore has no standing to make any claim against First National-Omaha. The district court did, however, find that First National-Omaha did cause the stock securing the remaining four notes to Kleman to be converted, and awarded damages to Kleman in the amount of $201,061.88. For reasons more particularly set out hereinafter, we believe that the decision of the district court must be reversed and the cause remanded for a new trial.

Although all of the parties to this action, and the district court as well, believed that, because an injunction was initially sought, this was an equity action, we believe they are in error. The importance of that decision is that it affects both what our standard of review is and whether we review the action de novo or remand the cause back to the district court for a new trial. Because we believe that this is a law action and not an action in equity, we do not review the matter de novo.

In order to arrive at that conclusion, one must look carefully at the pleadings in this case. Initially, the petition filed by First National-Chadron, Chadron Energy, and the Shaffers sought both a temporary and permanent injunction against the sale of the stock and asked for a declaratory judgment declaring the rights of the parties in the shares of stock of First National-Chadron. After the parties failed to post the bond necessary to obtain the temporary injunction and the sale was completed, Chadron Energy and the Shaffers amended their petition to seek only declaratory relief and abandoned any request for an injunction, temporary or permanent. Neb. Rev. Stat. § 25-21,157 (Reissue 1979) provides that in a declaratory judgment action issues of fact "may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." This court has treated the determination of factual

issues in a declaratory judgment action, which would otherwise be an action at law, in the same manner as if a jury had been waived. The findings of the trial court, therefore, have the effect of a verdict of a jury and will not be set aside unless clearly wrong, see *Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973), and, unlike an equity action, are not reviewed de novo. In *Eastern Shore Nat. Gas Co. v. Stauffer Chemical Co.*, 285 A.2d 826, 829 (Del. Ch. 1971), the Delaware court observed: "[T]he test as to whether or not [an equitable question even] exists [is] whether or not, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action." In the instant case, once the prayer for declaratory relief is disregarded, there is no equitable relief sought. While the plaintiffs, in their respective amended petitions, asked for both a declaratory judgment and "equitable relief," they, in fact, were not entitled to anything but a declaration as to their rights in the stock, and damages, if any. That constituted an action at law. See *First Nat. Bank of Wayne v. Gross Real Estate Co.*, 162 Neb. 343, 75 N.W.2d 704 (1956). This being a law action, we do not review the case de novo on the record but, rather, determine whether the decision is contrary to the law. See *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983). The fact that there may have been equitable relief sought initially is not binding. A petition in equity may be changed by amendment into an action at law, or vice versa, and it may be amended to seek redress in the form of damages as well as equitable relief. See, *Kraft v. Forest Park Realty & Ins. Co.*, 111 Ga. App. 621, 142 S.E.2d 402 (1965); *Johnston v. Federal Land Bank*, 226 Iowa 496, 284 N.W. 393 (1939). See, also, Neb. Rev. Stat. § 25-856 (Reissue 1979).

We turn, then, to an examination of the issues raised by this appeal. The first issue we address is whether the district court was in error as a matter of law in determining that the claim by Chadron Energy against First National-Omaha was moot. In reaching that conclusion the district court reasoned that the only effect of conducting a sale in a commercially unreasonable manner was to prevent the creditor from obtaining a deficiency judgment against the debtor. See, *State Bank of Litchfield v.*

Lucas, 210 Neb. 400, 315 N.W.2d 238 (1982); *First Nat. Bank of Bellevue v. Rose*, 197 Neb. 392, 249 N.W.2d 723 (1977). While it is true that if a creditor conducts the sale of a security interest in a commercially unreasonable manner the creditor may not obtain a deficiency judgment against the debtor, there are also rights afforded the debtor by reason of the creditor's failing to dispose of the property in a commercially reasonable manner. Section 9-504(3) provides in part as follows:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

Neb. U.C.C. § 9-502(2) (Reissue 1980) provides in part: "If the security agreement secures an indebtedness, *the secured party must account to the debtor for any surplus*, and unless otherwise agreed, the debtor is liable for any deficiency." (Emphasis supplied.)

Thus far, then, we find that the statute requires that the creditor must dispose of the property in a commercially reasonable manner and account to the debtor for any surplus which a sale conducted in a commercially reasonable manner might obtain. And, additionally, Neb. U.C.C. § 9-507(1) (Reissue 1980) provides in part:

> If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition *has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part.*

(Emphasis supplied.)

It seems clear to us, therefore, that not only does § 9-504(3) and the requirement that a security interest must be sold in a commercially reasonable manner affect the right of a creditor

to obtain a deficiency judgment but, likewise, the failure to sell a security interest in a commercially reasonable manner affords to a debtor the right to sue for damages for any surplus which the debtor does not realize by reason of the creditor's having failed to dispose of the property in a commercially reasonable manner. Even though the sale may produce a surplus, if in fact a sale in a commercially reasonable manner would have produced a larger surplus, the failure of the debtor to sell the security in a commercially reasonable manner has caused the debtor damages which the debtor has a right to recover in a proper action. The action was not, therefore, moot. However, we need not pass upon the question as to whether the sale by First National-Omaha was in this instance conducted in a commercially reasonable manner because the district court did not pass upon that issue. Instead, we must remand the cause back to the district court for a trial on the question of whether the sale of the stock belonging to Chadron Energy was conducted in a commercially reasonable manner and, if not, what, if any, damages Chadron Energy sustained thereby.

With that we then turn to the question as to whether the district court was correct in its determination that First National-Omaha had converted the stock in which the Shaffers and Kleman had a security interest when, in November of 1980, First National-Omaha permitted the stock in First National-Chadron to be transferred from the six individual members of the Wulf Group to Chadron Energy. The district court concluded that by releasing the stock and permitting the transfer to occur, a conversion was committed. While we believe that First National-Omaha did in fact convert the stock of the Shaffers and Kleman, we do not believe it occurred in November of 1980 but, rather, in October of 1982.

Neb. U.C.C. § 9-306(2) (Reissue 1980) makes it clear that the transfer of the stock in First National-Chadron from the Wulf Group to the holding company did not in any manner diminish or extinguish the security interest held by the Shaffers or Kleman in the stock. Section 9-306(2) provides that "a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party . . . ." Here, the evidence is clear

beyond contradiction that neither the Shaffers nor Kleman authorized the disposition of the collateral, and therefore their security interest continued.

Furthermore, Neb. U.C.C. § 9-311 (Reissue 1980) permits such transfer, notwithstanding a provision to the contrary in the security agreement. Section 9-311 provides: "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default." Courts have consistently held that this section gives a person entitled to sell the unfettered right to transfer his interest in collateral. See *Sturdevant v. First Security Bank*, 186 Mont. 91, 606 P.2d 525 (1980).

The fact that collateral may be transferred voluntarily or involuntarily as provided by § 9-311 does not destroy or adversely affect a prior perfected security interest. See *Brummund v. First Nat. Bank of Clovis*, 99 N.M. 221, 656 P.2d 884 (1983). Rather, the transferee takes subject to the security interest. *Layne v. Fort Carson Nat. Bank*, 655 P.2d 856 (Colo. App. 1982).

The notes executed by the individual members of the Wulf Group to the Shaffers and Kleman were still in effect, and the stock, though now transferred from the Wulf Group to the holding company, was still subject to the lien given by the Wulf Group in favor of the Shaffers and Kleman. Neither this nor the fact that First National-Omaha released the stock temporarily for the purpose of permitting the Wulf Group to transfer the stock to the holding company affects the Shaffers' or Kleman's security interest. Neb. U.C.C. § 9-304(5) (Reissue 1980) specifically contemplates such an action and provides:

> A security interest remains perfected for a period of twenty-one days without filing where a secured party having a perfected security interest in an instrument . . . (b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

Here, there is no evidence that First National-Omaha, the bailee

holding the stock and thereby perfecting the Shaffers' and Kleman's security interests, surrendered the stock for more than 21 days. As such, the perfection continued as to the Shaffers and Kleman.

In view of the fact, then, that the notes from the Wulf Group to the Shaffers and Kleman were not in default in November of 1980, and therefore, as junior lienholders, Shaffers and Kleman were not entitled to immediate possession of the stock from the senior lienholder and that the security interests held by the Shaffers and Kleman in the stock continued after the transfer, the delivery of the stock by First National-Omaha to the Wulf Group for transfer did not constitute an act of conversion.

Furthermore, although First National-Omaha did release the bank stock from its possession, ostensibly in derogation of its written assurance not to do so unless the Shaffers and Kleman gave written consent, this did not amount to a conversion on the part of First National-Omaha. First National-Omaha, by agreeing to hold the collateral for the benefit of the Shaffers and Kleman, the junior lienholders, created a bailor/bailee relationship between itself and Shaffers and Kleman. *Landmark Land Co., Inc. v. Sprague*, 529 F. Supp. 971 (S.D.N.Y. 1981), *rev'd on other grounds* 701 F.2d 1065 (2d Cir. 1983). While it is true that strict adherence to a formal contract for bailment establishes the obligation of the bailee, *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.*, 162 Neb. 47, 75 N.W.2d 366 (1956), First National-Omaha's technical breach of the agreement did not amount to a conversion. A bailee may satisfy his obligation by a return of certificates of like kind, there being no obligation to return the identical certificates. See, *Robertson v. Ramsey et al.*, 17 Tenn. App. 248, 66 S.W.2d 1022 (1933); *Christensen v. Pugh et al.*, 84 Utah 440, 36 P.2d 100 (1934). The agreement merely obligated First National-Omaha to hold 1,850 shares of First National-Chadron bank stock, and although there was a gap of time when First National-Omaha did not have possession of the stock, this does not mean that First National-Omaha converted the stock. When First National-Omaha recovered the stock, though it had been reregistered, it remained 1,850 shares of First National-

Chadron bank stock.

For these reasons, then, the finding by the district court was in error. However, as we have indicated, the subsequent sale by First National-Omaha of this stock did constitute a conversion for which Shaffers and Kleman were entitled to seek damages.

When First National-Omaha accepted a new note from Chadron Energy and discharged the notes previously executed by the six members of the Wulf Group, there was a novation. As noted in *First West Side Bank v. Herzog*, 204 Neb. 356, 361, 282 N.W.2d 38, 41 (1979): "In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place. See, Sheridan v. Dudden Implement, Inc., 174 Neb. 578, 119 N.W.2d 64; Thomas v. George, 105 Neb. 44, 178 N.W. 922." While First National-Omaha argues that there was a mere assumption of debt by Chadron Energy, the evidence simply fails to support that claim. The evidence of novation is overwhelming. There was no assumption agreement signed by Chadron Energy. The notes from the six members of the Wulf Group were, in effect, marked "paid" and returned to them. A new note was executed by Chadron Energy and the security previously held by First National-Omaha was released and security of the new debtor, Chadron Energy, obtained. The existing liability from the Wulf Group to First National-Omaha was completely extinguished and a new one substituted in its place.

The significance of all of this is that the superior lien previously held by First National-Omaha was extinguished. "A security interest is defined as 'an interest in . . . property . . . which secures payment of performance of an obligation.' If the underlying obligation ceases to exist, so does the interest securing it." *Poteau State Bank v. Denwalt*, 597 P.2d 756, 761-62 (Okla. 1979). Here, the underlying obligation ceased to exist in November of 1980, and, thus, the original First National-Omaha/Wulf Group security agreement also ceased to exist.

Shaffers and Kleman, their security interests in the stock remaining existent and perfected even after November of 1980, therefore became the senior lienholders as to the stock of First National-Chadron. When First National-Omaha sold the stock

in September of 1982, it converted the stock upon which Shaffers and Kleman had a security interest.

> "Where property is subject to a security interest, an exercise of dominion or control over the property which is inconsistent with the rights of the secured party, constitutes, as to him, a conversion of the property; and there may be conversion by [a] secured party where his acts are in defiance of the rights of others in the property."

Trust Co. v. Associated Grocers Co-op, 152 Ga. App. 701, 702, 263 S.E.2d 676, 677 (1979). See, also, *Consolidated Equip. Sales v. First Bank, etc.*, 627 P.2d 432 (Okla. 1981); *Amer. Nat. Bk. v. Etter*, 28 Colo. App. 511, 476 P.2d 287 (1970). It seems clear, beyond question, that First National-Omaha, by selling at auction the collateral on which Shaffers and Kleman held a first lien, over the protest of the Shaffers and without notice to Kleman, converted the 1,850 shares of First National-Chadron stock. The act of conversion, however, occurred on October 29, 1982, and not in November of 1980 as found by the district court. This would be true even if the sale was in a commercially reasonable manner. The difficulty, however, is that the court determined the damages to the Shaffers and Kleman as of November 1980, when, in fact, the conversion occurred in October of 1982. The measure of damages for conversion is the market value of the converted property at the time of the conversion. *Associated Bean Growers v. Chester B. Brown Co.*, 198 Neb. 775, 255 N.W.2d 425 (1977). It may very well be that the amounts due and owing were the same on the two dates, though one is inclined to believe that, at the very best, some additional interest may have been due in October of 1982 as compared to November of 1980. Nevertheless, though we find as a matter of law that the evidence established a conversion, we find it to have occurred in October of 1982, and thus, because the wrong date was selected, this portion of the matter must be remanded for trial to determine the amount of damages suffered by the Shaffers and Kleman by reason of First National-Omaha's act of conversion in October 1982. Shaffers and Kleman may recover the value of the property converted at the time and place of the conversion up to the amount due on the liens, including accrued interest. See *Implement Co. v.*

Dunard, 181 Mo. App. 658, 164 S.W. 685 (1914).

In view of the fact that the matter must be remanded for trial on the issues set out herein, no other errors need be considered. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., concurs in the result.

AGREX, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. JIM SCHRANT, APPELLEE AND CROSS-APPELLANT.

379 N.W.2d 751

Filed January 17, 1986. No. 84-568.

1. **Appeal and Error.** On appeal this court will not set aside a finding of fact made by the trial court unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or is in disregard of the rules of evidence or the law.
2. **Uniform Commercial Code: Agriculture: Crops: Words and Phrases.** Experienced grain producers who regularly grow and market grain on the open market as the principal means of providing for their livelihood, and by reason of such occupation have acquired and possess knowledge or skill peculiar to the practices and operations of grain marketing, are merchants within the meaning of Neb. U.C.C. §§ 2-104 and 2-201 (Reissue 1980).
3. **Uniform Commercial Code.** Whether a party in a specific instance was a merchant under the Uniform Commercial Code is a question of fact.
4. **Appeal and Error.** Consideration on appeal to this court of a case will be limited to errors assigned and *discussed*.
5. **Witnesses: Proof: Trial.** A question put to a witness which calls for an answer based upon conjecture and speculation does not constitute proper proof on an issue.
6. **Witnesses: Trial.** A witness should not be allowed to express an opinion on an inadequate basis.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

David A. Domina and David E. Copple of Domina & Gerrard, P.C., for appellant.

Lynn D. Hutton, Jr., of Lynn D. Hutton, Jr., P.C., for appellee.

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

HASTINGS, J.

Agrex, Inc., brought this action to recover losses alleged to have resulted from defendant Jim Schrant's breach of contract to sell it a quantity of soybeans. From a jury verdict and judgment of $6,162 in its favor, plaintiff has appealed and defendant has cross-appealed.

Plaintiff's assignments of error are: (1) The verdict was unsupported by any evidence and was clearly wrong; and (2) Testimony of a witness as to the value or worth of the commodity was permitted without adequate foundation and was purely conjectural. Defendant assigns as error on his cross-appeal: (1) The refusal of the court to direct a verdict in his favor; (2) The giving of certain instructions; and (3) The failure to give certain requested instructions. We affirm in part, and in part reverse and remand for a new trial on the issue of damages.

Plaintiff alleged in its petition that on July 15, 1983, defendant orally agreed to sell to the plaintiff 6,500 bushels of soybeans at a price of $6.02 per bushel, and following defendant's refusal to make delivery, plaintiff, in order to cover the grain contracted by the defendant, was required to go into the open market and purchase soybeans at $8.45 per bushel.

Defendant denied the existence of such contract; alleged that on July 22, the day he received written confirmation of the alleged contract from plaintiff, he denied to plaintiff that he had entered into the contract; alleged that plaintiff had failed to mitigate its damages; and alleged a violation of the statute of frauds.

The evidence presented by the plaintiff would support a conclusion that on July 15, 1983, defendant called the Enola grain elevator (Agrex, Inc.) and inquired as to the price then being paid for soybeans. When told that the market was $6.02 per bushel, according to the plaintiff's evidence, he agreed to sell 6,500 bushels. He was told that he would receive written

confirmation in the mail, and that same day plaintiff did mail to defendant a signed writing listing the price, quantity, and delivery date of July 1983.

Plaintiff's witness, Jacqueline Ohman, continuing her testimony, stated that several attempts were made to contact defendant as to why he had not delivered the soybeans, but she was not able to get in touch with him until September 8. According to her, when she did reach him on the 8th and asked him when he was planning to bring in the beans, he told her that he did not know when he was going to make delivery. Finally, on September 20, the witness was told by Mrs. Schrant that they did not consider that they were bound by any contract and did not intend to make delivery. On that same day the plaintiff went into the open market and purchased 6,500 bushels of soybeans to cover the contract at the market price of $8.45 per bushel. It is this difference—$2.43—between the contract price and the actual purchase price that plaintiff claims as damages.

Supporting plaintiff's claim was the testimony of the manager of the ASCS office in Columbus. He identified four exhibits which were marketing authorization forms for farm-stored commodities under loan. They were all signed by the defendant, dated July 25, 1983, but indicated an original telephonic request of July 15, 1983, to sell 6,500 bushels of soybeans. The forms also disclosed that copies of each were sent to Agrex, Inc., which, according to the witness, would be the marketing unit designated by the seller to be the purchaser.

The evidence presented by the defendant through his own testimony was to the effect that on July 15 he merely called the plaintiff to inquire as to the price being paid for soybeans and did not contract to sell. He admitted that he received the sale confirmation slip from the plaintiff, but did not sign it, and did not deliver the beans. Schrant also admitted that he made no written objection to the written confirmation of sale, but on July 22, he claimed, during a telephone call from plaintiff's manager, he asked how come he got the contract because he "didn't contract anything."

For ease of discussion this appeal may be divided into two distinct questions: (1) Should the verdict and judgment in favor of plaintiff as to liability stand? and (2) Shall the amount of the

verdict and judgment stand?

To the extent that either of these questions involves factual matters, we are bound by the rule that on appeal this court will not set aside a finding of fact unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or is in disregard of the rules of evidence or the law. *Hoegerl v. Burt*, 215 Neb. 752, 340 N.W.2d 428 (1983).

We take up, first, Schrant's cross-appeal. In that connection, in order to reach the verdict it did, the jury had to have found that Schrant orally contracted with plaintiff to sell it 6,500 bushels of soybeans for July delivery, that he received a written confirmation of the sale by mail, that he neglected to disavow that contract, and that he failed to deliver the beans. There was competent evidence on all points supporting such conclusions and, absent the existence of errors of law, we must affirm those findings.

However, defendant points to Neb. U.C.C. § 2-201(1) (Reissue 1980), which provides that any contract for the sale of goods for a price exceeding $500 is not enforceable unless there is some writing sufficient to indicate that a contract of sale has been made and which had been signed by the party against whom the enforcement is sought.

Defendant recognizes that in the form § 2-201 existed at the time—subsection (2)—his signed acknowledgment was not required if he was considered to be a merchant. Although § 2-201(2) was amended in 1983 to add subsection (b), which specifically exempted the requirement of a signed acknowledgment as between a merchant and a seller of grain, we are bound by the terms of § 2-201(2) in its original form. Therefore, the question of whether defendant was a merchant at the time becomes critical.

This court has not ruled on this specific question. In *Kimball County Grain Coop. v. Yung*, 200 Neb. 233, 263 N.W.2d 818 (1978), the question was raised, but because its resolution was deemed not to be necessary to a decision in the case, it was not decided. There were, however, two concurring opinions which fully discussed the pros and cons of the issue. We find it unnecessary to cite and discuss the authorities supporting the two different viewpoints. We believe the position taken by

Brodkey, J., is the more logical and more nearly represents the legislative intent as expressed in the code.

We therefore hold that experienced grain producers who regularly grow and market grain on the open market as the principal means of providing for their livelihood, and by reason of such occupation have acquired and possess knowledge or skill peculiar to the practices and operations of grain marketing, are merchants within the meaning of Neb. U.C.C. §§ 2-104 and 2-201 (Reissue 1980). Whether defendant in this instance met that definition was a question of fact which was resolved in favor of the plaintiff. *Kimball County Grain Coop. v. Yung, supra.*

In spite of the fact that defendant assigns as error the failure to give certain tendered instructions on the "merchant" issue and the giving of other instructions by the court on its own motion, he not only failed to include in the record a copy of his proposed instructions but also neglected to argue that issue in his brief. "[C]onsideration of the case will be limited to errors assigned and *discussed*." (Emphasis supplied.) Neb. Ct. R. 9D(1)d (rev. 1983).

However, we have examined the court's instructions and find that they adequately and correctly submitted the issue to the jury. There is no merit to defendant's cross-appeal.

Finally, we consider plaintiff's complaint that the verdict was unsupported by the evidence and was clearly wrong. It argues that it was not until September 20 that it was told that defendant disavowed the contract, and it was on that day that it purchased soybeans at the market price to cover the contract. Therefore, it reasons, that was the only evidence of plaintiff's damages, and that amount was $15,795 rather than $6,162, the sum found by the jury to be the damages.

However, there was evidence in the form of defendant's testimony that he had disavowed the alleged contract as early as July 22. In that event, though, plaintiff claims there was no evidence of the fair market price of beans on that date or any date other than September 20.

That brings us to plaintiff's contention that the trial court erred in permitting, over objection, the defendant to draw out on cross-examination of plaintiff's witness that her "best

educated *guess*" (emphasis supplied), without checking her records, was that the price of beans on August 1 was $1.50 to $2 a bushel higher than the contracted price. Testimony in the form of a *guess* was based on counsel's question, "You have no idea at all as to any of the prices of soybeans after July 15th of '83 until September 20th of '83?" and the reply of the witness, "I could make a guess."

We agree with plaintiff. The question put by counsel called for an answer based upon conjecture and speculation and did not constitute proper proof. *Sherman v. Travelers Ind. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975). A witness should not be allowed to express an opinion on an inadequate basis. *Hoegerl v. Burt*, 215 Neb. 752, 340 N.W.2d 428 (1983). That plaintiff was prejudiced by the admission of such evidence is apparent from the record.

The judgment of the district court respecting liability of the defendant is affirmed. The cause, however, is remanded for a new trial on the issue of damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

DONALD D. WISCH, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

379 N.W.2d 755

Filed January 17, 1986. No. 84-626.

1. **Implied Consent Law: Appeal and Error.** On appeal from an order of revocation of a motor vehicle operator's license under the implied consent law, our review is de novo as in equity.
2. **Trial: Evidence: Appeal and Error.** In determining the weight of the evidence, we will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
3. **Implied Consent Law: Blood, Breath, and Urine Tests: Arrests: Probable Cause.** The establishment of reasonable grounds for arrest and arrest are

conditions precedent to a valid request to submit to a chemical test in accordance with Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984).

4. **Implied Consent Law: Blood, Breath, and Urine Tests.** To constitute a refusal to submit to a chemical test required under the implied consent law, the only understanding required by the licensee is an understanding that he is being asked to take a test.
5. _____: _____. A motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such driver's initial refusal to take the test requested by the arresting officer.

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

Barbara Thielen of Taylor, Fabian, Thielen & Thielen, for appellant.

A. Eugene Crump, Deputy Attorney General, and Michele M. Wheeler, Special Assistant Attorney General, for appellee.

KRIVOSHA, C.J., and CAPORALE, J., and BLUE and OLBERDING, D. JJ., and COLWELL, D.J., Retired.

OLBERDING, D.J.

This is an appeal from the judgment of the district court for Douglas County affirming an order of the director of the Department of Motor Vehicles revoking the driver's license and operating privileges of Donald D. Wisch for a period of 1 year pursuant to the implied consent law of this state.

On August 13, 1983, Wisch was driving in the city of Omaha. While attempting to change lanes, he collided with another vehicle. At approximately 6:30 p.m. Officer Stephen A. Sanchelli of the Omaha Police Department responded to the scene. The officer described Wisch's behavior during the initial investigation as follows: "He was abusive and used profanity and I informed him at that time that if he continued I would place him under arrest for disorderly conduct." After observing Wisch had red, bloodshot, and glazed eyes and thick-tongued speech, and after smelling a strong odor of alcohol, the officer advised him he was taking him to the police station to take a breath test. At the station, the officer testified, he read an implied consent advisement postarrest form to Wisch verbatim and the section in regard to the consequences of a refusal twice. Appellant refused to sign the form. The officer further testified

at trial that he requested Wisch to submit to the breath test in the presence of another officer, and he refused. The officer asked Wisch a second time to take the "breath test," and Wisch again refused. The officer then dismissed the technician, and as she was at the door to leave the room Wisch stated that he changed his mind and would take the test. The officer informed him that it was too late. The officer testified that it was after the refusals that he then read Wisch his rights per *Miranda* in accordance with standard Omaha Police Department procedure. In his report the officer also checked the following boxes: (1) Alcoholic odor: strong; (2) Attitude: profanity, cocky, uncooperative; (3) Speech: thick-tongued, slurred; (4) Balance: needs support, unsure; (5) Walking: swaying, unsure.

Wisch's version of the facts differs from the officer's. He testified that he is a schoolteacher with 24 years' experience teaching science, that on the day of the occurrence he had been at the races at Ak-Sar-Ben from approximately 3 to 6 p.m., and that he consumed two small glasses of beer from about 4 to 5:30 p.m. He stated he tried to explain that the other driver was not telling it quite the way it happened, and the officer replied, "You shut up or I am going to arrest you for something." He further testified that the officer had read the *Miranda* warnings together with the implied consent advisement postarrest form, which confused him, and that when the officer asked if he would take the test, he thought he was talking about the *Miranda* rights and said, "No, I won't." Immediately upon realizing his mistake, he said he would take the test, but the officer replied, "I only ask you once." The time between the request of the officer and his agreement to take the test was not over 30 seconds, and the technician was still present. The reason Wisch gave for not signing the form was that he had left his glasses in his automobile and he could not read without them.

While Wisch raises eight assignments of error in his brief, they may be consolidated as follows: (1) The officer did not have reasonable grounds to believe that he was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor; and (2) His refusal was followed by a willingness to take the test, and therefore does not constitute a "refusal."

On appeal from an order of revocation of a motor vehicle operator's license under the implied consent law, our review is de novo as in equity. *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). However, in determining the weight of the evidence, we will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979).

The establishment of reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test. Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984); *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975). The evidence, as testified to by the officer and not materially disputed, shows that the officer observed Wisch (1) return to the scene of the accident in his automobile, (2) be abusive and use profanity, (3) first deny fault and then admit he was the cause of the property damage accident, (4) to have a strong odor of alcohol on his breath, (5) to have red, bloodshot, and glazed eyes, and (6) to have slurred and thick-tongued speech.

Based upon these observations and his 6 years' experience with the department, the officer testified at trial that in his opinion Wisch was operating a motor vehicle while under the influence of alcohol. In *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977), *overruled on other grounds*, *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), we held that where the arresting officer testified that defendant appeared to be intoxicated, that he was unsteady when he walked, that there was a strong odor of alcohol on his breath, and that his speech was slurred, such evidence was sufficient to support a conviction for operating a motor vehicle while under the influence of alcohol. The evidence before us is clearly sufficient to meet the lesser standard of "reasonable grounds."

Wisch next argues that he did not know he was being asked to submit to a chemical test because he was confused by the commingling of the *Miranda* warnings in connection with the reading of the implied consent advisement postarrest form. The only evidence offered by Wisch in this regard is his own uncorroborated testimony.

Wisch would have us believe that even though he has survived 24 years as a schoolteacher, he became confused when the arresting officer read a one-page form, which *does not* contain any *Miranda* warnings. He does not dispute that the officer read something, nor does he dispute that he refused to sign the form, which was signed by the arresting officer and witnessed by another officer.

Officer Sanchelli testified that he advised Wisch at the scene of the accident he was being taken to the police department for a "breath test" and that, upon arrival at the station, he read the implied consent form to plaintiff, verbatim. It was not until after he read the implied consent form to Wisch twice, asked Wisch to submit to the test twice, and Wisch refused to take the test, that he read him his *Miranda* rights. We simply find the officer's testimony more plausible.

As we have stated previously, to constitute a refusal to submit to a chemical test required under the implied consent law, the only understanding required by the licensee is an understanding that he has been asked to take a test. *Winter v. Peterson*, 208 Neb. 785, 305 N.W.2d 803 (1981). From a review of the evidence it is clear that Wisch knew he was going to be asked to take a test, that he was asked twice to take the test, and that he specifically refused twice to take the test. Wisch further argues that after no more than 30 seconds he realized his misunderstanding with the *Miranda* rights, and he agreed to take the test. In *Hoyle v. Peterson*, 216 Neb. 253, 343 N.W.2d 730 (1984), we held that a motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such driver's initial refusal to take the test requested by the arresting officer. At the time Wisch changed his mind, the technician had already been excused and was at the door leaving the room. This was beyond the point of no return.

The judgment of the district court is affirmed.

AFFIRMED.

MARGARET GILBERT, APPELLANT, V. CITY OF TEKAMAH, APPELLEE.

379 N.W.2d 758

Filed January 17, 1986. No. 84-638.

1. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
2. _____. The burden is on the party moving for summary judgment to show that no issues of material fact exist, and unless that party can conclusively do so, the motion must be overruled.
3. _____. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.
4. **Political Subdivisions: Streets and Sidewalks: Negligence: Liability.** A city is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its streets so that they will be reasonably safe for a person using them while that traveler is exercising reasonable and ordinary caution and prudence.
5. **Political Subdivisions: Negligence: Proximate Cause: Proof.** The burden is on the plaintiff to establish that the political subdivision was negligent and that its negligent act or omission was the proximate cause of the injury or damage or that it was a cause that proximately contributed to it.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Reversed and remanded.

Clarence E. Mock of Johnson and Mock, for appellant.

Thomas A. Grennan of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

KRIVOSHA, C.J., and CAPORALE, J., and BLUE and OLBERDING, D. JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), for damages claimed by the plaintiff, Margaret Gilbert, arising from a two-car collision on G Street in Tekamah, Nebraska. The Burt County District Court sustained the defendant's motion for summary judgment. The plaintiff appeals, claiming that there were genuine issues of material fact and that the

defendant was not entitled to judgment as a matter of law. We agree with the first assigned error and reverse and remand for trial.

Plaintiff alleges that she was personally injured and damaged as a proximate result of the city's negligence in the design, construction, and maintenance of G Street and as a result of the city's failure to warn of the street's dangerous condition. The city answered, denying any breach of duty and alleging Margaret's contributory negligence and assumption of risk. In support of its motion for summary judgment, the city offered the depositions of plaintiff and Steve Devening, the other driver, and of Thomas L. Harris, a former Tekamah chief of police. Margaret offered five photographs of the street area and accident scene.

A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. *Smith v. Baker's Local No. 433 Welfare Fund, ante* p. 215, 375 N.W.2d 922 (1985). The burden is on the party moving for summary judgment to show that no issues of material fact exist, and unless that party can conclusively do so, the motion must be overruled. *Green v. Village of Terrytown*, 189 Neb. 615, 204 N.W.2d 152 (1973). Accordingly, we examine the facts as disclosed in the record.

Reservoir Hill is the local name of a steep hill where G Street, running east and west, and 16th Street, running north and south, intersect at its crest. G Street west of the crest is a two-lane, gravel-surfaced street having a "Narrow Road" sign south and west of the intersection. At the crest of the hill, G Street abruptly veers in a northeasterly direction for a short distance and then proceeds east on a narrow blacktop surface.

The precise grade of the hill and the angle of the street deviation are not in the record. The evidence shows only that the hill on both sides is very steep, presenting a blind intersection for all east-west traffic. Travelers from the west to east have no view of approaching traffic until the crest of the hill has been fully passed. In the record the blacktop road on the

east side of the hill is variously described as "hazardous," "narrow," "a one-way street," and a road with space for two compact cars to pass. Margaret stated in her deposition that a ditch on the south side and banks on both sides of the blacktop prevent vehicles from traversing any part of the road other than the blacktop surface. However, photos in the record suggest the contrary. There is no evidence of an accurate measurement of the width of the blacktop, any shoulder space, or the two combined.

On the morning of September 26, 1981, with clear weather and dry surfaces, Margaret Gilbert was driving her Ford Fiesta west on G Street at a slow rate of speed in low gear on the east side of the hill toward the north edge of the street. At the same time, Steve Devening was driving his automobile east across the crest of the hill at a speed of 3 to 5 miles per hour. His car apparently was north of the estimated middle of the blacktop. Margaret had driven over this street each day for more than 10 years, while Devening had driven over the hill about 100 times. Devening did not see Margaret's vehicle until the two cars collided, about 50 feet east of the crest of the hill. Margaret first saw the Devening car when it was about 50 feet away, and the steepness of the hill gave her a view of only the underside of the other car. The cars impacted at the left front of each vehicle, forcing Margaret's car backwards down the hill.

Section 23-2410 provides the statutory basis for Margaret's suit. The statute provides a cause of action for damages to a person who suffers personal injury, loss of life, or property damage through the "insufficiency or want of repair of a highway or bridge . . . which a political subdivision is liable to keep in repair."

A city is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its streets so that they will be reasonably safe for a person using them while that traveler is exercising reasonable and ordinary caution and prudence. See *Hume v. Otoe County*, 212 Neb. 616, 324 N.W.2d 810 (1982). We have repeatedly held that a city is not an insurer of the safety of a person who uses streets maintained for the public use. *Shields v. County of Buffalo*, 161 Neb. 34, 71 N.W.2d 701 (1955). Generally, negligence may not be

predicated on a curve or variation in a road or the location or dimension of a bridge according to road plans "unless *it is so obviously dangerous that no reasonable or prudent man would approve the plans*." (Emphasis supplied.) See *Olson v. County of Wayne*, 157 Neb. 213, 220, 59 N.W.2d 400, 404 (1953). The burden is on the plaintiff to establish that the political subdivision was negligent and that its negligent act or omission was the proximate cause of the injury or damage or that it was a cause that proximately contributed to it. *Christensen v. City of Tekamah*, 201 Neb. 344, 268 N.W.2d 93 (1978).

Regarding the first assigned error, summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. It is an extreme remedy which should be awarded only when the facts and inferences are clear beyond all doubt. Ordinarily, questions of negligence and contributory negligence are for a jury, see *Krehnke v. Farmers Union Co-Op Assn.*, 199 Neb. 632, 260 N.W.2d 601 (1977), as is the question of reasonableness in the performance of a duty.

From a review of the record in the light most favorable to plaintiff, giving her the benefit of all favorable inferences to be drawn therefrom, *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985), we conclude that genuine questions of material fact concerning the city's duty of reasonable care to the plaintiff and the public existed so as to render summary judgment inappropriate. First, there is a conflict in the evidence concerning the width of G Street on the east side of the hill and the existence and width of shoulders on each side of the blacktop surface. Second, there is uncertainty in the ultimate inferences to be drawn from the steep grade of the street on both sides of the hill, the lack of visibility for drivers crossing the crest of the hill, the curvature of the road from the south to the north on the east side of the hill, and the adequacy or inadequacy of traffic controls. Our task is not to decide issues of fact but to discover if any genuine issues of fact exist. *Green v. Village of Terrytown*, 189 Neb. 615, 204 N.W.2d 152 (1973). We examine the evidence relative to the city's duty without regard to evidence of Margaret's knowledge of the road's condition, her own acts, or the ultimate issue of proximate

cause.

Due to the manner in which we decide this case, we do not reach the plaintiff's second assigned error. Since defendant was not entitled to judgment as a matter of law, we reverse and remand for trial.

REVERSED AND REMANDED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. I believe that the district court was correct in granting summary judgment. As noted by the majority:

> A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. *Smith v. Baker's Local No. 433 Welfare Fund, ante* p. 215, 375 N.W.2d 922 (1985).

In my view the appellant was barred from recovering against the City of Tekamah by reason of having assumed the risk, knowing full well of the dangers present. The record conclusively establishes that Ms. Gilbert was thoroughly familiar with the intersection, having driven over the street each day for more than 10 years, and could have taken an alternate route if she wished. In *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 670, 345 N.W.2d 12, 15 (1984), we repeated the oft-cited rule regarding assumption of risk by saying: " ' "One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it." ' "

In *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962), the plaintiff was held to have assumed the risk when injured by diving off the defendant's raft without first checking the water depth. And in *Schwartz v. Selvage*, 203 Neb. 158, 277 N.W.2d 681 (1979), the plaintiff mailman, who slipped on an unknown object on defendant's residence steps, was held to have assumed the risk because he saw the clutter on the steps and did not use the handrail.

One who, knowing and comprehending a danger, voluntarily

exposes himself to it, although not negligent in so doing, is deemed to have assumed the risk and is precluded from recovery. See, *Hess v. Holdsworth*, 176 Neb. 774, 127 N.W.2d 487 (1964); *Garcia v. Howard*, 200 Neb. 57, 262 N.W.2d 190 (1978).

It therefore appears to me that regardless of how wide, in fact, the street may be or how steep the grade of the street may be, the lack of visibility for drivers crossing the crest of the hill, the curvature of the road from the south to the north on the east side of the hill, and the adequacy or inadequacy of traffic controls, when one accepts the fact that with knowledge of the intersection and the apparent dangers thereof, Ms. Gilbert, nevertheless, proceeded, one must also conclude that she is barred from recovery. A summary judgment, therefore, was appropriate. I would have affirmed the decision of the district court.

STATE OF NEBRASKA, APPELLEE, V. LUKE J. SOULE, APPELLANT.
379 N.W.2d 762

Filed January 17, 1986. No. 85-029.

1. **Criminal Law: Speedy Trial: Prisoners: Time.** The time within which an instate prisoner must be tried under Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Cum. Supp. 1984) begins to run after the county attorney for the county in which an indictment, information, or complaint is pending receives notice from the Department of Correctional Services of the prisoner's request for a final determination of a pending Nebraska indictment, information, or complaint.
2. **Criminal Law: Motions for Continuance: Speedy Trial: Prisoners: Time.** A continuance granted at an instate prisoner's request in the county court where a complaint is pending against such a prisoner operates to extend the time within which such a prisoner must be brought to trial under Neb. Rev. Stat. § 29-3805 (Cum. Supp. 1984).

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

James P. Miller and Owen A. Giles, for appellant.

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

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

GRANT, J.

Defendant-appellant, Luke J. Soule, was charged and convicted on one count of burglary pursuant to Neb. Rev. Stat. § 28-507(1) (Reissue 1979). Soule was sentenced to 2 years on this burglary charge, to be served consecutively to a previously imposed sentence for robbery. Soule's sole assignment of error is that "[t]he Court below erred by overruling Appellant's motion for discharge made pursuant to [Neb. Rev. Stat. § 29-3805 (Cum. Supp. 1984)]." For the reasons set forth hereinafter, we affirm.

Soule was charged in this case with burglary by criminal complaint filed February 6, 1984, in the county court for Sarpy County, Nebraska. At that time Soule apparently was in custody at the Douglas County Corrections Center in Omaha, Nebraska, pending the resolution of a robbery charge filed against him in that jurisdiction. The robbery charge was resolved against Soule, and on April 26, 1984, Soule was committed to the Nebraska Department of Correctional Services (Department) to serve a sentence of 2 to 4 years.

On May 14, 1984, the sheriff of Sarpy County filed a detainer with the Department in connection with the burglary charge pending against Soule in Sarpy County. In a letter dated May 23, 1984, from Raymond E. Sankey, deputy administrator of detainer compacts for the Department, to Patrick Kelly, Sarpy County attorney, Sankey informed Kelly that "Soule is requesting a quick and speedy disposition of your charges under Section 3 of the Nebraska Mandatory Disposition of Instate Detainer's [sic] Act." That title is not used in the Nebraska statutes, but the letter refers to 1984 Neb. Laws, L.B. 591 (effective March 3, 1984), now reflected in Neb. Rev. Stat. §§ 29-3801 et seq. (Cum. Supp. 1984). Those statutes provide that a county attorney must bring to trial any pending indictment, information, or complaint within 180 days after request is made.

Under the procedure outlined in those statutes, the Director

of Correctional Services (Director) must promptly inform, in writing, each prisoner in the custody of the Department of any untried indictment, information, or complaint against him or her in this state, of which the Director has knowledge, and of the prisoner's right to make a request for final disposition thereof. Such prisoner may request, in writing to the Director, final disposition of such untried charge. The Director then has the obligation to inform the appropriate county attorney as to the prisoner's status with the Department, and to inform the court in which the untried indictment, information, or complaint is pending of the prisoner's request for final disposition of the untried charge. The Director also must offer to deliver custody of such prisoner to the appropriate authority in the city or county in which the untried charge is pending.

Section 29-3805 provides that within 180 days after the county attorney receives the Director's certificate, or "within such additional time as the court for good cause shown in open court may grant, the untried indictment, information, or complaint shall be brought to trial with the prisoner or his or her counsel being present."

The letter from the Director's deputy, which operated as a certificate under §§ 29-3803 to 29-3805, was received by the county attorney of Sarpy County on May 24, 1984, and by the county court for Sarpy County on the same day.

Soule first appeared in county court in Sarpy County on September 19, 1984. At this hearing, counsel was appointed for Soule, bond was set, and his preliminary hearing was scheduled for October 4, 1984. On October 4 Soule appeared with counsel in the county court. On that date the court's records show the following:

> Pre-Hearing Motion to continue—Defendant Heard Oct. 4, 1984 Defendant Present yes Defendant Counsel James Miller, P.D. State's Counsel John Irwin
>
> Defendant moved for week's continuance to enable his counsel to prepare adequately for preliminary hearing—State had no objection—One week continuance granted—So ordered.
>
> /s/ Albert Walsh
> Judge

Soule's preliminary hearing was held on October 11, 1984, and he was bound over to the district court to stand trial. An information was filed against Soule on the burglary charge in the district court for Sarpy County on October 15, 1984. Jury trial began on November 26, 1984, and Soule was found guilty of burglary on November 27.

At his sentencing on December 21, 1984, Soule's attorney made an oral motion to dismiss for failure of the State to bring Soule to trial within 180 days as required by § 29-3805. Two exhibits were received in evidence in support of this motion. These exhibits, together with the transcript of the county court proceedings, showed the time sequence and procedures set out above. The trial court overruled Soule's motion and imposed a sentence to be served consecutively to Soule's Douglas County sentence. Soule timely appealed from the sentence.

Section 29-3805 provides in its entirety:

> Within one hundred eighty days after the prosecutor receives a certificate from the director pursuant to section 29-3803 or 29-3804 or within such additional time as the court for good cause shown in open court may grant, the untried indictment, information, or complaint shall be brought to trial with the prisoner or his or her counsel being present. The parties may stipulate for a continuance or a continuance may be granted on a notice to the attorney of record and an opportunity for him or her to be heard. If the indictment, information, or complaint is not brought to trial within the time period stated in this section, including applicable continuances, no court of this state shall any longer have jurisdiction thereof nor shall the untried indictment, information, or complaint be of any further force or effect and it shall be dismissed with prejudice.

Pursuant to § 29-3805, the calculation of the time within which a defendant must be tried under this act begins to run after a prosecutor receives a certificate from the Director concerning a Nebraska prisoner's request for final disposition of a pending Nebraska charge.

The procedure under §§ 29-3801 to 29-3809 sets out a different timeframe from that set out in Neb. Rev. Stat.

§ 29-1207(2) (Reissue 1979) concerning mandatory disposition of untried indictments or informations within 6 months, or authorized continuances. Soule would have this court apply the law and decisions under the "speedy trial" requirements of Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 1979) to this case. We decline to do so, and determine that §§ 29-3801 et seq. are much more akin to Neb. Rev. Stat. §§ 29-729 to 29-765 (Reissue 1979), referring to interstate detainers, as discussed in *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984).

In this case there is no question that Soule was brought to trial more than 180 days after his request was received by the prosecutor and filed in the county court. The letter from Raymond E. Sankey to Patrick Kelly acted as "a certificate from the director pursuant to section 29-3803 or 29-3804" as provided in § 29-3805. This letter was received by the county attorney of Sarpy County on May 24, 1984. Under § 29-3805 the 180-day period then began to run and would have expired on November 20, 1984, unless a continuance satisfying the statute had been granted. We hold that the time within which an instate prisoner must be tried under §§ 29-3801 to 29-3809 begins to run when the county attorney of the county in which an indictment, information, or complaint is pending receives notice from the Department of Correctional Services of the prisoner's request for a final determination of a pending Nebraska indictment, information, or complaint.

The trial court held and the evidence shows that in the county court for Sarpy County a 1-week continuance was requested by Soule's attorney and was granted to Soule to aid him in preparing for his preliminary hearing. At that time the complaint against Soule was pending in that court. The district court held that defendant's motion in the county court extended for 7 days the running of the 180 days under § 29-3805. We hold that a continuance granted at an instate prisoner's request in the county court where a complaint is pending against such a prisoner operates to extend the time within which such a prisoner must be brought to trial under § 29-3805.

The rulings of the district court conform to the statute in question. Section 29-3805 specifically provides that trial shall be held within 180 days after the prosecutor receives a

certificate "or within such additional time as the court for good cause shown in open court may grant . . . ." In this case defendant Soule, through his counsel, requested and obtained a 7-day continuance. Such action resulted in the 180-day period's being extended 7 days. Soule was brought to trial within that properly extended period. The trial court was correct in denying defendant's motion for discharge premised on § 29-3805.

Other courts have reached the same result under similar intrastate detainer statutes. Among other states, Missouri, Minnesota, North Dakota, and Colorado have adopted the Uniform Mandatory Disposition of Detainers Act, on which Nebraska's §§ 29-3801 et seq. are based. In *Russell v. State*, 624 S.W.2d 176 (Mo. App. 1981), the court held that where a defendant files a motion within the 180-day period seeking a trial date beyond the 180-day limit, such a defendant is not then entitled to a discharge because the trial is held more than 180 days after the prisoner's request for final disposition of a pending case.

In *State v. Hamilton*, 268 N.W.2d 56 (Minn. 1978), the court held that the granting of a prosecutor's motion for a continuance, if based on good cause, operated to extend the 6-month period within which the applicable Minnesota statutes required that Minnesota prisoners must be brought to trial on pending Minnesota charges.

In *State v. Carlson*, 258 N.W.2d 253 (N.D. 1977), the court held that where counsel for the defendant and the State stipulated for a continuance, the period within which defendant had to be tried was extended for the period of the continuance. See, also, *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982).

By adopting §§ 29-3801 et seq. the Nebraska Legislature has provided a specific mechanism for a Nebraska prison inmate to assert his right to speedy trial on pending Nebraska charges. If the State fails to bring the defendant to trial timely, then dismissal of the charge is required. The statute itself, however, is written to provide an element of flexibility by providing an exception where a continuance is granted for good cause or agreement between the State and defendant.

The facts in this case show that defense counsel was the moving party for a continuance during a hearing in open court.

The prosecutor had no objection. The decision of the trial court denying defendant's motion to dismiss was correct. Defendant's conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DELBERT E. WARNKE, APPELLANT.
380 N.W.2d 241

Filed January 17, 1986. No. 85-192.

Verdicts: Appeal and Error. A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.

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

James P. Miller and Owen A. Giles, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

GRANT, J.

Defendant-appellant, Delbert E. Warnke, was charged by complaint in Sarpy County Court with driving while intoxicated, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). The complaint charged that on May 26, 1984, Warnke was in actual physical control of a vehicle either while under the influence of alcoholic liquor or while he had ten-hundredths of 1 percent or more by weight of alcohol in his body fluids. Warnke pled not guilty. After trial the county court found him "guilty, as charged, of driving while intoxicated." An enhancement hearing was held on December 21, 1984. At that hearing the court determined there were two valid prior convictions of defendant for the same offense.

Warnke was sentenced to 4 months in jail, a $500 fine was imposed, and his driving privileges in Nebraska were suspended for life. The county court suspended Warnke's lifetime revocation of driving privileges and reduced that revocation to 1 year, after which time the court stated that Warnke could apply for reinstatement. On appeal to the district court for Sarpy County, Warnke's conviction was affirmed and the sentence of lifetime revocation of his driving privileges was reinstated. The district court found the county court's order suspending its own order of lifetime suspension of Warnke's driving privileges and reducing it to 1 year was a nullity and plain error on the record, and imposed the statutorily required penalty.

Warnke appeals, assigning only one error: "The Court below erred by failing to find as a matter of law that the evidence presented to the trial Court was insufficient to sustain Appellant's conviction for the basic offense of Driving While Intoxicated." For the reasons hereinafter set out, we affirm.

The record shows that on May 26, 1984, two Sarpy County sheriff's deputies, riding together in a sheriff's patrol car, arrested defendant for driving his automobile while under the influence of alcoholic liquor. Each officer testified under the trial court's order of sequestration of witnesses. Deputy Timothy J. Carmody testified that he was driving the patrol car at the time of defendant's arrest, while Deputy Randall Furby testified he was driving the patrol car at that time. In all other respects the two deputies generally agreed in their testimony. Each testified that defendant was first observed at Highway 50 and Harrison Street, in Sarpy County, driving a car without license plates. Each testified that defendant was stopped about one-half mile away at Highway 50 and Josephine Street, and each testified that defendant's speech was slurred, although he was able to recite the alphabet, that defendant smelled of alcohol, and that his eyes were watery. Deputy Furby testified that defendant swayed when attempting to stand still. Both testified that defendant successfully completed only part of the physical dexterity tests he was asked to perform. The deputies both testified as to an open, cold can of beer found in defendant's car, as well as a partially full 12-pack of the same

kind of beer. Each deputy testified that he had known and seen people under the influence of intoxicating liquors and had made arrests of intoxicated persons. Each deputy was of the opinion that defendant was intoxicated to the degree where it would appreciably impair his ability to operate an automobile.

At the time of defendant's arrest, Deputy Carmody administered a preliminary pass-fail field test of defendant's breath. This test indicated that defendant failed the test, and defendant was taken to the Sarpy County jail for an Intoxilyzer test. At trial the results of that Intoxilyzer test were not admitted into evidence. Defendant was found guilty by the court, sitting without a jury, of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor.

In *State v. Taylor, ante* p. 114, 119, 375 N.W.2d 610, 614 (1985), we stated: "A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law. *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984)."

We have also held:

> [I]t is not for this court to accept one version of the case over another . . . . 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. Murphrey, 220 Neb. 699, 701, 371 N.W.2d 702, 704 (1985), quoting *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). With these standards in mind we consider Warnke's contentions.

Warnke first contends that the preliminary breath test may not be considered as evidence upon which a conviction may be based even though the results were admitted into evidence. We agree. We held in *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984), that such a test may be properly admitted for the limited purpose of showing a basis for an arrest. The record shows

clearly that the trial court admitted the evidence of the preliminary breath test "for the limited purpose showing probable cause . . . for an arrest." Since, as set out hereinafter, we determine there is other sufficient evidence to support Warnke's conviction, defendant's contention in this regard, although correct, does not affect the result herein.

Insofar as Warnke contends that the trial court erred in allowing the deputies to state their opinions about appellant's state of intoxication, we find Warnke's argument is unpersuasive. In *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983), we held that an officer could testify as to his or her opinion even as a nonexpert, provided that there were facts detailed from the officer's direct observations. Further, in *Green, supra*, we noted that such testimony is proper as based upon the witness' personal observations. The opinion evidence of the two deputies was properly admitted.

Warnke's third point in his argument is that due to conflicts in the deputies' testimony, it should be discounted as "invented to meet the exigencies of pending litigation." The only real conflict in the deputies' testimony was the question of who was driving. It is not for this court to resolve such conflicts, nor is it for this court to look at the credibility of witnesses or the plausibility of explanations. The trial judge viewed the witnesses and passed upon their credibility, then weighed the properly admitted evidence and concluded that Warnke was guilty as charged. The deputies' testimony was properly admitted.

Finally, Warnke generally asserts that the evidence presented is plainly insufficient even when viewed in total. We disagree. The recitation of facts indicates there was sufficient evidence to sustain Warnke's conviction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD HOLMES, APPELLANT.

379 N.W.2d 765

Filed January 17, 1986. No. 85-295.

1. **Sentences.** A sentence validly imposed takes effect from the time it is pronounced, and a subsequent sentence fixing a different term is a nullity.
2. **Criminal Law: Penalties and Forfeitures: Restitution: Words and Phrases.** Restitution imposed under Neb. Rev. Stat. § 28-427 (Reissue 1979) is not a criminal penalty to be imposed as punishment for the crime, but is in the nature of a civil or administrative penalty or sanction.
3. _____: _____: _____: _____. Restitution differs from forfeiture in that it is unnecessary to identify money found in the possession of the defendant as the money received by the defendant from a particular sale of drugs.
4. **Criminal Law: Restitution.** An order under Neb. Rev. Stat. § 28-427 (Reissue 1979) that the defendant make restitution creates a debt in favor of the State which can be satisfied from any funds belonging to the defendant.
5. **Statutes.** The heading, or catchline, to a statute is supplied in the compilation of the statutes and does not constitute any part of the law.
6. **Criminal Law: Restitution: Sentences.** An order for restitution under Neb. Rev. Stat. § 28-427 (Reissue 1979) may be made at the time of the sentencing, but there is no statutory requirement that it be made at that time, and it is not a part of the sentence.

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

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellant.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

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

BOSLAUGH, J.

The defendant, Donald Holmes, was sentenced on November 13, 1984, to imprisonment for 2½ to 3 years for delivery of cocaine and ordered to pay the costs of the action.

On December 11, 1984, the defendant filed a motion for the return of $2,700 that had been seized at the time of his arrest on September 20, 1983. The motion alleged the money had been in a safe in his home and was "not in the immediate vicinity of any drugs, narcotics or any other drug paraphernalia, nor is there

any evidence that said money was derived from the sale of drugs or intended to be used in the purchase or transferring of drugs or other narcotics." The motion further alleged that the money was "not needed for evidence in any case, nor [has it] been used as evidence in any case."

The motion was heard on February 12, 1985. In support of the motion the defendant introduced an affidavit stating that he owned $2,700 that had been stored in a safe in his Lincoln, Nebraska, home, which sum was not used in unlawful gambling nor in lotteries. Attached to and incorporated in the affidavit was a copy of the Nebraska State Patrol inventory of Holmes' vehicles, dwellings, or buildings, which he received on the date of his arrest. The inventory sheet indicates that $2,700 in cash was taken from a safe in the defendant's home on September 20, 1983.

The State presented no evidence other than a stipulation that $6,390 was expended by the Nebraska State Patrol in buying cocaine from Holmes on June 13 and June 20, 1982, and that none of that money had been repaid by the defendant. The county attorney then, by oral motion, requested that the trial court, pursuant to Neb. Rev. Stat. § 28-427 (Reissue 1979), order the defendant to make restitution in the amount of $6,390 to the Nebraska State Patrol for the purchase of controlled substances.

On February 14, 1985, the trial court found that the defendant's motion for return of the money should be denied. The defendant was ordered to make restitution within 10 days to the Nebraska State Patrol in the amount of $6,390, and the $2,700 held by the State Patrol was to be applied to the restitution. The defendant has appealed from that order.

The defendant contends (1) that the trial court erred in failing to order the return of the seized property pursuant to Neb. Rev. Stat. §§ 29-818 et seq. (Reissue 1979), and (2) that the trial court erred in sustaining the oral motion of the State for the imposition of additional sanctions upon the defendant, in that it lacked jurisdiction under § 28-427 to do so at the time.

The defendant contends that since there were no pleadings or testimony at the February 12, 1985, hearing to indicate anything other than that the money belonged to him, the court

should have ordered the $2,700 be returned to him. He relies upon §§ 29-818 et seq. as authority for an order returning the money.

Section 29-818 gives the court in which the complaint was filed exclusive jurisdiction to determine the rights to seized property and the disposition of it. Section 29-820 provides in part:

> *Unless other disposition is specifically provided by law*, when property seized or held is no longer required as evidence, it shall be disposed of on order of the court on such showing as the court may deem adequate, as follows:
>
> . . . .
>
> (2) Money shall be restored to the owner unless it was used in unlawful gambling or lotteries in which case it shall be forfeited and disposed of as required by Article VII, section 7, Constitution of Nebraska.

(Emphasis supplied.)

The trial court did not order the seized funds be returned to the defendant, because it found the defendant should make restitution under § 28-427.

Section 28-427 provides:

> Any penalty imposed for violation of this article shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law. A conviction or acquittal under federal law or the law of another state having a substantially similar law shall be a bar to prosecution in this state for the same act. Should any person be convicted for violation of this article, in addition to any penalty imposed by the court, the court may order that such person make restitution to any law enforcement agency for reasonable expenditures made in the purchase of any controlled substances from such person or his agent as part of the investigation leading to such conviction.

At the February 12, 1985, hearing it was stipulated that $6,390 was expended by the Nebraska State Patrol in buying cocaine from the defendant on June 13 and June 20, 1982. It was also stipulated that none of this money had been repaid to the State Patrol.

The defendant contends that the trial court lacked jurisdiction to order restitution because restitution must be a part of the sentence and a valid sentence had been imposed previously. The defendant argues that the restitution order amounted to a change or increase in his sentence and could not be imposed at the February 1985 hearing, because he had been validly sentenced previously.

A sentence validly imposed takes effect from the time it is pronounced, and a subsequent sentence fixing a different term is a nullity. See *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981). See, also, *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984); *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984); *State v. Kinney*, 217 Neb. 701, 350 N.W.2d 552 (1984); *State v. Sliva*, 208 Neb. 647, 305 N.W.2d 10 (1981); *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973).

The rule against changing a validly imposed sentence applies, consistent with its double jeopardy origins, when conditions amounting to punishment are ordered upon conviction, after which *additional punishment* may not be imposed. *Whedbee v. Powell, Comr. of Motor Vehicles*, 41 N.C. App. 250, 254 S.E.2d 645 (1979). See, also, A. Campbell, Law of Sentencing § 58 (1978).

The first two sentences of what is now § 28-427 originated as § 16 of 1971 Neb. Laws, L.B. 326.

It is clear from the language of § 16 of L.B. 326 that the Legislature contemplated that civil or administrative penalties or sanctions might be imposed upon a defendant convicted of violating the Nebraska drug laws and that such penalties or sanctions were to be in addition to, and not in lieu of, penalties imposed for the offense itself.

In 1974 the third sentence of what is now § 28-427 was added by 1974 Neb. Laws, L.B. 748. Its purpose was to permit the State to recover "buy money" expended in purchasing controlled substances from a defendant.

Whether a particular statutory penalty is civil or criminal in nature is a matter of statutory construction. *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980). Restitution under the federal Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1501 et seq. (1982), has been held to

be a criminal penalty. *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985); *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984).

Unlike the federal Victim and Witness Protection Act, which requires that restitution under that act be imposed at the time of and as a part of the sentencing procedure (18 U.S.C. § 3579), § 28-427 is silent as to when an order for restitution can be made. The only requirements are that the defendant have been convicted of a violation of the article and that the restitution be for "reasonable expenditures made in the purchase of any controlled substances" from the defendant or his agent as part of the investigation leading to the conviction. The facts in the present case satisfy all of these requirements.

The order for restitution can be made at the time of the sentencing, but there is no statutory requirement that it be made at that time.

We think the restitution which § 28-427 provides for is not a criminal penalty to be imposed as punishment for the crime, but is in the nature of "a civil or administrative penalty or sanction" which is "in addition to any penalty imposed by the court." Its purpose is to prevent the defendant from profiting by his crime and to restore the funds expended by the State in the investigation of the crime. See *United States v. $2,500 in United States Currency*, 689 F.2d 10 (2d Cir. 1982) (construing nonpunitive purposes of the forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 871-886 (1976)). See, also, *People v. Evans*, 122 Ill. App. 3d 733, 461 N.E.2d 634 (1984).

Restitution differs from forfeiture in that it is unnecessary to identify money found in the possession of the defendant as the money received by the defendant from a particular sale of drugs. An order that the defendant make restitution creates a debt in favor of the State which can be satisfied from any funds belonging to the defendant.

Other courts have recognized that "[a] penalty is in the nature of punishment for the nonperformance of an act or for the performance of an unlawful act. It involves the idea of punishment." *Hoffmann v. Clark*, 69 Ill. 2d 402, 429, 372 N.E.2d 74, 87 (1977). See, also, *Hidden Hollow Ranch v.*

Collins, 146 Mont. 321, 406 P.2d 365 (1965); *S. C. State Hwy. Dept. v. Southern Rwy. Co.*, 239 S.C. 227, 122 S.E.2d 422 (1961); *Julian v. Burrus*, 600 S.W.2d 133 (Mo. App. 1980).

Restitution, on the other hand, is *not* punitive in nature. "As contrasted to a fine, restitution is considered rehabilitative rather than punitive; contrasted to forfeiture, it is regarded as indemnifying the victim rather than dispossessing the offender." A. Campbell, Law of Sentencing § 10 at 49 (1978). See, also, *State v. Fader*, 358 N.W.2d 42 (Minn. 1984).

The defendant argues that the caption to § 28-427 supports his argument that restitution amounts to a penalty or punishment. The caption to § 28-427 reads "Additional penalties; exception." The heading, or catchline, is supplied in the compilation of the statutes and does not constitute any part of the law. See, Neb. Rev. Stat. § 49-802(8) (Reissue 1984); *Cosentino v. City of Omaha*, 186 Neb. 407, 183 N.W.2d 475 (1971).

We conclude that restitution imposed under § 28-427 is not a part of the sentence and that the trial court had jurisdiction to make the order of restitution on February 14, 1985, following the hearing on the oral motion of the State. The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. The majority opinion has correctly noted that a sentence validly imposed takes effect from the time it is pronounced, that a subsequent sentence fixing a different term is a nullity, and that a sentence, once imposed, may not be altered or modified thereafter. The majority opinion, however, justifies imposing restitution provided for by Neb. Rev. Stat. § 28-427 (Reissue 1979) at some time after the imposition of the sentence of imprisonment on the theory, apparently, that the order for restitution is not part of the criminal penalty but, rather, is in some manner a civil debt now reduced to judgment and owed by the defendant to the State of Nebraska. I do not believe that either the language of the statute or the procedures provided for by statute for the imposition of an order of restitution can support that conclusion, and it is for that reason that I must

dissent.

As noted by the majority opinion, § 28-427 provides:

> *Any* penalty imposed for violation of this article shall be in addition to, and not in lieu of, any *civil or administrative penalty* or sanction authorized by law. A conviction or acquittal under federal law or the law of another state having a substantially similar law shall be a bar to prosecution in this state for the same act. Should any person be convicted for violation of this article, in addition to any penalty imposed by the court, the court may order that such person make restitution to any law enforcement agency for reasonable expenditures made in the purchase of any controlled substances from such person or his agent as part of the investigation leading to such conviction.

(Emphasis supplied.)

One who violates the provisions of "this article" may be guilty of committing anything from an infraction to a Class II felony and as such may be ordered to pay a fine of as little as $100 or to be imprisoned for as long as 50 years. Section 28-427 merely provides that in addition to the penalty for violating the act for which fine or imprisonment may be imposed, the defendant may additionally be penalized by being ordered to make restitution to the State for reasonable expenditures incurred by the State when purchasing a controlled substance as part of the investigation and subsequent arrest. That the imposition of an order of restitution "imposed for violation of this article" is a criminal penalty and not intended to be either a civil or administrative penalty is clearly spelled out by the language of § 28-427 itself. As noted by the majority, the first sentence provides that "[a]ny penalty imposed for violation of this article shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law." In my view it is significant that the act includes "any penalty" imposed for violation of the article and says that it shall be in addition to any civil or administrative penalty. Had it said that it was in addition to any "other" penalty, the argument made by the majority might wash. Here, however, it specifically says that any penalty imposed for violation of the article shall not be in

lieu of any civil or administrative penalty. Interestingly enough, the word "criminal" is not included in the litany for which this penalty shall be in addition. In view of the fact that penalties are either criminal, civil, or administrative in nature and only civil and administrative penalties are excluded from the list, to suggest that the imposition of an order of restitution as a penalty imposed for violation of § 28-427 is civil in nature and not criminal is clearly wrong. I have difficulty concluding that the imposition of restitution under this article can be anything more than an additional criminal penalty imposed by the court, and as such must be imposed at the same time as other penalties are imposed.

This appears to be the view taken by at least most, if not all, of the federal courts of appeals which have passed upon a similar though not identical statute. In the case of *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985), the U.S. Court of Appeals for the Ninth Circuit was asked to pass upon an order of restitution imposed pursuant to the provisions of the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3579 and 3580 (1982). Specifically, the defendant contended that the trial court was required to hold a jury trial, under the sixth and seventh amendments to the federal Constitution, before it could impose an order of restitution. The defendant specifically asserted that the seventh amendment to the federal Constitution required the sentencing court to hold a jury trial on the issue of the amount of restitution liability because the provision of the act authorizing the victim to enforce a restitution order, § 3579(h), transformed a restitution order into a civil judgment. In rejecting the argument in *Keith, supra*, the court of appeals said at 1391-92:

> "[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980). Congress intended restitution under the Act to be a criminal penalty carrying the stigma associated with other authorized criminal sanctions. Under the Act, a court "sentencing" a defendant convicted of specified federal criminal offenses may order restitution "in addition to or in lieu of any other

penalty authorized by law." 18 U.S.C. § 3579(a)(1). Unlike an award of damages in a civil action, a restitution order under the Act may compensate only for the kinds of harms enumerated in subsection 3579(b) (excluding, for example, pain and suffering) and does not bar a subsequent civil action for damages based upon the same incident. 18 U.S.C. §§ 3579(e)(2), 3580(e). . . .

Congress made restitution under the Act a criminal penalty. We agree with the Second, Eighth, Tenth, and Eleventh Circuits that inclusion of the victim enforcement provision in the Act does not transform a sentencing proceeding resulting in a restitution order into an "action at common law" within the meaning of the seventh amendment. *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984); *United States v. Satterfield*, 743 F.2d 827, 839 (11th Cir.1984); *United States v. Brown*, 744 F.2d 905, 910 (2d Cir.1984); *United States v. Florence*, 741 F.2d 1066, 1067-68 (8th Cir.1984). Keith was not entitled to a jury trial on the issue of the amount of restitution liability.

The majority's effort to distinguish the federal Victim and Witness Protection Act from the instant act appears to me to be a distinction without a difference. While it is true that the federal Victim and Witness Protection Act specifically provides that the restitution shall be imposed at the time of sentence, if, as I believe it to be correct, restitution in this case is a criminal penalty, it must be imposed at the time of sentencing, whether our statute makes such provision or is silent. Furthermore, where, as the majority notes, the imposition of the restitution order is dependent upon the defendant's having been found guilty of a crime under "this article" and may not be imposed absent such a conviction or independent of such conviction, I am unable to conclude how it can be said that this is a civil penalty and not a criminal penalty imposed under the provisions of the criminal statute § 28-427.

The majority opinion makes some point of the fact that the first two sentences of § 28-427 were adopted in 1971, and with that language known to the Legislature, the last sentence was adopted in 1974. I would only point out that one must therefore conclude that the Legislature knew that this order of restitution

was to be an additional criminal penalty imposed for a violation of the article and was not "in lieu of any civil or administrative" penalties otherwise imposed.

Furthermore, the majority suggests that the order for restitution can be made at the time of the sentencing, but there is no statutory requirement that it be made at that time. I would suggest that if, indeed, as the majority contends, the order of restitution is a civil penalty and not part of the criminal act, it cannot be imposed at the time of the sentencing but, rather, must be imposed only after the defendant has been afforded proper due process, including the filing of some form of petition by the State and a trial at which the State is required to prove by a preponderance of the evidence that the amounts of moneys spent were "reasonable expenditures." A civil penalty cannot be imposed upon the defendant at the time of the imposition of a criminal sentence at the will of the State and without some form of trial. The defendant has some right to defend the imposition of a civil judgment. The fact that the Legislature did not see fit to provide any procedure for that trial appears to me to only be further evidence that the Legislature believed that the order of restitution was a part of the criminal penalty and could be imposed by the trial court in the same manner that the trial court can impose the payment of costs or any other fine.

While I wholeheartedly support the purpose of the section in question and believe that a defendant convicted of violating a section of the Uniform Controlled Substances Act (Neb. Rev. Stat. §§ 28-401 et seq. (Reissue 1979 & Cum. Supp. 1984)) should be ordered to make restitution and should not be permitted to profit from the sale of illegal drugs to the government, I likewise believe that we must hold it to be a part of the criminal action and therefore require it to be imposed at the time that the sentence is imposed. There is no outstanding mystery existing at that point of time. The government knows precisely how much money it has expended in purchasing a controlled substance from the defendant and can make that request prior to the time that the sentence is imposed. There is not anything in the act which requires that the defendant must have the ability at the time of sentencing to make restitution,

but only that he be ordered to make restitution when and if he can. For that reason I would have held that the order of restitution ordered by the district court was criminal in nature and came too late, and I would therefore reverse and remand.

CAPORALE and SHANAHAN, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GERALD E. JACOBSON, APPELLANT.
379 N.W.2d 772

Filed January 17, 1986. No. 85-392.

1. **Probation and Parole: Sentences.** Upon revocation of probation the court may then impose on the offender such punishment as might have been imposed originally for the crime for which such defendant was convicted.
2. **Probation and Parole: Final Orders: Time: Appeal and Error.** A sentence of probation is a final and appealable order from which an appeal must be taken within 1 month.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed as modified.

John C. Kinney of Ryan & Scoville Law Office, for appellant.

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

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

HASTINGS, J.

This appeal questions which law applies to a criminal sentencing following revocation of probation: the penal statute in effect at the time of the original sentence to a term of probation, or that which is effective at the time of sentencing following the revocation.

On November 18, 1980, following a plea of guilty, defendant was convicted of driving while intoxicated, third offense, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). The penalty then prescribed for that felony offense was up to 5

years' imprisonment, a 1-year suspension of driving privileges, and a fine of up to $10,000. On January 7, 1981, defendant was sentenced to a term of probation for 60 months.

In November of 1984 defendant was convicted in Iowa and sentenced for a driving while intoxicated offense. On the basis of that violation, the district court for Dakota County, following a plea of guilty, revoked defendant's probation.

Defendant was sentenced on May 7, 1985, to a term of imprisonment of from 18 months to 5 years. He was given no credit for time served in jail prior to sentencing. He had been arrested and held in jail by Nebraska authorities from March 21, 1985, until the date of sentencing.

At the time of the present sentencing, § 39-669.07 (Reissue 1984) had been amended, effective in 1982. It now provides that driving while intoxicated is a Class W misdemeanor, with penalties for third offense of 3 to 6 months in jail, a $500 fine, and a lifetime suspension of driving privileges.

Defendant assigns as error: (1) Sentencing under the 1978 statute, which was greatly in excess of that permitted by the 1982 amendment; (2) The failure of the court to give him credit for presentencing jail time; and (3) The failure of the State to meet its burden on enhancement for sentencing purposes.

Although we find no merit to either the first or third assignment of error, the record discloses, and the State concedes, that defendant must be given credit for jail time. Therefore, we affirm the judgment and sentence of the district court, but modify the sentence to provide for credit of 48 days previously served in jail.

The defendant argues that under the doctrine laid down by *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686, and the provisions of Neb. Rev. Stat. § 29-2204.01 (Reissue 1979), he should have been sentenced under the amended law, with the maximum term of imprisonment limited to 6 months.

Randolph provides that whenever a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment shall be that provided by the amendatory act. Section 29-2204.01 requires the discharge from confinement of any

person who has served the maximum period of confinement provided for that crime by any later statutory amendment.

Although recognizing the factual distinction between that section and the facts of this case, the defendant argues his conclusion by analogy. However, we rejected the same arguments in *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982), and concluded that a defendant convicted and sentenced before the law was amended, but whose appeal was pending at the time of such amendment, was not entitled to have *Randolph* or § 29-2204.01 apply so as to become the beneficiary of the alleged ameliorating provisions of § 39-669.07, as amended.

The fact that the act which furnished the basis for probation revocation, as well as the actual order of revocation and sentencing thereof, occurred after the law was amended is of no consequence. Upon revocation of probation the court may then impose on the offender such punishment as might have been imposed originally for the crime of which such defendant was convicted. Neb. Rev. Stat. § 29-2268(1) (Reissue 1979). The district court was correct in sentencing defendant under the 1978 law.

There is no merit to defendant's third assignment of error relating to enhancement. The finding of the district court that this was in fact a third offense was made at the time of the original sentence to a term of probation in 1981. A sentence of probation is a final and appealable order from which an appeal must be taken within 1 month. *State v. Osterman*, 197 Neb. 727, 250 N.W.2d 654 (1977). The defendant cannot now base an appeal on any error alleged to have occurred more than 4 years ago.

The judgment and sentence of the district court were correct, except as modified herein, and they are affirmed.

AFFIRMED AS MODIFIED.

CAPORALE, J., dissenting.

I dissent for the reasons set forth in my dissenting opinion in *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982).

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

P.A.M., APPELLANT, V. QUAD L. ASSOCIATES, A LIMITED PARTNERSHIP, APPELLEE.
S.K., APPELLANT, V. QUAD L. ASSOCIATES, A LIMITED PARTNERSHIP, APPELLEE.

380 N.W.2d 243

Filed January 24, 1986. Nos. 84-600, 84-618.

1. **Workmen's Compensation.** The Workmen's Compensation Act provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment.
2. _____. Injuries caused by intentional assaults are compensable if they arise out of, or result from, a risk connected with the employment.
3. _____. An employee injured on the premises of the employer where he works while coming to work or leaving after work is within the course of his employment under the Nebraska Workmen's Compensation Act.

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

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellants.

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

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

KRIVOSHA, C.J.

P.A.M. and S.K., former employees of Quad L. Associates (Quad), the owner and operator of a restaurant known as Wendy's Old Fashioned Hamburgers (Wendy's), appeal from judgments entered by the district court for Douglas County, Nebraska, sustaining Quad's motions for summary judgment and dismissing appellants' actions against Quad. Because the injuries arose out of the same incident and involve the same questions of law, the cases were consolidated for argument in this court.

The specific question presented to this court is whether appellants' injuries arose out of and in the course of their employment within the Nebraska Workmen's Compensation Act and that the actions, therefore, were within the exclusive jurisdiction of the Workmen's Compensation Court, or

whether the appellants could maintain a common-law action for negligence against their employer. This appears to be a case of first impression in this jurisdiction, in that the injuries sustained by the appellants occurred as a result of their being criminally assaulted while their employer's premises were being robbed. We believe that the district court was correct in finding that the injuries arose out of and in the course of the appellants' employment and that the actions were therefore exclusively within the jurisdiction of the Nebraska Workmen's Compensation Court. For that reason we affirm the judgments of the district court.

The depositions and affidavits of the various witnesses establish that on Friday, October 2, 1981, S.K., who was then 16 years of age and a junior in high school, was employed as a countergirl at a restaurant known as Wendy's Old Fashioned Hamburgers located in Omaha, Nebraska. S.K. had been working on a part-time basis since April of 1981. Although she had not been scheduled to work that evening, she was called to report for work at 6:30 p.m. Since she did not drive an automobile, her mother drove her to the restaurant. Later that evening, S.K. asked her friend and fellow employee, P.A.M., if P.A.M. could give her a ride home. P.A.M. agreed to do so.

Wendy's remained open until midnight, at which time the doors were locked and the exterior sign turned off. Thereafter, S.K. and three other employees performed their cleanup and restocking work, which was completed shortly after 1 a.m., at which time they punched out on the timeclock and the others left. S.K., nevertheless, waited in the building approximately 20 to 25 minutes for P.A.M. to finish her bookwork so she could be driven home.

P.A.M., who was then 19 years of age, had been employed by Wendy's for approximately 3½ years, beginning while she was in high school. She had been designated as one of several "assistant managers" at that location. Normally there were four employees and one manager on duty, but that evening the manager was working at another location. After closing, P.A.M. performed her bookwork, made up the deposit, and placed the day's receipts in deposit bags. P.A.M. testified in her deposition that part of her duties included making the bank deposit of the day's receipts. She indicated that she would do

this by carrying the locked bank deposit bags to her automobile and driving to a bank approximately two blocks from the restaurant's location. She further testified that she was paid more than the other nonmanagement employees for having the position of assistant manager and that one of the duties as assistant manager was to make the night deposits upon closing.

After finishing her work P.A.M. also clocked out. It was approximately 1:30 a.m. She then shut off all of the lights in the building, turned on the burglar alarm, and she and S.K. left the building and walked to the parking lot adjacent to the restaurant where her automobile was located. P.A.M., at that time, was carrying the deposit bags which she intended to place in the night depository at the bank. As both women were entering P.A.M.'s automobile, which was parked in a portion of the parking lot, two men carrying guns ran over from behind a dumpster and demanded the deposit bags, which P.A.M. turned over to them. The men then ordered both women to return to the building and instructed P.A.M. to unlock the door and turn off the burglar alarm. After entering the building P.A.M. was directed to open the safe. The women were then taken into separate rooms, where each was brutally sexually assaulted. After being sexually assaulted P.A.M. was further directed to deliver to the armed men the keys to the locked bank deposit bags. The two men then left the premises and ultimately were apprehended and convicted.

Although the assaults upon these women were vicious and brutal and nothing we do here is intended to minimize the tragedy, the question presented to us is not whether the attacks were cruel and brutal but, rather, whether the employer is subject to common-law liability because, as appellants' petitions alleged, the employer was negligent "[i]n failing to provide any security protection for its female employees leaving the premises in the middle of the night when the defendant knew, or should have known, of the danger of criminal assault," or did appellants' injuries arise out of and in the course of their employment, thereby limiting their cause of action to filing claims under the Nebraska Workmen's Compensation Act. If these were injuries arising out of and in the course of their employment, their exclusive remedies were in

the Workmen's Compensation Court. As we observed in *Johnston v. State*, 219 Neb. 457, 462, 364 N.W.2d 1, 5 (1985), quoting from *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975):

> The Workmen's Compensation Act provides the exclusive remedy by the employee against the employer for *any* injury arising out of and in the course of the employment. This is the basis on which the rights of employers and employees are put in balance. The employer, by having liability imposed on him without fault, receives in return relief from tort actions. Logically, therefore, where the employer is negligent he should not be relieved of liability where compensation coverage is not provided to the employee.
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> . . . The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is *exclusive*.

We think that the question involving P.A.M.'s case is clear under Nebraska law. At the time that the assault occurred, P.A.M. was on the employer's premises and was on her way to the bank to make the night deposit, clearly within the course of her employment. As admitted to by P.A.M., one of her duties, for which she received compensation, was to make the night deposit. The situation regarding P.A.M. is not dissimilar to the facts in the case of *Ridenour v. Lewis*, 121 Neb. 823, 238 N.W. 745 (1931). The evidence in *Ridenour* discloses that the employee was hired for the purposes of installing, repairing, and servicing radios and making collections for his employer. In the performance of these duties and while on a public street, the employee was robbed and assaulted. As a result of the assault, he died. In affirming the judgment of the district court awarding Ridenour's family death benefits provided by workmen's compensation law, we said at 831, 238 N.W. at 749:

> It seems to be well settled that injuries caused by intentional assaults are compensable if they arise out of, or result from, a risk connected with the employment. *Socha v. Cudahy Packing Co.*, 105 Neb. 691; *Nelson v.*

> *Service Oil Co., ante*, p. 762. This court is committed to the view that, when an employee is sent into the public street, under the circumstances detailed in this record, on his master's business, his employment necessarily involves exposure to all risks of the street, and injury from any such cause, not involving what is often referred to in the books as an "Act of God" (*Gale v. Krug Park Amusement Co.*, 114 Neb. 432), arises "out of the employment," within the meaning of the workmen's compensation act.

We concluded in *Ridenour* by saying at 833, 238 N.W. at 749:

> It would follow in the instant case that where the employment involved the installation, repair, and "servicing" of radios sold by the master, and also the collection of the master's accounts by the employee, and where such employee passing along the public streets pursuing his employment, with one of such accounts then in his possession for collection, is there assaulted for the purpose of robbery, and therein and thereby receives wounds causing his death, such injury arises out of, and in the course of, his employment.

Similarly, in *Goodwin v. Omaha Printing Co.*, 131 Neb. 212, 267 N.W. 419 (1936), we held that the shooting of a traveling salesman, by a highwayman, while driving from one town to another in furtherance of the business of the employer arises out of the employment within the meaning of the Nebraska Workmen's Compensation Act providing for compensation for injury or death by accident arising out of and in the course of the employment. In *Goodwin* we said at 216, 267 N.W. at 421:

> In the case at bar, the duties of the deceased required him to travel the highway where the accident occurred. He was killed while being robbed of property, a part of which was his own and a part that of the employer. A salesman who is required to travel from town to town for the purpose of selling his employer's goods is as much within the employment in so doing as he is when selling goods at such towns. Highway robbery is a hazard of the highway and a hazard of an employee whose employment requires him to travel the highways in the service of his employer.

To the same effect, the possibility of one's being robbed while

carrying a night deposit to the bank is a hazard which is not uncommon to the employment and one which can reasonably be said to arise out of and in the course of employment. Had P.A.M. filed a claim for workmen's compensation, we find it difficult to imagine that the claim would have been denied. It seems clear to us that P.A.M.'s claim arose out of and in the course of her employment.

While the situation with regard to S.K. may at first blush seem somewhat different, the result must, nevertheless, be the same. Although it is true that at the time the injury occurred to S.K. she was not then carrying out a specific task for the employer for which she received compensation, as was P.A.M., the evidence conclusively establishes that she was injured while on the premises of her employer and while leaving her employment. This has traditionally and consistently been held by this court to be an injury arising out of and in the course of one's employment. In *Thomsen v. Sears Roebuck & Co.*, 192 Neb. 236, 219 N.W.2d 746 (1974), we held that an employee injured on the premises of the employer where he works while coming to work or leaving after work is within the course of his employment under the Nebraska Workmen's Compensation Act. We said further, at 240, 219 N.W.2d at 749:

> "There are at least four situations in which the course of employment goes beyond an employee's fixed hours of work: the time spent going and coming on the premises; an interval before working hours while waiting to begin or making preparations, and a similar interval after hours; regular unpaid rest periods taken on the premises, and unpaid lunch hours on the premises. A definite pattern can be discerned here. In each instance the time, although strictly outside the fixed working hours, is closely contiguous to them; the activity to which that time is devoted is related to the employment, whether it takes the form of going or coming, preparing for work, or ministering to personal necessities such as food and rest; and, above all, the employee is within the spatial limits of his employment. . . ."

And in *Buck v. Iowa Beef Processors, Inc.*, 198 Neb. 125, 128, 251 N.W.2d 875, 877 (1977), quoting from 1 A. Larson,

The Law of Workmen's Compensation § 15.00 at 4-3 (1972), we said: " 'As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work before or after working hours or at lunchtime are compensable * * *.' "

Further, in *McDonald v. Richardson County*, 135 Neb. 150, 280 N.W. 456 (1938), we held that an employee injured when leaving the courthouse in which she was employed was within the course of her employment within the meaning of the Workmen's Compensation Act. In doing so we observed at 153-54, 280 N.W. at 458:

> In this case Byrd McDonald was not in the courthouse for her own personal reasons. She was in the building because she was employed there. For that reason she was on the driveway on the grounds. It was necessary as a part of her employment that she come and go across the grounds after leaving the public street. To urge that she had a right to go upon the premises as a member of the public is, we think, putting too narrow a construction upon the meaning of the compensation act as to what is or is not within the course of employment. An employee is required to cross the grounds of the premises of employer. An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law. Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable.

We believe that the facts in the instant case are identical with those in *McDonald*, in that P.A.M. and S.K. were required as a part of their employment to come and go to work; as such, when injured upon the premises of their employer, they are entitled to recover workmen's compensation. As we have already noted, the appellants, in their brief, describe their cause of action as arising by reason of their employer's failing to provide them with a secure premises in which to work. This is not unlike cases previously decided by this court wherein employees are injured by falling upon their employer's premises

and maintain that the employer failed to provide a safe place to work. An example is *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 612-13, 111 N.W.2d 368, 370 (1961), wherein we said:

> " 'The reason upon which the exception is grounded is that the hazards of entering or leaving the place of employment while on the property of the employer are hazards of the employment which must be assumed by the employer. The employer is obliged to provide safe ingress and egress to and from the place of employment for employees entering or leaving its property in the performance of the work of the employment. * * * But this is on the theory that the employer has control of the premises and the employee and that the risks of entering or leaving the place of work are incidental to the employment.' "

The appellants seek to distinguish those cases by maintaining that because the injuries received in the instant case were in the nature of sexual assaults, the injuries did not arise out of the employment, citing 99 C.J.S. *Workmen's Compensation* § 227 at 765 (1958), wherein it is noted:

> The view has been taken that for the injury from an assault to be compensable, the risk of such an assault must be greater for the employee than for one not engaged in such employment. The general rule, sometimes embodied in a statutory provision, is that where the assault is committed by a third person intending to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment, the injury does not arise out of the employment . . . .

While appellants are correct in their statement of the law, they are incorrect in their analysis of the undisputed facts in this case. There is no evidence that the assault by the two robbers against either of these women was because of any personal relationship with the women or was directed against them for reasons other than the fact that they were present as employees and were victims of a robbery at which time they were each assaulted. In 1 A. Larson, The Law of Workmen's

Compensation § 11.11(b) at 3-178 to 3-179 (1985), the noted author attempts to analyze whether an assault is personal and therefore within the exception noted above. He notes:

> There is a marked distinction between the holdup in which the robber says to himself, "I am going to track down Henry Davis, wherever he may be and steal the gold watch which I know he has," and the holdup in which the robber says, "I am going to rob whoever happens to be on duty as night watchman . . . ." The latter is not really personal to this victim at all; he is attacked exclusively in his employment capacity as being the one who occupies the position in relation to that employment which the robber has found to create a favorable opportunity.

The question presented to us is really no different than one which would be presented to us if, rather than being sexually assaulted, these women had been struck about the heads and shoulders following the robbery. No one would suggest for a moment that the assault upon them was personal and unrelated to the robbery. The women were sexually assaulted because the robbers intended to rob Wendy's, as a part of the overall scheme to steal the money and to raise havoc in the premises.

While this court has not heretofore specifically passed on that issue, other courts which have been presented with the situation identical to the case at bar have reached decisions similar to that reached by us here. In *Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E.2d 739 (1980), the Georgia Court of Appeals held that an employee assaulted early in the morning when arriving at work and parking her automobile in the employees' parking lot adjacent to her employer's plant was the subject of an "accident" within the Georgia Workers' Compensation Act and thereby precluded from bringing an independent tort action against her employer.

Further, in *McKinley v Holiday Inn*, 115 Mich. App. 160, 320 N.W.2d 329 (1982), the Michigan Court of Appeals held that a hotel maid who was criminally assaulted by one of the guests sustained an injury arising out of and in the course of her employment subject to the provisions of the Michigan Worker's Disability Compensation Act and was therefore precluded from bringing a common-law action against her employer.

Appellants have cited to us several cases in which common-law negligence actions have been permitted. These cases, however, are distinguishable on important facts. In *Eisenberg v. Industrial Com.*, 65 Ill. 2d 232, 357 N.E.2d 533 (1976), the employee was raped off the premises of the employer. In *State ex rel. Common School Dist. v. District Court*, 140 Minn. 470, 168 N.W. 555 (1918), the employee was raped off the employer's premises by an assailant who had "lurked about" all day waiting for an opportunity to assault her. And, finally, in *Doney v. Tambouratgis*, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979), the court took special note of the fact that the employer failed to raise the defense of the exclusivity of workmen's compensation.

We believe that an examination of the undisputed facts in the cases discloses without question that both S.K. and P.A.M. sustained injuries arising out of and in the course of their employment while on their employer's premises and were therefore entitled to make claims under the Nebraska Workmen's Compensation Act. Because they were entitled to make claims under the Nebraska Workmen's Compensation Act, they are precluded from bringing common-law actions for negligence. The employer was entitled to judgments as a matter of law. The district court was correct in sustaining the motion for summary judgment in each of the cases. The judgments are affirmed.

AFFIRMED.

PATRICIA BARRY, APPELLANT, V. DANIEL G. BOHI, M.D., APPELLEE.

380 N.W.2d 249

Filed January 24, 1986. No. 84-611.

1. **Medical Malpractice.** In order to qualify for the protection of the Nebraska Hospital-Medical Liability Act, the health care provider must file with the director of the Department of Insurance proof of certain financial responsibility and pay the surcharges levied under the act.

2. **Causes of Action: Medical Malpractice.** A cause of action arising while a patient and health care provider are subject to the Nebraska Hospital-Medical Liability Act is to be adjudicated in accordance with the provisions of the act.
3. **Medical Malpractice: Limitations of Actions: Time.** In medical malpractice cases a period of limitations or repose begins to run when the treatment rendered after and relating to the act or omission complained of is completed.
4. **Actions: Medical Malpractice: Limitations of Actions: Evidence: Time.** A medical malpractice action arises, for the purpose of determining the admissibility into evidence of a written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made.
5. **Trial: Evidence: Appeal and Error.** The general rule that if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is harmless rests on the premise that the nature of the cumulative evidence is such that no prejudice results from its improper admission.
6. **Trial: Medical Malpractice: Evidence: Appeal and Error.** It is presumed that the improper admission into evidence of an opinion of the medical review panel rendered in accordance with the provisions of the Nebraska Hospital-Medical Liability Act results in prejudice.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded for a new trial.

Charles F. Gotch and David A. Blagg of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Robert M. Slovek and Thomas J. Shomaker of Sodoro, Daly & Sodoro, for appellee.

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

CAPORALE, J.

The trial court, pursuant to the jury's verdict, dismissed Patricia Barry's malpractice action against Daniel G. Bohi, a physician practicing as an obstetrician and gynecologist. She assigns as error the trial court's (1) determination as a matter of law that Dr. Bohi was a health care provider qualified under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1984), when her cause of action arose, and (2) consequent receipt into evidence, pursuant to the act, of the written opinion of the medical review panel that Dr. Bohi "met the applicable standard of care required under the

circumstances." We reverse and remand for a new trial.

The act provides a method whereby health care providers, such as physicians, may limit their malpractice liability with respect to patients who have elected not to remove themselves from its operation. §§ 44-2821, 44-2824; *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). At the relevant times, the act required that all malpractice claims of patients under the act against providers qualified under the act be reviewed prior to suit by a medical review panel. § 44-2840 (Reissue 1978); *Prendergast v. Nelson, supra.* (As of July 10, 1984, a claimant may waive such review. § 44-2840(4) (Reissue 1984).) The act calls upon the panel to render a written opinion as to whether the provider met or failed to meet the applicable standard of care, or whether there exists to be resolved a material question of fact bearing on the issue of the provider's liability which does not require expert opinion. § 44-2843. The act further provides that should suit follow, the written opinion of the review panel "shall be admissible as evidence." § 44-2844(2); *Prendergast v. Nelson, supra.*

In order to receive the protection of the act, the provider must file with the director of the Department of Insurance proof of certain financial responsibility and pay the surcharges levied under the act. §§ 44-2824, 44-2827, 44-2829 through 44-2831.

Dr. Bohi first qualified under the act on September 10, 1976, both individually and as a member of the partnership with which he then practiced. On February 14, 1978, Dr. Bohi left that partnership and became associated with a professional corporation. Thereafter, the director of the Department of Insurance continued to receive proof of Dr. Bohi's financial responsibility; however, Dr. Bohi neglected to pay the surcharges levied under the act for the period from September 10, 1978, to February 7, 1979, on and after which date everyone agrees Dr. Bohi again qualified under the act.

Mrs. Barry first consulted Dr. Bohi on May 5, 1978, concerning changes she had noticed in her right breast over a period of several years. Dr. Bohi, among other things, examined the breast. He felt no definite mass and therefore concluded that the breast was normal.

Mrs. Barry returned to Dr. Bohi on November 10, 1978, complaining that her breast was still hard. Dr. Bohi noticed a change in the breast from the time of his earlier examination and ordered a roentgenogram of the breast, more specifically known as a mammogram. The mammogram was reported as revealing no evidence of malignant disease.

On December 26, 1978, Mrs. Barry consulted Dr. Bohi a third time. On this occasion Dr. Bohi referred her to a surgeon who saw her on the following day. While the surgeon's examination revealed no definite mass in the breast, he nonetheless, in consultation with another physician, decided that because of its firmness a biopsy should be performed.

The biopsy, performed on January 4, 1979, revealed the presence of metastatic carcinoma in the breast and the surrounding lymph nodes. The breast was then removed.

Mrs. Barry instituted this suit on November 30, 1979. Her petition alleges that Dr. Bohi was negligent "on or after May 5, 1978," in failing to conduct a thorough physical examination, in failing to diagnose the cancer, in failing to order a biopsy, and in failing to refer her to another physician or to advise her to seek additional medical attention. There is evidence that the cancer existed at the time of Dr. Bohi's initial examination. It is Mrs. Barry's thesis that she has been damaged because the delay in correctly diagnosing her condition substantially reduces her chances of recovery.

Prendergast v. Nelson, supra, holds that a cause of action arising while the patient and provider are subject to the act is to be adjudicated in accordance with the provisions of the act.

The trial court concluded that Mrs. Barry's cause of action arose when Dr. Bohi first examined her and failed to diagnose the then existing cancer, May 5, 1978, on which date he was qualified under the act. In accordance with that ruling the trial court, over Mrs. Barry's objection, received the aforesaid written opinion of the panel into evidence.

Mrs. Barry argues that her cause of action arose either when Dr. Bohi last examined her, December 26, 1978, or on January 4, 1979, when the biopsy was performed and she should have first discovered that Dr. Bohi failed to properly diagnose her condition. She contends that as Dr. Bohi was not qualified

under the act on either of those dates, the trial court erred in receiving the panel's written opinion.

We have held that in medical malpractice cases a period of limitations or repose begins to run when the treatment rendered after and relating to the act or omission complained of is completed. *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983); *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941).

This, however, is not a period of limitations or repose case, for suit was instituted well within 2 years of Mrs. Barry's last visit to Dr. Bohi. Neb. Rev. Stat. § 25-222 (Reissue 1979). The question presented, therefore, is not when Mrs. Barry's cause of action accrued for the purpose of determining whether it is barred by a period of limitations or repose but, rather, when did Mrs. Barry's cause of action arise for the purpose of determining whether the panel's written opinion is admissible in evidence.

The question appears to be one of first impression. We are not, however, entirely without guidance in formulating an answer. *Williams v. Elias, supra*, while stating that diagnosis is inseparable from treatment, nonetheless recognized that a physician has the right to change the diagnosis during treatment and that it is a physician's duty to diagnose a patient's condition and treat it "in the manner usually done by physicians in his locality." *Id.* at 662, 1 N.W.2d at 124.

We have held that a cause of action "accrues" so as to begin the running of a period of limitations when a legal right has been violated, as a consequence of which the aggrieved party has the right to institute and maintain suit. That is to say, the cause of action accrues upon the occurrence of the act or omission of which complaint is made. *Suzuki v. Holthaus, ante* p. 72, 375 N.W.2d 126 (1985); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). Other courts have applied the same rule for determining when a cause of action "arises" for the purpose of establishing venue. *Ford v. Mont. Dept. of Fish, Wildlife*, ____ Mont. ____, 676 P.2d 207 (1984); *State ex rel. Birnamwood Oil Co. v. Shaughnessy*, 243 Wis. 306, 10 N.W.2d 292 (1943); *Bergin v. Temple et al.*, 111 Mont. 539, 111 P.2d 286 (1941).

Thus, we conclude that while a medical malpractice action

accrues for limitations and repose purposes when the treatment rendered after and relating to the act or omission complained of is completed, such an action arises, for the purpose of determining the admissibility into evidence of the written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made.

In the case presently before us, then, Mrs. Barry had a right to institute and maintain suit, assuming she sustained damages, each time Dr. Bohi allegedly failed to use the requisite standard of care in making his diagnoses; that is, on May 5, 1978, November 10, 1978, and December 26, 1978. Thus, while the written opinion of the medical review panel was properly admitted into evidence for the cause arising as a result of the May 5, 1978, visit, it was improperly admitted for the causes arising from the November 10 and December 26, 1978, visits.

Dr. Bohi observes, however, that there was evidence independent of the panel's written opinion that he had at all times met the requisite standard of care. He correctly argues that, generally, if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is harmless and that harmless error does not form a basis for the reversal of a judgment. *State v. Whitmore, ante* p. 450, 378 N.W.2d 150 (1985); *Fuel Exploration, Inc. v. Novotny, ante* p. 17, 374 N.W.2d 838 (1985); *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984). Those general rules, however, rest on the premise that the nature of the cumulative evidence is such that no prejudice results from its improper admission into evidence. That cannot be said of a written opinion rendered by a panel convened pursuant to the act and numbering among its members an expert selected by Mrs. Barry. § 44-2841. Under such circumstances prejudice must be presumed to result.

Finally, Dr. Bohi argues that since Mrs. Barry chose to participate in the selection of the panel and submitted to the panel's review, she is estopped from objecting to the receipt into evidence of the panel's written opinion. See, *American Motors Sales Corp. v. Perkins*, 198 Neb. 97, 251 N.W.2d 727 (1977) (may not at one and the same time invoke provisions of statute and challenge its validity); *Loringer v. Kaplan*, 179 Neb. 215,

137 N.W.2d 716 (1965) (party petitioning for divorce estopped from denying legal effect of decree). The argument overlooks, however, that Mrs. Barry was obligated to participate in the procedure specified by the act with respect to the cause arising from the May 5, 1978, visit. Notwithstanding the fact that the panel rendered an opinion covering all of Mrs. Barry's visits to Dr. Bohi, its authority was only to express an opinion with respect to the visit which occurred while Dr. Bohi qualified for the protection of the act. Under the circumstances Mrs. Barry is not estopped from objecting to the admission into evidence of the opinion insofar as it relates to the two visits which occurred when Dr. Bohi was not qualified under the act.

The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

This is a continuing course of treatment case arising out of an alleged failure to properly diagnose the plaintiff's illness. There is but one cause of action, which, under the facts in this case, accrued on May 5, 1978. Since the defendant was qualified on that date, the opinion of the medical review panel concerning the entire course of treatment is admissible.

BOYD E. BURHOOP, APPELLANT, V. JEAN M. BURHOOP, APPELLEE.

380 N.W.2d 254

Filed January 24, 1986. No. 84-700.

1. **Alimony: Appeal and Error.** An award of alimony will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion.
2. **Property Division: Alimony.** The ultimate test for the division of property as well as the propriety of an award of alimony is reasonableness as determined by the facts of each case.
3. **Alimony.** The actual earning capacity of a spouse is frequently more important than the profitability of that spouse's business in determining the propriety of an award of alimony.
4. _____. The earning capacity of both spouses must be considered in making a determination of alimony.

5. **Property Division.** Awards of property jointly owned by divorced parties are not usually commended. When a proper situation presents itself, the trial court does not abuse its discretion in awarding the parties an undivided one-half interest in the property.

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

L.W. Kelly, Jr., of Kelly & Kelly, for appellant.

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

KRIVOSHA, C.J., HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and OTTE, D.J.

BRODKEY, J., Retired.

Boyd E. Burhoop appeals to this court from a decree entered in a dissolution of marriage proceeding in the district court for York County in which he was the petitioner and his wife, Jean M. Burhoop, was the respondent. The parties to this action were married in September of 1959, at which time both parties were attending college. Neither brought substantial assets into the marriage, although it is true that sometime subsequent to their marriage Boyd did inherit an interest in real estate and also a sum of money from his grandmother. Boyd's inheritance does not appear to be an issue in the present appeal, undoubtedly because both the real estate in question and the money were disposed of before the final hearing in the dissolution action.

After their marriage Jean worked part time at various jobs to help put both parties through college. She became qualified to teach school and did so on various occasions on a part-time basis. Boyd received his degree in veterinary medicine, and then entered the service for a short period of time. Four children were born of the marriage, to wit: Kimberly in 1962, Cynthia in 1964, Curtis in 1966, and Craig in 1967. The parties had been married for nearly 25 years at the time of the dissolution action. Two hearings were held in that proceeding, the first being on December 1, 1983. At that hearing a stipulation was entered between the parties with reference to the allegations of the petition regarding the birth of the children, the statistical data, the names and addresses of the parties, the date of the marriage, that the marriage was irretrievably broken, and that all

reasonable efforts of reconciliation had failed.

The second hearing was held, pursuant to a continuation of the first hearing, on June 29, 1984, following which the court entered its decree finding that the marriage was irretrievably broken and awarding custody of the two minor children to Jean. The court awarded Jean child support in the sum of $250 per month per child until the children were emancipated and awarded her alimony in the amount of $500 per month for 9 months, $750 per month for the next 8 months, and $1,000 per month thereafter. The decree also awarded specific items of personal property to Boyd, including a 1978 Chevrolet Suburban, a grand piano, and a going business concern known as Burhoop Veterinary Clinic. Jean was awarded all personal property not specifically awarded to Boyd, including a 1977 Cadillac automobile.

The decree also provided:

> Each of the parties is awarded an undivided one-half interest as a tenant in common in all real estate owned by the parties subject to existing indebtedness thereon.
>
> Each of the parties is awarded an undivided one-half interest in all contracts for the sale of real estate and or leases thereof.

It appears that all of the real estate and real estate contracts were originally held by the parties as joint tenants with right of survivorship.

The only issues before the court in this appeal, as set out in the assignments of error, are that the court abused its discretion (1) in awarding alimony to Jean, (2) in the amount of the alimony awarded to Jean, and (3) in the division of the property between the parties.

Under established law in this state we review the case de novo on the record and reach independent conclusions without reference to the conclusions reached by the trial judge. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984). It is also the law, however, that where the evidence is in conflict, this court gives weight to the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than another. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87

(1984); *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980).

Awards of alimony are initially entrusted to the discretion of the trial judge and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion. *Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985). The same standard of review applies to the division of property. *Guggenmos, supra*; *Haase v. Haase*, 210 Neb. 371, 314 N.W.2d 270 (1982). An abuse of discretion requires the "reasons or rulings of the trial judge to be clearly untenable and to deprive a party of a substantial right such as to amount to a denial of justice." *Guggenmos, supra* at 748, 359 N.W.2d at 90.

There is no mathematical formula by which awards of alimony and division of property can be made. *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981). The ultimate test for the division of property and awards of alimony is reasonableness as determined by the facts of each case. *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985); Neb. Rev. Stat. § 42-365 (Reissue 1984). Under § 42-365 this court, in deciding what is reasonable, should consider

> the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

A review of the record convinces us that the trial court did not abuse its discretion in its award of alimony to Jean. Nor do we believe that the trial court abused its discretion in the amount of alimony awarded. The record reveals that the parties had been married for almost 25 years at the time of the dissolution of their marriage. For the greater part of the marriage, Boyd had run a veterinary clinic in York, Nebraska, and had been financially successful in that business. The couple's lifestyle reflected Boyd's success. During this same time, Jean had primary responsibility for the rearing of the children. The record also reveals that she contributed to the family income by working various part-time jobs and that she

contributed substantially to the success of Boyd's veterinary practice.

Jean is presently selling insurance and receives a salary of $1,200 per month. However, she is still a trainee in the position, and if she does not meet her monthly quota of premiums, her employment contract is void. Jean sees to the medical and dental needs of the two minor children living with her. Both children are in need of dental work, and one is in need of continuing care for a medical condition. Jean has been paying for the medical and dental expenses for the children out of her temporary allowance. The record does not reveal whether Boyd has contributed in any respect or in any amount to the medical bills so incurred. Jean herself will need surgery in the near future to correct some problems caused by physical abuse from Boyd. For these reasons we believe and hold that the trial court did not abuse its discretion in awarding alimony to Jean.

Boyd's second assignment of error in this appeal is with reference to the amount of the alimony awarded to Jean. Boyd claims that the amount of alimony awarded is excessive because it exceeds his earning capacity. Boyd bases his argument on losses reflected in recent years on joint tax returns. In *Jenks v. Jenks*, 200 Neb. 298, 263 N.W.2d 469 (1978), we recognized that the earning capacity of both parties in a dissolution of marriage should be considered. We noted in *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984), that alimony in excess of one's earning capacity is an abuse of discretion. The relevant inquiry is whether such an award is present here.

The joint tax returns of the parties for the past few years, received in evidence at trial, show substantial losses. However, as Boyd himself points out, many of those losses are nonrecurring, resulting from the sale of a bar and liquor business and a cattle-feeding venture which went bad. It is interesting to note that during the years when the joint tax returns of the parties showed substantial losses, they bought a new $84,000 house and put $27,000 worth of improvements into it, and bought two new automobiles and a grand piano, paying cash for each. It is reasonable to conclude, therefore, that Boyd's earning capacity is far in excess of that reflected in the parties' tax returns. The income during the marriage and

how it was spent are important factors which should be considered in determining whether alimony should be awarded and the amount thereof. *Theye v. Theye*, 200 Neb. 206, 263 N.W.2d 92 (1978) (Boslaugh, J., concurring opinion).

At the time this dissolution action was filed, the parties were heavily in debt. However, since that time much of the income-producing property owned by the parties has been sold and the receipts therefrom applied to the outstanding indebtedness. Boyd admits that this reduction in indebtedness will increase the profitability of his veterinary practice in future years. Since the dissolution action was filed, Boyd has sold his established practice in York and is planning to move to another town in Nebraska where he plans on continuing to practice veterinary medicine. Thus, for the next few years Boyd's practice may not be as profitable as it has been in the past.

While the condition of a spouse's business is an important consideration in determining alimony, it is not the sole factor. *Gleason, supra*. The actual earning capacity of a spouse is frequently more important than the profitability of that spouse's business in determining the propriety of an award of alimony. *Gleason, supra*. In the instant case Boyd has undoubtedly acquired a great deal of expertise in his profession. It is reasonable to assume, therefore, that he will have a relatively high earning capacity in the future.

On the other hand, Jean has a job in which she has the capacity to earn $1,200 per month only if she sells a certain quota of premiums. She is a relative newcomer to the insurance business, and it may take her a few years to develop a clientele and derive a steady income from the sale of insurance. In view of Jean's earning capacity, her substantial contribution to the success of Boyd's veterinary practice, and her substantial contribution to the care of the parties' four children, we are of the opinion that the award of $1,000 per month as alimony is not an abuse of discretion. We therefore affirm the trial court's award of alimony in this amount for the period of time set out in the decree.

This brings us to Boyd's third assignment of error. Boyd asserts that the trial court abused its discretion in the division of property. We have held in numerous cases that there is no

magical formula for dividing property in a marriage dissolution proceeding; such awards are to be determined on the facts of each case. *Gleason, supra.* The ultimate test in making such determination is that of "reasonableness." *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983). In the instant case the trial judge in his decree awarded the parties an undivided one-half interest in the real estate, land contracts, and leases. Awards of property jointly owned by divorced parties are not usually favored by the court. *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979); *Walker v. Walker*, 193 Neb. 540, 227 N.W.2d 878 (1975). However, we have also held that when a proper situation presents itself, the trial court does not abuse its discretion in awarding the parties an undivided one-half interest in such property. See *Ragains, supra.*

We are of the opinion, however, that such a "proper situation" is not present here. Most of the properties previously referred to as owned by the parties had been sold prior to the June 1984 dissolution hearing. The trial court may have been of the opinion that, in view of the success which the parties had been having in selling the properties, selling at a private sale would continue to bring better prices than forced sales. However, it has been many months since all of the properties were listed for sale, and there are still a few properties unsold, to wit: 37 acres in York, Nebraska, two rental properties, and the real estate underlying the veterinary clinic in York. The trial court in its decree made no provision as to who was going to collect the rent, keep up the repairs and maintenance on the properties, and pay taxes and other expenses. This was an extremely bitter divorce and the parties have had difficulty agreeing on very many things.

In view of the circumstances we are of the opinion and so order that the remaining property be sold, either by agreement of the parties within 90 days from the judgment on the mandate in this case or, if the parties cannot agree, that said property be sold at public auction for its fair market value under the supervision of the trial court. The net proceeds from such sale shall be divided equally after any indebtedness on such land or property is paid.

For the reasons above stated we conclude that the judgment

of the district court must be affirmed as modified above. The parties are to pay their own court costs.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. GEORGE E. WRIGHT, INDIVIDUALLY AND AS NEXT FRIEND OF HIS MINOR SON, MATTHEW J. WRIGHT, APPELLEE, V. JOANNE PEPPERL, REVISOR OF STATUTES OF THE STATE OF NEBRASKA, APPELLANT.

380 N.W.2d 259

Filed January 24, 1986. No. 84-729.

1. **Constitutional Law: Statutes: Mandamus: Limitations of Actions: Public Officers and Employees.** Because the Revisor of Statutes has a continuing duty to publish the laws of Nebraska as adopted by the Legislature and not otherwise declared unconstitutional by the Supreme Court, an application for a writ of mandamus to compel the proper publication of the laws is not subject to a claim that the action is barred by a 4-year statute of limitations.
2. **Mandamus: Public Officers and Employees.** It is generally held that mandamus only lies to enforce the performance of a ministerial act or duty, and not to control judicial discretion.
3. **Statutes: Public Officers and Employees.** From a reading of Neb. Rev. Stat. §§ 49-705, 49-765, and 49-767 (Reissue 1984), the Revisor of Statutes is obligated by law to print and publish the laws as enacted by the Legislature, and not to exercise his or her own discretion in excising a portion of the law.
4. **Constitutional Law: Statutes: Presumptions.** State laws are accorded a presumption of constitutionality.
5. **Constitutional Law: Statutes: Courts: Public Officers and Employees.** The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to any other public official.
6. **Constitutional Law: Statutes: Supreme Court: Public Officers and Employees.** Unless and until a law is declared unconstitutional by the Supreme Court, the authority granted to the Revisor of Statutes in Neb. Rev. Stat. § 49-705(2)(c), (d), and (e) (Reissue 1984) does not become operative.
7. **Constitutional Law: Statutes: Public Officers and Employees.** The Revisor of Statutes has no right nor duty to pass upon the constitutionality of legislative acts not determined by this court to be unconstitutional, and therefore has no right to raise the constitutionality of an act as a defense to his or her failure to publish the law as enacted by the Legislature.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Robert M. Spire, Attorney General, and Harold Mosher, for appellant.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

KRIVOSHA, C.J.

This appeal presents two questions of law to be resolved by this court. The first question is whether the state Revisor of Statutes can be compelled by writ of mandamus to publish the laws as enacted by the Legislature of the State of Nebraska when the Revisor of Statutes refuses to do so. The second question is whether the constitutionality of a law enacted by the Legislature, having no reference to the Revisor of Statutes, can be tested in a mandamus action against the Revisor of Statutes.

This action was originally commenced in the district court for Lancaster County, Nebraska, by the appellee, George E. Wright, individually and as next friend of his minor son, Matthew J. Wright. The petition, as originally filed, sought declaratory relief. The two named defendants were Joanne Pepperl, the Revisor of Statutes, and Paul L. Douglas, then Attorney General of the State of Nebraska. The Revisor of Statutes filed a demurrer, and the Attorney General filed a special appearance. When the case came on for hearing, Wright dismissed the cause as to the Attorney General and was granted leave to file an amended petition asking only for a writ of mandamus to be issued against the Revisor of Statutes, requiring her to publish Neb. Rev. Stat. §§ 79-4,118 and 79-4,119 as previously enacted by the Legislature in 1973. See 1973 Neb. Laws, L.B. 358, §§ 3 and 4. The Revisor of Statutes filed an answer in which she admitted §§ 79-4,118 and 79-4,119 were not then published in a form which gave effect to §§ 3 and 4 of L.B. 358. She further set out a number of defenses, including that Wright has a plain and adequate remedy at law,

and therefore was not entitled to mandamus, and that, in any event, L.B. 358 violated Neb. Const. art. VII, § 11. The district court determined that L.B. 358 was constitutional and ordered the Revisor of Statutes to publish §§ 79-4,118 and 79-4,119 as enacted by the Legislature in L.B. 358.

It is from this order which the Revisor of Statutes now appeals, assigning as error the following:

1. The district court erred in not finding that there is a defect of parties plaintiff.

2. The district court erred in not finding that plaintiff has a plain and adequate remedy in the ordinary course of law.

3. The district court erred in not finding that the amended petition does not state facts sufficient to constitute a cause of action.

4. The district court erred in not finding that the one or more causes of action, if any there be, are improperly joined.

5. The district court erred in not finding there is a defect of parties defendant.

6. The district court erred in not finding that the action is barred by the statute of limitations.

7. The district court erred in not finding that LB 358, Sections 3 and 4, Laws of Nebraska 1973, is unconstitutionally ambiguous and vague.

8. The district court erred in not finding that LB 358, Laws of Nebraska 1973, insofar as it provides for the loan of state purchased textbooks to nonpublic schools and their students is unconstitutional under Article VII, Section 11, of the Nebraska Constitution.

Assignments Nos. 1, 3, 4, and 5 were not discussed in appellant's brief and thus will not be considered by this court on appeal. See *State v. Hansen, ante* p. 103, 375 N.W.2d 605 (1985). In addition, for reasons which we will explain hereafter, we also need not consider assignments Nos. 7 and 8 or appellant's argument that L.B. 358 is unconstitutional because it contains more than one subject. In sum, we need only consider assignments Nos. 2 and 6. In doing so we find that the decision of the district court must be in part affirmed and in

part reversed.

The evidence discloses that in 1971 the Nebraska Legislature enacted the Nebraska textbook loan act, L.B. 659. Generally, the legislative program embodied in this act was intended to provide financial assistance to nonpublic elementary and secondary schools through the loan of secular textbooks by public school district boards of education to private schools. The constitutionality of this act was challenged, and on July 25, 1974, we declared the act unconstitutional. See *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974). Our decision was based upon the Constitution of the State of Nebraska as it existed in 1971. In May of 1972, after L.B. 659 had been enacted, Neb. Const. art. VII, § 11, was amended by the people and the language significantly changed. See *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981). When the Legislature convened in 1973, it enacted L.B. 358, which was virtually identical with the earlier act, L.B. 659, which was later to be declared unconstitutional by this court in *Gaffney, supra*. L.B. 358, as enacted by the Legislature, was published in the session laws of 1973; but in 1975 when the Revisor of Statutes, at that time Bruce Cutshall, prepared and published the laws enacted by the Legislature in 1973, he excised those portions of L.B. 358 which authorize the textbook loan program and instead printed §§ 79-4,118 and 79-4,119 as they existed prior to our declaring the 1971 act unconstitutional. See 5 Neb. Rev. Stat. (Reissue 1976). In doing so the Revisor noted, "The Revisor of Statutes, as authorized by section 49-705, has reinstated section 79-4,118 as it existed immediately prior to being amended by section 2 of LB 659, Laws 1971, which the Supreme Court has held to be unconstitutional." Therefore, §§ 79-4,118 and 79-4,119 do not appear in the revised statutes in the form in which they had been enacted by the Legislature in 1973, although at the end of each section the revisor noted that the section had been amended in 1973 by L.B. 358. This was so even though the constitutionality of L.B. 358 had never been tested and, except for the fact that it did not appear in the revised statutes, was still the law of the State of Nebraska.

On November 30, 1982, George Wright made a written request to the board of education of the Norfolk Public Schools

for the loan of textbooks which are designated for use in the public school. The request was made on behalf of his son, Matthew J. Wright, who at that time attended sixth grade of the Sacred Heart Elementary School in Norfolk. A similar request was made on November 2, 1983. Both requests were denied by the board of education for the reason that §§ 79-4,118 and 79-4,119, as they appeared in volume 5 of the Revised Statutes of Nebraska, did not include the language contained in L.B. 358 which authorized the school district to purchase and loan textbooks to children who are enrolled in a private school. It was apparently the position of the school board that if the statute did not appear "in the red books" it was not the law and therefore could not be implemented.

In deciding this matter we turn first to the contention made by the Revisor of Statutes that, even if a duty to publish existed, Wright is barred from enforcing the publication because the statute of limitations has run on the cause of action. Although the contention is raised by the Revisor of Statutes, no authority is cited to us in support of that position, nor is any argument made explaining how or in what manner the statute of limitations in such a case could run. We believe that the contention is simply without merit. Under the provisions of Neb. Rev. Stat. § 49-702(4) (Reissue 1984), the Revisor of Statutes is obligated "[t]o prepare, arrange and correlate for publication, at the end of each legislative session, the laws enacted during the session, and to arrange and correlate for publication replacements of the permanent volumes of the statutes." Further, Neb. Rev. Stat. § 49-765 (Reissue 1984) provides in part: "The Revisor of Statutes, when reissuing and bringing up to date the Revised Statutes of Nebraska, 1943, shall incorporate in the reissued volumes all laws enacted by the Legislature since the volumes to be reissued were brought up to date." And Neb. Rev. Stat. § 49-767 (Reissue 1984) obligates the Revisor of Statutes to "certify that the contents of the supplements and reissued volumes, as published, are true copies of *all* laws of a general nature that are in force at the time of the publication thereof." (Emphasis supplied.)

This is a continuing duty imposed upon the Revisor of Statutes each day during which the revisor occupies that office.

It would be manifestly absurd to suggest that a law enacted by the Legislature of the State of Nebraska could be effectively repealed if the Revisor of Statutes failed to publish the law within 4 years of its enactment and no one challenged that failure. In the first instance it is not the publication by the revisor which creates the law. It is adoption by the Legislature and the Governor's signature which cause a law to be enacted. See Neb. Const. art. III, § 14, and art. IV, § 15. As each day commenced, the Revisor of Statutes was obligated to publish the laws of Nebraska at such time as a revised edition of the statutes of Nebraska was prepared. Therefore, even if one may argue that some form of statute of limitations must apply to every action, then it must be likewise recognized that each day the failure to act commenced a new cause of action. Therefore, until the statute was properly published an action for a writ of mandamus, if proper, would not be subject to a claim that the action was barred by a 4-year statute of limitations.

That brings us to the question of whether the writ of mandamus should have been issued. In deciding that issue we must consider whether the district court should have passed upon the constitutionality of L.B. 358 or should have limited its judgment merely to issuing a writ of mandamus because of the Revisor of Statutes' refusal to perform a purely ministerial function.

The statutes of the State of Nebraska provide for the issuance of a writ of mandamus and prescribe when and under what conditions that writ may be issued. See Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1979). Section 25-2156 specifically provides:

> The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.

In *State ex rel. Herman v. City of Grand Island*, 145 Neb. 150, 15 N.W.2d 341 (1944), we explained in some detail the function of a writ of mandamus. We said at 157-58, 15 N.W.2d

at 346:

> It is generally held that mandamus only lies to enforce the performance of a ministerial act or duty, and not to control judicial discretion. It has been authoritatively said that, "A duty or act is ministerial in the sense here intended when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law. It is such an act as an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Where the duty in a particular situation is so plainly prescribed as to be free from doubt, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there is provision or implication to the contrary." 34 Am. Jur., sec. 70, p. 859. "Where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial; but an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act." 38 C.J., sec. 73, p. 598.
>
> "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law and must, therefore, in a certain sense, construe it in order to form a judgment from its language as to what duties he is directed by statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer." 34 Am. Jur., sec. 72, p. 862.

See, also, *Watts v. City of Omaha*, 184 Neb. 41, 165 N.W.2d 104

(1969).

It would appear that, from a reading of Neb. Rev. Stat. §§ 49-705, 49-765, and 49-767 (Reissue 1984), the Revisor of Statutes is obligated by law to print and publish the laws as enacted by the Legislature, and not to exercise his or her own discretion in excising a portion of the law.

The Revisor of Statutes argues, however, that § 49-705(2) requires and empowers the Revisor of Statutes to delete from the statutes those laws which are unconstitutional. In part, the Revisor of Statutes is correct, in that § 49-705(2) provides in part:

> In addition to the authority provided in subsection (1) of this section, the Revisor of Statutes, in preparing supplements and reissued or replacement volumes for publication and distribution, may . . . (c) remove from within any section language which the *Supreme Court has held to be unconstitutional* without impairing the constitutionality of the remainder of the section, (d) omit any section or sections, or any complete act, which the *Supreme Court has held to be unconstitutional*, (e) reinstate a section as it existed immediately prior to an amendment which the *Supreme Court has held unconstitutional* . . . .

(Emphasis supplied.)

What the Revisor of Statutes fails to recognize, however, is that the Supreme Court of Nebraska has never passed upon the constitutionality of 1973 Neb. Laws, L.B. 358. Even though L.B. 358 is, in language, nearly identical with the earlier 1971 Neb. Laws, L.B. 659, which the Supreme Court did declare unconstitutional, it is not L.B. 659. L.B. 358 is not unconstitutional until declared so by the Supreme Court. State laws are accorded a presumption of constitutionality, see, *State v. Edmunds*, 211 Neb. 380, 318 N.W.2d 859 (1982), and *Parker v. Roth*, 202 Neb. 850, 278 N.W.2d 106 (1979), and the power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to any other public official. See *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966). As we observed in *State v. Karel*, 204 Neb. 573, 576, 284 N.W.2d 12, 14 (1979):

"Changes made by the Revisor of Statutes in preparing supplements and reissued or replacement volumes of the Revised Statutes, under the provisions of section 49-705, R.R.S. 1943, cannot change the substantive meaning of any statute as enacted by the Legislature." The fact that the language of 1973 Neb. Laws, L.B. 358, is nearly identical with the language of 1971 Neb. Laws, L.B. 659, does not render L.B. 358 unconstitutional unless and until it is declared so by this court. And unless and until a law is declared unconstitutional by the Supreme Court, the authority granted to the Revisor of Statutes in § 49-705(2)(c), (d), and (e) does not become operatiave.

In the instant case there was a constitutional amendment enacted by the people between the time that 1971 Neb. Laws, L.B. 659, and 1973 Neb. Laws, L.B. 358, were enacted. To suggest, therefore, that L.B. 358 is unconstitutional because of our earlier holding in *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974), is wholly without merit. The Revisor of Statutes was obligated to publish the law as enacted by the Legislature, and in the event the Revisor of Statutes fails to publish the law, he or she can be compelled to do so by a writ of mandamus.

That leaves us with only the question of whether the district court should have passed upon the constitutionality of 1973 Neb. Laws, L.B. 358. We think not. As we have already indicated, the purpose of a writ of mandamus is simply to compel a public official to perform a duty ministerial in nature and clearly prescribed. The parties have both cited to us the case of *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895), as authority for the proposition that the constitutionality of an act may be tested in an action seeking a writ of mandamus. We believe, however, that the situation in *Van Horn* is not at all similar to that in the instant case, and the distinction points up the difference. In *Van Horn* the Legislature, in 1895, made radical changes with regard to counties under township organization, fixing the number of supervisors in such counties at seven and requiring that a special meeting be called at which the board of supervisors would redivide the county into suitable districts and choose supervisors for each of such districts. The

members of the board of supervisors refused to perform that duty, maintaining that the *duty* imposed upon them by the law enacted in 1895 was unconstitutional. That is to say, they maintained that they were not required to perform the ministerial duty because the duty was in violation of the Constitution. In permitting the board members to raise the constitutionality of the duty, we said in *Van Horn v. State, supra*: "Ministerial officers, upon whom the legislature has sought to impose a duty by statute, may assert the unconstitutionality of that statute as a defense to an application for a *mandamus* to require them to perform the supposed duty." (Syllabus of the court.)

In the instant case, however, the duty imposed upon the Revisor of Statutes is not to purchase and issue schoolbooks, the subject of 1973 Neb. Laws, L.B. 358, but, rather, only to publish the laws as adopted by the Legislature. The Revisor of Statutes has no right nor duty to pass upon the constitutionality of legislative acts not determined by this court to be unconstitutional, and therefore has no right to raise the constitutionality of an act as a defense to his or her failure to publish the law as enacted by the Legislature. If the Revisor of Statutes had maintained that the act to be performed by the Revisor of Statutes was unconstitutional, then *Van Horn* might apply. But, here, the Revisor of Statutes does not claim that § 49-705(2) is unconstitutional, and therefore *Van Horn* does not apply. Until this court, in a proper case, determines the status of L.B. 358, the Revisor of Statutes is obligated to publish the law.

The parties argue that even if the action by the district court was inappropriate, we should nevertheless resolve the matter because it is now before us. However, a system of laws cannot operate on the basis that procedures may be disregarded and parties may agree to try issues not properly before a court. The sole and only question to be considered by the district court in an action for a writ of mandamus is whether the act sought to be compelled is ministerial in nature and without discretion. The constitutionality of L.B. 358 is not involved in the question of whether the Revisor of Statutes should be required to publish the laws as enacted by the Legislature. For that reason the

constitutionality should not have been considered.

The judgment of the district court, therefore, is affirmed insofar as it issued the writ of mandamus compelling the Revisor of Statutes to print 1973 Neb. Laws, L.B. 358, and is reversed and the cause remanded with directions to dismiss as to the question regarding constitutionality.

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

BOSLAUGH, J., concurs in the result.

WEST TOWN HOMEOWNERS ASSOCIATION, INC., A NEBRASKA CORPORATION, APPELLEE, V. MICHAEL D. SCHNEIDER, APPELLANT.

380 N.W.2d 265

Filed January 24, 1986. No. 84-800.

1. **Pleadings.** A special appearance is in the nature of a plea in abatement, and it is governed by the same rules.
2. **Pleadings: Proof.** The burden of proving the facts necessary to sustain a special appearance is on the party pleading it.
3. **Records: Appeal and Error.** Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions that includes that evidence.
4. _____: _____. Where there is no bill of exceptions, we are limited to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment.

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

David W. Jorgensen of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Patrick J. Nelson of Jacobsen, Orr & Nelson, P.C., for appellee.

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

COLWELL, D.J., Retired.

Defendant, Michael D. Schneider, appeals a summary judgment entered against him after denial of his special appearance, claiming no jurisdiction over his person. He assigns as error: (1) Unlawful service of summons by certified mail; and (2) Denial of due process. Both errors relate to Neb. Rev. Stat. § 25-505.01 (Supp. 1983), which provides that

> a plaintiff may elect to have service made by any of the following methods:
>
> . . . .
>
> (3) Certified mail service which shall be made by (a) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and (b) filing with the court proof of service with the signed receipt attached.

Plaintiff, West Town Homeowners Association, Inc., filed a petition in the county court for Buffalo County to recover assessments from defendant. Its praecipe for summons filed March 26, 1984, requested service by certified mail upon defendant at 645 West Lakeshore Drive, Lincoln, Nebraska. The summons was issued the same day. On April 9, 1984, plaintiff's attorney filed his "proof of service" affidavit showing compliance with § 25-505.01(3) and that the certified mail was received by Lauri Schneider, believed to be defendant's spouse, on March 31, 1984, at 7605 Glenvale Drive, Omaha, Nebraska, which was the address given on the envelope. The original summons and return receipt were attached to the affidavit.

Defendant filed a special appearance objecting to jurisdiction over his person for five reasons, summarized as no valid service of summons served upon him; there were no supporting documents. Briefly, his argument is that the summons was delivered at an address other than stated in the praecipe and that it was not received by defendant.

At the special appearance hearing, both parties were represented by counsel. There is no preserved record of either the evidence or this proceeding other than the transcript. The special appearance was denied and defendant did not further

plead. Defendant did not oppose plaintiff's later motion for summary judgment, which was granted for $2,235.76 plus interest and costs. Defendant appealed to the district court and, without making an appearance, attempted to raise the constitutional issue of lack of due process. The district court noted the absence of a bill of exceptions from the county court special appearance hearing and defendant's failure to there raise any constitutional issues; the court then reviewed the proceedings for error on the record as provided in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982) and affirmed the judgment. Defendant appeals and we affirm.

Neb. Rev. Stat. § 25-506.01(2) (Cum. Supp. 1984) provides: "Service by certified mail shall be made by plaintiff or plaintiff's attorney." Neb. Rev. Stat. § 25-507.01 (Cum. Supp. 1984) provides in part: "(2) When service is by certified mail, the plaintiff or plaintiff's attorney shall file proof of service within ten days after return of the signed receipt. (3) Failure to make proof of service or delay in doing so does not affect the validity of the service." Neb. Rev. Stat. § 25-508.01(1) (Cum. Supp. 1984) provides: "An individual party, other than a person under the age of fourteen years, may be served by personal, residence, or certified mail service." Neb. Rev. Stat. § 25-1244 (Reissue 1979) provides: "An affidavit may be used . . . to prove the service of a summons, notice or other process, in an action . . . ." See, also, *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979). Neb. Rev. Stat. § 25-516.01 (Cum. Supp. 1984) states in part: "Prior to filing any other pleading or motion, a special appearance may be made for the purpose of objecting to the jurisdiction of the court over the person of the defendant."

An appearance is special when its *sole purpose* is to question the jurisdiction of the court; however, a further or later request for other relief may be a general appearance. *Ivaldy v. Ivaldy*, 157 Neb. 204, 59 N.W.2d 373 (1953).

It appears that defendant's concern to limit his appearance resulted in the incorrect position that he had no duty to support his special appearance in the county court hearing.

A special appearance is in the nature of a plea in abatement, and it is governed by the same rules. See *Gaines v. Warrick*, 113

Neb. 235, 202 N.W. 866 (1925). One who questions jurisdiction by a special appearance should specifically point out the defect which it is claimed prevents the court from acquiring jurisdiction. *Wendt v. Yant Construction Co.*, 125 Neb. 277, 249 N.W. 599 (1933). The burden of proving the facts necessary to sustain a special appearance is on the party pleading it. See 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 39 (1962). See, also, 1 C.J.S. *Abatement and Revival* § 16b(2) (1936).

Having discussed the procedures involved here, we find that evidence in support of the assigned errors was not preserved in the bill of exceptions, which includes only the county court summary judgment proceedings and the district court's review on the record.

Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions that includes that evidence; the bill of exceptions is the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court. Where there is no such bill of exceptions, we are limited to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment. See, *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983); *Wendt v. Yant Construction Co., supra*; *Gaines v. Warrick, supra*; *T. S. McShane Co., Inc. v. Dominion Constr. Co., supra*.

At the county court special appearance hearing, defendant had the burden to produce evidence supporting his special appearance. He also had the duty to preserve all evidence for later inclusion in a bill of exceptions filed with his appeal. Failing in this, we are limited to an examination of the pleadings to see if they are sufficient to support the court's orders and judgment. From such review it appears that the requirements of § 25-505.01(3) were met in that the summons was sent to defendant by certified mail, the return receipt shows to whom, where, and when it was delivered, and proof of service was filed with the original summons and signed receipt attached. It is presumed that the ruling of the county court denying the special appearance was correct. The same presumption prevails as to

the evidence supporting the judgment.

The constitutional question of due process was waived, since no record was preserved and it was first raised in this court. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). Further, defendant did not notice the Nebraska Attorney General as required by Neb. Ct. R. 16A (rev. 1983).

AFFIRMED.

BRUCE L. BUMP AND BRENDA K. BUMP, HUSBAND AND WIFE, APPELLANTS, V. FIREMENS INSURANCE CO. OF NEWARK, NEW JERSEY, APPELLEE.

380 N.W.2d 268

Filed January 24, 1986. No. 84-828.

1. **Trial: Pleadings: Appeal and Error.** In the absence of an abuse of discretion, a trial court's decision permitting an amendment to a pleading will be affirmed.
2. **Trial: Pretrial Conferences.** Pretrial conferences are conducted to simplify and narrow issues presented in a case. Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried.
3. **Pretrial Conferences: Pleadings.** Generally, issues delineated in an unaltered pretrial order supplant the issues raised in the pleadings.
4. **Pretrial Conferences: Waiver: Appeal and Error.** Any claimed error based on the issues specified by the trial court may be waived by failure to object to the report on the pretrial conference and cannot be asserted for review by this court.
5. **Trial: Rules of Evidence: Hearsay.** Under Rule 801(4)(b)(iv) of the Nebraska Evidence Rules, a statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant within the scope of agency or employment.
6. **Trial: Pretrial Motions.** Whatever rights a litigant may have concerning discovery, such rights are not unlimited. Subject to mandatory provisions of the Nebraska Discovery Rules and appropriate statutes, discovery procedures, including a time limit for completion of discovery, are matters for judicial discretion exercisable to control orderly progression of cases toward trial.
7. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.

8. **Insurance: Pleadings: Contracts.** In an insured's action against an insurance company on its policy, as a general rule limitations of liability, and loss from an excepted cause, are matters of defense to be specifically pled by the insurer.
9. **Jury Instructions.** Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

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

Philip M. Kelly of Winner, Nichols, Douglas and Kelly, for appellee.

KRIVOSHA, C.J., HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and OTTE, D.J.

SHANAHAN, J.

Firemens Insurance Co. of Newark, New Jersey (Firemens) issued a homeowner's insurance policy to Brenda and Bruce Bump, insuring their residence against damage by wind. Firemens' policy excluded loss caused by "pressure or weight of water or ice, whether driven by wind or not," as well as loss caused by "latent defect." While Brenda and Bruce were absent from their home in Chadron on August 3, 1981, a severe thunderstorm with a 4-inch rain and winds of 55 knots struck the city. Upon return to their home Bruce discovered that one of the basement walls had buckled, permitting mud and water to enter the basement. On August 4 Bruce contacted Firemens' local agent, who instructed Bruce to obtain an engineer's report on the loss and an estimate of the damage to Bumps' house. Sometime toward the end of August, after Bruce had obtained and forwarded his engineer's report to Firemens' agent, an adjuster for Firemens, David Johnson, came to Bumps' house, inspected the premises, and in the course of his inspection, according to a later offer of proof, stated to Brenda that "[Bumps] were insured, and the loss was covered, and [Bumps could] proceed with the repair work." Relying on the adjuster's statement about insurance coverage for the loss, Bumps

contacted a contractor who, beginning in September, repaired the damage to the house, including replacement of the damaged basement walls.

In a November 4 letter to Bruce, Firemens' adjuster stated that the insurance company was obtaining a "second opinion" from a structural engineer concerning Bumps' "wind damage claim." The adjuster hired a structural engineer, Warren Bishop, who viewed Bumps' home on November 28, after Bumps had substantially completed repairs to their home. Bishop reviewed weather service records and then reached his conclusion that the damage to Bumps' house had resulted from "excessive external pressure" exerted on the outside wall when the high wind, as a "catalyst," drove water against the wall. In his January 4, 1982, letter to Bumps, the adjuster stated:

> After reviewing all aspects of this matter it is the company's position that there would be no coverage afforded for your loss. The primary causative factor of the basement walls buckling was the weight or pressure of water against the wall and that is specifically excluded from your policy. While there is a theory that pressure of the wind against the walls lessened the downward pressure of the upper walls against the foundation, the main cause of your loss was pressure of water against the foundation wall from underground sources and this is specifically excluded.

After Firemens refused to pay Bumps' claim, on June 24, 1983, Bumps filed suit and alleged two causes of action against Firemens. In their first cause of action, Bumps alleged that the "windstorm" on August 3, 1981, was the cause of damage to their home and sought a judgment for $6,065 against Firemens. In their second cause of action, Bumps alleged that they had "relied upon the representations of [Firemens'] agents, and as a result thereof, [Bumps] contracted for the repair of the damages and incurred expenses in repairing said damage" to Bumps' house, thereby suffering "loss and damage in the amount of One Thousand Dollars ($1,000.00)," for which Bumps sought an additional judgment against Firemens. On July 18 Firemens filed its original answer in which Firemens generally denied liability on its policy of insurance, alleged that

damage to Bumps' house was "caused by an occurrence outside the provisions" of Firemens' policy, and specifically denied "any representations of any agents [of Firemens] gave rise to an estoppel, or any basis for reliance" by Bumps. The court permitted Firemens to file an amended answer, and on September 8 Firemens filed its amended answer alleging that Firemens "Demurrers to it [Bumps' petition]" and that its "policy itself prohibits suit after the expiration of one year from the occurrance [sic] giving rise to the claim and the instant suit is untimely." (Under "SECTION I—CONDITIONS," paragraph 8 of Firemens' policy requires that suit against the company must be "started within one year after the occurrence causing loss or damage.") Firemens' amended answer also contained renewed allegations that Bumps' damage resulted from an "occurrence outside" the provisions of its policy and that estoppel was inapplicable in the litigation. In its order of September 19 the trial court recited: "The court took up the demurrer found in defendant's answer . . . . ORDERED defendant's demurrer is overruled."

The parties filed no further pleadings before a pretrial conference on May 30, 1984. At the pretrial conference the court specified the issues for trial as follows:

1. Did a wind storm cause damage to a foundation wall?
2. If so, what is the amount of damage to the foundation wall?
3. Did rain water enter through the damaged wall?
4. Was personal property damaged by the rain water?
5. What was the amount of damage done to the personal property?

In addition to the five issues designated, the court's report on the pretrial conference provided:

> AMENDMENT OF PLEADINGS: [Bumps] will have the opportunity to amend their petition as to cause of action number two. The amendment is to be done by June 11, 1984. The Court advised counsel that if a demurrer is filed concerning cause of action number two of the amended petition, argument could be had by telephonic conference.

. . . .

ADDITIONAL DISCOVERY: There will be no additional discovery after July 15, 1984.

. . . .

EXCEPTIONS: Either party may except to this report in writing within ten days of receipt of a copy. Unless excepted to, this report shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice.

Bumps neither amended their petition nor objected to the report concerning the pretrial conference.

At commencement of trial on September 5, Firemens' counsel, by a motion in limine, sought to prevent Bumps' presenting evidence concerning the adjuster's statement made while inspecting damage at Bumps' home. Firemens based its motion on the pretrial conference report, that is, estoppel was not among the five issues designated for disposition at trial, and Bumps had not amended their petition. In response to Firemens' motion Bumps' attorney argued that Bumps were

> entitled to show all of the evidence pertaining to the inspection and investigation of the claim by the insurance company. . . . [I]t would be unfair if the company were able to limit or prohibit [Bumps'] presenting all of the facts relative to that investigation and that inspection of the loss as it was turned in by [Bumps]. . . . I think that is part and parcel of even the wind claim.

Noting that Bumps had neither amended their petition nor objected to the report of the pretrial conference, the court sustained Firemens' motion in limine, prohibited Bumps from adducing evidence about the adjuster's statement made during investigation of the loss, and later, in reference to the adjuster's statement, remarked to counsel, "Don't try to get it in."

Bumps called an expert witness who expressed his opinion that a "high wind" caused the basement wall to fail. In the course of direct examination of Brenda Bump, interrogation elicited existence of the conversation between Brenda and the adjuster, but, on objection by Firemens, the content of that conversation was not disclosed. Bumps offered to prove that the adjuster had in fact told Brenda Bump that Bumps "were

insured, and the loss was covered."

During presentation of Bumps' case on the second day of trial, and without having called Firemens' structural engineer to the witness stand, Bumps' attorney orally requested an order requiring Firemens to produce the written report from its expert witness and documents relative to the expert's report. Commenting that "you had up to July 15, 1984 to make whatever discovery you wanted to," the court denied Bumps' motion for production of documents but allowed Bumps to call Firemens' expert to testify as a part of their case. Bumps declined to call Firemens' expert as a witness and rested their case. The expert testified during Firemens' case and expressed his opinion that failure of the basement wall was caused by external pressure from "soil and/or water" against the wall. Bumps did not cross-examine Firemens' expert about his findings or opinion concerning the loss which occurred on August 3, 1981.

Without request from Firemens the court instructed the jury that a loss from a "latent defect" was excluded from coverage under Firemens' policy of insurance issued to Bumps. The jury returned a verdict for Firemens.

Bumps contend that the trial court committed the following errors: (1) Allowing Firemens to amend its answer; (2) Eliminating Bumps' second cause of action as a result of the pretrial conference; (3) Sustaining Firemens' motion in limine and prohibiting adduction of evidence concerning the adjuster's statement that the loss to Bumps' house was "covered" by Firemens' policy; (4) Refusing to order production of the expert witness' report submitted to Firemens; and (5) Giving the instruction that loss due to a "latent defect" was excluded from coverage under Firemens' policy of insurance.

Bumps' first assignment of error regarding Firemens' amended answer is without merit. Firemens filed its answer on July 18 and approximately 7 weeks later, on September 8, filed its amended answer raising a potential question whether Bumps had filed their lawsuit within the time prescribed by Firemens' policy. Although they express their dissatisfaction with the trial court's permitting Firemens to amend its answer, Bumps do not

show in what manner the trial court abused its discretion in permitting the amended answer. In the absence of an abuse of discretion, a trial court's decision permitting an amendment to a pleading will be affirmed. See *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984).

In their second assignment of error, Bumps assail the trial court's eliminating the second cause of action alleged in their petition. The record fails to disclose the precise procedural scalpel used to excise the second cause of action from Bumps' petition. Assuming that the allegations of the second cause of action did state facts sufficient to constitute a cause of action, the trial court, nevertheless, removed from trial any issue raised by the second cause of action. Pretrial conferences are conducted to simplify and narrow issues presented in a case. *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985). Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried. See *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980). Generally, issues delineated in an unaltered pretrial order supplant the issues raised in the pleadings. See *Marotta v. Iroquois Realty Co.*, 412 N.E.2d 797 (Ind. App. 1980). In *Hasenauer v. Durbin*, 216 Neb. 714, 719, 346 N.W.2d 695, 698 (1984), we stated:

> The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial. To that end litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken.

Although the trial court so narrowed the issues to the extent that Bumps' second cause of action was eliminated from the lawsuit, Bumps were given the opportunity to amend their petition but elected not to amend their pleading. Moreover, informed of their right to object to any aspect of the report entered on the pretrial conference, Bumps made no objection. Without Bumps' objection or exception to the report of pretrial conference, there is nothing preserved for appellate review regarding the trial court's specification of issues to be resolved at trial. Any claimed error based on the issues specified by the trial court was waived by Bumps' failure to object to the report

on the pretrial conference and cannot be asserted for review by this court. See *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144 (Me. 1983).

Through elimination of the second cause of action, Bumps' reliance on the adjuster's statement made during his investigation of the loss was irrelevant, that is, existence of Bumps' reliance was of no consequence to determination of the action. See Neb. Evid. R. 401 (relevant evidence; defined) (Neb. Rev. Stat. § 27-401 (Reissue 1979)). However, as reflected in the report on the pretrial conference, the crucial question to be answered by the jury was: "Did a windstorm cause damage to a foundation wall?" Evidence having any tendency to make it more probable that wind was the cause of damage to the house was relevant to a determination of Bumps' first cause of action. See Neb. Evid. R. 401. Given Bumps' "wind damage claim," if the "loss was covered," it is the inescapable and only inference that the loss was caused by a peril or risk—a windstorm—for which there was coverage by Firemens' policy issued to Bumps. Therefore, in addressing Bumps' third assignment of error and contention that the adjuster's statement was admissible, we must examine Neb. Evid. R. 801(4): "A statement is not hearsay if: . . . (b) The statement is offered against a party and is . . . (iv) a statement by his agent or servant within the scope of his agency or employment . . . ." See Neb. Rev. Stat. § 27-801(4) (Reissue 1979).

Rule 801(4)(b)(iv) is patterned on Rule 801(d)(2)(D) of the Federal Rules of Evidence. The advisory committee's notes for federal Rule 801(d)(2)(D) contain the following observation:

> The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusive of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment.

See Fed. R. Civ. P. 801 at 307 (West 1985). In the traditional view regarding vicarious admission in a statement of an agent,

> there must be a showing of "speaking authority" tested by the usual standards of agency law before the statement of the agent can be admitted against his principal. Dissatisfaction with this narrow formula grew steadily because it frequently caused courts to exclude the agent's highly probative statement on the theory that the employer had not authorized the agent to make damaging remarks about him.

4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(D)[01] at 801-219 (1985). The rationale for the general proposition—a statement made by an agent or employee within the scope of such agency or employment is admissible—is expressed in McCormick on Evidence § 267 at 788-89 (E. Cleary 3d ed. 1984):

> The agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true. Moreover, if the admissibility of admissions is viewed as arising from the adversary system, responsibility for statements of one's employee is a consistent aspect. Accordingly, the predominant view now favors broader admissibility of admissions by agents if the statement concerned a matter within the scope of the declarant's employment and was made before that relationship was terminated.

The hallmarks of reliability and trustworthiness are more evident in a situation involving an insurance adjuster's vicarious admission than in the case of statements made by generic agents or employees. "An 'adjuster' or 'insurance adjuster' is a person, copartnership or corporation who undertakes to ascertain and report the actual loss to the subject-matter of insurance due to the hazard insured against." *Jensen v. Lincoln Hail Ins. Co.*, 125 Neb. 87, 94-95, 249 N.W. 94, 97 (1933). As a result of its policy, an insurance company has a contractual obligation to pay its insured's valid claim and, therefore, often dispatches one with special knowledge—the adjuster—to

separate fact from fiction regarding a claim and obtain information to enable the insurance company to distinguish the valid claim from a claim for which the insurance company is not liable under its policy. Otherwise, an insurance company's sending an inept or incompetent adjuster, or one who is otherwise incapable of ascertaining and reporting a loss, spawns skepticism about good faith dealing with an insured—a specter the insurance industry has long labored to dispel. In the present case there is nothing to indicate that Johnson, acknowledged as Firemens' adjuster, was other than one qualified to ascertain the loss and attendant circumstances on which Bumps' claim was based.

In *Continental Insurance Company v. Levinson*, 224 So. 2d 445 (Fla. App. 1969), the question was whether a boat loss had resulted from a risk covered by an insurance policy. Levinson called Continental's investigator as a witness, who acknowledged telling Levinson that there was coverage for the loss under Continental's policy. Levinson also testified about his conversation with Continental's investigator. The appellate court held the investigator was Continental's "employee," so that the investigator's statements to Levinson regarding coverage under the policy were made in the scope of that investigator's authority and were admissible as an admission against Continental. Regarding the investigator's statements about insurance coverage, the Florida court concluded that the jury was free to "consider them indicative and meaningful in the light of [the investigator's] experience in the field and his investigation of this particular loss." *Id.* at 446.

Acceptance of admissibility regarding an agent's admission has been recognized in situations analogous to *Continental Insurance Company v. Levinson, supra.* In *Kaiser Aluminum & Chemical v. Ill. Cent. Gulf R. Co.*, 615 F.2d 470 (8th Cir. 1980), a suit on account of a contaminated shipment of bauxite, a statement by the defendant railroad's claim agent that " '[i]t is highly likely that contamination originated with one or more railcars' " was admissible under federal Rule 801(d)(2)(D) and relevant as evidence on the issue of the condition of the ore delivered to the railroad for shipment. *Id.* at 476. *Rutherford v. State*, 605 P.2d 16 (Alaska 1979), involved bodily injury

sustained by the plaintiff when the plaintiff's automobile collided with an emergency vehicle driven by a state trooper responding to an emergency call. State troopers investigating the accident prepared departmental memoranda expressing that the trooper driver, by operating his vehicle at a "slower speed," could have avoided the accident. The Alaska Supreme Court, reviewing the Alaska rules of evidence identical with federal Rule 801(d)(2)(D), held the memoranda were admissible as the "statement of a party opponent made by an agent or employee concerning a matter within the scope of his agency or employment . . . ." *Id.* at 23.

Unquestionably, communication with an insured is a vital and integral part of services rendered by an insurance adjuster for validation or rejection of an insured's claim against the insuring company. Such communication constitutes a statement within the scope of an adjuster's agency or employment by the insurance company. We, therefore, hold that the adjuster's statement made to Brenda Bump concerning insurance coverage supplied by Firemens' policy was admissible under Rule 801(4)(b)(iv). Because the statement contained evidence bearing upon the issue of causation for the loss claimed by Bumps, the adjuster's statement was relevant. See Neb. Evid. R. 401. Exclusion of the adjuster's statement was not harmless error but affected Bumps' substantial right to present reliable evidence on the question of causation, the very heart of the lawsuit. See Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1979)). Under the circumstances failure to admit the adjuster's statement was an abuse of discretion constituting prejudicial error preventing Bumps from receiving a jury's fair consideration of their claim for damages.

Bumps' fourth assignment of error directed to the court's refusal to order production of documents during the course of trial is not sustained. Bumps' motion for production of documents was an end run to avoid the restrictive order found in the report on the pretrial conference, the specific time limit for completion of discovery. Bumps offer no justification for failure to complete discovery within the time constraint imposed by the court. Whatever rights a litigant may have concerning discovery, such rights are not unlimited. Subject to

mandatory provisions of the Nebraska Discovery Rules and appropriate statutes, discovery procedures, including a time limit for completion of discovery, are matters for judicial discretion exercisable to control orderly progression of cases toward trial. "[T]he principle that a judge is responsible for moving his docket is not a new one, and discretion was always lodged in trial judges to deny discovery when that process interfered with expeditious disposition of civil litigation." *Klabunde v. Stanley*, 384 Mich. 276, 282, 181 N.W.2d 918, 920-21 (1970). In addition to making a request not conforming with the requirements of Rule 34 of the Nebraska Discovery Rules, Bumps never asked the court "to prevent manifest injustice" and alter the pretrial order imposing a time limit for completion of discovery. See Supreme Court rule regarding pretrial procedure (Neb. Ct. R. at 10.1 (rev. 1983)). Bumps have not indicated in what manner they have suffered prejudice by the court's refusal to order Firemens to produce the written report rendered by its expert witness and do not suggest that their inability to obtain the expert's report resulted in an unfair disposition of their claim for damages. A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system. See *Younkin v. Younkin, ante* p. 134, 375 N.W.2d 894 (1985). See, also, *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984) (characteristics of an "abuse of discretion"). We find no abuse of discretion on the part of the trial court in refusing to order production of documents during trial.

In their fifth and final assignment of error, Bumps contend the court erred in giving the instruction that the "latent defect" was excluded from coverage under Firemens' policy of insurance. It is true that a "latent defect" was a risk excluded from coverage under Firemens' policy. However, Firemens' amended answer does not refer to any specific policy exclusion in terms of a "latent defect" but, rather, refers to some nondescript cause of damage which, at best, is simply an allegation tantamount to a denial that Bumps' loss or damage

was caused by a peril or risk covered by Firemens' policy. In an insured's action against an insurance company on its policy, as a general rule limitations of liability, and loss from an excepted cause, are matters of defense to be specifically pled by the insurer. *Farmers Union Coop. Ins. Co. v. Reinwald*, 194 Neb. 766, 235 N.W.2d 630 (1975). A latent structural defect in Bumps' house was not an issue framed by Firemens' amended answer, was not one of the issues specified in the court's report on the pretrial conference, was not raised by any evidence adduced at trial, and was absolutely irrelevant to any consideration by the jury under the circumstances. "Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case." *Simon v. Christie*, 210 Neb. 600, 601, 316 N.W.2d 303, 304 (1982). It is more than mere probability that an instruction on a matter not an issue in litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial. Submitting a factual issue on which there is no evidence can only obfuscate a jury's deliberation. The instruction on latent defect was clearly prejudicial error. We need not elaborate further.

For the foregoing reasons we affirm the district court's judgment concerning Bumps' second cause of action stated in their petition, but in view of the prejudicial errors occurring at trial concerning Bumps' first cause of action, we reverse the judgment of the district court and remand this matter for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

XEROX CORPORATION, APPELLANT, V. DONNA KARNES, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

380 N.W.2d 277

Filed January 24, 1986. No. 84-850.

1. **Taxation: Valuation.** A tax levied on property which has been assessed at a value in excess of its actual value is not void.
2. **Taxation: Valuation: Appeal and Error.** The exclusive remedy for relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property.
3. **Courts: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.

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

John K. Boyer and Amy S. Bones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

A. Eugene Crump, Deputy Attorney General, and John Boehm, for appellees.

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

PER CURIAM.

This was an action by Xerox Corporation for a declaratory judgment to determine the constitutionality of the 1980 amendment to Neb. Rev. Stat. § 77-1301 (Reissue 1981). The section as amended provided that real and personal property should be valued for taxation only in odd-numbered years. The plaintiff's specific complaint was that its property depreciated annually and if depreciation would not be recognized in even-numbered years its property would be overvalued for that year.

We held that an action for a declaratory judgment was a proper remedy to determine the constitutionality of the statute and that the statute as amended violated Neb. Const. art. VIII, § 1, because it made no provision for a determination of the

actual value of property subject to taxation in even-numbered years. The judgment of the district court was reversed and the cause remanded with directions to enter a judgment in conformity with the opinion. *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984).

Upon remand the district court entered a judgment upon the mandate which conformed to our opinion. The plaintiff, Xerox Corporation, contending that the taxes levied on property in excess of its actual value were void, proposed that a judgment be entered declaring that "taxes levied upon personal property, pursuant to Neb. Rev. Stat. § 77-1301(1), in excess of actual value, and without regard to the uniform method of valuing property as provided in Neb. Rev. Stat. § 77-201, are void and unenforceable." When the trial court refused to include that language in the judgment, the plaintiff appealed. The record in this court consists only of the transcript.

Apparently, it was the theory of the plaintiff that a determination that the 1980 amendment to § 77-1301 was unconstitutional would entitle it, under Neb. Rev. Stat. § 77-1736.04 (Reissue 1981), to a partial refund of the taxes levied upon its property in 1982. Although the petition did not pray for such relief, and none of the subdivisions in which its property was located were parties to the action, its briefs requested a declaratory judgment including a provision "directing all appropriate taxing jurisdictions to refund that portion of property taxes paid which were based upon those increments of value in excess of Xerox Corporation's actual value as returned by it for 1982." This latter relief was not available to the plaintiff in this action.

While it is true that property is to be valued at its actual value for purposes of taxation, and taxes are to be levied by valuation uniformly and proportionately upon all tangible property, it does not follow that taxes levied upon property in excess of its actual value are void and unenforceable. In fact, the rule in this state is to the contrary.

This matter was discussed in *Power v. Jones*, 126 Neb. 529, 532-33, 253 N.W. 867, 868 (1934), in which this court said:

> "When the tax is void, either because the person assessed was not subject to taxation, or because it was

assessed for an unlawful purpose, or without compliance with provisions of law imposed, it can be recovered back or treated as void in proceedings to enforce payment of tax." *Moffitt v. Reed*, 124 Neb. 410.

If a tax or assessment is levied without authority of law, it is, of course, void. This sometimes arises when the levy is made without a compliance with the jurisdictional requirements. It might also arise when there was no tax which the plaintiff was in equity bound to pay; as, for instance, where a city attempted to levy taxes upon property outside of its boundaries. If a tax is absolutely void, the taxpayer may, if not guilty of laches, invoke the aid of the court to protect his rights. *Touzalin v. City of Omaha*, 25 Neb. 817; *Rothwell v. Knox County*, 62 Neb. 50; *Wiese v. City of South Omaha*, 85 Neb. 844; *Hemple v. City of Hastings*, 79 Neb. 723.

I have been unable to find a decision in Nebraska holding that if an assessment was too high the tax would be absolutely void. In cases where property is assessed at a higher proportion of its actual value than other property similarly located, the taxpayer should first apply to the board of equalization to correct any errors therein. This appears to be a prerequisite to bringing legal action. *Medland v. Connell*, 57 Neb. 10; *Western Union Telegraph Co. v. Douglas County*, 76 Neb. 666; *Hahn System v. Stroud*, 109 Neb. 181; *Philadelphia Mortgage & Trust Co. v. City of Omaha*, 65 Neb. 93; *Schmidt v. Saline County*, 122 Neb. 56; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 28 A.L.R. 979; *Meridian Highway Bridge Co. v. Cedar County*, 117 Neb. 214.

The rule has been restated in many other cases. In *Gamboni v. County of Otoe*, 159 Neb. 417, 436, 67 N.W.2d 489, 502 (1954), this court said: "Assessments on property are not void merely because some properties are assessed higher than others. That fact, when properly presented and established, is basis for adjustment by the tribunal having authority for that purpose."

In *S. S. Kresge Co. v. Jensen*, 164 Neb. 833, 841, 83 N.W.2d 569, 575 (1957), the distinction between the rule in Oklahoma and the rule in Nebraska was explained as follows:

> The company relies on Webb & Jones v. Renfrew, 7 Okl. 198, 54 P. 448. This case appears to sustain the position taken by the appellant. We do not concur in the views expressed therein. An assessed valuation over and above actual value appears to be violative of the Oklahoma Constitution and is construed as being void as to the excess. In this state, overvaluation is an irregularity only which must be appealed to the courts if relief is desired, except where it involves a void, a willfully discriminatory, or a fraudulent assessment in which event a collateral attack may properly be made.

In *Scudder v. County of Buffalo*, 170 Neb. 293, 295, 102 N.W.2d 447, 449 (1960), we said: "An overassessment is an erroneous assessment but not a void one. Boettcher v. County of Holt, 163 Neb. 231, 79 N.W.2d 183."

In *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982), quoted from in *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984), we held that the exclusive remedy for relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property. The only remedy which would provide the plaintiff with direct relief from the overvaluation of its property was before the county boards of equalization. The plaintiff may have recognized this phase of its problems when, at page 7 of its petition, it alleged:

> Further, if Plaintiff is required to file returns not providing for depreciation, it may be required to file protests in each county with the respective boards of equalization, and appeal all adverse decisions to the respective District Courts in order to preserve the right to individual county tax refunds in each county and taxing subdistrict.

Gates v. Howell, 204 Neb. 256, 282 N.W.2d 22 (1979), *appeal after remand* 211 Neb. 85, 317 N.W.2d 772 (1982), cited by the plaintiff, does not support its contention in this case. The *Gates* case involved the validity of a statute which attempted to classify a mobile home as a motor vehicle so that a mobile home would be subject to the special tax applicable to motor vehicles

rather than the general property tax applicable to real estate and personal property. Valuation of property was not an issue in that case.

The first opinion in the *Gates* case determined that the statute was invalid and reversed the judgment of the district court with directions to enter a judgment in accordance with the opinion. Upon remand the appellants attempted to obtain additional relief through the judgment on the mandate. The trial court refused to grant the additional relief requested and entered a judgment in accordance with the mandate. On the second appeal that judgment was affirmed.

In this case, as in the *Gates* case, the district court had no discretion as to the judgment which could be entered on the mandate. When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *Gates v. Howell, supra.*

The judgment on the mandate entered by the district court in this case conformed to the opinion and mandate of this court, and it is affirmed.

AFFIRMED.

CANDICE J. GRACE, APPELLANT AND CROSS-APPELLEE, V. MELVIN A. GRACE, APPELLEE AND CROSS-APPELLANT.

380 N.W.2d 280

Filed January 24, 1986. No. 84-948.

1. **Property Division.** How property, inherited by a party before or during the marriage, will be considered in determining division of property must depend upon the facts of the particular case and the equities involved.
2. **Child Custody.** The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their

age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider.

3. **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.

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

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Richard A. Douglas of Winner, Nichols, Douglas and Kelly, for appellee.

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

PER CURIAM.

Candice J. Grace appeals from a decree entered by the district court for Scotts Bluff County, Nebraska, dissolving the marriage between her and the appellee, Melvin A. Grace. Following trial, the district court dissolved the marriage of the parties and awarded custody of the parties' 6-year-old son to Mrs. Grace and custody of the parties' 13-year-old son to Mr. Grace. Mr. Grace was ordered to pay Mrs. Grace $600 per month alimony for not more than 7 years, child support for the child in Mrs. Grace's custody in the amount of $300 per month, and attorney fees in the amount of $2,000. The district court excluded from the marital estate certain ranch corporation stock owned by Mr. Grace and awarded the stock to him on the basis that the stock had been received by Mr. Grace by way either of gift or inheritance. The court then divided the rest of the personal property of the estate by awarding Mrs. Grace $10,000 in cash, awarding each party his or her own personal property, requiring Mrs. Grace to return to Mr. Grace certain property items, and requiring Mrs. Grace to return to the ranch corporation its automobile which was in her possession.

In her appeal Mrs. Grace maintains that the trial court erred (1) in granting custody of the older child to Mr. Grace, (2) in awarding an inadequate amount of child support for the child in her custody, (3) in failing to include in the marital estate the stock in the ranch corporation, (4) in awarding an inadequate amount of alimony, and (5) in awarding an inadequate attorney fee. Mr. Grace has cross-appealed, maintaining that the trial court erred in granting the custody of the younger child to Mrs. Grace and in awarding Mrs. Grace an excessive amount of attorney fees. We have reviewed the record de novo as we are required to do in matters of this type. See, *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985); *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985); *Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). We modify the court's order for division of property and affirm the decision of the district court in all other respects.

As might be anticipated, the facts are somewhat in conflict. Nevertheless, it can be determined from the record that the parties met when Mrs. Grace was 17 and Mr. Grace 24 and were married 5 months later in July of 1968. They first lived north of Lewellen, Nebraska, in a small house owned by Grace Land and Cattle Company, a family ranching corporation. While Mrs. Grace testified that she personally made improvements to the house, the evidence indicates that both Mr. and Mrs. Grace together decorated the interior of the house. All improvements to the exterior, as well as work done on the kitchen and bathroom cabinets, were done by hired help employed by the family corporation.

The parties later moved into a second house owned by the corporation and, again, hired help made improvements. Mrs. Grace testified that she spent a great deal of time in going over plans and designs, but it does not appear that such efforts on her part substantially contributed to enhancing the value of the property.

Mr. Grace owns 18.14 percent of the outstanding stock of Grace Land and Cattle Company, and throughout the marriage Mr. Grace was employed on the ranch by the ranch corporation. Prior to 1971, he was not on a salary but just used

the company checkbook to make draws for living expenses. However, after 1971 he was placed on a salary, and at the time of the trial his monthly salary was $1,500. He also received additional benefits from the ranch, including meat, a house to live in, payment of utilities, a car, a two-wheel-drive pickup truck, a four-wheel-drive pickup truck, and gasoline. Additionally, he received dividends from the corporation in those years in which dividends could be paid. The dividends were credited against the draws made by Mr. Grace in excess of his salary. At the time of trial the record indicated that Mr. Grace was indebted to the corporation for draws in excess of his salary in the amount of approximately $86,000, though there was no formal agreement that he would repay that sum. Because Grace Land and Cattle Company is a subchapter S corporation for federal income tax purposes, Mr. Grace is charged, for federal income tax purposes, with profits or losses of the company, regardless of whether there is any actual cash-flow to him.

During the first 10 years of the parties' marriage, Mrs. Grace gave birth to the two children referred to above, gave birth to another child who lived only 3 hours, and suffered three miscarriages.

Although Mrs. Grace contended that she served as a "ranch wife," the evidence indicated that she did not take an active role in ranch duties and work. The man who worked with Mr. Grace on a portion of the corporation ranch testified that Mrs. Grace never worked on a tractor, did not do any haying, did not feed the cattle, and did "damn little" work at roundup time. Mrs. Grace began teaching aerobics during the marriage and currently is teaching aerobics and managing a gym at a weekly salary of $250, working 8 a.m. to 3 p.m. and 5 p.m. to 6:30 p.m. She also intends to work, on the average, two nights a week at a local college from 6:30 p.m. to 8 p.m.

The evidence further discloses that on the date of their marriage Mr. Grace owned 477 shares of the common stock of Grace Land and Cattle Company, of which 237 shares were received by gift and 240 shares were inherited. During the marriage, Mr. Grace acquired an additional 261 shares, of which 117 shares were inherited and 144 shares were a gift.

There is a great deal of evidence by each of the parties attempting to show whether each party was or is a good parent. Little good can be served in memorializing forever those facts in this opinion. Both are now relatively normal and both are good parents who truly love their children.

We turn, then, first to the question of whether the trial court erred in failing to include any of the shares of Grace Land and Cattle Company in the marital estate. In *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982), we said that "when awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate." The rationale for such a general rule is fairly obvious. Persons make gifts or leave property to individuals in the belief that such gift or inheritance will remain with the beneficiary and not be divided by a court to thereafter become a part of the assets of some other family. To hold otherwise would be to defeat the intent of the individual making the gift or leaving the inheritance. We recognized in *Van Newkirk* that among the exceptions to this rule is the exception where the evidence establishes that both of the spouses have contributed to the improvements or operation of the property which one of the parties owned prior to the marriage or received by gift or inheritance during the marriage, or when the evidence shows that the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage. See *Rhodes v. Rhodes*, 210 Neb. 373, 314 N.W.2d 271 (1982). The evidence in this case does not support the claim that such exceptions exist in this case. Mrs. Grace's efforts with regard to the improvements or operation of property owned by Grace Land and Cattle Company, in which her husband owned stock, were not within those exceptions.

There are other considerations, however, beyond the exception set out in *Van Newkirk v. Van Newkirk, supra*. The *Van Newkirk* rule itself does not purport to be an ironclad, rigid rule for all circumstances. In *Matlock v. Matlock*, 205 Neb. 357, 359, 287 N.W.2d 690, 691 (1980), we considered a situation

where the appellant husband argued that paying the appellee wife the sum of $7,800 "gives to her property which was a gift to himself [Mr. Matlock] and his [deceased] first wife and that the property should be entirely excluded from consideration in determining any award to the respondent." In that case it was undisputed that the residential property was acquired initially by a gift and ultimately by inheritance by Mr. Matlock, who had paid the expenses of maintenance, taxes, insurance, and utilities on the property during the entire time of the Matlock marriage. The parties in that case had been married in November of 1974 and had had no children. The appellant had three children by his deceased first wife.

This court approved the payment of $7,800 to the appellee wife, stating at 359, 287 N.W.2d at 691:

> We have consistently held that rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. Blome v. Blome, 201 Neb. 687, 271 N.W.2d 466; Pfeiffer v. Pfeiffer, 203 Neb. 137, 277 N.W.2d 575. The court shall also have regard for the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities. Campbell v. Campbell, 202 Neb. 575, 276 N.W.2d 220. How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. Ulmer v. Ulmer, *ante* p. 351, 287 N.W.2d 685.

We reaffirm the general rule set out in *Matlock v. Matlock, supra*, and hold that, on the basis of the record in this case, the stock held by Mr. Grace in the Grace Land and Cattle Company should be considered in determining the division of property. As stated in *Ulmer v. Ulmer*, 205 Neb. 351, 353, 287 N.W.2d 685, 687 (1980), where it was alleged that the trial court erred in

not allowing a party the full amount of her inheritance, "While the source of funds brought into a marriage is a consideration in the division of property, it is not an absolute." See, also, *Koubek v. Koubek*, 212 Neb. 2, 321 N.W.2d 55 (1982).

Here, Mr. Grace's shares of stock represented 18.14 percent of the stock of a farm and ranch corporation which had a net value of $6,834,000 as valued by the principal stockholder (Mr. Grace's father), $8,927,300 by Mrs. Grace's appraiser, and $9,132,200 in the corporation's 1984 financial statement. Using the average of these figures, Mr. Grace's minority interest would be, mathematically, approximately $1,500,000.

It is obvious that to award Mrs. Grace a portion of this stock in kind would not be of any immediate or possible future benefit to her. The corporation does not pay dividends, and it is totally an effort headed by Mr. Grace's father and mother and shared in by all their children, all of whom do active work each day in the furtherance of the corporation's business. To inject an outsider—especially an ex-spouse of one of the family members—would be unfair to other stockholder members of Mr. Grace's family and to appellant Mrs. Grace herself.

Nevertheless, in reaching a just and equitable award, the fact remains that due to the way the parties to this marriage lived during the marriage, they did not acquire a house or a car or any property a married couple of 16 years, with above average assets, would be expected to acquire. We must consider that particular situation in this case. As representing a minority interest in a closely held, strictly family corporation, the valuation of $1,500,000 set out above would be unreasonably high. What Mr. Grace really owns, as reflected in his shares of stock in the family corporation, is an expectancy interest in a large farming and ranching operation. Accordingly, appellant Mrs. Grace is awarded the sum of $100,000 as division of property under the particular facts of this case. Such amount is payable at the rate of $10,000 per year, with interest as provided in Neb. Rev. Stat. § 45-103 (Reissue 1984) on the unpaid balance. The amount of $10,000 allowed under the trial court's decree shall be considered as the first payment hereunder, with the second payment due January 15, 1987.

We then turn to the question of the custody of the two

children. Attempting to determine where children should be placed after the dissolution of a marriage is an extremely difficult matter. Nevertheless, children must be placed somewhere, and therefore their custody must be resolved by the court if the parties are unable to otherwise agree. As we observed in *Moeller v. Moeller*, 215 Neb. 360, 362-63, 338 N.W.2d 749, 751-52 (1983):

> " ' "The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider." ' "

In the present case the 13-year-old expressed a strong preference for living on the ranch with his father. While the wishes of a child are not controlling, if the child is of sufficient age and has expressed an intelligent preference, his preference is entitled to consideration. *Hall v. Hall*, 178 Neb. 91, 132 N.W.2d 217 (1964). See, also, *Boroff v. Boroff*, 197 Neb. 641, 250 N.W.2d 613 (1977). His basis for wanting to live on the ranch and not in Scottsbluff seems reasonable, and considering those various factors set out in *Moeller, supra*, permitting him to live on the family ranch with his father and other relatives who also live and work on the ranch seems to be in his best interest. The custody of the 6-year-old seems to be another story. As a general rule, efforts should be made not to separate children. However, in the instant case we have a different situation. The younger child is only 6 years old. Although they are only 7 years apart in age, at this time in their lives that 7 years is substantial. The district court's determination that the younger child would do better with his mother does not seem improper.

Mrs. Grace attempted to show that Mr. Grace would not be a

stable parent. We believe, however, that the record discloses that at the present time Mr. Grace is stable and able to provide the older child with a more than adequate home and that Mrs. Grace could do likewise for the younger child. There seems to be no evidence compelling a different result from that ordered by the district court. While it is true, as we have already indicated, that these matters, including child custody, are reviewed by us de novo, recently in *Clark v. Clark*, 220 Neb. 771, 777, 371 N.W.2d 749, 754 (1985), we said:

> [D]eterminations 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.

We believe an examination of the record fails to disclose any abuse of discretion by the district judge, and for that reason his determination that the older child be placed with the father and the younger with the mother is affirmed. That disposes of both the custody issue raised by Mrs. Grace in her appeal and that raised by Mr. Grace in his cross-appeal.

We turn, then, to whether the alimony awarded Mrs. Grace was inadequate. We believe it was not. Neb. Rev. Stat. § 42-365 (Reissue 1984) provides in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

The evidence in this case discloses that Mrs. Grace's annual income is approximately $14,400. Mrs. Grace further provided

the district judge with information concerning her monthly expenses. These were shown to be $1,158.40 per month. Therefore, considering the alimony and child support awarded by the district judge, Mrs. Grace has income of $2,100 per month (independent income $1,200, alimony $600, and child support $300) and expenses of $1,160 per month, leaving her a net income, after expenses but before taxes, of $940 per month. As we have said recently in *Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985), determining what is reasonable alimony under given circumstances is never an easy task. The standard of reasonableness, by its very nature, defies clear and specific quantification inasmuch as the determination of reasonableness is directly tied to the virtually unique circumstances of each case.

We went on further in *Ford, supra*, to hold that the standard of review established by this court in *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984), should apply with regard to alimony and that the rule is to the effect that the matter is initially entrusted to the sound discretion of the trial judge, and while the matter will be reviewed on appeal de novo on the record, it will be affirmed in the absence of an abuse of the trial court's discretion. We are simply unable to say, in light of the record presented here and the purpose of alimony as prescribed in § 42-365, that the trial court abused its discretion. We believe the award of alimony must be affirmed at this time.

We turn, then, to the question of child support. The trial court directed that Mr. Grace pay to Mrs. Grace for the support of the minor child in her custody the sum of $300 per month. The amount of child support ordered in a dissolution of marriage action is initially left to the sound discretion of the trial court and is reviewed de novo on the record in this court and is affirmed in the absence of an abuse of discretion. *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985). We have examined the record in this regard and determine there has been no abuse of discretion. We therefore affirm the district court's decree with regard to child support.

That leaves us, then, with the question of the attorney fee. Our examination of the record fails to disclose any abuse of discretion by the trial court in the awarding of these fees, and

for that reason the order in that regard should be affirmed. See *Guggenmos v. Guggenmos, supra.*

The judgment of the district court is therefore affirmed as modified. Mr. Grace is ordered to pay to Mrs. Grace the sum of $2,000 to apply upon the fee charged by Mrs. Grace's attorney for services performed in this court.

AFFIRMED AS MODIFIED.

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

I concur with the majority in all respects except with its finding that the *division of property* should be modified. To that extent I must respectfully dissent. I do so because I believe that the law as set out by the majority herein and the evidence as presented by Mrs. Grace cannot support the action taken by the majority with regard to the awarding of additional property. The majority concedes that our holding in *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), is that property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. The majority further concedes that there is no evidence in the instant case to bring this property within any exception noted in *Van Newkirk*. Nevertheless, the majority then suggests that the *Van Newkirk* rule does not purport to be an ironclad, rigid rule for all circumstances. In doing so the majority gives us no indication as to how or under what circumstances this new exception to *Van Newkirk* should be employed. The majority relies upon our holding in *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980), as the basis for its holding herein. The facts, however, in the *Matlock* case disclose that during the marriage Mrs. Matlock was continuously employed, earning gross wages of approximately $19,000 per year, all of which went into the family income. There is no such evidence in the instant case.

In modifying the decree regarding the division of property, the majority, in the instant case, determines that the stock held by Mr. Grace in the Grace Land and Cattle Company should be considered in determining the division of property. A further problem with that determination is that the only evidence with regard to the value of the stock in Grace Land and Cattle

Company was its value if the entire corporation was dissolved. The majority properly recognizes that a minority interest in a closely held, strictly family corporation is not the same as stock held in a public corporation and acknowledges that the valuation of $1,500,000 would be unreasonably high. Yet, without evidence of any other value, including what the value of the stock is as "an expectancy interest in a large farming and ranching operation," as characterized by the majority, the majority awards Mrs. Grace the sum of $100,000 as division of property. We are without any indication as to how one should mathematically determine the division of a future interest when no evidence has been offered as to the value of that interest.

While it may very well be that Mrs. Grace is entitled to more alimony than was awarded to her by the district court, it was incumbent upon Mrs. Grace to produce sufficient and appropriate evidence to support her claim. This she did not do. We should not be filling gaps in the evidence, no matter how meritorious such action might seem. For that reason I must respectfully dissent from that portion of the majority decision.

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

380 N.W.2d 288

Filed January 24, 1986. No. 85-160.

1. **Criminal Law: Evidence: Other Acts.** The rule as to admission of evidence of other crimes or acts is one of relevance.
2. **Evidence: Words and Phrases.** "Relevant evidence," as defined in Neb. Rev. Stat. § 27-401 (Reissue 1979), "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
3. **Trial: Witnesses: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for a new trial.

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

Robert M. Spire, Attorney General, and Mel Kammerlohr, for appellee.

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

GRANT, J.

Defendant, Richard D. Moore, was charged by information filed in Douglas County District Court with one count each of theft by deception and attempted theft by deception. After jury trial Moore was convicted on both counts. Moore was then sentenced to 4 months in the Douglas County Corrections Center on each count, with the sentences running concurrently. In this appeal Moore assigns as error that the district court improperly admitted into evidence (1) "testimony concerning other acts of the Defendant" and (2) "testimony concerning the Defendant's family income." For the reasons hereinafter stated we reverse and remand for new trial.

The facts show that Moore filed loss claims with Royal Insurance Company and Fireman's Fund Insurance Company, setting out losses on September 21, 1981, and on January 9, 1982, respectively. In both instances the insurance companies had issued a standard homeowner's policy to Moore, and Moore had timely paid the premium. Evidence was adduced at trial concerning Moore's actions in filing these claims, and Moore was convicted of theft by deception on the September 21, 1981, claim and attempted theft by deception on the January 9, 1982, claim. There is no contention in this court that the evidence on these two counts was not sufficient to support Moore's conviction.

Both in the State's case in chief and during the State's cross-examination of defendant, the prosecution repeatedly, over defendant's counsel's objection, introduced testimony concerning a series of insurance claims filed by Moore from mid-1979 to late 1984. The claims referred to in the State's case in chief, in addition to those charged, were the following:

(A)

Mark Schwartz, a claims representative for Royal Insurance, testified that Moore filed a claim for a loss occurring April 25, 1981, for $4,847 worth of stereo equipment. Schwartz testified that he had obtained a taped statement from Moore and that Moore had told him that Moore's stereo equipment, which he had loaned to his brother for a party, had been stolen from his brother's van in Merriam, Kansas. Royal paid Moore approximately $4,400 on the claim.

(B)

Lonnie Howell, a claims adjuster for Fireman's Fund Insurance Company, testified that Moore filed a loss claim on October 30, 1981. This claim alleged a break-in of the defendant's mother's car in the Midlands Mall parking garage in Council Bluffs, Iowa, on October 12, 1981, which was 12 days after the insurance went into effect. Howell testified that the police report indicated that the vehicle was locked, had the windows rolled up, and had no appearance of forced entry. Moore claimed a total loss of approximately $3,500 for articles stolen from the car which were owned by him. Fireman's paid $3,150 on the claim.

On cross-examination of Moore, the State, over defendant's counsel's objection, went into detail as to the two claims put in evidence in the State's case in chief. Also on cross-examination, the State elicited evidence of the following claims:

(A)

Moore testified that on July 10, 1979, he had a boat, motor, and trailer stolen from Carter Lake, Iowa. Moore further testified that he filed a claim with his insurance carrier, State Farm Mutual Insurance Company, which paid the claim in an amount not specified.

(B)

Moore testified concerning a burglary of his home on November 3, 1979, and stated he sustained a loss of $6,000 in stereo equipment. State Farm Mutual Insurance Company paid the claim in an amount not specified.

(C)

Moore testified that in June of 1982 he and his brother visited the Ocean Wave Bar in Council Bluffs, Iowa, and when they left the bar they discovered that Moore's car had been stolen. The

car was later found near Missouri Valley, Iowa, where it had apparently been stripped and set afire. Moore filed a claim with his insurance company, Western Casualty, which paid $12,000 on the claim.

(D)

Moore testified that he filed two loss claims in November of 1984. The claims were filed with two different insurance companies; one for loss of personal property in the car and the other for damage to the car. Moore submitted a claim of $2,500 for a video camera and recorder which were stolen out of his car while parked in the Blue Ridge Mall parking lot in Kansas City, Missouri, where Moore was visiting, and a claim of $600 for damages to his car at the time. Moore was paid in full for both of these claims.

Moore testified on his own behalf on direct examination. He testified as to facts in connection with the specific charge in the information concerning his claim submitted on the January 9, 1982, loss. He also denied generally that he intended to or did defraud either of the insurance companies at any time. There was no testimony on his direct examination concerning his income, living expenses, or any related matters. Moore's entire testimony on his direct examination covered seven pages of the bill of exceptions. The State's cross-examination of Moore covered 56 pages of the bill of exceptions. The second question asked on cross-examination was: "Mr. Moore, during the months or during the year 1981 and the month of January in 1982, I want to know what your monthly expenses were. And I will help you with that by going through some specific items."

In response to a long series of questions beginning with the foregoing question, the trial court admitted into evidence, over objection, Moore's testimony concerning his occupation, income, and expenses. The prosecutor's inquiry ranged into subjects concerning Moore's various jobs, his house, his rate of pay, his mortgage payment, his utility bills, his car payments, the number of children he had, his grocery bills, his insurance premiums for life and health insurance, his charge card purchases, his car ownership, how he financed his cars, and his expenses for maintenance of his vehicles.

The prosecutor also inquired of the defendant about the

defendant's wife's job, name of her current employer, current income, previous employers, past income, and whether she had obtained raises. This evidence was objected to as being beyond the scope of direct examination and also as irrelevant to the determination of whether fraud was committed in the instant case.

Moore contends in his first assignment of error that the district court erred in improperly admitting testimony of "other acts." 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.

Section 27-404(2), of course, is merely a part of § 27-404, entitled "Character evidence; not admissible to prove conduct; exceptions; evidence of other crimes, wrongs, or acts." Underlying the admissibility of such evidence under § 27-404(2) is the requirement that such evidence is relevant. "The rule is one of relevance." *State v. Coca*, 216 Neb. 76, 80, 341 N.W.2d 606, 609 (1983).

Relevancy is defined in Neb. Rev. Stat. § 27-401 (Reissue 1979). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In considering the relevance of the evidence in question, we note that the gist of the two crimes with which Moore was charged, as set out in Neb. Rev. Stat. § 28-512 (Reissue 1979), was obtaining, or attempting to obtain, property of another by deception. Deception, in turn, is defined in subsection (1) of the same statute as intentionally creating a false impression, "including false impressions as to law, value, intention, or other state of mind . . . ."

There is no doubt in these cases that Moore obtained property (cash) of another in one case and attempted to obtain cash in the other. The only possible relevance of Moore's other acts in dealing with insurance companies would be that those

other acts created a "false impression," or were such as to deceive an insurance company, and to thus tend to show that Moore was deceiving someone in the criminally charged actions in this case. If Moore's actions were not to deceive in the other instances, then such other actions would only show that Moore's character was to file an insurance claim when he had a loss of his property. That item of character is, of course, irrelevant.

The State recognized this and, therefore, undertook to insinuate that each of Moore's prior acts was deceitful. That simply cannot be done in a criminal case charging other specific crimes. The State clearly is trying to give effect to that old adage, "Where there's smoke, there's fire." Such evidence produced by the State, or elicited from defendant, on cross-examination, has no place in the proving of a criminal act. The evidence as to the other acts of Moore both before and after the crimes charged was irrelevant and should not have been admitted.

In addition to our determination as to the relevance of the evidence as to Moore's insurance claims other than those which were the subject of the information, we note also that such evidence could readily lead the jury to reach a decision on an improper basis. Neb. Rev. Stat. § 27-403 (Reissue 1979) states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." On the question of "unfair prejudice," we said in *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 439, 345 N.W.2d 300, 306 (1984):

> Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only "unfair prejudice" with which we are concerned. In the context of § 27-403 such prejudice means a tendency to suggest a decision on an improper basis.

In this case the State has been able to submit the question as to the commission of two alleged crimes by adducing evidence as to six other incidents—none specifically alleged to be

criminal in nature—and thus inviting the jury to determine criminality by sheer weight of numbers.

In its brief the State contends, "Because of the frequency by which these claims occurred, the court did not abuse its discretion in determining that such claims were relevant and probative on the issue of intent, plan or scheme." Brief for Appellee at 9. However, in referring to § 27-404(2), this court held in *State v. Ellis*, 208 Neb. 379, 392, 303 N.W.2d 741, 750 (1981), "The trial court must balance between the danger of unfair prejudice to the defendant and the probative value of that evidence." We also went on to say, "It is for this court to determine whether the trial court abused its discretion, taking into consideration all factors and other means of proof." *Id.* The evidence of the other claims unfairly prejudiced the defendant in the jury's consideration of the charges against him.

In his second assignment of error, Moore contends that the trial court improperly allowed the prosecutor to inquire into Moore's family finances. Specifically, Moore argues that the inquiry was "irrelevant, highly prejudicial and beyond the scope of the direct exam." Brief for Appellant at 14. The State contends this line of questioning was relevant because of Moore's "unfavorable financial situation." Brief for Appellee at 13. The State contends that the poor financial position of the defendant establishes a motive for defrauding insurance companies. Such reasoning and the resulting evidence would help the State's position in every case where the defendant is poor, and could be injected into every case where it might aid a defendant. Finally, the State contends that even if the financial position of Moore was irrelevant, "the admission of such evidence would nevertheless constitute harmless error." Brief for Appellee at 14. None of the State's contentions have merit.

It is well established that the scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *State v. Thaden*, 210 Neb. 622, 316 N.W.2d 317 (1982). In this case, however, the State's inquiries led only to totally irrelevant evidence, and the admission of such evidence constituted an abuse of the trial court's discretion. The

questions began as to the date that Moore purchased his home in Omaha in January of 1979 and progressed through the amount of his monthly payments, the number of his children, and the amount of his monthly grocery bill in 1981. At one point Moore was asked if he had not bought a 1973 Grand Prix automobile in November of 1979, and when Moore stated he could not remember, an obviously impeachment-directed question was next asked: "But you do remember going to a bar called The Garage in Millard the night of January 9th, but you can't remember what automobiles you had in 1981?" Similar insinuations were made as to Moore's testimony as to relevant events. Evidence resulting from such inquiries is irrelevant and prejudicial in this case. The impeachment of a witness may not be based on such tangential matters.

Given the circumstance of this case, we believe the trial court did abuse its discretion in allowing the prosecutor to inquire into Moore's financial position and that such evidence was not merely "harmless error" but was prejudicial to Moore.

We reverse the judgment and remand the cause to the district court for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., participating on briefs.

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 any reference to Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 1984) is misplaced. The evidence in this case with regard to other claims made by the appellant and paid by various companies was inadmissible because the evidence was irrelevant under the provisions of Neb. Rev. Stat. § 27-401 (Reissue 1979). There was no issue as to whether the evidence could have been offered to show motive under § 27-404(2). It could not.

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

STATE OF NEBRASKA, APPELLEE, V. RALPH SURBER, APPELLANT.

380 N.W.2d 293

Filed January 24, 1986. No. 85-240.

1. **Courts: Pretrial Motions.** Under Neb. Rev. Stat. § 29-1919 (Reissue 1979), on determination that a discovery order has not been complied with, the trial court has broad discretion to enter such other order as it deems just under the circumstances.
2. **Constitutional Law: Pretrial Motions: Evidence.** The failure of the State to produce an officer's preliminary notes or recordings is not a violation of the fourth amendment to the U.S. Constitution when those notes or recordings are transferred to a report and destroyed as regular practice, so long as such notes or recordings are not destroyed in bad faith.
3. **Criminal Law: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Kurt A. Hohenstein, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

GRANT, J.

Defendant was charged with operating or having actual physical control of a motor vehicle while "under the influence of alcoholic liquor or when he had 10/100ths of one percent or more by weight of alcohol in his body fluids," in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), and with driving a motor vehicle at 66 miles per hour in a 55-mile-per-hour speed zone.

Defendant pled not guilty and, after trial in the county court for Dakota County, was found guilty on each count. He appealed to the district court, where his conviction was affirmed. Defendant timely appealed to this court, assigning as error that the trial court erred (1) in admitting into evidence the

results of defendant's urine test because of lack of foundation; (2) in admitting into evidence the results of field sobriety tests made at the time of his arrest because defendant had requested and had not received tape recordings made by the arresting officer at the time of the arrest; and (3) in determining that the evidence established defendant's guilt beyond a reasonable doubt. We affirm.

On May 30, 1984, at about 10:45 p.m., Trooper Doug Johnson of the Nebraska State Patrol, by use of his radar equipment, determined that defendant was driving 66 miles per hour on a public highway near Jackson, Dakota County, Nebraska, where the speed limit was 55 miles per hour. The trooper stopped defendant for the speeding violation. The trooper testified that as he approached defendant, he smelled the odor of alcohol on defendant's breath, determined that defendant's speech was slurred and confused, and saw that defendant noticeably swayed.

The trooper then requested defendant to perform several field sobriety tests, including reciting the alphabet, counting backwards, and doing several physical operations. Trooper Johnson operated his tape recorder during defendant's performance of the verbal parts of these tests. Defendant filed a motion, before trial, that this tape recording be produced for his examination. The trial court granted this motion, but the recording was not produced by the State.

A later pretrial hearing was held on defendant's "Motion to Suppress Field Sobriety Testimony." Defendant alleged that since a tape recording had been made of a portion of the field sobriety tests and the court had ordered that the tape recording be produced for defendant's examination but the tape could not be produced since it had been "inadvertently destroyed by the State," that, therefore, all evidence relating to the field sobriety tests should be suppressed. The facts as to the tape recording were submitted by agreement of counsel. Those facts were that Trooper Johnson, as well as other officers, was allowed by the Nebraska State Patrol to use his own tape recorder, at his expense, to assist in preparing his reports. Trooper Johnson used his recorder instead of taking written notes, as some other officers did. He would play the recording himself and prepare

his official report. When his report was finished as to any particular incident, Trooper Johnson would not preserve or keep any tapes but, instead, would routinely reuse the cassette tapes at later times in his work. The reason for such reuse was financial, in that the officer did not want to have to purchase the many cassettes necessary if he was to attempt to preserve every recording. The parties are in agreement that, in this case, there was no purposeful destruction of the tapes.

At trial Trooper Johnson testified in detail, using his report, as to defendant's performance of the verbal portion of the field sobriety tests. Defendant objected to that testimony, and the trial court overruled the objection and the trooper was permitted to testify as to the facts in his report.

Defendant's position is that it was prejudicial error to permit Trooper Johnson to testify as to defendant's performance of the field sobriety tests when the recording was not made available to defendant. The two grounds asserted for exclusion of the evidence for failure to produce the tape recording of those tests are (1) that the failure to produce was in violation of the trial court's order and (2) that the destruction of the tape recording was the destruction of evidence which might have been exculpatory to the defendant, and that, therefore, admission of other evidence on the same point violated defendant's rights under the fourth amendment to the Constitution of the United States.

With regard to defendant's contention that the violation of the trial court's discovery order requires exclusion of all evidence of the field tests, Neb. Rev. Stat. § 29-1919 (Reissue 1979) sets out the statutory guidelines as to the effect of a party's failure to comply with a discovery order. Subsection (4) of that statute provides that on determination that a discovery order has not been complied with, the trial court may "[e]nter such other order as it deems just under the circumstances." In *State v. Vicars*, 207 Neb. 325, 334, 299 N.W.2d 421, 427 (1980), we held that § 29-1919 gives the trial court "broad discretion under the circumstances which may exist." In this case the trial court stated that its discovery orders were always conditioned that evidence was to be produced "if available." Here, there was no contention that the destruction of the tape recording was

anything but routine and inadvertent. The recording was not required, by statute or regulation.

Second, under the controlling case law of the U.S. Supreme Court, there was no violation of defendant's fourth amendment rights. Trooper Johnson made the tape recording as preliminary notes for his official report. Defendant had access to the official reports. In *Killian v. United States*, 368 U.S. 231, 242, 82 S. Ct. 302, 7 L. Ed. 2d 256 (1961), the Court stated:

> If the agents' notes . . . were made only for the purpose of transferring the data thereon . . . and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.

In the case at bar Johnson transferred the information on the recording to a report. There is no evidence of bad faith, nor does defendant so contend. In *Killian, supra* at 242, the Court also stated: "It is entirely clear that petitioner would not be entitled to a new trial because of the nonproduction of the agents' notes if those notes were so destroyed and not in existence at the time of the trial." We hold that the failure of the State to produce an officer's preliminary notes or recordings is not a violation of the fourth amendment to the U.S. Constitution when those notes or recordings are transferred to a report and destroyed as regular practice, so long as such notes or recordings are not destroyed in bad faith. The trial court did not abuse its discretion, under the facts in this case, in determining that the trooper's direct testimony was admissible even though the court's discovery order had not been complied with.

Johnson also testified that in his opinion, based on the field tests and his observations, defendant was under the influence of alcohol and operating a motor vehicle on the highways of Nebraska. That testimony was contradicted by the testimony of defendant's witness, but nevertheless there was sufficient evidence to support the trial court's finding that defendant was guilty of operating a motor vehicle while under the influence of

alcoholic liquor. As we held in *State v. Green*, 217 Neb. 70, 75-76, 348 N.W.2d 429, 432 (1984):

> In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.

Defendant's assignment of error concerning the sufficiency of the evidence to support the conviction is without merit.

Insofar as defendant's assignment of error that the trial court erred in admitting into evidence the results of defendant's urine test because of lack of foundation, that question is not properly submitted for this court's review because a proper record is not before us. Defendant makes references in his brief at 7 to "Title 177 of the Nebraska Department of Health." In the discussions before the trial court, that title was said to have formerly been "Rule 3." Such regulation is not in the record before us, and we are unable to review defendant's allegations that the methods prescribed in that rule were not complied with. We do not take judicial notice of departmental regulations in effect on the date of this incident.

As stated in *Nevels v. State*, 205 Neb. 642, 646, 289 N.W.2d 511, 513 (1980): "Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity." Similarly, in *American Assn. of University Professors v. Board of Regents*, 203 Neb. 628, 633, 279 N.W.2d 621, 624 (1979), we said: "Since Rule 4(B)(7) of the CIR [now Commission of Industrial Relations] does not appear in the record we decline to consider its validity or application to the facts in this case at this time."

This omission does not control the outcome of this case, however. Defendant has been found guilty of driving while under the influence of alcoholic liquor. The evidence supports that finding. It is not necessary that the trial court determine that defendant also had ten-hundredths of 1 percent or more by

weight of alcohol in his body fluid. *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974); *State v. Wenzel*, 215 Neb. 395, 338 N.W.2d 772 (1983). See, also, *State v. Parker, ante* p. 570, 379 N.W.2d 259 (1986).

No allegation is made on this appeal concerning defendant's conviction of speeding. The judgment of conviction on each count is affirmed.

AFFIRMED.

JAMES D. HILL AND KENNETH L. IDEEN, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANTS AND CROSS-APPELLEES, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

380 N.W.2d 296

Filed January 24, 1986. No. 85-257.

1. **Attorney Fees: Class Actions: Proof.** The burden is upon the one claiming an attorney fee in a class action to show that a *net* benefit was conferred upon the class.
2. **Prejudgment Interest: Claims.** Prejudgment interest may be recovered on claims which are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. If 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.
3. **Prejudgment Interest: Declaratory Judgments: Claims.** Where the existence of an overpayment is dependent upon an interpretation of a statute and there is a reasonable dispute over its meaning so as to require a suit for declaratory judgment in order to clarify it, a claim based upon such a determination cannot be said to be liquidated and no prejudgment interest would be allowed.

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

Edward F. Carter, Jr., of Barney, Carter & Johnson, P.C., for appellant Shaeffer.

J. Murry Shaeffer of Shaeffer, Boucher & Hawk, P.C., for appellants Hill and Ideen et al.

William G. Blake of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellee City of Lincoln.

Ronald Rosenberg of Rosenberg Law Offices, for appellees members Lincoln Police Union Local No. 544.

Charles F. Noren, for appellees employees affected by the decision.

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

PER CURIAM.

This case was brought as a class action and sought the return of a certain portion of wage deductions which had been contributed to the funding of retirement benefits for policemen and firemen employed by the City of Lincoln.

The appeal on the substantive issue was decided by our opinion found in *Hill v. City of Lincoln*, 213 Neb. 517, 330 N.W.2d 471 (1983). The effect of that decision was to entitle some or all of the members of the class to a refund of a part of their withholdings, but at the same time to mandate smaller retirement benefits than those previously computed.

The present appeal is actually in two segments, involving two different sets of parties. Appellant J. Murry Shaeffer, the attorney for the "class," claims the trial court erred in failing to award him an attorney fee from the "fund" which he generated. Appellants Hill and Ideen, on behalf of the "class," object to the claimed insufficiency of prejudgment interest awarded by the trial court following the initial remand of the case.

Appellees in the Shaeffer appeal include certain members of the "class" who object to the award of any attorney fee, as well as those policemen and firemen who opted out of the "class." In the Hill-Ideen appeal the appellee is the City of Lincoln.

A reference to the opinion cited above will reveal that for pension purposes the city had been withholding a portion of wages computed on the base pay of each employee, as well as on overtime pay, remuneration for holiday service, and college credits. In interpreting the statute, we held that sums computed on anything in excess of base pay must be refunded. This was obviously a benefit to those employees affected. However, we

also determined that pension benefits, which had been figured in the same way, must also rest on the same foundation; i.e., base pay rather than total remuneration. This could prove to be detrimental to the employees affected.

As matters now stand, because of the disparate effect this litigation had upon each employee, a serious doubt must be entertained as to whether this was in fact a proper case for class litigation. However, that question has not been raised.

A review of the record leaves little doubt that the employees received a benefit from this litigation. Recomputation of the amounts which should have been deducted from wages resulted in the ascertainment of refunds aggregating in excess of $200,000. By the same token, it cannot seriously be questioned that retirement benefits, which must now be computed on the same smaller wage figures, will be proportionately less. However, the record does not deal in specifics. The appellant Shaeffer made no effort to present evidence in that regard. It was his burden to show a benefit conferred upon the "class." *Moyer & Moyer v. State Farm Mut. Ins. Co.*, 190 Neb. 174, 206 N.W.2d 644 (1973).

In dealing with benefits to a class for the purpose of awarding an attorney fee, we must look to the "net" benefit. In *Simmons v. Friday*, 190 F.2d 849 (8th Cir. 1951), the court denied an attorney fee in litigation allegedly benefiting one of the parties. In doing so it stated at 851-52:

> Since G. A. Franz [the decedent] as a remainderman was entitled to but one-tenth of the corpus of the estate, the entire estate was therefore augmented ten times this amount, or in the amount of $871,185.70. This increase in the appellant's estate was purely incidental; and the court must recognize the fact that G. A. Franz's estate by this same litigation lost one-half of $871,185.70 or $435,592.85. If we subtract the "benefits", $87,118.57, from the "detriment", $435,592.85, the litigation resulted in a net loss to the estate of G. A. Franz of $348,474.28.

The record does disclose testimony of several of the appellees' witnesses that this particular litigation did not prove beneficial to the employees' interests because of the decrease in pension rights. The evidence was of questionable validity

because of the weakness of the foundation for such opinions. However, the fact remains, as earlier stated, that the appellant Shaeffer offered no evidence at all in this regard.

We see little difference between the burden Shaeffer has in this instance of showing a net benefit to the class and that of one trying to prove a case of lost profits in a breach of contract action. In the latter instance the burden of proof is not met by the plaintiff's evidence of probable gross sales. It is incumbent upon such plaintiff to show such items as cost of merchandise, labor, and other expenses tending to establish net profits. Such items need not be proven by the defendant.

It is the duty of the plaintiff to present some evidence from which the amount of loss reasonably can be computed. *Raskin v. Seldin Dev. & Management Co.*, 213 Neb. 729, 331 N.W.2d 783 (1983).

In *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 438, 197 N.W.2d 646, 648 (1972), this court said:

> Plaintiff testified that his gross receipts amounted to $8 to $10 a day before defendant began to compete but that subsequent to such competition his gross receipts amounted to only $4 or $5 a day. There was no evidence as to plaintiff's business expense except the fact that he merely paid expenses when his gross receipts diminished. With language extremely applicable to the instant situation the court discussed the plaintiff's burden in such an instance: "Plaintiff must not only show in such a case his right of recovery but the elements and facts which compose the measure of his recovery and not leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation."

The trial court was correct in finding that the appellant Shaeffer failed in his burden of proving a benefit to the class.

After hearings following the mandate from this court, the district court concluded that the plaintiffs' claims were liquidated and that the city must pay interest. However, it decreed that such interest would be payable only from May 25, 1979, the date upon which this action was filed, and until October 19, 1983, the date upon which the trial court concluded its hearing on the question of interest.

The district court gave no explanation of its limitation as to the May 25 date other than to recite that it was equitable for such interest to be computed only from and after that date. The order went on to state: "The hearing upon Plaintiffs' attorneys fees having been convened on September 26 and October 19, 1983, and continued upon the request of the Plaintiffs' counsel, it is hereby ordered that prejudgment interest shall accrue and be due only until October 19, 1983, and no prejudgment interest shall thereafter accrue."

Prejudgment interest may be recovered on claims which are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. If a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed. *Classen v. Becton, Dickinson & Co.*, 214 Neb. 543, 334 N.W.2d 644 (1983).

Neither party disputes that the amount of the claim was ascertainable by a simple mathematical computation, involved though the process might be. Additionally, there was no reasonable controversy over the right to recover from a factual basis, only as to the legal interpretation of the appropriate statute.

Although its holding has been somewhat "watered down" throughout the intervening years, the case of *Lewis v. Rountree*, 79 N.C. 122, 128, 28 Am. R. 309, 313 (1878), has interesting language appropriate to this case:

> It is a rule which may be gathered from the cases that whenever a debtor has notice or ought to know that he owes a *certain* sum, and when he is to pay, if he fails to pay it, he ought to pay interest. In the present case although we may assume that the defendant had notice by the commencement of the action, that he was looked to for the payment of damages, yet as a fact, not only was the amount technically unliquidated, but owing to the unsettled state of the law, it was uncertain.

At the time this litigation was commenced, neither party knew whether improper amounts were being withheld from

wages. It was necessary to bring an action to declare the rights of the parties before it could be determined that anyone was entitled to anything. The final result as expressed by the court's final judgment on the mandate was not anticipated by any of the parties or by the trial court. Until that judgment was entered no city official had any authorization to step up and return the amount of any overpayment. It is still not known what the "net" overpayment, if any, might be. It could hardly be said that the amount due in this instance was a liquidated amount.

We hold that where the existence of an overpayment is dependent upon an interpretation of a statute and there is a reasonable dispute over its meaning so as to require a suit for declaratory judgment in order to clarify it, a claim based upon such a determination cannot be said to be liquidated and no prejudgment interest would be allowed.

The judgment of the district court is affirmed except as to that portion allowing prejudgment interest, which is ordered stricken.

AFFIRMED AS MODIFIED.

JERRY V. KENNEDY, APPELLEE, V. PATSY J. KENNEDY, APPELLANT.

380 N.W.2d 300

Filed January 24, 1986. No. 85-361.

1. **Child Custody: Evidence: Modification of Decree.** While there are no hard-and-fast rules which can be set down in cases of this nature, in determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child.
2. **Child Custody: Modification of Decree.** 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.
3. _____: _____. 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.

4. **Child Custody: Modification of Decree: Proof.** The burden of proving the existence of a material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
5. **Rules of the Supreme Court: Courts: Trial: Records.** The rules of this court require the district court to provide a court reporter whenever a litigant requests the presence of the court reporter.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded with directions to dismiss.

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

David E. Veath of Fisher & Veath, for appellee.

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

KRIVOSHA, C.J.

Patsy J. Kennedy (Ms. Kennedy) appeals from an order entered by the district court for Dawes County, Nebraska, changing the custody of her two minor children from herself to her former husband, Jerry V. Kennedy (Mr. Kennedy). We believe that the district court was in error, and for that reason we reverse and remand with directions.

The record discloses that the parties were divorced on February 2, 1981. The decree entered in connection therewith specifically found that both parents were fit and suitable but, nevertheless, awarded custody of the two minor children to the mother. On January 24, 1985, Mr. Kennedy moved to have custody of the children changed to him. In the affidavit attached to his motion, he stated that he was previously unable to provide a suitable home for the children but that he is now able to do so. He further alleged that Ms. Kennedy had been cohabiting "with various different men" and that the children had been under stress due to their circumstances of living with their mother. In response Ms. Kennedy moved to have the father obtain or pay for health insurance for the children. The original decree ordered Mr. Kennedy to obtain such health insurance for the children, but when he quit his previous job he

lost his health coverage and has not since obtained any additional health coverage for the children.

The evidence establishes that after the divorce Ms. Kennedy did, at different times, live with two men to whom she was not married. She also lived with her current husband for approximately 6 months prior to marrying him, but at the time of trial had been married for nearly a year and was providing a stable home for the children. Aside from the fact that the parties lived together without first marrying, there is no evidence to indicate that the children were in any other way adversely affected by the relationship. Quite to the contrary, the record affirmatively establishes that the children have a good relationship with Ms. Kennedy's current husband and have had that relationship since the time he lived in the family home. The record further discloses that although Mr. Kennedy knew about Ms. Kennedy's living arrangements, he never made complaint until he sought change of custody.

Mr. Kennedy also introduced evidence that Ms. Kennedy permits the 14-year-old son in her custody to drink beer at home. Ms. Kennedy confirmed that she does permit her son to drink beer in front of her because she would rather have him drink at home in moderation than "go sneaking around drinking." She further testified that, while she permits him on occasion to drink beer, she does not encourage her son to use alcohol. Additionally, the record discloses that Mr. Kennedy has permitted his son to chew tobacco and has, since an early age, provided him with the tobacco. Although the son does have some kidney problem, there was no evidence in the record to indicate that the drinking of beer in any manner medically affected the son. In fact, according to letters from the son's doctor, the son was doing well physically.

Mr. Kennedy further maintained that if the children were permitted to live with him they would obtain a better home life, would not be permitted to watch improper programs on television, and would receive a religious education, which they were not receiving with the mother.

At the trial Ms. Kennedy's counsel requested the court to require the presence of the court reporter to record the closing arguments, the remarks of the guardian ad litem, and the

court's comments from the bench. The court refused to provide the court reporter. Unfortunately, because the court reporter was not present when the court denied counsel's motion, we do not know the reason for the denial. In denying the motion for new trial, however, the district judge, on the record, said:

> I am convinced in this case that the Supreme Court, if it gets a look at this case, will decide the case based on the facts that were presented. It tries the cases de nobo [sic] on the record, it doesn't care what statements a district judge, a trial judge makes in support of his own opinion. It just looks at the facts, see if they support the decision, and it [sic] they don't support the decision I don't think that there is anything that a judge can say in making his decision that will cause them to affirm him.

We turn first to the question of whether there was a material change of circumstances which justified the district court's changing the custody of the children. An examination of the record discloses that but for the fact that more than a year prior to the hearing seeking to change custody of the children Ms. Kennedy at different times lived with three men, at times when she was not married to any of them (though ultimately she did marry the last one), no other significant material change of circumstances occurred from the time the decree was originally signed. There is no evidence that the children were in any manner adversely affected by the living arrangements or exposed to any sexual activity. Where, as here, the evidence discloses that although the mother may have engaged in sexual activity with men not her husband when the children were home, absent a showing that the children were exposed to such activity or were in any manner damaged by reason of such activity, such sexual activity does not justify a change in custody. See, *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984); *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981). This is particularly true where the events occurred more than a year prior to the custody hearing. In *Riddle v. Riddle, ante* p. 109, 112, 375 N.W.2d 143, 145 (1985), we said:

> While there are no hard-and-fast rules which can be set down in cases of this nature, it appears to us that in

> determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child.

The record establishes that for at least a year prior to the custody hearing Ms. Kennedy was happily married and providing her children with a stable home environment.

Nor does the fact that Ms. Kennedy has permitted the 14-year-old son to occasionally drink beer constitute a material change of circumstance justifying a change of custody. Although this court does not approve of minors violating the laws regarding the use of either alcohol or tobacco, this court is not prepared to determine what is more harmful to a young boy, occasionally drinking beer or occasionally chewing tobacco, particularly in view of the fact that the Legislature has deemed it appropriate to provide that a minor may possess alcohol in his or her permanent place of residence. See Neb. Rev. Stat. § 53-180.02 (Reissue 1984).

Nor does the mere fact that Mr. Kennedy now maintains that he has a home more stable than it was at the time of the decree justify removing the children from Ms. Kennedy and placing them with Mr. Kennedy. As we observed in *Hoschar v. Hoschar*, 220 Neb. 913, 915, 374 N.W.2d 64, 66 (1985):

> 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.

We have frequently held that " '[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). The burden of proving the existence of a material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award. See *Hoschar v. Hoschar, supra*. An examination of the record fails to disclose how or in what manner Mr. Kennedy has met his burden. For that reason we find that the district court was in error in changing the custody of the children from Ms. Kennedy to Mr. Kennedy.

That leaves us, then, with the question of whether the district court erred in denying Ms. Kennedy's request for a court reporter to be present during closing arguments, statement by the guardian ad litem, and the decision of the court. In view of the fact that we have found the district court to be in error in its decision, addressing the question of the court reporter's presence might not be relevant. Nevertheless, we address the issue because we believe that this matter is of sufficient public interest that we should comment in an effort to avoid a repetition of this matter.

Contrary to the district court's observation that the Supreme Court is not interested in what the district court has to say, the rules of this court require the district court to provide a court reporter whenever a litigant requests the presence of the court reporter. Rule 4 of the Nebraska Supreme Court Rules Relating to Official Court Reporters, effective October 1, 1976, and amended November 30, 1979, provides in part as follows:

> 4. GENERAL QUALIFICATIONS AND DUTIES:
>
> . . . .
>
> b. The court reporter *shall* make a verbatim record of the following:
>
> . . . .
>
> (2) The testimony *or other oral proceedings*.
>
> . . . .
>
> (4) The opening statements and *closing arguments, at the request of counsel*, any party, or the court.

(Emphasis supplied.)

Rule 4b requires the court reporter to make a verbatim recording of closing arguments when requested by counsel. The

district court's refusal to permit the court reporter to perform the duty imposed upon the court reporter by our rules was in error. Furthermore, by providing in rule 4b(2) that the court reporter shall make a verbatim record of "[t]he testimony or other oral proceedings," we intend that any portion of the proceedings, including comments made by the court from the bench, shall be recorded by the court reporter. While it is true, and we have previously held, that if a judge reaches a right decision for the wrong reason the decision will not be reversed, that does not mean that rule 4b(2) may be disregarded. The district court was in error in refusing the requests of Ms. Kennedy's counsel to have a court reporter present. The parties are entitled to the benefits afforded to them by reason of the provisions of rule 4b, and the trial court may not deny those benefits to the parties when a proper request is made.

To the extent that our ruling here is contrary to our previous holdings in *Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 164 Neb. 704, 83 N.W.2d 523 (1957), *Sandomierski v. Fixemer*, 163 Neb. 716, 81 N.W.2d 142 (1957), or other cases to similar effect, all of which were decided prior to the adoption by this court of rule 4b, they are superseded by our holding herein.

The decision of the district court is reversed and the cause remanded with directions to dismiss the application of Mr. Kennedy seeking to change the custody of the minor children.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. ELIZABETH A. HOLMAN, APPELLANT.

380 N.W.2d 304

Filed January 24, 1986. No. 85-369.

1. **Criminal Law: Theft: Words and Phrases.** Theft by receiving stolen property consists of receiving, retaining, or disposing of stolen movable property of another knowing or believing that it has been stolen, unless the property was

received, retained, or disposed of with intention to restore it to the owner.

2. **Search and Seizure.** Generally, for a seizure of property to be valid it must be made pursuant to a validly authorized search warrant or under exigent circumstances or under some other recognized exception.
3. **Motions to Suppress: Search and Seizure.** A motion to suppress can only be made by a person who had a reasonable expectation of privacy in the area searched and where the evidence was seized.
4. **Police Officers and Sheriffs: Search and Seizure.** An officer may seize evidence and contraband if it is discovered inadvertently while it is in plain view and the officer has a right to be in the place where he has such a view.
5. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime. A practical, nontechnical probability that incriminating evidence is involved is all that is required.
6. **Miranda Rights: Police Officers and Sheriffs.** The *Miranda* procedures were not meant to preclude law enforcement personnel from performing their traditional investigatory functions such as general on-the-scene questioning.
7. **Investigative Stops: Motor Vehicles.** Upon stopping a vehicle for a traffic violation, it is lawful to detain the driver while checking the registration and the license of the driver.
8. **Investigative Stops: Motor Vehicles: Miranda Rights.** Roadside questioning of a driver detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of *Miranda*.

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

Dennis R. Keefe, Lancaster County Public Defender, and Coleen J. Nielsen, for appellant.

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

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

BOSLAUGH, J.

The defendant, Elizabeth A. Holman, was convicted by a jury for theft by receiving stolen property. The offense consists of receiving, retaining, or disposing of stolen movable property of another knowing or believing that it has been stolen, unless the property was received, retained, or disposed of with intention to restore it to the owner. Neb. Rev. Stat. § 28-517 (Reissue 1979). The defendant was sentenced to a term of 20

months to 3 years.

On appeal the defendant has assigned three errors: (1) The trial court erred in overruling defendant's motion to suppress evidence relating to the tires because they were improperly seized; (2) The trial court erred in overruling the defendant's motion in limine and allowing the State to elicit testimony as to defendant's silence when asked about the tires; and (3) There was insufficient evidence as a matter of law to support conviction.

The record shows that on March 26, 1984, at approximately 12:45 a.m., the defendant was driving a 1976 Plymouth automobile eastbound on B Street in southwest Lincoln, Nebraska, when she was observed by a Lincoln police officer, Mark Domangue, at the corner of 8th and B Streets. Officer Domangue noted that the front license plate was missing from the automobile and that the trunk lid was up and there were large tires stacked in the trunk. Officer Domangue then turned his cruiser around and activated his red lights. He followed the vehicle southbound on 8th where the vehicle ran the stop sign at A Street. The vehicle continued without stopping for the police officer, ran another stop sign on 7th at A Street, and eventually stopped between 7th and 8th on A Street.

After the vehicle had stopped, Officer Domangue approached the defendant's car and saw the four new, large truck tires in the trunk. Officer Domangue asked the defendant for her license and registration, and also asked her whose tires were in the trunk. The defendant gave the officer her license and a certificate of title and told the officer that they were not her tires but that she knew who the owner was. The defendant also stated that she had just picked the tires up. The officer asked the defendant whose tires they were, and she did not say anything.

The officer next asked the defendant to step out of her car, whereupon they walked to the rear of the vehicle and the officer again asked about the tires. The defendant gave the same responses.

The officer then placed the defendant in the back seat of his cruiser and ran a driver's history check, a check for warrants, and a registration check, which is the normal procedure for a

traffic offense stop. The officer was informed that the rear plate on defendant's car was registered to another vehicle, there was an outstanding out-of-county warrant issued for the defendant, and that the defendant's driver's license had been suspended in Nebraska. The officer at that point called for a wrecker to tow the defendant's car and placed the defendant under arrest for driving on a suspended license and for the outstanding warrant.

The wrecker arrived, and the vehicle, with the tires still in the trunk, was towed to Whitney's wrecker company. At the time the car was towed, the officer did not have any report that tires of that type had been stolen, but he requested that the towing company release the tires only upon proper proof of ownership. The officer also made a report on the incident and requested that the tires be checked to determine whether they were stolen property.

On March 29, 1984, Officer Domangue met with Terry Klein of the T.O. Haas Tire Company at Whitney's wrecker company to look at the tires. The T.O. Haas Tire Company is located about 2 miles from where the defendant was stopped on March 26, 1984. Upon viewing the tires, Terry Klein believed that the tires belonged to T.O. Haas because that type of tire was not sold anywhere else in Lincoln. Klein later checked the inventory of T.O. Haas and found that four tires exactly like those he had seen at Whitney's were missing.

Based on these facts, a warrant was issued on April 5 for Elizabeth Holman's arrest, and on May 16, 1984, charges were filed.

The defendant contends that the sole reason for towing her vehicle was for the purpose of seizing the tires and that evidence seized in such a manner should be suppressed as violative of defendant's constitutional right against unreasonable search and seizure. U.S. Const. amend. IV; Neb. Const. art. I, § 7. At the same time, the defendant concedes that the officer had a valid reason to stop the defendant's vehicle and that the officer's viewing of the tires was inadvertent because they were large and clearly visible.

Generally, for a seizure of property to be valid it must be made pursuant to a validly authorized search warrant or under

exigent circumstances or under some other recognized exception. *State v. Skolnick*, 218 Neb. 667, 358 N.W.2d 497 (1984). The failure to have a search warrant when evidence is seized does not necessarily require that the evidence be suppressed. *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983). Furthermore, a motion to suppress can only be made by a person who had a reasonable expectation of privacy in the area searched and where the evidence was seized. See, *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978); *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977). There could be no reasonable expectation of privacy as to property in plain sight in a vehicle's completely open trunk while driving on a public thoroughfare.

An officer may seize evidence and contraband without a warrant if it is discovered inadvertently while it is in plain view and the officer has a right to be in the place where he has such a view. *State v. Searles, supra*; *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976); *State v. Romonto*, 190 Neb. 825, 212 N.W.2d 641 (1973). In effect, such activity is not a search and no warrant is required. *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981); *State v. McCune*, 189 Neb. 165, 201 N.W.2d 852 (1972), *cert. denied* 412 U.S. 954, 93 S. Ct. 3002, 37 L. Ed. 2d 1007 (1973). This is known as the plain view exception to the warrant requirement.

In *State v. Haselhorst*, 218 Neb. 233, 236, 353 N.W.2d 7, 10 (1984), we followed the U.S. Supreme Court decision in *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983), and enumerated the three criteria for a warrantless, plain view search.

> First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," . . . . Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

The defendant in the present case does not claim that the first two criteria were not met, but contends that even though a woman's driving around with four large truck tires in the trunk

may seem rather odd, it "does not give rise to one of a criminal nature. Therefore, the plain view exception to the warrant requirement in this case simply does not apply." Brief for Appellant at 14.

The defendant's interpretation of the immediately apparent requirement of the plain view doctrine is incorrect. In *State v. Haselhorst, supra* at 237, 353 N.W.2d at 10, we held that a seizure of property that is in plain view " ' "is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity" ' . . . ." Furthermore, we stated that

> probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," [citation omitted] that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Id. (citing *Texas v. Brown, supra* at 742).

The evidence in this case shows that Officer Domangue observed the defendant's car with four very large truck tires in the trunk at 12:45 a.m. within 2 miles of the Haas tire company. When he turned on his red lights and attempted to stop the vehicle, the defendant violated two stop signs before pulling over. When asked whose tires were in the trunk, the defendant responded that they were not hers and that she knew who they belonged to but refused to state who owned the tires. Under a practical, nontechnical standard these facts gave rise to probable cause to associate the tires with criminal activity so that seizure for further investigation was lawful.

The defendant's second assignment of error relates to the trial court's refusal to exclude Officer Domangue's testimony concerning the defendant's answers and eventual silence when asked who the tires belonged to. The defendant contends that testimony as to her statements and silence in response to the officer's questions should have been suppressed because her freedom was restricted in such a manner that she was in custody

and should have been given the warnings required by *Miranda v.Arizona*, 384 U.S. 436, 88 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prior to the questioning. The defendant also argues that the officer's testimony as to her silence violated her fifth amendment right against self-incrimination.

In *Miranda v. Arizona, supra*, the U.S. Supreme Court established procedural safeguards to protect a citizen's right against self-incrimination. However, the *Miranda* decision distinguished preliminary investigation from custodial interrogation. *Miranda* applies only to interrogations initiated by law officers after a person has been taken into custody or deprived of his freedom in any significant way. *State v. Parsons*, 213 Neb. 349, 328 N.W.2d 795 (1983). "The Miranda procedures . . . were not meant to preclude law enforcement personnel from performing their traditional investigatory functions such as general on-the-scene questioning . . . ." *State v. Bennett*, 204 Neb. 28, 35, 281 N.W.2d 216, 220 (1979). Thus, "In on-the-scene investigations the police may interview any person not in custody and not subject to coercion for the purpose of determining whether a crime has been committed and who committed it." *State v. Dubany*, 184 Neb. 337, 342, 167 N.W.2d 556, 559 (1969); *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981).

The facts in this case do not support the defendant's contention that testimony as to her statements and silence should have been excluded. Officer Domangue was justified in stopping the defendant's vehicle because it did not have a front license plate and also because the defendant ran two stop signs. Upon stopping a vehicle for a traffic violation, it is lawful to detain the driver while checking the registration and the license of the driver. The U.S. Supreme Court recently held that roadside questioning of a driver detained pursuant to a routine traffic stop does not continue custodial interrogation for purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). The Court reasoned that even though a driver is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver "in custody" and entitled to *Miranda* warnings. *Berkemer*, 104 S. Ct. at 3151. There was no such action or treatment in the present case, so testimony as to the

defendant's statements and silence was admissible.

Lastly, the defendant contends that there was insufficient evidence to support conviction. The law in Nebraska is clear as to the review of the evidence in a criminal case to determine whether it is sufficient to support a guilty verdict. This court will not resolve conflicts in the evidence, pass upon the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. A verdict will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Ewing, ante* p. 462, 378 N.W.2d 158 (1985); *State v. Huffman*, 214 Neb. 429, 334 N.W.2d 3 (1983). Furthermore, this court 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 of guilty beyond a reasonable doubt. *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983); *State v. Huffman, supra.*

The fact that the defendant was driving around at 12:45 a.m. with four large truck tires in the trunk of her vehicle was, at the outset, a suspicious circumstance. The delay in stopping the vehicle after the officer had turned on his red lights was an additional factor. The refusal to disclose the ownership of the tires, after stating that they did not belong to her but that she knew who the owner was, was a highly incriminating circumstance. The evidence was sufficient, if believed, to sustain a finding of guilty of theft by receiving stolen property beyond a reasonable doubt. It cannot be said that the evidence in this case was so lacking that, as a matter of law, it was insufficient to support the verdict.

The judgment of the district court is affirmed.

AFFIRMED.

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

I concur in the result reached by the majority in this case. I write separately, however, because I do not concur in that portion of the majority opinion which suggests that the officer had a basis either to stop the appellant or to arrest her because he observed four very large truck tires in the trunk at 12:45 a.m. The presence of the tires in the trunk was of no consequence in

this case. Neither was the fact that appellant, when asked about the tires, replied that they were not hers but she knew whose they were. See *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

The officer stopped the appellant because he observed appellant did not have a proper license plate, a violation of law. Upon stopping the vehicle and making a check, he determined that there was an outstanding warrant for her arrest. Having once arrested the appellant, there was nothing else to do with the vehicle except secure it by impounding it. And when, later, it appeared that the tires which were in plain view were stolen, the officer obviously had a right to take them into possession. That is all that is involved in this case.

KAYE LEA VANDERZEE, APPELLANT, V. BRIAN KIETH VANDERZEE, APPELLEE.

380 N.W.2d 310

Filed January 24, 1986. No. 85-628.

1. **Child Custody.** Generally, before the court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.
2. _____. Generally, the best policy in divorce cases is to keep minor children within the jurisdiction, but the welfare of the child is the paramount consideration.
3. _____. Community ties are an important factor to be considered in determining whether to allow a child to be removed from the state.
4. **Child Custody: Visitation.** The effective denial of visitation rights by removal to another jurisdiction is a factor to be considered in determining the best interests of the child.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Stanley D. Cohen and Deborah K. Long, for appellant.

Gary J. Nedved of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

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

PER CURIAM.

The petitioner, Kaye Lea Vanderzee, appeals from the order of the district court denying her motion for an order permitting her to remove the parties' minor child to Maryland.

The petitioner and Brian Kieth Vanderzee were divorced in January of 1985. Custody of their minor child, Tyler, was awarded to the petitioner. The decree awarded reasonable rights of visitation to the respondent and, pursuant to the agreement of the parties, specifically provided that he would have Tyler from Sunday at 5 p.m. through Tuesday at 5 p.m., weekly; for a week at Thanksgiving or at Christmas on alternate years; on Father's Day; on other alternate holidays; and for Tyler's birthday on alternate years.

On May 20, 1985, the petitioner filed her motion for permission to remove Tyler from the court's jurisdiction to Maryland. The respondent filed objections and the trial court denied the motion, finding that it was not in the child's best interests to be so removed. Specifically, the court found that because of Tyler's age (2½), the desirability of residing in the proximity of his father and grandparents was superior to the petitioner's reason for moving. The court also found that the child's age would prevent the respondent from maintaining his parental relationship over such a physical distance. The petitioner's subsequent motion for new trial was overruled.

On appeal the petitioner contends that the trial court abused its discretion by denying her motion for permission to remove Tyler, because she had demonstrated a legitimate reason for leaving the jurisdiction.

Our review on appeal is de novo on the record, and the judgment of the trial court will not be disturbed in the absence of a clear abuse of discretion. *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985). Where the evidence is in conflict, we "give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another." *Id.* at 736, 365 N.W.2d at 842.

Generally, before the court will permit the removal of a

minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985). Generally, the best policy in divorce cases is to keep minor children within the jurisdiction, but the welfare of the child is the paramount consideration. *Boll v. Boll, supra.*

While we recognize that "[a]n award of custody to a parent should not be interpreted as a sentence of immobilization," *Korf v. Korf, ante* p. 484, 485-86, 378 N.W.2d 173, 174 (1985), community ties are an important factor to be considered in determining whether to allow a child to be removed from the state. *Boll v. Boll, supra.* The record provides evidence of substantial family ties to grandparents, aunts and uncles, and cousins, all living in or near the State of Nebraska.

The law also contemplates instate visitation by the noncustodial parent. *Gottschall v. Gottschall*, 210 Neb. 679, 316 N.W.2d 610 (1982). The effective denial of visitation rights by removal to another jurisdiction is a factor to be considered in determining the best interests of the child. *Parsons v. Parsons, supra.* The respondent has exercised his substantial visitation rights on a regular basis. Since the move to Maryland would reduce those visits to twice a year, the respondent is justifiably concerned that his relationship with Tyler would suffer as a result.

The petitioner testified that her reason for moving to Maryland is to start a cleaning service with the financial backing of her brother-in-law. She has arranged for full-time employment until her business succeeds. This backup job pays the same hourly wage as the part-time employment she had in Nebraska at the time of trial. While the appellant testified that she knew she could make more money in her new business in Maryland, there is no independent factual basis in the record to support her testimony. In fact, the petitioner has never started a business before, and she did not testify to any previous administrative experience. Unlike the appellant in *Boll v. Boll, supra*, the petitioner failed to show that similar opportunities were unavailable in Nebraska or that her proposed new business would create a substantial opportunity for increased

earnings.

From our review of the record, we find no abuse of discretion by the trial court. The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF RAY WELLS, DECEASED.
ANNA H. SMITH, PERSONAL REPRESENTATIVE OF THE ESTATE OF RAY WELLS, DECEASED, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.
380 N.W.2d 615

Filed January 31, 1986. No. 84-335.

1. **Partnerships.** The existence of a partnership is a question of fact under the evidence.
2. **Partnerships: Intent.** The intent of the parties is of prime concern in determining whether a partnership exists.
3. **Partnerships: Proof.** The burden of establishing the existence of a partnership is upon the party asserting that such a relationship exists.
4. **Trial: Proof.** The party charged with the burden of proof must establish by a preponderance of the evidence the issue essential to recovery.
5. **Partnerships: Words and Phrases.** A partnership is a contract of two or more competent persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.

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

Joseph J. Cariotto, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Michael E. Thew, for appellee.

KRIVOSHA, C.J., HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and OTTE, D.J.

OTTE, D.J.

Anna H. Smith appeals from an order of the Lancaster County District Court affirming an order of the Lancaster

County Court assessing an inheritance tax of $28,329.50 on the estate of Ray Wells. We affirm.

On December 17, 1981, Anna H. Smith, as personal representative of the estate of Ray Wells, filed her petition in the Lancaster County Court claiming that she and Ray were partners and asking that not less than one-half the real and personal property of the estate be declared partnership property, having been held in trust by Ray for Anna. Anna contends that one-half of the assets did not pass to her by Ray's will but, rather, are hers as a result of the partnership agreement with Ray and are therefore not subject to inheritance taxes under Neb. Rev. Stat. § 77-2001 (Reissue 1981). Anna's interest in the estate is not limited to that of personal representative; she is also the sole recipient of the rest, residue, and remainder of Ray's estate under his will.

Also on December 17, 1981, Anna filed an inheritance tax worksheet, which she signed on September 22, 1981, in which the taxable amount of the Wells estate was fixed at $77,888.20. The tax due on this amount was $11,469.88. The Lancaster County attorney's office did not approve the computation, and subsequently Anna submitted a second worksheet, setting the taxable amount of the Wells estate at $181,302.78, with inheritance tax of $28,329.50.

On February 9, 1982, the Lancaster County Court disallowed Anna's petition and assessed the tax at $28,329.50. Anna appealed the order to the Lancaster County District Court. On February 24, 1984, the district court affirmed the county court's order, and Anna now appeals to this court.

Anna makes several assignments of error which can be condensed into the question of whether the district court erred when it determined that Anna and Ray were not partners during Ray's lifetime.

The undisputed evidence shows that Anna and Ray had known each other for approximately 20 years. Their association began when Ray was forced to abandon his occupation as an independent trucker. Anna convinced Ray to go into the hog raising business and, subsequently, a farming operation. Although they never married, Anna and Ray lived together in a house previously owned and occupied by Ray. The

hog operation and farm were located on a parcel of land on West O Street, the downpayment of which came from money Ray received when he sold his tractor and trailer.

Anna and Ray worked together on the farm, sharing the physical labor in all respects except for tasks that Ray was unable to perform because of medical reasons. Anna alone kept the books of the farming operation. A checking account carrying both parties' names was used to deposit all gross income received and to pay all personal expenses and costs incurred in the farming operation. Anna and Ray also owned an automobile which was titled in both names.

The estate inventory lists two parcels of real estate, shares of stock, grain, and farm machinery, all titled, and in the case of the real estate, mortgaged, solely in the name of Ray Wells. No designation of a partnership appeared on any financial statements or accounts, and no partnership tax return was ever prepared or filed. After Ray's death Anna filed a claim against his estate to recover a $20,000 loan to the farm operation which was evidenced by a promissory note signed by Ray.

In its brief the appellee suggests that the appropriate standard of review in this case is for error appearing on the record, as required by Neb. Rev. Stat. § 25-1911 (Reissue 1979), rather than de novo on the record, the standard designated in Neb. Rev. Stat. § 25-1925 (Reissue 1979) for this court's review of equity cases. We do not reach the issue at this time because we find that, under either standard, the evidence is insufficient to establish that a partnership existed.

The existence of a partnership is a question of fact under the evidence. *Carlson v. Peterson*, 130 Neb. 806, 266 N.W. 608 (1936). The intent of the parties is of prime concern in determining whether a partnership exists. *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984). Where intent is in dispute, it will be ascertained objectively from all the evidence and circumstances. *Id.* The burden of establishing the existence of a partnership is upon the party asserting that such a relationship exists. *Johnson v. Graf*, 162 Neb. 396, 75 N.W.2d 916 (1956).

Unlike a case where a plaintiff is claiming the existence of a partnership with the defendant and must establish such

partnership by clear and convincing evidence, see *Carlson v. Peterson, supra*, where, as here, a third person asserts the existence of a partnership, the party charged with the burden of proof must establish by a preponderance of the evidence the issue essential to recovery. *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984) (citing *Davis v. Landis Outboard Marine Co.*, 179 Neb. 391, 138 N.W.2d 474 (1965)).

Neb. Rev. Stat. § 67-306 (Reissue 1981) provides in part that "[a] partnership is an association of persons organized as a separate entity to carry on a business for profit." In *South Sioux City Star v. Edwards, supra*, we further defined a partnership as " ' "a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and *to divide the profit or bear the loss in certain proportions.*" ' " (Emphasis supplied.) 218 Neb. at 490, 357 N.W.2d at 180 (quoting *Baum v. McBride*, 143 Neb. 629, 10 N.W.2d 477 (1943)).

Neb. Rev. Stat. § 67-307 (Reissue 1981) also provides standards to determine the existence of a partnership. The statute reads in part:

> In determining whether a partnership exists, these rules shall apply:
>
> . . . .
>
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business . . . .

With these guidelines in mind we find the county court's assessment of the evidence in this case to be correct. The evidence shows that Anna and Ray associated in the operation of an agricultural business for approximately 20 years. During

this association, Anna kept the books of the business and was an active participant in a wide variety of activities necessary to a successful farming operation. The gross income from the farm was deposited in an account titled jointly in Anna's and Ray's names. These funds were used to pay the personal expenses of both parties and to pay the business expenses of the farm. The evidence also shows that Ray's original contribution of $7,000 from the sale of his tractor and trailer was the money used for a downpayment on the land where the farming operation was located. From the proceeds of the farm came most of the property included in Ray's estate.

Based upon this evidence, Anna argues that she and Ray were partners in the farming business. In *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982), the surviving spouse posited a similar argument based upon evidence of her work on the family farm. Although the facts and legal propositions differed from those at hand, we nonetheless find the reasoning in *Carman* appropriate. In *Carman* the court determined that the contribution of the wife relative to her work on the farm was not a contribution "in money's worth" as required by Neb. Rev. Stat. § 30-2313 (Reissue 1979) such that one-half the value of the farm production and jointly acquired personalty should be excluded from the augmented estate and set aside as Mrs. Carman's separate property. We said at 101, 327 N.W.2d at 614:

> From these facts appellee argues that she did more than merely perform as a farmwife; that in fact she functioned as a partner in the farming operation, or in any event did at least as much as would a hired hand; and, thus, one-half of the items of farm production and other items of personalty were to be treated as being owned by her outright. We, as did the District Court, disagree.

While the evidence in the instant case may indeed prove the existence of an understanding between Anna and Ray to contribute their labor and skills to the operation of a farm, it does not establish that the farm was intended to operate as a partnership. According to § 67-307(4), the receipt of a share of the profits of a business is prima facie evidence of a partnership. In *South Sioux City Star v. Edwards*, 218 Neb.

487, 490, 357 N.W.2d 178, 180 (1984), we elaborated on this statutory directive:

> The sharing of profits is a primary factor to be considered in ascertaining the intention of the parties. *Frisch v. Svoboda*, 182 Neb. 825, 157 N.W.2d 774 (1968), held that the absence of a mutual interest in the profits or benefits of an undertaking is conclusive that a partnership does not exist.

The evidence indicates only that the money made from the farm was intended to be used to support the personal and business needs of the parties and the farm. It does not indicate that Anna had a direct right to a certain percentage of the farm's profits. See *South Sioux City Star, supra*. We also find significant the fact that Ray was solely liable on the indebtedness against property that Anna now claims as partnership property. Perhaps the most telling indicator of the parties' intent is the fact that Anna loaned $20,000 to the operation but then filed a claim in Ray's estate for repayment in full. These facts do not indicate an intent "to divide the profit or bear the loss in certain proportions." *South Sioux City Star, supra*.

For these reasons the judgment of the Lancaster County District Court assessing inheritance tax in the amount of $28,329.50 is affirmed.

AFFIRMED.

JACQUELINE CRAIG, APPELLEE, V. HASTINGS STATE BANK, A BANKING CORPORATION, APPELLANT.

380 N.W.2d 618

Filed January 31, 1986. No. 84-622.

1. **Contracts.** While a court is not free to speculate about terms absent from a written contract and will not rewrite a contract which expresses the intent of the parties, a court will construe uncertain, indefinite, or ambiguous terms in a written contract.
2. _____. Where a questioned clause in a written contract may be fairly

interpreted in more than one way, there is ambiguity to be resolved by a court as a matter of law.

3. _____. When contractual language is ambiguous, a court will construe such language against the party preparing the contract, especially where the language is embodied in a preprinted form.
4. _____. Although a provision is not ambiguous merely because such provision is general enough to encompass more than one transaction or option, virtually unlimited breadth of a contractual provision cannot be ignored in assessing ambiguity in a provision.
5. _____. Where specific terms characterizing or enumerating a class are followed by general words capable of including more than the class specified, the general terms are construed to refer to the same nature or kind as that of the class specified.
6. **Contracts: Banks and Banking: Joint Accounts.** Under Neb. Rev. Stat. § 30-2703(a) (Reissue 1979), a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
7. **Contracts: Banks and Banking: Debtors and Creditors: Joint Accounts.** Under Neb. Rev. Stat. § 30-2713 (Reissue 1979) and in the absence of an agreement otherwise providing, a bank can set off the debt of a depositor having an account with the bank, but only to the extent of the debtor's present beneficial interest in that account. When there is a joint account and proof of net contributions, the amount of the debtor's beneficial interest in such joint account is determined by the net contributions rule required by Neb. Rev. Stat. §§ 30-2703(a) and 30-2701(6) (Reissue 1979).
8. _____: _____: _____: _____. Under the net contributions rule of Neb. Rev. Stat. § 30-2703(a) (Reissue 1979) and in the absence of an agreement otherwise providing, if it is established that a nondebtor party to the account has funded all or part of the beneficial interest in an account, a bank has no right of setoff against the beneficial interest contributed by the nondebtor depositor.
9. _____: _____: _____: _____. In the absence of an agreement otherwise providing, if a person has a present right to withdraw funds from a joint account and is indebted to the financial institution where the account is maintained, the financial institution has a right to set off against such indebtedness the debtor's beneficial interest in the account as determined by the net contributions rule of ownership in accordance with Neb. Rev. Stat. §§ 30-2703 and 30-2701(6) (Reissue 1979).

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Dale A. Norris of Whelan, Foote & Scherr, P.C., for appellant.

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

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

SHANAHAN, J.

Hastings State Bank (HSB) appeals a judgment for damages awarded after a bench trial in the district court for Adams County regarding Jacqueline Craig's action for HSB's conversion of her joint bank account. We affirm.

With money inherited from her husband, Jacqueline Craig acquired a certificate of deposit for $15,000 from Home Federal Savings and Loan Association in Hastings. As the sole payee named on the Home Federal certificate, Jacqueline redeemed that certificate on June 30, 1981, and that same day used the redemption proceeds to purchase HSB's money market certificate No. 10829 in the amount of $15,000.

HSB's certificate, a preprinted instrument drafted by HSB and utilized as the standard form for the bank's money market certificates, contained the following clause:

> On certificates made in joint survivorship, the bank may deem either or any of said payees, or the survivor or survivors as the absolute owner for purposes of payment, presentation and transfer of this certificate, payment of interest hereon, the giving or receiving of notice or any other action affecting this certificate.

HSB issued certificate No. 10829 payable to Jacqueline and her two sons, Russell Craig and Steven Craig, with rights of survivorship. Neither of Jacqueline's sons knew she had purchased the certificate, and neither made any contribution to purchase the certificate. In its letter on June 26, 1982, HSB notified Jacqueline and her sons that the bank "under the setoff provision of a promissory note from Steve Craig to the Hastings State Bank, certificate of deposit #10829 and the accumulated interest thereon has been applied to the balance of the note."

On May 9, 1983, Craig filed her petition alleging that HSB had "unlawfully converted the proceeds" of the money market certificate. In its answer HSB responded that the contract terms of the certificate permitted HSB "to pay or otherwise treat any of the named owners as absolute owners" of the certificate. The

district court, after finding that "the entire beneficial interest in the Certificate of Deposit belongs to the Plaintiff, Jacqueline Craig," and that "the provision in the Certificate of Deposit providing 'or any other action affecting this certificate' is void and must be construed against Defendant Bank as draftor [sic] of the instrument," entered judgment in Jacqueline's favor for $15,000 and interest.

HSB contends the district court erred in (1) declaring the money market certificate's wording, "or any other action affecting this certificate," void, (2) construing the certificate's contractual clause adversely to HSB, and (3) failing to recognize HSB's contractual and statutory right to set off the certificate of deposit against the indebtedness of one of the certificate's named payees.

HSB's assignments of error require examination of a bank's right, whether by contract or statute, to set off against a joint account the debt owed the depository bank by a debtor who has not contributed to the account subjected to such setoff.

In *Uttecht v. Norwest Bank of Norfolk, ante* p. 222, 225, 376 N.W.2d 11, 13 (1985), we construed the language of a contractual provision conferring a bank's right to "charge to or offset against any amount then on deposit in any account (including a savings certificate) . . . any and all debts or liabilities . . . then owed to [the] Bank by [the] depositor or, in the case of a multiple-party account, by any party to such multiple-party account." In *Uttecht* we held, under Neb. Rev. Stat. § 30-2713 (Reissue 1979), a bank can by contract obtain a right to set off the full amount of a debt owed the bank by one of the parties to a joint account, notwithstanding a possibly different result from strictly statutory provisions for a bank's setoff. Therefore, if the wording of the questioned clause in HSB's money market certificate confers on HSB the right to set off Steven's debt against the joint account with Jacqueline, *Uttecht* requires reversal of the district court's judgment.

HSB contends the phrase "any other action affecting this certificate" encompasses "all types of actions," including HSB's right to setoff against the joint account, because Steven is an absolute owner of the account. Jacqueline maintains that the phrase is not clear enough to create the contractual right to

setoff.

Our initial inquiry is governed by basic rules for construing contracts. A court is not free to speculate about terms absent from a written contract. See *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983). Where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain. See, *Gunset v. Mossman*, 196 Neb. 529, 243 N.W.2d 783 (1976); *Richardson v. Waterite Co.*, 169 Neb. 263, 99 N.W.2d 265 (1959). On the other hand, a court will construe uncertain, indefinite, or ambiguous terms in a written contract. See, *Pawnee Plastics, Inc. v. American Savings Co.*, 210 Neb. 131, 313 N.W.2d 262 (1981); *Metropolitan Utilities Dist. v. Fidelity & Deposit Co.*, 200 Neb. 635, 264 N.W.2d 854 (1978); *Timmerman Bros., Inc. v. Quigley*, 198 Neb. 129, 251 N.W.2d 877 (1977). In *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 498, 334 N.W.2d 463, 465 (1983), we stated that "absence of articulation accounts for ambiguity" and held that where a questioned clause in a written contract may be fairly interpreted in more than one way, there is ambiguity to be resolved by a court as a matter of law. When contractual language is ambiguous, a court will construe such language against the party preparing the contract, especially where the language is embodied in a preprinted form. See, *DaLee Realty, Inc. v. Kuhl*, 209 Neb. 6, 305 N.W.2d 891 (1981); *Baltes v. Hodges*, 207 Neb. 740, 301 N.W.2d 92 (1981). The policy and rationale for construction adverse to a drafter are expressed in comment *a.* to Restatement (Second) of Contracts § 206 at 105 (1981):

> Where one party chooses the terms of the contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts

and in cases where the drafting party has a stronger bargaining position, but it is not limited to such cases.

Is the certificate's phrase "any other action affecting this certificate" ambiguous, requiring construction adverse to HSB as drafter of the instrument? The answer to that question must be gleaned from the contents of the particular phrase in relation to other wording of the entire certificate provision. If the particular phrase, when considered in the context of the entire certificate provision "as a whole," is susceptible to being reasonably understood in more than one sense, the phrase is ambiguous. See, *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980); *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978). Although a provision is not ambiguous merely because such provision is general enough to encompass more than one transaction or option, see, *Wilke v. Eau Claire First Fed. Sav. & Loan*, 108 Wis. 2d 650, 323 N.W.2d 179 (1982), and *Truck Ins. Exch. v. Marks Rentals*, 288 Md. 428, 418 A.2d 1187 (1980), the virtually unlimited breadth of a contractual provision cannot be ignored in assessing ambiguity in a provision. The phrase "any other action affecting this certificate" is not a paragon of precision. Although we certainly cannot disagree with HSB that the questioned phrase encompasses "all types of actions," we do not accept HSB's somewhat dogmatic declaration that the particular phrase compels but one conclusion—HSB's right to setoff. One must focus on the key word in the phrase examined, namely, *action*. HSB has not directed us to any meaning given in a judicial decision or dictionary which includes setoff as the meaning of *action*. Our research indicates many meanings of *action*, ranging from "a deliberative or authorized proceeding" to "a voluntary act of will that manifests itself externally" and "the entire process of betting including essentially the offering and acceptance of a bet and determination of a winner." Webster's Third New International Dictionary, Unabridged 21 (1981). The last-given meaning of *action* probably would not apply to activity in better banking circles but does point out the varied meanings of *action*. Consequently, as used in HSB's certificate, the word *action* is ambiguous. Where specific terms characterizing or enumerating a class are followed by general words capable of including more than the class specified, the

general terms are construed to refer to the same nature or kind as that of the class specified. See, *Coad v. London Assurance Corporation*, 119 Neb. 188, 227 N.W. 925 (1929); *United Cal. Bank v. Prudential Ins. Co., etc.*, 140 Ariz. 238, 681 P.2d 390 (1983); *Employers Liability Assurance Corp. v. Morse*, 261 Minn. 259, 111 N.W.2d 620 (1961). The words preceding "any other action affecting this certificate" describe situations involving delivery of funds (payment) to a named payee on surrender or redemption of the certificate, payment of interest earned on the certificate, and transmission of the information pertinent to the certificate. Thus, we construe the meaning of the word *action*, as used in HSB's certificate and for the question presented to us, to mean the bank's delivery of funds (payment) to a named payee on surrender or redemption of its certificate of deposit, payment of interest earned on a certificate, and the transmission of information pertinent to the certificate. Our construction of the phrase excludes setoff, which, in relation to a certificate of deposit, is a bank's counterdemand against funds deposited in the bank, reducing the amount payable from the funds held by the bank. We note, however, that the bank in *Uttecht v. Norwest Bank of Norfolk, ante* p. 222, 376 N.W.2d 11 (1985), used the word *offset* in describing the depository bank's contractual right to charge an account held jointly by the depository's debtor and another. A similar, modest expansion of HSB's commercial vocabulary would have eliminated the problem in this case.

Although the district court seems to have determined that the questioned wording in HSB's certificate is against public policy and, consequently, void, we do not conclude that an agreement such as that attempted by HSB is necessarily, in and of itself, against public policy. The district court was, nevertheless, correct in construing the certificate against HSB and determining that HSB's certificate did not provide for setoff.

Although HSB did not have a contractual right of setoff, we must still determine whether Nebraska statutes give HSB a right of setoff concerning the joint account in this case. We are confronted, at the outset, with an apparent inconsistency in the pertinent portion of the statutory scheme regulating multiple-party bank accounts. See Neb. Rev. Stat. §§ 30-2701

to 30-2713 (Reissue 1979).

"Joint account means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." § 30-2701(4). Under § 30-2703(a), which sets forth the "net contributions" rule applicable to joint accounts, "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." No reasonable person would attach a meaning for "belongs to," as used in § 30-2703(a), other than "to be the property of" a person. See Webster's Third New International Dictionary, Unabridged 201 (1981).

Section 30-2703

> reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership. . . .
>
> . . . The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

Comment for § 30-2703.

Section 37-2701(6) defines "net contribution," namely:

> Net contribution of a party to a joint account as of any given time is the sum of all deposits thereto made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance.

Section 30-2713 delineates a bank's right of setoff:

> Without qualifying any other statutory right to setoff or lien and subject to any contractual provision, if a party

> to a multiple-party account is indebted to a financial institution, the financial institution has a right to setoff against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to setoff is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

Under § 30-2713 a bank can set off the debt of a depositor having an account with the bank, but only to the extent of the debtor's present beneficial interest in that account. When there is a joint account and proof of net contributions, the amount of the debtor's beneficial interest in such joint account is determined by the net contributions rule required by §§ 30-2703(a) and 30-2701(6). In the absence of proof of net contributions, the debtor is presumed to have an equal interest with other parties having a present right of withdrawal regarding the account. However, under the net contributions rule of § 30-2703(a) and in the absence of an agreement otherwise providing, if it is established that a nondebtor party to the account has funded all or part of the beneficial interest in an account, a bank has no right of setoff against the beneficial interest contributed by the nondebtor depositor. Within the purview of §§ 30-2703(a), 30-2701(6), and 30-2713, the uncontroverted facts disclose that Jacqueline funded the entire account and do not show that she intended to give either of her sons a present beneficial interest in the account reflected by the certificate. Therefore, HSB possessed no statutory right to set off Steven's debt against the account held jointly by Jacqueline, Russell, and Steven.

However, confusion about setoffs seems to stem from § 30-2702:

> The provisions of sections 30-2703 to 30-2705 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of

> withdrawal of these persons as determined by the terms of account contracts. The provisions of sections 30-2708 to 30-2713 govern the liability of financial institutions who make payments pursuant thereto, and their setoff rights.

HSB argues that, since § 30-2702 limits application of § 30-2703 only to controversies between parties to the account, the net contributions rule has no bearing upon the bank's right of setoff.

In interpreting legislation a court must attempt to construe a particular statute in conjunction with other statutes dealing with the same subject matter. See, *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985); *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985). However, a court must also, if possible, divine the intent of the Legislature from the plain and ordinary meaning of the statutory language. See, *In re Interest of K.S.*, 216 Neb. 926, 346 N.W.2d 417 (1984); *State Farm Mutual Auto Ins. Co. v. Fitzgerald*, 214 Neb. 226, 334 N.W.2d 168 (1983).

The plain language of § 30-2713 provides the essential and indispensable determinant of a bank's right of setoff—the debtor's present beneficial interest in the account measured by the proven net contributions of the parties to the account. Section 30-2702 does state that the provisions of §§ 30-2703 to 30-2705 are only relevant to disputes involving parties to the account, but does not specifically preclude a subsequent statutory section from incorporating the net contributions rule and, in fact, specifically refers to § 30-2713 as the statutory section governing a bank's setoff right. The language of § 30-2702 hardly compels us to ignore the clear mandate of § 30-2713.

Section 30-2708 provides additional guidance in ascertaining the import of § 30-2702. Section 30-2708 states as follows:

> Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed

> application of any sum withdrawn from an account, for purposes of establishing net contributions.

As a result of the account contract authorized by § 30-2708, a bank may, without incurring liability, make payments from a joint account to any individual named in the account contract, regardless of the withdrawing individual's beneficial interest in the account. Section 30-2702, by stating that the provisions of §§ 30-2703 to 30-2705 "have no bearing on the power of withdrawal . . . as determined by the terms of account contracts," obviously reflects the Legislature's intention, manifested in § 30-2708, to insulate banks from liability in making payments from a joint account. Similarly, the comment to § 30-2702 notes that the standards governing the relationship between parties to multiple-party accounts are distinct from the standards regulating the financial institute-depositor relationship in order to "achieve the degree of definiteness that financial institutions must have in order to be induced to offer multiple-party accounts for use by their customers." Although § 30-2702 restricts the net contributions rule of § 30-2703(a) to disputes between and among parties to a joint account, the language of and comment to § 30-2702 compel the conclusion that § 30-2702 seeks only to insure that the beneficial interests of the parties have no bearing upon the bank's liability for making payment from the account. See, also, comment to § 30-2703 (§ 30-2708 protects a bank "without reference to whether a withdrawing party may be entitled to less than he withdraws as against another party"). We cannot imagine the Legislature would act so unreasonably and contrary to basic fairness as to intend that § 30-2702 would subject one's property to pay the debt of another without agreement for such disposition.

As expressed in *Erhardt v. Leonard*, 104 Idaho 197, 200, 657 P.2d 494, 497 (1983):

> A joint savings account is a contractual agreement between a financial institution and the named depositors. . . . Account contracts, such as the joint savings account in this case, define the power of withdrawal held by each party to the account, as a means of protecting the financial institution. . . . But the actual ownership of the

funds in the account is not affected by the account contract.

While a bank's payment made pursuant to statute discharges the bank from all claims for the amounts paid whether such payment is consistent with the beneficial ownership of the account as between the parties, the bank, as a creditor availing itself of setoff pursuant to § 30-2713, must look to the debtor's beneficial interest in a joint account. We hold that, in the absence of an agreement otherwise providing, if a person has a present right to withdraw funds from a joint account and is indebted to the financial institution where the account is maintained, the financial institution has a right to set off against such indebtedness the debtor's beneficial interest in the account as determined by the net contributions rule of ownership in accordance with §§ 30-2703 and 30-2701(6).

According to the record before us, Jacqueline made the entire contribution to the account reflected by HSB's certificate payable jointly to Jacqueline and her sons. The "sum of all deposits" made by Steven is zero. Correspondingly, Steven had no present beneficial interest, that is, ownership, regarding the bank account held jointly with his mother and brother. Absence of Jacqueline's contractual authorization and lack of Steven's beneficial interest defeat the bank's right to setoff against the joint account existing in the present case.

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

AFFIRMED.

GIFFORD-HILL & COMPANY, INC., A DELAWARE CORPORATION, APPELLEE, V. JACK W. STOLLER AND BETTY M. STOLLER, APPELLANTS.

380 N.W.2d 625

Filed January 31, 1986. No. 84-831.

1. **Debtors and Creditors: Conveyances: Fraud: Equity: Appeal and Error.** An action to declare a conveyance fraudulent as to a creditor invokes equity

jurisdiction of a court. On appeal an equitable action for declaration of a fraudulent conveyance is a trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.

2. **Debtors and Creditors: Conveyances: Fraud: Proof.** Under Neb. Rev. Stat. § 36-401 (Reissue 1978), the burden of proof is on a creditor to prove, by clear and convincing evidence, that a debtor intended to hinder, delay, or defraud the creditor by an alleged fraudulent conveyance.
3. **Debtors and Creditors: Conveyances: Fraud: Intent: Proof.** Regarding intent to hinder, delay, or defraud required under Neb. Rev. Stat. § 36-401 (Reissue 1978), intent, as any other subjective state or mental element, may be proved by circumstantial or direct evidence.
4. **Debtors and Creditors: Conveyances: Fraud: Intent.** Good faith, among other characteristics, encompasses an absence of or freedom from intent to defraud. A lack of good faith is demonstrated by a transferee's participation in a plan to hinder creditors, even though the transfer may be supported by adequate consideration.
5. **Debtors and Creditors: Conveyances: Fraud: Intent: Consideration.** In the case of intent established under Neb. Rev. Stat. § 36-401 (Reissue 1978), consideration given by the grantee or transferee becomes immaterial and does not preclude a finding that a debtor intended to hinder, delay, or defraud a creditor, lest the law approve acquisition of property tainted with fraud. Adequate consideration given by a grantee with fraudulent intent will not sustain a conveyance against a creditor's claim to set aside a transaction pursuant to § 36-401.

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

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellants.

David C. Nuttleman of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee.

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

SHANAHAN, J.

The district court for Scotts Bluff County entered judgment that real estate conveyances by Jack W. Stoller to his wife, Betty M. Stoller, were fraudulent conveyances made with intent to hinder Gifford-Hill & Company, Inc., a creditor of Jack Stoller. We affirm.

In January 1978 Jack Stoller and David Deines formed

Western Irrigation Systems, Inc. Of Western Irrigation's capital stock, Stoller, as president and sales manager, owned 60 percent and Deines, as secretary-treasurer and general manager, owned 40 percent. Western Irrigation's contemplated business was design, sale, installation, and service of irrigation systems and supplying other products for agricultural use. To commence business, on January 23, 1978, Western Irrigation obtained a loan from the Gering National Bank & Trust Company for $252,000, which was guaranteed by the Small Business Administration. Although Western Irrigation had given the bank a promissory note secured by a mortgage on corporate assets, the bank required additional security for the loan to Western Irrigation, namely, Jack's personal guaranty of Western Irrigation's note, as well as mortgages from Stollers on three of five tracts of real estate owned jointly by Jack and Betty, including the Stoller home. The bank required similar security from Deines.

Late in 1979, when Western Irrigation experienced a "financial crisis," and the bank became "jumpy," officials of the bank and SBA demanded liquidation of Western Irrigation's assets. In January 1980 Western Irrigation went out of business. To forgo foreclosure of mortgages on Stollers' three tracts of real estate and as additional security concerning Jack's guaranty of Western Irrigation's promissory note, the bank requested that Stollers assign their interest in a contract for the purchase of a Wyoming farm. As later testified by Stollers, sometime before January 25, 1980, Jack and Betty reached an oral agreement that Betty would assume responsibility for all Jack's indebtedness on account of his involvement with Western Irrigation, especially any balance of indebtedness to the bank and SBA which might remain after liquidation of Western Irrigation's assets. As a part of that oral assumption agreement, Jack agreed to convey all his real estate to Betty. On January 25 Stollers gave the bank their written assignment of the Wyoming contract. That assignment contained a cancellation provision in the event Western Irrigation's debt was paid to the bank. However, Jack and Betty did not tell anyone about their assumption agreement and did not prepare any memorandum containing such assumption

agreement.

On February 4, 1980, Gifford-Hill filed suit against Western Irrigation to collect an unpaid account for $157,849.09 and named Deines and Jack Stoller as defendants with Western Irrigation. Jack and Deines were joined as defendants due to their personal guaranty regarding Western Irrigation's account with Gifford-Hill. The sheriff, on February 7, served summons in the Gifford-Hill case on Jack Stoller personally at Stollers' home. On February 13, by warranty deed, Jack conveyed his interest in five tracts of real estate, that is, all the real estate owned by Jack and Betty Stoller jointly, to Betty Stoller individually for $1 and "other valuable consideration." Western Irrigation's physical assets were sold at auction on April 23, but the sale resulted in a deficiency concerning the amount owed to the bank. Betty later gave her promissory notes to the bank and SBA concerning that deficiency after liquidation of Western Irrigation's assets. In September 1981 Jack Stoller consented to judgment against him for $157,849.09 in the suit brought by Gifford-Hill. Execution on Gifford-Hill's judgment was issued on January 18, 1982, but returned wholly unsatisfied on February 8, 1982.

On March 23, 1983, Gifford-Hill commenced the present action against Jack and Betty Stoller and sought judgment that each of Jack's five conveyances to Betty on February 13, 1980, be "declared fraudulent and void" regarding Gifford-Hill. In their amended answer Stollers allege that the conveyances to Betty were supported by consideration and were not made with the intent to hinder, delay, or defraud Gifford-Hill. On June 18 Jack filed bankruptcy, naming Gifford-Hill as an unsecured creditor, and was discharged as a bankrupt on December 14.

Evidence adduced at trial showed that on February 13, 1980, Jack owned personal property valued at $21,079 and owed debts of $229,879 excluding the unpaid account involved in Gifford-Hill's pending suit against Jack for $157,849.09. Considering Gifford-Hill's subsequent judgment, Jack's indebtedness, liquidated and contingent, at February 13, 1980, was $387,728.09. The fair market value of the real estate conveyed from Jack to Betty was between $231,000 and $246,000. During trial, Jack testified about the consideration

given by Betty for the five questioned conveyances to her:

> [S]he . . . committed herself to the signing of any notes that would be necessary to cover any anticipated shortages created by the sale of the Western Irrigation Systems corporation assets to the SBA and/or the Gering National Bank. She also agreed to assume all the mortgages on the property and all the underlying promissory notes on those properties.

Betty Stoller testified she first learned of the Gifford-Hill litigation when summons was served on Jack for that lawsuit. "[T]he first I knew of this [Gifford-Hill litigation] is when the papers were brought to the house to Jack." When asked if she knew about Gifford-Hill's lawsuit before the conveyances from Jack, Betty replied, "I guess I didn't realize what the lawsuit was about, I didn't know anything about any of this indebtedness to [Gifford-Hill]."

The trial court found that, before the conveyances to Betty, Stollers knew about the Gifford-Hill action against Jack, Betty did not give adequate consideration for the conveyances from Jack, and, therefore, the conveyances were made with intent to hinder Gifford-Hill's collecting the debt owed by Jack. The court declared the five conveyances void as to Gifford-Hill.

Stollers contend the district court erred in its findings (1) that the conveyances by Jack to Betty were made without adequate consideration and with intent to hinder, delay, or defraud Gifford-Hill, a creditor, and (2) that Betty had notice of Gifford-Hill's claim against Jack, when he conveyed the real estate on February 13, 1980.

An action to declare a conveyance fraudulent as to a creditor invokes equity jurisdiction of a court. *First Nat. Bank v. First Cadco Corp.*, 189 Neb. 553, 203 N.W.2d 770 (1973). On appeal an equitable action for declaration of a fraudulent conveyance is a trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *First Nat. Bank v. First Cadco Corp., supra*; cf. *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983) (trial de novo on record in an action for an

injunction). See, also, Neb. Rev. Stat. § 25-1925 (Reissue 1979).

Applicable to the questioned conveyances are Neb. Rev. Stat. §§ 36-401 to 36-409 (Reissue 1978) pertaining to "Conveyances to Defraud Creditors." In pertinent parts the statutes provide:

> Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent as against the persons so hindered, delayed or defrauded, shall be void.

§ 36-401.

> The question of fraudulent intent in all cases arising under the provisions of sections 36-401 to 36-409 shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

§ 36-406.

Statutory provisions prohibiting conveyances to defraud creditors have evolved from the concept that a debtor's property was a source from which a creditor should be paid. See *Mohar v. McLelland Lumber Company*, 95 Idaho 38, 501 P.2d 722 (1972). When a debtor intentionally withdrew executable assets from the reach of process, such transactions were characterized as fraudulent to creditors of that debtor. See *Klein v. Rossi*, 251 F. Supp. 1 (E.D.N.Y. 1966). The burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction. See *Chagnon Lumber Co., Inc. v. DeMulder*, 121 N.H. 173, 427 A.2d 48 (1981). Clear and convincing evidence is "that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."

Castellano v. Bitkower, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984); *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

Because intent to hinder, delay, or defraud (§ 36-401), as any other subjective state or mental element, is frequently difficult to establish by direct proof, circumstances surrounding a transaction provide evidence to determine whether fraudulent intent existed at the time of the transaction. *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130, 88 N.W. 552 (1901); *Barnard v. Barnard*, 568 S.W.2d 567 (Mo. App. 1978); *United States v. Leggett*, 292 F.2d 423 (6th Cir. 1961).

Over the years, courts have encountered innumerable instances where a debtor transferred property with intent to defraud a creditor. As courts frequently observed, specific situations produced a probability of fraudulent intent in the transfer. Consequently, certain circumstances became the basis for an inference that a fraudulent conveyance existed. Those circumstances have been called badges, signs, indicators, or indicia of fraud. For example, in *Montana Nat. Bank v. Michels*, ____ Mont. ____, 631 P.2d 1260 (1981), the Montana Supreme Court, construing a question of intent to hinder, delay, or defraud a creditor by a conveyance between husband and wife, expressed:

> " '[B]adges of fraud' . . . are said to be facts which throw suspicion on a transaction, and which call for an explanation. . . . More simply stated, they are signs or marks of fraud. They do not of themselves or per se constitute fraud, but they are facts having a tendency to show the existence of fraud, although their value as evidence is relative not absolute. They are not usually conclusive proof; they are open to explanation. They may be almost conclusive, or they may furnish merely a reasonable inference of fraud, according to the weight to which they may be entitled from their intrinsic character and the special circumstances attending the case. Often a single one of them may establish and stamp a transaction as fraudulent. When, however, several are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent . . ."

> The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor. 37 Am.Jur.2d *Fraudulent Conveyances*, § 10 at 701.

Montana Nat. Bank v. Michels, supra at ____, 631 P.2d at 1263. See *Barnard v. Barnard, supra* ("indicia of fraud" creating an inference of improper motive in a debtor's conveyance).

Although the "badges of fraud" may not be conclusive and may be strong or weak according to the nature and number involved in a particular transaction, concurrence of several such badges provides a strong inference of fraud. See, *United States v. Leggett, supra*; *Barnard v. Barnard, supra*.

In reference to one of the badges of fraud, namely, the transferor-transferee relationship, this court, considering a conveyance by a husband to a wife, held: "A conveyance of real property between husband and wife in Nebraska is presumptively fraudulent as to existing creditors and will be set aside unless the good faith of the transaction is established by a preponderance of the evidence." *First Nat. Bank in Kearney v. Bunn*, 195 Neb. 829, 832, 241 N.W.2d 127, 129 (1976) (citing *Farmers Elevator Co. v. Peck*, 134 Neb. 305, 278 N.W. 499 (1938)). "Among the most common indicia of fraud is the transfer of property by a debtor during the pendency of a suit against him, especially where the transfer renders the debtor insolvent or greatly reduces his estate." *Arnold v. Dirrim*, 398 N.E.2d 442, 446-47 (Ind. App. 1979). Good faith and adequate consideration may be shown to counteract evidence tending to establish that a conveyance is fraudulent. See, *Blair State Bank v. Bunn*, 61 Neb. 464, 85 N.W. 527 (1901); *Lusk v. Riggs*, 70 Neb. 713, 97 N.W. 1033 (1904).

"Good faith," among other characteristics, encompasses an absence or freedom from intent to defraud. See, *Doyle v. Gordon*, 158 N.Y.S.2d 248 (Sup. 1954); *Efron v. Kalmanovitz*,

249 Cal. App. 2d 187, 57 Cal. Rptr. 248 (1967). Consequently, good faith and fraud are mutually exclusive terms; the presence of one excludes the existence of the other in the same subject. A lack of good faith is demonstrated by a transferee's participation in a plan to hinder creditors, even though the transfer may be supported by adequate consideration. *Filley v. Mancuso*, 146 Neb. 493, 20 N.W.2d 318 (1945). See, also, *Smith v. Whitman*, 39 N.J. 397, 189 A.2d 15 (1963); *Swanson v. Fuline Corporation*, 248 F. Supp. 364 (D. Or. 1965). In the case of intent established under § 36-401, consideration given by the grantee or transferee becomes immaterial and does not preclude a finding that a debtor intended to hinder, delay, or defraud a creditor, lest the law approve acquisition of property tainted with fraud. See *Arnold v. Dirrim, supra*. Thus, adequate consideration given by a grantee with fraudulent intent will not sustain a conveyance against a creditor's claim to set aside a transaction pursuant to § 36-401.

In the present case there are several badges of fraud appended to the Stoller conveyances. To place the questioned conveyances in perspective, there is no question that Jack fully understood his ultimate legal liability for payment of Western Irrigation's debt to Gifford-Hill, a liability occurring in the same manner as Jack's liability to the bank—the result of his personal guaranty. Stollers acknowledged the likelihood of further deterioration of Jack's financial condition, such as the possibility that proceeds from Western Irrigation's liquidation would be insufficient to pay the bank. Betty was aware of Jack's financial predicament and its probable consequences, including exposure to foreclosure and, perhaps, the eventual loss of Stollers' home. In that perilous financial environment, Betty took steps to assist Jack, namely, their mutual assignment of the Wyoming contract. All that occurred before the lawsuit by Gifford-Hill. Enter Gifford-Hill and its lawsuit filed on February 4, 1980. Within 1 week after the sheriff had served Jack with summons in the Gifford-Hill litigation, Jack, on February 13, conveyed his five tracts of real estate to Betty. Therefore, when the Gifford-Hill lawsuit was less than 2 weeks old, a fact realized by Betty who had personal knowledge that Jack has been served with summons, Jack disposed of all his

real estate by conveyances to his wife, when he was insolvent, or was rendered insolvent by such conveyances. See *Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 266, 291, 75 N.W. 877, 884 (1898) ("insolvency means that the party . . . in question is unable to pay his debts as they become due in the ordinary course of his daily transactions"). See, also, *Arnold v. Dirrim, supra*.

Fraudulent intent is a question of fact. See § 36-406. We find that the circumstances in this case establish an intent to hinder, delay, or defraud Gifford-Hill by the conveyances on February 13, 1980, between Jack and Betty Stoller. Additionally, fraudulent intent on the part of Stollers precludes good faith in their interspousal conveyances. Nothing in the record negatives Stollers' fraudulent intent as an inference drawn from all the circumstances surrounding the conveyances from Jack to Betty. Thus, we need not assess the adequacy of any consideration concerning the questioned conveyances.

Finally, regarding Stollers' contention that Betty did not have notice of Gifford-Hill's claim against Jack at the time of the conveyances, notice or knowledge was a question of fact resolved against Stollers. Upon our review of the record, we find that Betty did have knowledge of Gifford-Hill's lawsuit against Jack, and when we consider the circumstances and the district court's observation of the witnesses, there is an inference that Betty knew about Jack's indebtedness which was the subject of the Gifford-Hill litigation.

For the foregoing reasons the judgment of the district court is affirmed.

AFFIRMED.

CLEMENT G. MURPHY AND MARY MURPHY, HUSBAND AND WIFE, APPELLEES, V. STUART FERTILIZER COMPANY, INC., A DISSOLVED NEBRASKA CORPORATION, ET AL., APPELLEES, CHARLES SHANE AND HOLLY SHANE, APPELLANTS.

380 N.W.2d 631

Filed January 31, 1986. No. 84-981.

1. **Guaranty: Contracts: Debtors and Creditors.** Accepting payments late does not discharge the guarantor unless such late payments are due to an extension agreement entered into between the creditor and the debtor, supported by valid consideration and binding on the parties.
2. **Guaranty: Words and Phrases.** A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults.

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

James Widtfeldt, for appellants.

Jewell, Gatz & Collins, for appellees Murphys.

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

KRIVOSHA, C.J.

This is an action at law in which Clement G. Murphy and his wife, Mary Murphy, as sellers of certain real estate, brought suit to collect certain delinquent installment payments due from, among others, Charles Shane and Holly Shane, guarantors of the contract of sale. Following a trial to the district court, a jury having been waived, the district court found in favor of the Murphys and against the Shanes and entered judgment in the amount of $61,800, that being the amount of principal and interest due as of March 30, 1984. Because the contract contained no provision permitting acceleration in the event of default, the Murphys were only permitted to sue for those payments delinquent as of the date judgment was entered. The defendant Stuart Fertilizer Company, Inc., which was the named purchaser of the property, is a dissolved corporation; the coguarantors, Orville Seger, Jr., and Makayla Seger, have filed bankruptcy. For that reason, only Charles Shane and Holly Shane have appealed the judgment.

The appellants, Shanes, assign five errors of law. The first assignment is that the contract, exhibit 1, was modified in a manner not approved by the Shanes and therefore not binding upon them. The second assignment of error is that because the Shanes were absolute guarantors, they are subrogated to the rights of the Murphys and therefore were entitled to terminate the contract and deliver all of the assets back to the Murphys in full satisfaction of the contract. The third assignment of error is that the Murphys removed the documents from escrow, thereby terminating the contract. Assignments of error Nos. 4 and 5 are to the effect that the decision of the court is contrary to the evidence and contrary to the law. We believe that each of the assignments of error is without merit and that the judgment entered by the district court for Holt County, Nebraska, should be, in all respects, affirmed.

Before we proceed to recite the facts and analyze the law, we note that, this being a law action and a jury having been waived, the findings of fact made by the district court have the effect of a jury verdict and will not be set aside unless clearly wrong. *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983); *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983). An examination of the record discloses that in August of 1979 Clement and Mary Murphy were the owners of two tracts of land in Holt County, Nebraska, and some personal property located on the land. On September 12, 1979, the Murphys entered into an agreement with Stuart Fertilizer Company, Inc., a Nebraska corporation, to sell to Stuart Fertilizer the land and personal property owned by the Murphys for a total purchase price of $130,000, to be paid at the rate of $10,000 down and $10,000 per year for 12 years. The unpaid balance was to bear interest at the rate of 12 percent per annum. This contract was signed on behalf of Stuart Fertilizer by Charles Shane as president and attested to by Holly Shane as secretary. Attached to the bottom of the agreement was a document bearing the words "We hereby guarantee the payments as set-forth in this Agreement as provided herein." This guaranty was signed by Charles Shane, Holly Shane, Orville Seger, Jr., and Makayla Seger, all as guarantors, and subscribed to before Pamela A.

Roether on the day that the agreement was executed.

An examination of the document discloses that the guaranty was attached to the agreement with Scotch tape and was not a part of the original agreement. The Shanes maintain that this indicates that neither the Shanes nor the Segers ever guaranteed this particular agreement. The Shanes contend that, in fact, they had guaranteed only a contract dated August 2, 1979, for the sale of only one of the tracts of land, with a purchase price of $78,500. The facts as found by the trial court are to the contrary. The evidence discloses that the agreement of August 2, 1979, was placed in the custody of Orville Seger and the appellants' attorney and that when the other agreement was presented to Clement Murphy on September 12, 1979, for his signature, Charles Shane's signature was already affixed as president of Stuart Fertilizer and the guaranty was already attached. That is to say that when Stuart Fertilizer's attorney presented the contract to Clement Murphy for execution, the guaranty which had been in the possession of either Orville Seger or the attorney for Stuart Fertilizer was already affixed to the agreement of September 12, 1979. No one other than Seger, Shane, or their attorney could have attached the guaranty.

The Murphys received only the downpayment and the annual payment due for 1980 on time. The 1982 and 1983 payments were not made, though certain partial payments on interest were accepted late by the Murphys. On September 6, 1983, notice of default was sent to Stuart Fertilizer, as required by the contract, and when no action was taken to correct the default, suit was filed for the amount then due.

We do not believe that the trial court was in error when it found that the guaranty bearing the Shanes' signatures was properly affixed to the agreement of September 12, 1979, and that by reason thereof the Shanes were absolutely liable as guarantors. The Shanes' argument concerning their lack of knowledge and understanding regarding their obligation as guarantors is further weakened by the fact that nearly 5 years before suit was filed by the Murphys, the Shanes clearly were aware that the agreement between the Murphys and Stuart Fertilizer was for all of the property. During all of that time, no objection was ever raised. Even if the Shanes had alleged that

the guaranty was fraudulent, a fact which the evidence does not support, such a claim would be barred by the statute of limitations, since the Shanes had actual knowledge of the contract terms and the guaranty more than 4 years prior to the time suit was filed. See Neb. Rev. Stat. § 25-207 (Reissue 1979). There is simply no merit in the Shanes' contention that the guaranty was not a part of the agreement and therefore not enforceable against them.

Likewise, the Shanes' contention that by accepting payments of interest only, the Murphys, in some manner, modified the agreement and discharged the Shanes as guarantors is without merit. The rule appears to be clear that accepting payments late does not discharge the guarantor unless such late payments are due to an extension agreement entered into between the creditor and the debtor, supported by valid consideration and binding on the parties. 38 Am. Jur. 2d *Guaranty* § 95 (1968). See, e.g., *Commercial Sav. Bank v. Dunning*, 202 Iowa 478, 210 N.W. 599 (1926); *State Bank of Burleigh County v. Porter*, 167 N.W.2d 527 (N.D. 1969); cf. *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939). The record simply is devoid of any evidence that an agreement to accept payments late was entered into between the Murphys and Stuart Fertilizer. The record simply discloses that payments were made late and accepted by the Murphys.

The Shanes further contend that the guaranty was discharged by reason of the Murphys' failing to allow the property to be sold in order to pay off the contract. The evidence is insufficient to establish that a bona fide offer of purchase was ever obtained. Even if such was the case, the Shanes' guaranty would not be discharged. The guaranty was an absolute guaranty, providing: "We hereby guarantee the payments as set-forth in this Agreement as provided herein," and as such was not discharged by reason of the Murphys' refusal to permit the property to be sold. A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults. See, *In re Estate of Williams*, 148 Neb. 208, 26 N.W.2d 847 (1947); *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984). The guaranty in the present case contained no conditions and as

such obligated the Shanes to make payment if Stuart Fertilizer failed to do so. The inability of Stuart Fertilizer to sell the property did not relieve the Shanes of their unconditional obligation to pay.

The Shanes' further contention that by removing the contract from possession of the escrow agent for the purpose of filing suit against them, the Murphys somehow terminated the escrow and thereby relieved the Shanes of their guaranty is without merit. Likewise, the Shanes' contention that as guarantors they are subrogated to the rights of the Murphys and therefore at their election can terminate the contract and return the property is without any legal basis and is wholly without merit. To permit such a circuitous result would be to make the guaranty to pay meaningless.

The simple fact of the matter is that the Shanes guaranteed payment in the event that Stuart Fertilizer failed to do so. Stuart Fertilizer has failed to do so, and the Shanes must pay. The judgment of the district court in that respect was correct. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JORGE TOPETE, APPELLANT.
380 N.W.2d 635

Filed January 31, 1986. No. 85-367.

1. **Appeal and Error.** To be considered on appeal errors must be assigned and discussed in the appellant's brief.
2. **Trial: Witnesses: Interpreters.** The appointment of an interpreter for an accused at trial is a matter resting largely in the discretion of the trial court.
3. _____: _____: _____. Even though a defendant might not speak grammatically correct English, where the record satisfactorily demonstrates that such defendant had a sufficient command of the English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint an interpreter.
4. _____: _____: _____. If a defendant understands and communicates reasonably well in the English language, the mere fact that such defendant might be able to accomplish self-expression a little better in another language does not warrant utilizing an interpreter at trial.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Roman de la Campa, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

HASTINGS, J.

Following a trial in the county court, defendant was convicted of operating a motor vehicle while under the influence of alcoholic liquor; of refusing to submit to a chemical blood, breath, or urine test; and of operating a motor vehicle left of the centerline of a highway. On appeal to the district court the judgment was affirmed.

Although several errors are loosely assigned, only the claim that the trial court erred in refusing to provide the defendant with an interpreter at his trial was argued in the defendant's brief. Therefore, we are limited to a consideration of that alleged error. Neb. Ct. R. 9D(1)d (rev. 1983).

According to the testimony of Doug Johnson, a trooper of the Nebraska State Patrol, he arrested the defendant on August 26, 1984. Johnson testified that he had observed the defendant driving his vehicle across the centerline of the highway. Upon stopping the defendant the officer was aware of a moderate odor of alcohol on defendant's breath, and defendant had difficulty maintaining his balance, was unable to touch the end of his nose, and his speech was slurred. Officer Johnson instructed him on the giving of a breath sample, but after three attempts the defendant failed to give an adequate sample.

Regarding the need for an interpreter, the officer testified that he was with the defendant for over an hour on the evening or early morning of his arrest; that the defendant conversed with the officer as well as with the jailer, all in English; and from the officer's observation the defendant had a complete understanding of what was going on.

The record reveals that the defendant testified at some length both at a hearing to determine the need for an interpreter and at

the trial itself. Such testimony discloses ample basis for concluding that the defendant was able to communicate in the English language.

The appointment of an interpreter for an accused at trial is a matter resting largely in the discretion of the trial court. *Perovich v. United States*, 205 U.S. 86, 27 S. Ct. 456, 51 L. Ed. 722 (1907); *Prokop v. State*, 148 Neb. 582, 28 N.W.2d 200 (1947).

Even though a defendant might not speak grammatically correct English, where the record satisfactorily demonstrates that such defendant had a sufficient command of the English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint an interpreter. *State v. Faafiti*, 54 Hawaii 637, 513 P.2d 697 (1973).

If a defendant understands and communicates reasonably well in the English language, the mere fact that such defendant might be able to accomplish self-expression a little better in another language does not warrant utilizing an interpreter at trial. *Flores v. State*, 509 S.W.2d 580 (Tex. Crim. 1974).

Nebraska statutory law requires the appointment of an interpreter in a court proceedings when the defendant is "unable to communicate the English language." Neb. Rev. Stat. § 25-2401 (Reissue 1979).

There was no abuse of discretion on the part of the trial judge in refusing to appoint an interpreter. The judgment of the district court in affirming such action was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICIA A. MINDRUP, APPELLANT.

380 N.W.2d 637

Filed January 31, 1986. No. 85-507.

1. **Pleas: Constitutional Law.** A written petition to enter a plea of guilty which itemizes a defendant's constitutional rights and the range of penalties for the offense charged does not in and of itself establish that a defendant knowingly, voluntarily, and intelligently pled guilty.

2. **Pleas: Right to Counsel: Appeal and Error.** Failure to inform a defendant of the right to counsel does not constitute error when the defendant has had the benefit of counsel before the court.
3. **Pleas: Waiver: Appeal and Error.** A defendant may not waive the reading of a document which would have advised him or her of the nature of the offense and later complain that the plea of guilty was entered in ignorance of the nature of the offense.
4. **Pleas.** It does not matter how a defendant comes to understand the possible penalty for an offense, so long as he or she was aware of it at the time of the plea.
5. _____. The use of a written petition to plead guilty is discouraged.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

James C. Stecker, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

CAPORALE, J.

Defendant, Patricia A. Mindrup, pled guilty in the county court to third offense driving while under the influence of alcohol. Her driver's license was thereupon suspended for life; in addition, she was ordered incarcerated in the county jail for a period of 3 months, to pay a $500 fine, and to pay the court costs. The district court affirmed. In this court defendant assigns as error the district court's finding that her county court plea was knowingly, voluntarily, and intelligently made. We affirm.

Upon the advice of her attorney, Mindrup read, executed, and filed a document entitled "Petition to Enter Plea of Guilty," which Mindrup's attorney prepared and persuaded the county court to accept. While the plea petition recites that Mindrup understood the "nature of the charges brought against" her, nowhere does the document itemize the elements of the offense. The document details all the constitutional rights Mindrup waived by her plea. It recited as well that she knew "the maximum possible sentence is . . 6 months . . . ~~years~~ imprisonment and/or a fine of $ . . . . 500.00 . . . . ." Under the foregoing language Mindrup wrote: "I can also louse [sic] my

Drivers License for life." The county judge also inquired of Mindrup whether she understood that by pleading guilty she waived certain constitutional rights, and listed them, save and except the right to counsel. The following exchange took place with respect to the penalties:

> THE [JUDGE]: I think everything's included on there, the maximum penalties, your rights, so forth. The one thing I don't see included, and that is that even if you are placed on probation on a D.W.I. Third, the law requires a minimum 7-day jail sentence and a one-year license suspension. Do you understand that?
>
> . . . MINDRUP: Yeah.

Mindrup then informed the county court that she was not under any threat, nor under the influence of alcohol or drugs. After determining that a factual basis existed for the plea, the county court found that Mindrup was knowingly, voluntarily, and intelligently entering her plea and accepted it.

Mindrup contends that her plea was in fact not given knowingly, voluntarily, and intelligently because the county judge failed to engage her in a dialogue sufficient to enable him to determine that she knew her constitutional rights and waived them, nor that she knew and understood the charges against her and the penalties associated therewith. She argues that the plea petition is not sufficient in and of itself to establish the voluntariness of her plea.

The defendant in *State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985), challenged the voluntariness of his plea of guilty to a charge of breaking and entering, notwithstanding the fact that he had executed a plea petition similar to the one in the present case. He had also been present and heard the trial judge's recitation of the applicable constitutional rights to another defendant in a different case who had been arraigned immediately before him, and told the judge, upon inquiry, that a similar recitation could be "skipped." In addition, the trial judge explained the elements of the crime to Predmore and had the county attorney read the statutory provisions regarding the penalty therefor. The court observed that a written petition to enter a plea of guilty does not satisfy the requirement that there be a record which shows that the judge personally examined the

defendant and determined that the latter knew his or her rights and the consequences of a guilty plea. Nonetheless, Predmore's conviction was affirmed because he had heard the dialogue between the judge and another defendant and consequently suffered no prejudice to any substantial right.

Predmore teaches that a written petition to plead guilty which itemizes a defendant's constitutional rights is not in and of itself sufficient to establish the voluntariness of the plea. Here, however, there was a dialogue between the county judge and Mindrup concerning her constitutional rights except as to her right to be represented by counsel were she to plead not guilty and proceed to trial. The fact remains, however, that she was in fact represented by counsel. *State v. Neal*, 216 Neb. 709, 346 N.W.2d 218 (1984), *cert. denied* ____ U.S. ____, 105 S. Ct. 788, 83 L. Ed. 2d 782 (1985), holds it is not error to fail to inform a defendant of the right to counsel when the defendant has had the benefit of counsel before the court. (We do not consider the fact that in *Neal* the defendant expressed satisfaction with his attorney's representation to bear on the issue of whether the record demonstrated that the defendant knew of the right to the assistance of counsel.)

We examine next the fact that the county judge did not himself advise Mindrup of the elements of the offense. The record reveals that Mindrup, through her attorney, specifically waived the reading of the complaint which set forth the offense in the words of the statute, Neb. Rev. Stat. § 39-669.07 (Reissue 1984). As stated in *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984), a complaint is generally sufficient if it sets forth the offense in the words of the statute itself, so long as the statutory language fully, directly, and expressly, without uncertainty or ambiguity, contains all the elements necessary to constitute the offense to be punished. Accord *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984). The complaint in this case meets the foregoing requirements. Having waived the reading of the document which would have advised her of the nature of the offense, Mindrup cannot now be heard to complain that her plea was made in ignorance thereof.

We have declared previously that it does not matter how a defendant comes to understand the possible penalty for an

offense, so long as he or she was aware of it at the time of the plea. *State v. Fischer*, 220 Neb. 664, 371 N.W.2d 316 (1985). Although as presented to Mindrup, the plea petition did not completely detail the possible penalty, she herself wrote in the fact that she could lose her operator's license for life, and the county judge informed her that even if she were placed on probation, she would lose her license for a year and be required to spend at least 7 days in jail. Under those circumstances we are compelled to conclude that Mindrup knew well what she was facing when she elected to plead guilty.

While the use of written plea petitions such as involved in this case is not to be encouraged, for it increases rather than decreases the likelihood of error, the record before us, like the one in *Predmore*, fails to show prejudice to any of Mindrup's substantial rights.

The decision of the district court is therefore correct, and it is affirmed.

AFFIRMED.

WHITE, J., dissenting.

The record fails to show that the essential elements of the crime with which the defendant was charged were part of the dialogue between the court and the appellant. Among the rights waived by the defendant by a guilty plea is the requirement of the State to prove beyond a reasonable doubt that the defendant committed the crime charged, i.e., *each* and *every* essential element of the crime. How we can conclude from this record that such a plea was voluntary is a mystery. We presume that a mere waiver of the reading of a complaint excuses the court of failing to explain to the defendant what it is the State must prove beyond a reasonable doubt. The record cannot, as to this essential point, be said to be anything other than silent. The plea proceedings failed to meet the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), and should be set aside and the cause remanded for a new trial.

SHANAHAN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLANT, V. RAMONA DOBBINS, ALSO KNOWN AS RAMONA GOINGS, APPELLEE.

380 N.W.2d 640

Filed January 31, 1986. No. 85-556.

1. **Sentences: Evidence.** A sentencing judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed.
2. _____: _____. Evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination of a proper sentence.
3. **Sentences: Appeal and Error.** The scope of review in a case where the State appeals a sentence is whether there was an abuse of discretion.
4. **Probation and Parole: Appeal and Error.** A grant of probation will not be disturbed on appeal unless there appears to be an abuse of discretion.
5. **Sentences: Evidence.** The trial court has broad latitude in receiving evidence at a sentencing hearing.

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

George Rhodes, Custer County Attorney, for appellant.

Steven O. Stumpff of Stumpff Law Office, for appellee.

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

WHITE, J.

This is an appeal by the State from the order of the district court for Custer County sentencing the defendant, Ramona Dobbins, to 18 months of probation, with the condition that she serve 90 days in the county jail. The State assigns as error that the sentence is excessively lenient and that the trial court should have allowed the county attorney to offer testimony at the sentencing hearing. The State contends that these actions constitute an abuse of discretion by the trial court. We find no abuse of discretion and affirm the sentence imposed by the trial court.

The facts of the case are as follows. On October 2, 1984, Dobbins, then 23 years old, entered the home of George Eacker in Broken Bow by going through a screen door. Eacker, upon entering his residence from the backyard, encountered

Dobbins. She asked him if she could use the bathroom, and he consented. After remaining in the bathroom for several minutes, she left the premises. Eacker and his wife then discovered that a floral arrangement, some perfume, and a jar were missing from the bathroom.

Dobbins then went to the home of Chard Hirsch and entered through the front door. Hirsch discovered Dobbins in the living room. Hirsch noted that her billfold, which was lying on a table, had been rifled. Dobbins asked if she could use the telephone. Hirsch consented and observed that the call was fictitious, as the phone started buzzing while Dobbins was talking. Hirsch also observed that Dobbins smelled of alcohol.

In the meantime, Eacker began searching for Dobbins so he could question her regarding the items missing from his home. Noticing that Dobbins' car was parked near the Hirsch residence, he knocked on the door and asked to see Dobbins. Dobbins then left the house and got into her car, but she was prevented from driving away when Eacker removed the keys from the ignition. The police were called, and Dobbins was arrested.

An information filed October 19, 1984, charged Dobbins with two counts of burglary under Neb. Rev. Stat. § 28-507 (Reissue 1979), Class III felonies, and with carrying a concealed weapon, a Class I misdemeanor. On March 29, 1985, Dobbins entered pleas of guilty to the counts of burglary, and the county attorney dismissed the charge of carrying a concealed weapon. The district judge ordered a presentence investigation. On July 3, 1985, Dobbins received a sentence of 18 months' supervised probation, including 90 days in the Custer County jail with credit for 18 days served while awaiting trial. The county attorney filed notice of appeal, and the court suspended the 90-day sentence and released Dobbins on personal recognizance pending the appeal.

The appeal is properly filed under Neb. Rev. Stat. § 29-2321 (Cum. Supp. 1984), and this court has the following options under Neb. Rev. Stat. § 29-2323 (Cum. Supp. 1984):

> Upon consideration of the criteria enumerated in section 29-2322, the Supreme Court shall:
>
> (1) If it determines that the sentence imposed is

excessively lenient, set aside the sentence, and:

(a) Remand the case for imposition of a greater sentence;

(b) Remand the case for further sentencing proceedings; or

(c) Impose a greater sentence; or

(2) If it determines that the sentence imposed is not excessively lenient, affirm the sentence.

Neb. Rev. Stat. § 29-2322 (Cum. Supp. 1984) prescribes the factors to be taken into account by this court when reviewing a sentence imposed by a trial court:

If the appeal has been properly filed, as set forth in section 29-2321, the Supreme Court, upon a review of the record, shall determine whether the sentence imposed is excessively lenient, having regard for:

(1) The nature and circumstances of the offense;

(2) The history and characteristics of the defendant;

(3) The need for the sentence imposed:

(a) To afford adequate deterrence to criminal conduct;

(b) To protect the public from further crimes of the defendant;

(c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the court shall deem pertinent.

It is clear that the trial court's sentence in this case is within statutory limits provided by Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1984), which authorizes the granting of probation in any case "for which mandatory imprisonment is not specifically required."

A sentencing judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed. Evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination

of a proper sentence. Such information may be found in reports of probation officers, police reports, affidavits, and the judge's observations of the defendant. *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984).

The factual information available to the court reveals the following about the defendant. She has an extensive criminal history dating from 1978, with theft being charged eight times. She was committed to the Nebraska Center for Women in York from November 1982 to October 1983. Dobbins received her GED while incarcerated in York.

Dobbins had an unhappy childhood, as one of 10 children. She has never associated with her father, and her stepfather suffered from alcoholism. She was committed for psychiatric evaluation while in grade school, due to behavior problems and glue sniffing. She has not been gainfully employed since 1978. Dobbins has two sons from a previous relationship and is currently married to Dennis Dobbins. She has been evaluated and found to be of borderline intelligence and frequently depressed.

Between her arrest and sentencing for the two counts of burglary, Dobbins underwent inpatient alcoholism treatment at St. Gabriel's Treatment Center in Omaha. She was satisfactorily discharged on December 19, 1984. The diagnosis was chemical dependency in the terminal stage. Since her release, Dobbins has had sporadic attendance at Alcoholics Anonymous meetings.

The trial judge considered these factors, including her criminal record, before imposing sentence on Dobbins. He did not sentence her to the penitentiary because she had recently successfully completed inpatient alcoholism treatment, because the value of the items taken during the burglaries was small, and because there was no violence associated with the burglaries.

The scope of review in a case where the State appeals a sentence is whether there was an abuse of discretion. A grant of probation will not be disturbed on appeal unless there appears to be an abuse of discretion. *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984). The trial court has the opportunity to observe the defendant throughout the judicial process and is in a better position than this court to determine whether the

defendant is suited for probation.

> When a judge makes his own determination and places an unpopular defendant on probation, he knows he is inviting criticism. Such a judge now is also inviting possible reversal of his sentence determination by this court if the local county attorney can get the Attorney General's permission to appeal to this court. We, as the reviewing court, must examine all the facts in the record (many of which are mentioned in the State's brief) that affect that sentencing judge's exercise of discretion. If we determine that the judge has not abused his discretion, we must affirm his decision—popular or not.

Id. at 888, 359 N.W.2d at 820.

Upon review of the record as a whole, we do not find that the judge abused his discretion in sentencing the defendant to probation with 90 days in the county jail. While it is, perhaps, a lenient sentence, it is not excessively lenient.

The State's second assignment of error, that the trial court should have allowed the county attorney to offer testimony at the sentencing hearing, is not persuasive. The trial court has broad latitude in receiving evidence at a sentencing hearing. *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981). The record shows that the judge considered the evidence offered by the county attorney and legitimately decided against allowing testimony. We find no abuse of discretion.

For all the foregoing reasons we affirm the sentence of the district court.

AFFIRMED.

TAKEO UTSUMI, APPELLANT, V. CITY OF GRAND ISLAND, A POLITICAL SUBDIVISION, AND MARTIN TODD, APPELLEES.

381 N.W.2d 102

Filed February 7, 1986. Nos. 84-621, 85-563.

1. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
2. **Pleadings: Demurrer.** Where the petition fails to state facts sufficient to constitute a cause of action, the petition is subject to a demurrer.
3. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 23-2420 (Reissue 1983), is a condition precedent to the institution of suit against a political subdivision.
4. **Actions: Pleadings: Proof.** When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must allege and prove all the facts essential to a strict compliance with the prescribed conditions.
5. **Directed Verdict: Negligence: Trial.** Ordinarily, the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper.
6. **Negligence.** One who is capable of understanding and discretion, and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent or contributorily negligent.
7. _____. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it.

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

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellant.

Kenneth H. Elson, for appellees.

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

KRIVOSHA, C.J.

The appellant, Takeo Utsumi, filed suit in the district court for Hall County, Nebraska, against the City of Grand Island, a political subdivision, and Martin Todd, a police officer

employed by the City of Grand Island. In his fourth amended petition, Utsumi alleged, in substance, that on April 21, 1980, Dreisbach's Steakhouse was robbed by an individual who fled the premises following the robbery. Utsumi alleged that he then pursued the robber in a westerly direction for approximately one block because, as he alleges, he requested Officer Todd to pursue the fleeing robber but Todd failed, refused, and neglected to perform his duties, in that he failed and refused to apprehend the robber. Utsumi further alleged that the robber, while being pursued by him, shot at Utsumi once and missed, and subsequently shot him in the right leg, causing severe injuries. Utsumi sought judgment against the City of Grand Island and Todd for his injury sustained by reason of having been shot by the robber, which, he maintains, was proximately caused by reason of Todd's failing and refusing to pursue and apprehend the felon.

The petition contained no allegations that Utsumi had in any manner complied with the requirements of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 23-2420 (Reissue 1983), by making a claim in writing to the City of Grand Island, as required by § 23-2416, within 1 year after the claim accrued.

The City of Grand Island filed a demurrer to the fourth amended petition on the ground that it did not state facts sufficient to constitute a cause of action against the City of Grand Island. The demurrer was sustained and, when Utsumi failed to plead further, the action as to the City of Grand Island was dismissed with prejudice.

The defendant Todd ultimately filed an answer to the fourth amended petition, generally denying the allegations of plaintiff's fourth amended petition and specifically alleging that Utsumi "knew and appreciated the danger of pursuing and chasing the armed robber, [and] voluntarily or deliberately exposed himself to that danger, and as a proximate result of that danger [sustained] the injury . . . ." Todd further alleged that Utsumi was contributorily negligent for a number of reasons more particularly set out in the answer. Todd's answer to the fourth amended petition concluded by alleging that "whatever injuries and damages plaintiff sustained as a result of being shot

by the armed robber were the direct and proximate result of the plaintiff's contributory negligence *and* assumption of risk." (Emphasis supplied.) Thereafter, Todd filed a motion for summary judgment. On July 23, 1984, the district court for Hall County, Nebraska, sustained the motion for summary judgment and dismissed the action against Todd.

Utsumi appeals these two orders, maintaining that the district court was in error. We believe that the district court was not in error and that the judgments dismissing the action as to both the City of Grand Island and the appellee Todd must be affirmed.

We have frequently held that 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. *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985); *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); *Gilbreath v. Ridgeway*, 218 Neb. 822, 360 N.W.2d 474 (1984). We believe that such is the case with regard to the claim against Todd. Moreover, where the petition fails to state facts sufficient to constitute a cause of action, the petition is subject to a demurrer. See, Neb. Rev. Stat. § 25-806 (Reissue 1979); *Johnson v. Ruhl*, 162 Neb. 330, 75 N.W.2d 717 (1956). As we shall point out, the petition fails to state sufficient facts as to the City of Grand Island and thus is subject to attack by demurrer.

The petition, insofar as it sought relief against the City of Grand Island, failed to allege that Utsumi had complied with the provisions of the Political Subdivisions Tort Claims Act. This was a fatal defect. In *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976), a case involving a similar question, we affirmed the action of the district court in sustaining a demurrer filed by the city of Lincoln when the plaintiff's petition failed to allege that he had complied with the provisions of the Nebraska Political Subdivisions Tort Claims Act prior to the institution of the action. In holding that the plaintiff's petition failed to state a cause of action, we said at 712-13, 240 N.W.2d at 344: "The notice of claim requirements

of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision . . . ." The failure to allege that the condition precedent had been met was a fatal defect. As we observed in *Sole v. City of Geneva*, 106 Neb. 879, 881, 184 N.W. 900 (1921):

> When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must *allege* and prove all the facts essential to a strict compliance with the prescribed conditions.

(Emphasis supplied.) See, also, *Delozier v. Village of Magnet*, 104 Neb. 765, 178 N.W. 619 (1920).

Utsumi's failure to allege that he had made claim as required by § 23-2416 and had otherwise complied with the provisions of the Political Subdivisions Tort Claims Act rendered his petition defective and subject to demurrer. The trial court was correct in sustaining the demurrer, and when Utsumi elected not to further plead within the time granted by the court, the district court was correct in dismissing the action as to the City of Grand Island.

We turn, then, to whether the district court was correct in granting summary judgment in favor of the appellee Todd. While this court has not previously held that if a peace officer, in the course of his duties, fails to take such action as would prevent harm to an individual to whom he had a duty, there is liability on the part of the municipality employing the peace officer and the officer as well, Utsumi argues that we should do so in this case. We need not, however, accept Utsumi's invitation, because even assuming, though not deciding, that such a cause of action could exist under an appropriate set of facts, the allegations of Utsumi's petition conclusively establish that Utsumi is, as a matter of law, barred from recovery, either under the doctrine of assumption of risk or by reason of his own contributory negligence. Therefore, Todd is entitled to judgment as a matter of law. We believe that no reasonable person could reach any other conclusion.

As we observed in *Garcia v. Howard*, 200 Neb. 57, 60, 262 N.W.2d 190, 192 (1978): "Ordinarily the questions of

negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper." In the instant case, if we accept all of Utsumi's allegations as true, reasonable minds could draw but one conclusion regarding Utsumi's voluntary pursuit of an armed robber; therefore, since the granting of a directed verdict would be appropriate where evidence was adduced, the granting of a summary judgment was correct where, as here, the allegations of the plaintiff's petition establish that the plaintiff is barred from recovering as a matter of law.

To suggest that one who voluntarily pursues an armed robber does not know or appreciate the danger of his action is simply too much to ask. No reasonable mind could conclude anything other than that one who pursues an armed robber is exposing himself to potential danger and injury. That knowledge of the danger bars any right of recovery by Utsumi. In *Ybarra v. Wassenmiller*, 206 Neb. 164, 171, 291 N.W.2d 725, 729 (1980), we said: " 'One who is capable of understanding and discretion, and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent or contributorily negligent.' " And, in *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 670, 345 N.W.2d 12, 15 (1984), we said: "One who is capable of understanding and discretion, such as the plaintiff in this case, and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent." We further said in *Rodgers, supra* at 669-70, 345 N.W.2d at 15:

> " 'To constitute want of due care on his part it is not required that he should have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that he placed himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his acts.' " [Citation omitted.]
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> . . . .
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> . . . " 'One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes

himself to the danger assumes the risk of injury from it.' "

Utsumi was not required to pursue the robber nor to take such action to protect his life. While he might not have known that the robber would shoot him in the leg, he had to have understood that by pursuing a fleeing armed robber he was placing himself in a position of a known danger where there was no need for him to be. Having voluntarily chosen to be a vigilante, he voluntarily exposed himself to danger and therefore was either contributorily negligent or assumed the risk and, in either case, is barred from recovery.

Under either the theory that Utsumi knew the robber had a gun and was therefore contributorily negligent in pursuing him or the theory that as a reasonable person Utsumi had to know that by pursuing a fleeing robber, armed or not, he was exposing himself to danger, he is barred from recovery. In *Sandberg v. Hoogensen*, 201 Neb. 190, 197-99, 266 N.W.2d 745, 750 (1978), we said:

> "It may be said that contributory negligence involves the notion of some fault or breach of duty on the part of the one charged therewith, or a failure to use such care for his safety as an ordinary prudent person would have used under the same or similar circumstances. On the other hand, under the assumption of risk, even though the risk be obvious, the person may be free from any suggestion of fault or negligence on his part. . . ."
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> . . . .
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> . . . "The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributory cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to the injury, although it plays no part in causing the injury."

Consistent with those notions, no matter how we view the allegations of plaintiff's petition, the one fact that is clear is that Utsumi voluntarily pursued a robber when he was under no obligation to do so. On that set of facts, one can reach no other conclusion than that he was either contributorily negligent

sufficient to bar his recovery or that he assumed the risk and is likewise barred from recovery. The district court, therefore, was correct in granting the motion for summary judgment in favor of Todd.

The judgment is affirmed in all respects.

AFFIRMED.

EMELIA PROROK, APPELLANT, V. COUNTY OF CUSTER, NEBRASKA; NEAL FINK, CUSTER COUNTY SHERIFF; AND GEORGE RHODES, CUSTER COUNTY ATTORNEY, APPELLEES.

381 N.W.2d 106

Filed February 7, 1986. No. 84-667.

1. **Courts: Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
2. **Summary Judgment.** If the record in summary judgment proceedings presents 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, the motion should be granted.
3. **Negligence: Proximate Cause: Words and Phrases.** As used in the law of negligence, proximate cause is that cause which, in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury or loss, and without which the injury or loss would not have occurred.

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

Kent A. Schroeder of Ross, Schroeder & Fritzler, for appellant.

Gregory G. Jensen, for appellees.

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

HASTINGS, J.

Plaintiff, Emelia Prorok, appeals the summary judgment entered on her negligence claim against the County of Custer,

the Custer County sheriff, and the Custer County attorney.

Prorok's claim is based on the same facts as *Nebraska State Bank & Trust Co. v. Wright*, 213 Neb. 822, 331 N.W.2d 535 (1983), in which Prorok was appellant and in which we affirmed the confirmation of a real estate foreclosure sale. Nevertheless, we will repeat the more salient details for the sake of convenience.

On April 15, 1980, Nebraska State Bank and Trust Company of Broken Bow, Nebraska (Bank), was awarded a decree of foreclosure of its blanket $341,696.88 mortgage on separate tracts of land. The priorities established as to one particular tract (Lots 14, 15, and 16, Block 13, J. P. Gandy's Addition to Broken Bow, Custer County, Nebraska) were: First lien, First Federal Savings and Loan Association of Lincoln (First Federal), on an unforeclosed mortgage, $24,698.58; second lien, Robert and LaDann Hostick, on a foreclosed mortgage, $5,339.32; third lien, Bank, allocated at $12,035.98; fourth lien, Prorok, $9,558. The decree provided that in the event of a judicial sale the tract was to be sold subject to First Federal's mortgage. On February 9, 1981, an order of sale was issued directing the sale of the tract subject to First Federal's mortgage.

The sheriff's published notice of sale made no reference to First Federal's mortgage. The sheriff announced during the sale that the property was being sold subject "only to" taxes of record and that it would not be subject to any current liens. The tract was sold to Bank for $45,500.

On April 23, 1981, the trial court set the sale aside, upon Bank's motion, finding that the sheriff had made misleading statements concerning the liens due on the land and that Bank's bid was a mistake. Carl Norden, who bid on behalf of Bank, stated by affidavit that he would not have bid $45,500 for the tract had he known that the property was to be sold subject to the First Federal mortgage. Two more judicial sales took place, with high bids of $10,100 and $12,001. Each was set aside.

The last sale was ordered on January 8, 1982. That sale was finally confirmed for the price of $19,000, bid by Burdette Christensen. Prorok objected to the confirmation, or in the alternative moved the court to readjust the lien priorities.

Prorok filed a motion for new trial. Both of Prorok's motions were denied, and the decision was affirmed on appeal to this court. *Nebraska State Bank & Trust Co. v. Wright, supra.*

In the case at bar Prorok claims that Custer County, the sheriff, and the county attorney committed several acts of negligence in the preparation for and performance of the foreclosure sale. She claims that in the absence of those acts of negligence, the first sale would have been confirmed and her lien would have been satisfied in part by the $45,500 final bid. Prorok reasons that the proceeds from the first sale should have been distributed $6,000.23 to Robert and LaDann Hostick, $29,322.20 to Bank, and the remaining $10,177.57 to Prorok. Most of Prorok's claim would be satisfied with such an arrangement. Prorok's distribution scheme allocates none of the proceeds to First Federal, since Bank's foreclosure decree provided that the property should be sold subject to the First Federal mortgage.

The trial court sustained the defendants' motion for summary judgment, generally on the basis of sovereign immunity. Although we do not agree with the trial court's reason, we do agree that it was correct in sustaining the motion. "Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm." *Sommerfeld v. City of Seward, ante* p. 76, 80, 375 N.W.2d 129, 132 (1985).

If the record in summary judgment proceedings presents 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, the motion should be granted. *Sommerfeld v. City of Seward, supra*; *Watters v. Foreman*, 204 Neb. 670, 284 N.W.2d 850 (1979).

The facts in this case are undisputed. The court ordered the sale subject to the mortgage of First Federal. The sheriff represented to the assembled potential bidders that the property would not be subject to any liens except for unpaid taxes. The Bank bid on the property believing that its purchase would not be subject to any liens, and Bank would not have bid the property in at the price it did had it known the true state of

facts.

In other words, but for the sheriff's misstatement, there would have been no bid sufficient to have created excess funds in which Prorok could have shared. That is the position in which she now finds herself. She has ended up in the same position in which she would have been had the sheriff not been guilty of negligent conduct in the first place.

This is a question of proximate cause. As used in the law of negligence, proximate cause is that cause which, in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury or loss, and without which the injury or loss would not have occurred. The burden was on Prorok to show that the negligent conduct on the part of the sheriff, which we assume to have existed, was the proximate cause of her loss. This she cannot and did not do.

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

AFFIRMED.

IN RE ESTATE OF EUGENIA A. PETERSON, DECEASED. CARL A. PETERSON, APPELLANT, V. JAMES E. ABBOTT AND LEROY ABBOTT II, COPERSONAL REPRESENTATIVES OF THE ESTATE OF EUGENIA A. PETERSON, DECEASED, APPELLEES.

381 N.W.2d 109

Filed February 7, 1986. No. 84-706.

1. **Antenuptial Agreements: Contracts: Proof.** The burden of proof regarding the validity of an antenuptial contract is on the party asserting its invalidity.
2. **Contracts.** The law has long been that a person who signs a contract without reading it cannot later relieve himself of its burdens.
3. **Antenuptial Agreements: Contracts: Words and Phrases.** "Fair disclosure," in the context of an antenuptial agreement, contemplates that each spouse shall be given information of a general and approximate nature concerning the net worth of the other.
4. **Decedents' Estates: Antenuptial Agreements: Contracts: Waiver.** Neb. Rev. Stat. § 30-2316 (Reissue 1979) provides that the parties to a valid antenuptial agreement may waive the right to elect a share of both real and personal property of a deceased spouse.

5. **Decedents' Estates: Antenuptial Agreements: Contracts: Statutes.** The effect of an antenuptial contract in which the parties agree to be bound by present and future laws is to be determined by the statutes in effect at the time of the death of the party to the agreement whose estate is attempting to effectuate the agreement.

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

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

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

GRANT, J.

Eugenia A. Peterson died February 5, 1983. A petition for formal probate of her will was filed in the county court for Scotts Bluff County, Nebraska, and the will was admitted to probate on March 22, 1983. Decedent's husband, Carl Peterson, filed a "Petition for Elective Share" in the probate proceedings in that court on August 3, 1983, in which he elected "pursuant to Nebraska Probate Code Section 30-2317 to take one-half of the augmented estate of the decedent." The copersonal representatives of decedent's estate, decedent's two sons from her previous marriage to LeRoy Abbott, filed an answer to the petition for elective share, asserting that an antenuptial agreement executed by Carl and Eugenia barred Carl's claim. Carl replied to the answer, alleging that the antenuptial agreement was void, asserting, inter alia, that there was fraud and overreaching in the execution of the antenuptial agreement and that, in any event, such an agreement applied to real property only and not to personal property.

After a pretrial conference the county court issued a pretrial order bifurcating the trial. The first part of the trial was to determine whether Carl was entitled to an elective share, and if it was so determined, the second part of the trial would be used to determine the amount of the share. In regard to the procedure, at the beginning of the trial the court stated:

> [B]asically that [the pretrial order] states that . . . it is the estate's right and obligation to go forward first with the evidence to present the existence of a valid antenuptial or prenuptial agreement and, then, the evidence for the Contestant, Mr. Carl Peterson, would be permitted in opposition thereto, and that any rebuttal evidence then would be taken up at that time.
>
> So it would be the opinion of the Court that estoppel or waiver or that type of evidence would not be germane until having heard the evidence Mr. Peterson may present.

At trial the estate, as set out in the court's journal entry, "presented evidence of the antenuptial agreement, the execution of the Agreement and related matters whereupon the Estate rested reserving the right to present rebuttal evidence of estoppel. The Contestant [Carl Peterson] then presented evidence in opposition to the antenuptial agreement and rested . . . ." After Carl rested, the estate offered no rebuttal evidence and then moved to dismiss "on the basis that there was insufficient evidence to support a finding that the antenuptial agreement was invalid." The court sustained the motion to dismiss.

Carl Peterson timely appealed to district court. The district court affirmed the county court order dismissing Carl's petition for elective share, "[f]inding no error on the record." Carl timely appeals to this court and assigns 14 errors. The assignments may be grouped into four. First, appellant alleges that the antenuptial agreement was invalid on several grounds, including improper execution and insufficient disclosure of assets and fraud committed by Eugenia in connection with the antenuptial agreement. Second, appellant urges that the county court erred in holding that the burden of proof was on Carl to show the invalidity of the agreement. Third, the county court erred in failing to find that Neb. Rev. Stat. § 30-106 (Reissue 1964) controlled as to the validity and extent of the agreement. Fourth, the county court erred in finding that Carl was estopped from denying the validity of the agreement.

The standard of review by this court is for errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 1979); *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985); *In*

re Estate of Massie, 218 Neb. 103, 353 N.W.2d 735 (1984). The evidence before the county court shows the following.

When they met, Carl Peterson and Eugenia Abbott were each single. Carl had been divorced and Eugenia's first husband had died. Each had children, all of whom were adults at the time of these proceedings. Eugenia and Carl were married on July 25, 1969, and executed an antenuptial agreement 2 days before their marriage. The agreement had been prepared by Eugenia's lawyers and was brought to Eugenia's house by Paul Hefti, the president of the Guardian State Bank of Alliance, Nebraska. The agreement was signed by both parties, and both acknowledged their signatures before Hefti, who was a notary public. Hefti had died before the date of the proceedings herein. The Guardian State Bank was the executor of the estate of Eugenia's first husband, LeRoy Abbott, and handled the trusts set up in LeRoy Abbott's will.

Although Carl and Eugenia jointly held some property during their marriage, they generally kept their financial matters separate. Based upon the sale of his ranch in 1973, Carl's net worth in 1969 when the antenuptial agreement was signed was approximately $250,000. Eugenia's net worth at that time included approximately $215,868.53 of personal property and an interest in the LeRoy Abbott estate, in which she had a power of appointment over approximately one-half of the adjusted gross estate of approximately $10 million. Inter vivos gifts from Eugenia to Carl during the marriage included a house in Scottsbluff, a condominium in Hawaii, and approximately $200,000 in tax-exempt bonds. Carl was bequeathed $200,000 in cash in Eugenia's will.

Initially, Carl asserts that the county court erred in putting the burden on Carl to prove the invalidity of the antenuptial agreement. We have held that the burden of proof regarding the validity of an antenuptial contract is on the party asserting its invalidity. *Moss v. Stueven*, 200 Neb. 215, 263 N.W.2d 98 (1978); *Strickland v. Omaha Nat. Bank*, 181 Neb. 478, 149 N.W.2d 344 (1967); *Caprette v. Spieth*, 181 Neb. 11, 146 N.W.2d 746 (1966). The county court, therefore, did not err in placing the burden on Carl to show the invalidity of the antenuptial agreement. It was incumbent upon Carl to show the

fraud and overreaching that he alleged in claiming that the agreement was invalid.

Insofar as Carl contends that the county court should have accepted as true all of his evidence and all the reasonable inferences from that evidence because his petition was dismissed at the conclusion of his evidence, the posture of this case does not support Carl's conclusion. Carl's premise is that the county court sustained a motion to dismiss his case at the conclusion of his evidence. In reality, the county court heard all the evidence on the issue of the validity of the antenuptial agreement. The court required the estate to go forward initially with the estate's evidence on the existence and execution of a valid antenuptial agreement. Carl then adduced evidence on the question of the validity of the agreement and rested. The estate did not adduce further evidence and moved for dismissal of Carl's claim resting on the invalidity of the agreement—in effect, at the end of this phase of the case. The court treated this as a submission of the case on the point and found in part as follows:

> (1) The formalities of the statutes were met in the execution of the antenuptial contract.
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> (2) Both husband and wife possessed substantial assets at the time of execution of the contract, although the wife's assets were proportionally much larger.
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> (3) The disclosure by the wife was full, fair and open disclosure in the contract. The Court finds evidence presented by the husband that Exhibit A was not attached at the time of execution to be unconvincing.
>
> (4) The contract does not appear to be unjust or unreasonable on its face, and does include full, fair and open disclosure. Therefore no presumption of fraud arises. The burden of proof does not shift to the estate to prove validity of the contract. The burden of proof remains on the husband to show invalidity of the antenuptial contract.
>
> (5) There is no evidence of fraud or overreaching in this matter.

Our review of the record leads us to the conclusion that the evidence fully supports the findings of the county court. Carl's

first attack on the agreement is that there was not a full disclosure by Eugenia of her assets at the time of the agreement.

Carl testified that he basically understood the purpose of the antenuptial agreement. He further testified that he had no specific knowledge of the extent of Eugenia's wealth but that he generally knew that it was substantial. His position rests primarily on his contention that "EXHIBIT 'A' " (the inventory in the LeRoy Abbott estate) was not attached to the antenuptial agreement when he signed it. Carl's testimony so indicated. He testified that the agreement he signed consisted of only six pages, the last page being the page on which he signed.

The estate asserts that the evidence shows that the agreement had "EXHIBIT 'A' " attached when signed by Carl. The exhibit detailed Eugenia's holdings and her interest in the estate of LeRoy Abbott. That interest primarily consisted of the marital deduction trust, of which Eugenia was a beneficiary and over which she had a testamentary, general power of appointment.

The antenuptial agreement recited, "A copy of the inventory of the [LeRoy Abbott] estate, together with a stipulation between the executor and the county attorney for Box Butte County, Nebraska, tentatively fixing the value thereof, is annexed hereto, and marked EXHIBIT 'A'." The inventory showed a total gross estate value of $10,239,847.90. Other recitals in the agreement which Carl admitted signing stated that Eugenia had the "power of appointment over approximately a fractional one-half of his [LeRoy's] adjusted gross estate . . . ." The antenuptial agreement also recited, "Each of the parties acknowledges that the other party has fully acquainted him with his means and resources; . . . and that he is entering into this agreement freely, voluntarily and with full knowledge."

We have held that recitals in a contract have a limited value in the construction of a contract. *McKinnon v. Baker*, 220 Neb. 314, 370 N.W.2d 492 (1985). Recitals, however, may be looked to "in determining the proper construction of the contract or the intention of the parties." *Strickland v. Omaha Nat. Bank*, 181 Neb. 478, 484, 149 N.W.2d 344, 351 (1967). The recitals in the antenuptial agreement could properly be considered by the

trial court in determining the extent of Carl's knowledge at the time he signed the agreement.

Carl testified that he merely "thumbed through" the agreement and that he had no knowledge that the agreement was to include "EXHIBIT 'A'." The law has long been that a person who signs a contract without reading it cannot later relieve himself of its burdens. *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

Further testimony showed that three copies of the agreement were signed; that one copy was kept at the office of Lester Danielson, Eugenia's attorney, who had died prior to these proceedings. Two copies were kept by Eugenia. All were found after Eugenia's death, with the exhibit attached. Mr. Danielson's secretary of more than 17 years had prepared the documents and testified to her office procedures followed in all cases. That procedure required that exhibits to documents be attached before documents were signed. An attorney who reviewed the agreement with both Carl and Eugenia in 1972 testified that "EXHIBIT 'A' " was attached at the time of his interview with Carl and Eugenia and that its contents were discussed with both of the parties.

If "EXHIBIT 'A' " was attached to the agreement, Carl's basic argument that there was not sufficient disclosure fails. As set out above, that exhibit disclosed the extent of LeRoy Abbott's assets at the time of his death and Eugenia's rights to such assets. As stated in *In re Estate of Hill*, 214 Neb. 702, 707, 335 N.W.2d 750, 753 (1983):

> "Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their pending marriage."

Additionally, aside from the agreement, Carl knew generally of Eugenia's financial situation. Carl had known LeRoy Abbott for 10 years before LeRoy Abbott's death, and in response to a question as to his knowledge about Abbott's

estate, if he "knew there was a substantial amount of wealth that she had some interest in," Carl answered, "Yes. It was common knowledge."

We hold that the trial court was correct in finding that Carl was given a fair disclosure of Eugenia's assets at the time of the agreement.

The remaining question to be resolved is whether § 30-106 (Reissue 1964) or Neb. Rev. Stat. § 30-2316 (Reissue 1979) is to be applied in determining the validity and effect of the antenuptial agreement. Section 30-106 (Reissue 1964) was in effect at the time the agreement was executed in 1969 and provided in part: "A man or woman may also bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage." At the time of Eugenia's death in 1983, § 30-2316 (Reissue 1979) of the Nebraska Probate Code was in effect, and § 30-106 (Reissue 1964) had been repealed.

Carl contends that § 30-106 (Reissue 1964) applies, that that statute, by its clear terms, makes an antenuptial agreement applicable only to "lands," and that, therefore, even if the antenuptial agreement is valid, it operates only to prevent Carl's election to take a spouse's share of real property, and does not apply to prevent Carl from claiming an elective share of the personal property in Eugenia's estate.

Section 30-2316 (Reissue 1979), on the other hand, provides that the parties to a valid antenuptial agreement may waive the right to elect a share of both real and personal property of a deceased spouse.

We note that the estate contends that, even if applicable, § 30-106 (Reissue 1964) has been construed by this court to mean that an antenuptial agreement executed when such statute was in effect could preclude a surviving spouse from an elective share in both real and personal property. See, *Kingsley v. Nobel*, 129 Neb. 808, 263 N.W. 222 (1935); *Anderl v. Willsey*, 193 Neb. 698, 229 N.W.2d 46 (1975); *Moss v. Stueven*, 200 Neb. 215, 263 N.W.2d 98 (1978). Carl contends that in a series of cases culminating in *Grassman v. Jensen*, 183 Neb. 147, 158 N.W.2d 673 (1968) (White, C.J., concurring in the result in part and dissenting in part), and later in *Blanchard v. White*, 217

Neb. 877, 351 N.W.2d 707 (1984), this court has indicated that § 30-106 (Reissue 1964) applies only to real property, and not to personal property. In view of the manner in which this case is disposed of, we need not determine that issue.

The dispute is clear. As stated above, Carl contends that since § 30-106 (Reissue 1964) was in effect on July 23, 1969, when the antenuptial agreement was signed, the provisions of that statute were incorporated into the agreement, and the terms of § 30-106 (Reissue 1964) control the effect of the agreement. The estate contends that since § 30-2316 (Reissue 1979) was in effect on February 5, 1983, when Eugenia died, the terms of § 30-2316 (Reissue 1979) control the effect of the antenuptial agreement. We hold that § 30-2316 (Reissue 1979), the statute that was in effect at the time of the death of Eugenia, controls.

In considering the problem, we are necessarily guided by the general rules of inheritance of Nebraska. As stated in *In re Estate of Luckey. Bailey v. Luckey*, 206 Neb. 53, 57, 291 N.W.2d 235, 238 (1980):

> The right of inheritance is created by statute. It is within the power of the legislature to determine what persons or whether any person shall inherit from one who dies intestate, and to determine what proportion of the decedent's estate shall descend to any particular person or class of persons. The legislature creates and may take away the right to inherit.

Within that general rule the Legislature has set out both the right of surviving spouse to elect to take an elective share of a deceased spouse's estate (Neb. Rev. Stat. § 30-2313 (Cum. Supp. 1984)) and the right of spouses to waive such a right by contract (§ 30-2316 (Reissue 1979)).

Section 30-2313 (Cum. Supp. 1984) provides in part: "If a married person domiciled in the state dies, the surviving spouse has a right of election to take an elective share in any fraction not in excess of one half of the augmented estate under the limitations and conditions hereinafter stated."

The "augmented estate" referred to in § 30-2313 (Cum. Supp. 1984) is defined in Neb. Rev. Stat. § 30-2314 (Cum. Supp. 1984) in detail, and includes many items which are to be added to the basic estate.

Section 30-2316 (Reissue 1979) provides in part:

> The right of election of a surviving spouse . . . may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of all rights (or equivalent language) in the property or estate of a present or prospective spouse . . . is a waiver of all rights to elective share . . . and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession . . . .

Carl's position would give him all the rights of election under § 30-2313 (Cum. Supp. 1984), including his right to a share of the "augmented estate," but none of the burdens which he asserts are put on him by § 30-2316 (Reissue 1979).

As to which law controls, we held in *In re Estate of Enyart*, 100 Neb. 337, 349, 160 N.W. 120, 124 (1916), *overruled on other grounds, Kingsley v. Noble*, 129 Neb. 808, 263 N.W. 222 (1935): "There is no vested interest in a statute, and a change in the manner of disposition of estates of deceased persons may be made by the legislature at any time. The law at the time of death determines the right and manner of disposition, and not the former law."

Similarly, in 79 Am. Jur. 2d *Wills* § 69 at 327-28 (1975), it is stated:

> [T]he power of one spouse to bequeath property away from the other spouse and the rights of the surviving spouse upon his or her election not to take under the will are controlled by the law in force at the time of the testator's death and not by that in effect when the will was executed.

In 3 W. Whitford, Probate and Administration, *Descent and Distribution* 1155 (1957), it is set out, "The right of election is purely statutory, and the statute in force at the time of death controls, rather than the statute in force at the time an antenuptial contract was executed (or at some other time prior to death)."

In *In re Estate of Florey*, 212 Neb. 665, 671, 325 N.W.2d 643, 646-47 (1982), we said:

> Our court has repeatedly held that the will of the deceased speaks as of the date of death of the testator. [Citations omitted.] The right of a surviving spouse to elect to receive those benefits provided by law in lieu of those provided by the will also must be determined by the law in effect at the date of the decedent's death. With the adoption of the new probate code, Neb. Rev. Stat. § 30-2901 (Reissue 1979) provides that the new code applies to any wills of decedents dying subsequent to the effective date of the code. The court must therefore look to the law in effect when the decedent died to determine the rights of the electing spouse.

Carl's answer to all these statements of law is that all these statements apply only to wills and that we are here considering an antenuptial contract, not a will. We hold, however, that the effect of the contract here involved—an antenuptial contract which removes the rights of both contracting parties to elect to share in each other's estate and in which the parties agree to be bound by present and future laws—must be determined by the statutes in effect at the time of the death of the party to the agreement whose estate is attempting to effectuate the agreement.

The provision of the antenuptial agreement in question provided in part:

> 3. Each party hereby waives, releases and relinquishes any and all claims and rights of every kind, nature or description that he may acquire by reason of the marriage in the other party's property or estate under the present or future laws of Nebraska or any other jurisdiction, including:
>
> (a) The right to elect to take against any present or future last will and testament or codicil of the other party;
>
> (b) The right to take his intestate share in the other party's estate; and
>
> (c) The right, if any, to act as administratrix or administrator of the other party's estate.

The contract before us is an antenuptial agreement to become effective in the future and designed to control the rights of inheritance of both parties, and a contract in which the

parties have agreed specifically to be bound by future laws.

The law generally is that statutes in existence at the time of the execution of a contract become part of the contract as if set forth therein. *Faught v. Platte Valley Public Power & Irrigation Dist.*, 155 Neb. 141, 51 N.W.2d 253 (1952). A limitation of that general rule was set out in *Carlson v. Nelson*, 204 Neb. 765, 773, 285 N.W.2d 505, 509 (1979): "Existing statutes and laws with reference to which a contract is made (assuming there are no valid contractual provisions providing otherwise) enter into and become part thereof." See, also, *Goodwin v. Freadrich*, 135 Neb. 203, 215, 280 N.W. 917, 922 (1938), where it is stated that " 'the existing statutes . . . at the time a contract is made [become] a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a different intention.' " And as stated in *Board of Trustees v. Krizek*, 113 Ill. App. 3d 222, 226, 446 N.E.2d 941, 944 (1983): "Nothing prevents the parties to a contract from agreeing to be bound with reference to future laws [citations omitted] . . . ." See, also, 17 Am. Jur. 2d *Contracts* § 257 at 657-58 (1964), which states contracts are governed by the law in existence at the time it was made, "unless the parties have indicated an intention to the contrary, such as an intention to be bound by future laws." In this case Carl and Eugenia agreed to be bound by future laws.

The only right that Carl had in Eugenia's estate was the right to take a share of that estate contrary to the will itself. That right of election is purely statutory and is provided by § 30-2316 (Reissue 1979). The right of a surviving spouse to elect against a will is statutory only. Carl now says the antenuptial agreement was invalid insofar as it states that Carl gives up the right to share in Eugenia's personal property because, as Carl contends, § 30-106 (Reissue 1964) specifically provided that neither party can agree not to share in the personal property of his or her deceased spouse. Carl now wants to apply the provisions of that 1969 contract, including the statutes existing at that time and later repealed. Just as he has no vested right in any laws of inheritance, neither does Carl have a vested right to apply 1969 inheritance laws to a 1983 estate.

Carl also raises the question that by the terms of the current

Nebraska Probate Code itself, that code provides that it shall not impair any accrued right. Carl states, in his brief at 18, "The right of [Carl] to inherit personal property, or to elect against a will which denied him his statutory share of his wife's personal property, accrued at the time of the marriage."

No such right "accrued" at the time of the marriage. Carl, indeed, had no rights under § 30-106 (Reissue 1964) to elect or do anything else, after that statute was repealed in 1974. The will in question was not executed until 1982. When § 30-2313 (Reissue 1979) was made the law of this state, Carl received a right, by legislative grace, to choose to take a certain percentage of his deceased spouse's estate. Carl, however, had given up that right in a contract wherein he promised that he waived and released "any and all claims and rights of every kind . . . in the other party's property or estate under the present or future laws of Nebraska . . . including: (a) The right to elect to take against any present or future last will and testament or codicil of the other party . . . ."

In view of this disposition of the case, the assignment of error alleging that the trial court erred in finding that Carl was estopped to deny the validity of the contract need not be determined.

The judgment of the trial court was correct, and the judgment of the district court affirming that holding is correct.

AFFIRMED.

CARL W. LUMBARD, DOING BUSINESS AS LUMBARD-LESCHINSKY, APPELLEE, V. THE WESTERN FIRE INSURANCE COMPANY, FORT SCOTT, KANSAS, A CORPORATION, APPELLANT.

381 N.W.2d 117

Filed February 7, 1986. No. 84-801.

1. **Insurance: Contracts.** An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
2. _____: _____. If an insurance policy is ambiguous, it will be construed in favor

of the insured.

3. _____: _____. An ambiguity exists only when a policy can be interpreted to have two or more reasonable meanings.
4. _____: _____. An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
5. _____: _____. A policy provision covering burglary only if felonious exit from the premises be by actual force and violence, as evidenced by visible marks made by tools, explosives, electricity, or chemicals upon, or physical damage to, the interior of the premises at the place of such exit, is enforceable.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded for further proceedings.

Kenneth H. Elson, for appellant.

Earl D. Ahlschwede of Ahlschwede, DeBacker & Truell, for appellee.

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

CAPORALE, J.

The plaintiff, Carl W. Lumbard, a merchant doing business as Lumbard-Leschinsky, seeks to recover the value of certain merchandise removed from his premises under a policy of burglary insurance issued by defendant, The Western Fire Insurance Company, Fort Scott, Kansas, a corporation. Western appeals from the summary judgment entered in favor of Lumbard on the grounds that the district court erred (1) in determining that the policy's definition of "burglary" violated public policy and thus was unconscionable and unenforceable and (2) in finding that the policy covered the loss. We reverse and remand for further proceedings.

The policy provided that Western would pay Lumbard "for all loss of or damage to merchandise, furniture, fixtures, and equipment within the premises occasioned by . . . burglary . . . ." The policy defined burglary as

> the felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence . . . or (3) from within the premises by a person making felonious exit therefrom

> by actual force and violence as evidenced by visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the interior of the premises at the place of such exit.

When Lumbard's store was closed at the end of the business day on January 16, 1981, the supply door was fastened shut by means of two bars which fit into hooks on the inside of the door in such a manner as to render the door incapable of being opened from the outside. When the store was opened for business the next day, it was found that numerous items, mostly stereophonic equipment, had been removed from the store. There were no signs of forcible entry into or exit from the store, but the bars which held the supply door shut had been removed from the hooks and laid on the floor beside the door.

Western denied coverage for the loss of the items removed from the store on the basis that the occurrence did not fall within the policy's definition of a burglary.

Western's first ground of appeal, that the trial court erred in concluding that the policy's definition of burglary is void and unenforceable as violative of public policy, is meritorious.

Cochran v. MFA Mut. Ins. Co., 201 Neb. 631, 271 N.W.2d 331 (1978), involved an insurance policy which stated it did not apply to loss away from the described premises of

> "property while unattended in or on any motor vehicle or trailer, other than a public conveyance, *unless the loss is the result of forcible entry* into such vehicle while all doors, windows or other openings thereof are closed and locked, *provided there are visible marks of forcible entry upon the exterior* of such vehicle or the loss is the result of the theft of such vehicle which is not recovered within 30 days, but property shall not be considered unattended when the Insured is required to surrender the keys of such vehicle to a bailee."

(Emphasis supplied.) *Id.* at 632, 271 N.W.2d at 332. Entry into the locked automobile from which the property was taken had been gained by the use of a "jiggle" key which was later found in the vehicle. As a result, there were no marks of forcible entry. In upholding the lower courts' denials of coverage, the *Cochran* opinion rejected the argument that it would be unconscionable

to enforce a policy provision requiring such marks where other evidence of a burglary is present. The court specifically stated that the "provision requiring visible marks of forced entry is not unconscionable." *Id.* at 634, 271 N.W.2d at 333. The *Cochran* opinion also rejected the argument that the requirement establishes a mere rule of evidence which will not be literally enforced if it is clear the burglary was not "an inside job." *Id.* at 633, 271 N.W.2d at 333. While the cases discussed hereinafter with respect to Western's second ground of appeal do not expressly state that clauses such as that involved in this case are not unconscionable, their holdings so imply.

We turn, then, to Western's second ground of appeal, the trial court's finding that the loss is covered by the policy.

The rule controlling the resolution of the issues presented by that ground is that an insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning. *Swanson v. First Fidelity Life Ins. Co.*, 214 Neb. 654, 335 N.W.2d 538 (1983); *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982); *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982).

As noted in *Great Plains Ins. Co., Inc. v. Kalhorn*, 203 Neb. 799, 803-04, 280 N.W.2d 642, 645 (1979):

> An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.

Accord *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984).

It is true that if an insurance policy is ambiguous, it will be construed in favor of the insured. However, an ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings. *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983). An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Rodriguez v.*

Government Employees Ins. Co., 210 Neb. 195, 313 N.W.2d 642 (1981).

A review of our prior decisions concerning similar policy language is helpful in determining whether the subject language is ambiguous.

Cochran v. MFA Mut. Ins. Co., 201 Neb. 631, 271 N.W.2d 331 (1978), found the policy language cited previously to be unambiguous.

In *Hazuka v. Maryland Cas. Co.*, 183 Neb. 336, 160 N.W.2d 174 (1968), this court held the loss of money from a safe, on which only the inner door had been pried open, was not covered by the insurance policy. The exterior of the safe contained no marks indicating a forcible entry, and the combination lock was neither marked nor damaged. The applicable policy stated:

> " 'Safe Burglary' means (1) the felonious abstraction of insured property from within a vault or safe described in the declarations and located within the premises by a person making felonious entry into such vault or such safe and any vault containing the safe, when all doors thereof are duly closed and locked by all combination locks thereon, provided such entry shall be made by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon the exterior of (a) all of said doors of such vault or such safe and any vault containing the safe, if entry is made through such doors, or (b) the top, bottom or walls of such vault or such safe and any vault containing the safe through which entry is made, if not made through such doors, or (2) the felonious abstraction of such safe from within the premises."

Id. at 339, 160 N.W.2d at 177. The *Hazuka* court, in reaching its decision, held the provision was not ambiguous and noted that not every burglary constitutes a basis for liability; liability attaches only if the burglary meets the requirements of the policy.

The policy in *Grayson v. Maryland Casualty Co.*, 100 Neb. 354, 160 N.W. 85 (1916), excluded from coverage money lost

> "from a combination fire and burglar-proof safe, or from a burglar-proof safe, containing an inner steel

> burglar-proof chest, unless the same shall have been abstracted from the steel or so-called burglar-proof chest contained within the safe, after entry into said chest has been effected by the use of tools or explosives directly thereupon."

Money was stolen from the plaintiff's safe. While a small drill hole was on the dial at the time of trial, there was evidence that no such drill mark was on the dial shortly after the burglary. In any event, the expert witnesses were in apparent agreement that the drill mark could not have assisted in opening the combination lock. This court reversed the lower court and held the policy excluded coverage.

The policy in *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825, 166 N.W. 242 (1917), insured against loss caused by " 'any person or persons who shall have made entry into the safe or safes by the use of tools or explosives thereupon.' " *Id.* at 826, 166 N.W. at 242. Coverage was found to exist because the inner steel doors of a safe had been exploded open.

The policy in question unequivocally requires visible marks on the interior of the premises at the place of exit. There is no other reasonable meaning which can be given the words used, and, therefore, no ambiguity exists which requires construction. The uncontroverted evidence is that no such marks existed. Obviously, then, the loss in question is excluded from coverage.

Summary judgment can only be granted when, among other things, the moving party is entitled to judgment as a matter of law. *Pierce v. City of Ogallala, ante* p. 433, 378 N.W.2d 140 (1985); *Jacobs v. Goetowski, ante* p. 281, 376 N.W.2d 773 (1985).

It follows from the foregoing analysis that Lumbard is not the party entitled to judgment as a matter of law. The judgment of the trial court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT C. NORFOLK, APPELLANT.

381 N.W.2d 120

Filed February 7, 1986. No. 85-045.

1. **Miranda Rights: Confessions: Right to Counsel.** Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of a *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. If a defendant to be interrogated is indigent, the defendant must also be informed that a lawyer will be appointed to represent the defendant.
2. **Miranda Rights: Waiver: Words and Phrases.** In reference to a waiver of the rights designated in the *Miranda* warning, *intelligent* is not synonymous with *prudent*, and intelligence is not equated with wisdom.
3. **Miranda Rights: Waiver.** To determine whether a defendant acted intelligently regarding a waiver of any right designated in the *Miranda* warning, the proper standard is whether a defendant, at the time of the waiver, possessed the capacity to understand and act in response to the *Miranda* warning given by an interrogating officer.
4. **Confessions: Evidence.** The test for determining admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement.
5. **Witnesses: Trial.** A lay witness, when testifying on the basis of firsthand knowledge, can relate specific objective observations of a person's conduct, condition, or behavior, notwithstanding that such witness may not be allowed to offer his opinion as to the person's sanity.
6. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.

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

SHANAHAN, J.

Robert C. Norfolk appeals his conviction for first degree murder after a bench trial in the district court for Douglas County. We affirm.

In May 1984 Norfolk rented a room in the residence of his aunt, Della Jones. On the morning of May 12, after a night of drinking, Norfolk returned to his room, obtained a butcher knife from the kitchen, cut the telephone lines in the house, stabbed Jones, and strangled her to death.

Later on May 12, Jones' niece, Barbara, became concerned about Jones' well-being when Jones neither answered her telephone nor responded to knocks on the front door of her house. Near 4 p.m., Barbara observed Norfolk entering Jones' residence and asked a friend, Larry Nelson, to inquire about her aunt's whereabouts. Nelson confronted Norfolk, who, after stating that Jones had left town around 3 o'clock to visit her sister, drove away in his car. Sometime close to 7:30 p.m., Barbara entered Jones' residence, found Jones lying on the floor, and contacted the police.

On May 13, at approximately 9:30 p.m., a police officer in downtown Omaha noticed that the automobile being driven by Norfolk matched the description of the vehicle associated with the Jones homicide and stopped the Norfolk car. When the officer mentioned that Norfolk was a suspect in a homicide investigation, Norfolk replied, "Do yourself a favor and call a backup." The officer arrested Norfolk, who responded, "Don't shoot. I was on my way down to turn myself in anyway." Later, in the course of his conversation with the arresting officer, Norfolk again mentioned that he was on his way to the police station to turn himself in "for the killing." According to the officer, at the time of the arrest Norfolk seemed "nervous and a little upset" but did not appear to be under the "influence of any drugs or alcohol."

Norfolk was taken to the police station, where, at 10:55 p.m., Officer James C. Wilson informed Norfolk of the *Miranda* rights. After Norfolk orally waived his *Miranda* rights and then signed the standard *Miranda* advisory form used by Omaha police, Wilson commenced interrogation, which lasted more than 2 hours and resulted in Norfolk's oral statement that

he had stabbed Jones, strangled her lifeless, and had intercourse with her. Wilson had told Norfolk that the officer "knew everything," because Wilson had a copy of the autopsy report concerning Jones and "can see it here in the report." In fact, an autopsy report had not been issued at the time of Wilson's remark to Norfolk. Another officer told Norfolk, "Well, maybe you'd feel better if you would tell us everything." After his oral statement Norfolk agreed to give a tape-recorded statement. Wilson again informed Norfolk concerning the *Miranda* rights. At commencement of the recorded interrogation, Wilson commented that the statement to be recorded was for "the official record." Norfolk, at that point and for the first time, requested an attorney. Wilson ignored the request for an attorney and Norfolk's later demand that the recorder be turned off. Throughout the interrogation, Wilson had no difficulty communicating with Norfolk, who appeared to understand all questions asked by Wilson.

The State filed an information charging Norfolk with first degree murder, namely, Norfolk had killed Jones "purposely and of deliberate and premeditated malice or in the perpetration of, or in an attempt to perpetrate a sexual assault in the first degree . . . ." See Neb. Rev. Stat. § 28-303 (Reissue 1979). Norfolk moved to suppress his custodial statements made to police. After an evidentiary hearing on Norfolk's motion, the district court determined that the taped statement, although voluntary, was obtained in violation of Norfolk's *Miranda* rights; therefore, the tape-recorded statement was not admissible during the State's case in chief, but could be used for impeachment purposes as part of the State's rebuttal evidence. The court also concluded, however, that Norfolk had "knowingly and voluntarily" waived the *Miranda* rights concerning Norfolk's oral statement made before his taped statement and that such oral statement, "given voluntarily in compliance with the Miranda rights," was thereby admissible for the State's case in chief.

Before trial Norfolk notified the State of his intention to assert an insanity defense, see Neb. Rev. Stat. § 29-2203 (Cum. Supp. 1984), and then waived his right to a jury trial. At trial the State relied primarily on testimony from officers involved in

Norfolk's interrogation, who recited the oral statement made by Norfolk before he requested an attorney; testimony from Jones' niece, Barbara, and her friend, Leroy Nelson, who described the events leading to the discovery of Jones' body; and testimony from the investigating officer, who, when describing the interior of Jones' residence, testified that the cords of two telephones had been cut. The State also called Carol Quiroz and Norfolk's former employer, Richard Ogden, as witnesses to testify about certain aspects of Norfolk's behavior. Quiroz had been acquainted with Norfolk for 2½ years and was a tenant at the apartment house where Norfolk lived before he rented from Jones. Ogden had employed Norfolk for approximately 5 months. When the prosecutor asked Quiroz whether she was aware of Norfolk's having any "delusions" or whether she had observed Norfolk "hallucinating," "seeing things," or "hearing voices," Norfolk's counsel objected that the question called for a conclusion "[Quiroz] is not qualified to answer." The court overruled the objection and Quiroz answered, "No." Ogden was asked whether he was aware of Norfolk's having "hallucinations or delusions" or whether he had observed Norfolk "talking to himself at any time." Over Norfolk's objection that the witness was "not qualified to talk about hallucinations and delusions," the court allowed Ogden to give his answer, "No." Finally, the State called Dr. Blaine Roffman, a forensic pathologist, who had performed the Jones autopsy and who testified that Jones' body had incurred numerous "contusions and abrasions," some superficial "stab wounds or lacerations," and "hemorrhages in the posterior portion of the pharynx and in the superior portion of the trachea and around the vocal chords." Based upon such observations, Dr. Roffman concluded that Jones died as a result of "[a]sphyxiation secondary to [manual] strangulation."

To support his insanity defense Norfolk called two psychiatrists, Dr. David Kentsmith and Dr. Bruce Gutnik, both of whom testified that Norfolk was in a psychotic state at the time of the Jones homicide, unable to differentiate right from wrong and unable to control his actions. Dr. Gutnik, in particular, testified that "for at least a period of 24 to 36 hours

in there, something was definitely very psychotic about this gentleman." To rebut testimony from Norfolk's psychiatrists, the State called Dr. Emmet Kenney, who expressed his opinion that Norfolk was able to distinguish right from wrong, was sane at the time of the homicide, and was "feigning" mental illness.

At the conclusion of all evidence, the district court found Norfolk guilty of first degree murder and, later, sentenced him to life imprisonment in the Nebraska Penal and Correctional Complex.

Norfolk claims three prejudicial errors occurred at trial: (1) The oral, nonrecorded custodial statement was improperly admitted into evidence; (2) The lay witness' testimony concerning Norfolk's "mental state" was improperly admitted as evidence; and (3) The evidence is insufficient as a matter of law to support a finding of guilt for first degree murder.

Norfolk's assertion of error in admitting into evidence his custodial oral statement has two aspects—deficiency in the warning required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and lack of voluntariness.

Norfolk contends that any apparent waiver of his right to remain silent resulted from his mistaken belief that a custodial oral statement was not "official," that is, a belief that an oral statement was not admissible as evidence to convict a defendant. To buttress his position, Norfolk emphasizes that as soon as he realized his statement being made during the tape-recorded interrogation was a part of the "official record," he requested a lawyer and demanded that the tape recorder be turned off. His actions during the tape-recorded interrogation, Norfolk argues, show his prior lack of appreciation that his oral statement would be evidence against him at trial. Norfolk, therefore, maintains that such circumstances preclude an intelligent waiver of his right to remain silent.

Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the

defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. *Miranda v. Arizona, supra.* If a defendant to be interrogated is indigent, the defendant must also be informed that a lawyer will be appointed to represent the defendant. *Miranda v. Arizona, supra.* In *Miranda* the U.S. Supreme Court emphasized the need to protect integrity of a suspect's waiver and noted a waiver is not simply a "a preliminary ritual to existing methods of interrogation," but is "fundamental with respect to the Fifth Amendment privilege." *Miranda, supra* at 476. In stressing that a waiver must be knowingly and intelligently made, the U.S. Supreme Court has enunciated that when a custodial statement is obtained without the presence of a defendant's attorney, a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda, supra* at 475.

Any question involving an effective waiver of the *Miranda* rights necessarily involves consideration of two different problems—whether the waiver is the product of improper external influence on a defendant and whether a defendant possessed a certain degree of awareness or understanding regarding a right and a decision to forgo that right. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193 (1977).

As far as our research indicates, the U.S. Supreme Court has not articulated a definition of *intelligence* in reference to a defendant's constitutionally acceptable waiver of a right regarding criminal prosecutions. Whether a defendant has "intelligently" waived the *Miranda* rights has frequently arisen in situations involving an alleged physical or mental condition preventing a defendant's comprehension of the *Miranda* warning administered by law enforcement personnel. In such cases, courts, examining all the circumstances surrounding an alleged waiver, have focused specifically on a defendant's ability to understand the rights designated in the *Miranda* warning and acknowledge such understanding by communication with an interrogator. For example, in *Fryer v. State*, 325 N.W.2d 400 (Iowa 1982), the defendant, possessing

an IQ in the "dull-normal range," contended that he lacked the requisite mental capacity to understand his rights and, thus, was incapable of waiving his rights. The Iowa Supreme Court rejected that contention, stating that "the facts and circumstances indicate that Fryer was *capable of understanding* and knowingly waiving his rights." (Emphasis supplied.) *Id.* at 409. Similarly, in *Howard v. State*, 458 A.2d 1180 (Del. 1983), the Delaware Supreme Court rejected the defendant's claim that his intoxication rendered his waiver ineffective, holding the defendant "had sufficient *capacity* to know what he was saying and to have voluntarily intended to say it." (Emphasis supplied.) *Id.* at 1183. In *State v. Finson*, 447 A.2d 788, 792 (Me. 1982), the Supreme Judicial Court of Maine stated the general proposition as follows: "A person [allegedly suffering from a mental deficiency] is not necessarily incapable of waiving his constitutional rights or giving a voluntary statement, if despite the [deficiency] he is aware and *capable of comprehending* and communicating with coherence and rationality." (Emphasis supplied.) See, also, *Moore v. Ballone*, 658 F.2d 218, 229 (4th Cir. 1981) (waiver not intelligent where State failed to establish that defendant was "capable of understanding his rights"); *Matter of Sanders*, 56 Or. App. 724, 643 P.2d 384, 387-88 (1982) (individual waiving right must possess " 'capacity to understand fully the nature of the right he is waiving . . .' "). In *State v. Lamb*, 213 Neb. 498, 505, 330 N.W.2d 462, 467 (1983), this court held a defendant's waiver to be effective where the defendant appeared to "know what he was doing" and "was capable of making voluntary and intelligent responses."

Norfolk does not argue that he suffered from a deficiency in mental capacity at the time of the waiver under examination. Such argument would not withstand the clear record in this case. Rather, Norfolk argues he was mistaken about the evidentiary value of his custodial oral statement to the interrogating officer. Generally, in situations where a defendant has claimed a mistake or misapprehension in the evidentiary value or effect of a custodial statement, courts have been less concerned with a defendant's construction or interpretation of the *Miranda* warning and more concerned whether an

interrogating officer has a duty to inform a defendant about consequences of a custodial statement.

In *Harris v. Riddle*, 551 F.2d 936 (4th Cir. 1977), for instance, the defendant made incriminating oral statements while in custody and after expressly waiving the *Miranda* rights. On appeal defendant claimed that at the time of his waiver "[h]e erroneously believed that an oral confession would not be harmful to him and could not be used against him." *Id.* at 938. After noting the defendant had thrice been advised of his *Miranda* rights, the Fourth Circuit Court of Appeals stated at 938:

> Yet it does seem likely that if Lt. Austin had said to Harris, "Look, you are making a mistake; what you tell me *will* be used against you even though I do not write it down and you do not sign it, and you do not have to shoot the gun to be guilty," such a warning would have been grasped and understood and perhaps heeded. But *Miranda* does not put upon the police the burden of explaining the rules of evidence and the substantive criminal law.

The court concluded that the defendant had made an "intelligent" waiver.

A misunderstanding about the evidentiary effect of an oral statement existed in *Wantland v. State*, 45 Md. App. 527, 413 A.2d 1376 (1980), where the defendant argued "he did not know that an *oral statement* could be used against him in court," which misunderstanding "precluded his having made a voluntary, knowing, and intelligent waiver." *Id.* at 535, 413 A.2d at 1382. The Maryland court was not persuaded by that argument and held:

> We decline to adopt the view that *Miranda* requires a waiver to be wisely made. Were we to follow that path, the police would be forced into the role of counsel for an accused. *Miranda* does not require that an accused be apprised of the evidentiary value of a statement.

Id. at 538, 413 A.2d at 1383. As expressed by the New York Court of Appeals: "Although a suspect must be apprised of his or her rights, providing a general legal education is not the business of the police or the courts." *People v. Williams*, 62 N.Y.2d 285, 289, 465 N.E.2d 327, 329, 476 N.Y.S.2d 788, 790

(1984). See, also, *State v. Wurm*, 32 Wash. App. 258, 647 P.2d 508 (1982); *Albright v. State*, 378 So. 2d 1234 (Fla. App. 1979); *Schilling v. State*, 86 Wis. 2d 69, 271 N.W.2d 631 (1978).

A requirement that a defendant comprehend the consequences of a custodial statement would impose a double duty in interrogation by law enforcement personnel—first, administration of the mandatory *Miranda* warning and, second, valid construction, as well as illustrative explanation, of the contents of the *Miranda* warning, including complete and accurate information bearing on the consummate consequence, namely, admissibility of the custodial statement as evidence at a defendant's trial. Imposing such burdensome responsibility on an interrogating officer would be unwise and impracticable. See, *Harris v. Riddle, supra* at 938 ("average interrogating police officer is not capable" of "explaining the rules of evidence and the substantive criminal law"); *Wantland v. State, supra* at 538, 413 A.2d at 1383 (questioning whether police were "qualified" to instruct the defendant "as to the effect of an oral statement *vis a vis* one that is written").

In reference to a waiver of the rights designated in the *Miranda* warning, *intelligent* is not synonymous with *prudent*, and intelligence is not equated with wisdom. See *Collins v. Brierly*, 492 F.2d 735 (3d Cir. 1974). In *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973), the court applied the "capacity" standard in response to the defendant's argument that misapprehension of an oral statement's effect rendered a waiver ineffective. The court found that the government had met its burden of proving an intelligent waiver by showing that the defendant "was *capable* of understanding" the *Miranda* warning. (Emphasis supplied.) *Id.* at 896. Recognizing that "even where capacity exists, it is sometimes true that understanding can be faulty or mistaken," *id.* at 897, the court in *Frazier* rebuffed the notion that a misunderstanding about consequences, by itself, provides a valid reason to exclude a defendant's custodial statement.

To determine whether a defendant acted intelligently regarding a waiver of any right designated in the *Miranda* warning, we hold that the proper standard is whether a defendant, at the time of the waiver, possessed the capacity to

understand and act in response to the *Miranda* warning given by an interrogating officer. 1 W. LaFave & J. Israel, Criminal Procedure § 6.9(b) (West 1984). By requiring such capacity as the determinant of an effective waiver, we ensure that the waiver requirement is not reduced to a "preliminary ritual to existing methods of interrogation." *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In rejecting a requirement that a defendant must possess *actual* understanding of the consequences of a waiver after the *Miranda* warning, we avoid imposing upon the police the obviously impractical and unrealistic burden of supplying a legal interpretation of the *Miranda* warning and thus engendering the necessity of a case-by-case judicial determination of the length and breadth of an accused's actual comprehension of all consequences attendant to a custodial statement. Under all the circumstances of this case, the district court's finding, namely, that Norfolk's waiver, preceding his oral statement, was "intelligently" made, is not clearly wrong and cannot be set aside. See *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982).

Norfolk next maintains that his custodial statement was exacted by improper interrogation tactics, namely, Officer Wilson's deceptive reference to a nonexistent autopsy report concerning the victim, Jones, and the officer's suggestion that Norfolk would "feel better" if he would "tell us everything." Norfolk argues that such conduct rendered his statement involuntary and, hence, inadmissible at Norfolk's trial.

During the course of his interrogation, Norfolk acknowledged committing certain acts tending to prove the ultimate fact of his guilt for the Jones murder; thus, his various custodial statements constituted admissions. See *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). The State bears the burden of proving that a defendant's statement was voluntarily made, before that statement is admissible as evidence against the defendant. See *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984). In determining whether the State has satisfied its burden, a court examines the totality of the circumstances to ascertain whether the defendant's statement "is 'the product of a rational intellect and a free will.' " *State v.*

Bodtke, supra at 510, 363 N.W.2d at 922. A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless such determination is clearly erroneous. *State v. Hunt, supra.*

Officer Wilson's deliberately deceptive statement regarding the autopsy report is an interrogation tactic which may be inconsistent with popular notions about a professional and procedurally restrained police force and is a type of police practice which is, perhaps, infrequent. Nevertheless, the test for determining admissibility of a statement obtained by police deception is whether that deception *produced* a false or untrustworthy confession or statement. See, *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983); *State v. Stevenson & Jackson*, 200 Neb. 624, 264 N.W.2d 848 (1978). Placed in the context of Norfolk's willingness to talk at the time of his arrest, the relative brevity of the interrogation, and the absence of other threatening or obviously coercive interrogation tactics, the isolated statement regarding the autopsy report does not appear to have produced a false or untrustworthy statement. Although a confession or statement to be admissible as evidence must not have been obtained as the result of "any direct or implied promises, however slight, nor by the exertion of any improper influence," *State v. Jones*, 208 Neb. 641, 646, 305 N.W.2d 355, 359 (1981), the officer's comment that Norfolk would "feel better" if he "would tell us everything" does not warrant overturning the district court's finding that Norfolk's statement was voluntarily made. Generally, "[a]n interrogation tactic in which the police appear to befriend the defendant" does not, by itself, render the confession involuntary. See *State v. Erks, supra* at 305, 333 N.W.2d at 779. Examining all the circumstances surrounding interrogation of Norfolk, the district court apparently concluded that the officer's attempt to "befriend" Norfolk did not improperly influence Norfolk's statement showing guilt for the Jones homicide. Cf. *State v. Erks, supra* (affirmance of the district court's decision to suppress confession where defendant, suspected of a sexual assault, was informed that confessing would protect himself and his family from public embarrassment). The district court's finding and determination

that Norfolk's statement was voluntarily made was not clearly erroneous and is, therefore, affirmed.

Norfolk claims the district court erred in allowing Carol Quiroz and Richard Ogden to testify with respect to whether Norfolk had, in their presence, experienced delusions or hallucinations. Norfolk relies upon *State v. Myers*, 205 Neb. 867, 869, 290 N.W.2d 660, 661 (1980), in which this court stated as follows:

> "Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion." [Citing *Torske v. State*, 123 Neb. 161, 242 N.W. 408 (1932).]

In *Myers* the nonexpert witness had "known the defendant for some 15 years, having observed the defendant in various emotional states." *Id.* at 869-70, 290 N.W.2d at 661. Norfolk claims that Quiroz and Ogden had no such "intimate personal acquaintance" with Norfolk and, thus, could not testify concerning his mental state.

Norfolk's argument fails to take into account the difference between the opinion testimony countenanced in *Myers* and the testimony adduced in the present case. In *Myers* the lay witness was allowed to testify that the defendant was not insane at the time he perpetrated the criminal act. In the case before us Quiroz and Ogden commented upon certain aspects of Norfolk's demeanor personally observed by those witnesses. Neither witness offered an opinion about Norfolk's sanity. Whatever degree and duration of personal contact may be sufficient to permit testimony about a defendant's sanity in accordance with *Myers*, the testimony adduced by the State from lay witnesses in the present case was not an opinion regarding Norfolk's sanity and, hence, does not fall within the ambit of the principle enunciated in *Myers*. See *People v Allen*, 90 Mich. App. 128, 282 N.W.2d 255 (1979) (rule governing admission of lay testimony as to sanity does not apply to a witness who simply describes defendant's manipulative character).

Since Quiroz and Ogden did not offer an opinion regarding Norfolk's sanity, but testified concerning their observations of Norfolk's conduct or behavior in terms of false perceptions or mistaken ideas, admissibility of such testimony is controlled by the personal knowledge requirement prescribed by Rule 602, Nebraska Evidence Rules. Neb. Rev. Stat. § 27-602 (Reissue 1979). See 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 602[03] (1985). In contrast to *State v. Myers, supra*, Rule 602 requires only that the proponent of the witness' testimony introduce evidence "sufficient to support a finding that [the witness] has personal knowledge of the matter." § 27-602. Ogden, as Norfolk's employer, and Quiroz, as an acquaintance and cotenant at Norfolk's apartment house, had sufficient personal knowledge to testify regarding Norfolk's conduct or behavior. A lay witness, when testifying on the basis of firsthand knowledge, can "relate specific objective observations of a person's conduct, condition or behavior," notwithstanding that such witness may not be allowed to offer his opinion as to the person's sanity. *Mason v. United States*, 402 F.2d 732, 738-39 (8th Cir. 1968). The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion. See *Chmelka v. Continental Western Ins. Co.*, 218 Neb. 186, 352 N.W.2d 613 (1984). On the basis of the objection asserted by Norfolk, we find no abuse of discretion by the district court in admitting into evidence the testimony of Quiroz and Ogden.

Finally, Norfolk contends that there was insufficient evidence to support a finding that Norfolk had acted "purposely and with deliberate and premeditated malice" when he killed Jones. See § 28-303(1) (elements of crime of murder in the first degree). "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. Craig*, 219 Neb. 70, 80, 361 N.W.2d 206, 214 (1985). In first degree murder cases where premeditation is an issue, there is a mental process involved,

> namely, the subjective state of the perpetrator, which can be proved by circumstantial evidence. . . . Concerning the element of premeditation, "the time required may be of the shortest possible duration. The time may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed . . . ." [Citation omitted.]

State v. Lynch, 215 Neb. 528, 533, 340 N.W.2d 128, 132 (1983). Taking the view most favorable to the State, the record establishes through Norfolk's confession and the required corroborative evidence introduced by the State, see *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982), that Norfolk obtained a butcher knife from Jones' kitchen, cut the cords of two telephones, entered Jones' bedroom, struck her, inflicted superficial stab wounds on her body, and manually strangled her to death. Such conduct represents circumstances from which the trier of fact could and did draw the inference that Norfolk, purposely and with deliberate and premeditated malice, killed Jones. We conclude there is sufficient evidence to sustain Norfolk's conviction of first degree murder.

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

AFFIRMED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. W.R. LESOING, APPELLANT.

381 N.W.2d 130

Filed February 7, 1986. No. 85-072.

1. **Municipal Corporations: Fees.** Usually, when a municipal corporation has power to make or provide for the making of improvements, it has power to make arrangements to meet the expense thereof. In the absence of express direction by statute, the method to be adopted is within the discretion of the proper municipal authorities.
2. **Administrative Law: Fees.** A legislative body is permitted to delegate to an

administrative officer the power to collect a fee, as long as the fee is clearly limited as to the amount and purpose.

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

Gordon Peterson of Bailey, Polsky, Cada, Todd & Cope, for appellant.

James D. Faimon, Assistant City Attorney, for appellee.

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

KRIVOSHA, C.J.

The appellee, City of Lincoln, filed a petition in the former municipal court of the City of Lincoln alleging that the appellant, W.R. Lesoing, was liable to the city for the costs of backfilling and replacing paving and asphalt after the excavation by Lesoing of a public street in the City of Lincoln. Lesoing, by amended answer, admitted that he had obtained a permit to make an excavation in the public street of the City of Lincoln and that the excavation had been backfilled and the paving and asphalt replaced by the city. As a defense, however, Lesoing alleged, in effect, that the City of Lincoln did not have authority to adopt an ordinance authorizing the collection of such fees. He further alleged that the ordinance, if authorized, was either unconstitutionally vague or an unlawful delegation of legislative authority in that no method for calculating the costs was set out in the ordinance. He concluded by alleging that even if the ordinance was valid, the City of Lincoln failed to follow the ordinance in that the permit issued by the city did not set out the cost of the work, as allegedly required by the ordinance.

Following trial, the municipal court entered judgment for the city and against Lesoing for the full amount sought by the city. Lesoing appealed to the district court for Lancaster County, Nebraska, where the judgment of the municipal court was affirmed. It is from that order which he now appeals to this court, assigning as error the following: (1) The district court erred in finding that the City of Lincoln has authority to enact Lincoln Mun. Code § 14.70.040 (1982) and to assess backfill

and repaving costs against the defendant; (2) The district court erred in finding § 14.70.040 was a constitutional delegation of legislative authority; (3) The district court erred in finding § 14.70.040 was not unconstitutionally vague; and (4) The district court erred in finding that § 14.70.040 does not require the exact amount of the costs be set out in the permit. We have reviewed each of the assignments and believe that the judgment of the district court must be affirmed.

The record discloses that in late 1982 Harold G. Wright Company, a contractor from Blair, Nebraska, received the general contract from the University of Nebraska for construction of the new Wick Alumni Center to be located at 1520 R Street in Lincoln, Nebraska. Lesoing received the plumbing subcontract, which called for connecting the water and sewer lines from R Street to the alumni center on the University of Nebraska campus. This connection required that part of R Street be excavated to reach the water and sewer pipes. Lincoln Mun. Code § 14.70.010 (1982) requires that before any person other than a duly authorized employee or contractor of the City of Lincoln may make any opening, cut, trench, or excavation in or under the surface of any street, such person must first obtain a written permit to do so from the codes administration division of the City of Lincoln. Section 14.70.040 then provides in part:

> The opening and backfill of all cuts, trenches, and excavations shall be done in accordance with the city's standard specifications. The permittee shall notify the department of public works, maintenance division, when the excavation is ready for backfill. All backfill in any cuts, trenches, or excavation beneath any paved or unpaved roadway or beneath any sidewalk shall be placed by the department of public works. The costs and expenses incident thereto shall be collected from the permittee in the manner provided for in the permit.

At the outset we note that while at trial Lesoing raised the issue as to whether the costs charged were reasonable, he has not preserved that question on appeal, and it is thus not before us now. Therefore, we assume, for the purposes of our decision, that there is no issue as to the reasonableness of the charges

made by the City of Lincoln.

Lesoing obtained the necessary permits from the City of Lincoln and made two cuts in R Street. At an appropriate time the cuts were backfilled and repaved by the city, which then billed Lesoing $1,802.07. Lesoing refused to pay, and suit followed.

We turn first to Lesoing's contention that the City of Lincoln has no statutory authority to assess backfill and repaving costs against him. His argument apparently is premised upon the notion that these charges are in reality a "special assessment" and must therefore be assessed against the property benefited. See *Midwest Development Corp. v. City of Norfolk*, 192 Neb. 475, 222 N.W.2d 566 (1974). That simply is not the case. The work that was done at the request of Lesoing was not to confer any special benefit upon the abutting property other or different than that enjoyed by the community generally but, rather, was at the specific request of Lesoing in order to permit him to fulfill his plumbing contract with the University of Nebraska. The backfilling and paving were simply to replace the excavation required by Lesoing in order to permit him to carry out his work under his contract. The instant charge is intended to reimburse the city for costs incurred by it in doing work for and at the request of Lesoing, which the city has no obligation to assume, and is not in any way a tax or assessment requiring specific statutory authorization. The city's authority to control who makes excavations of the streets and who repairs them is clearly authorized by both Neb. Rev. Stat. § 15-255 (Reissue 1983) and by the Lincoln City Charter, art. II, § 2(40) (1985), both of which provide in part that a primary city may "regulate . . . any excavation or obstruction [of] the streets." This general authority to regulate the excavation of the streets was sufficient authority.

In *Jacobs v. City of Omaha*, 181 Neb. 101, 147 N.W.2d 160 (1966), a similar question was raised. There, the statutory language gave the city of Omaha the power to regulate " 'the nature, kind, and manner of constructing streets.' " *Id.* at 104, 147 N.W.2d at 163. This court held that the statute implicitly gave the city the power to regulate changes in streets, including the making of curb cuts or the installation of driveway

approaches and that an ordinance requiring individuals wishing to make a curb cut or to install a driveway approach to acquire a permit and pay a fee was valid and authorized by the statute. Where, as here, the statutes applicable to cities of the primary class, of which Lincoln is one, give the city the power to regulate excavations, it must therefore follow that the city has implicit authority to require contractors to obtain a permit before excavating in a street and to further require the contractor to reimburse the city for the costs of refilling and repaving the excavation once the contractor has finished his work in the street. As noted in 13 E. McQuillin, The Law of Municipal Corporations § 37.57 at 153 (3d ed. 1971):

> Usually when a municipal corporation has power to make or provide for the making of improvements, it has power to make arrangements to meet the expense thereof. . . . [I]n the absence of express direction [by statute] the method to be adopted is within the discretion of the proper municipal authorities.

It seems clear that the City of Lincoln, having the power to backfill and repave excavations for which it has granted permits, is also justified in collecting from the contractor who ordered the work done the costs expended for backfilling and repaving.

Lesoing next contends that § 14.70.040 is an unlawful delegation of legislative authority by the Lincoln City Council. This argument is premised upon the contention that by providing that the costs and expenses incident thereto shall be collected from the permittee in the manner provided in the permit, there is some unlawful delegation of authority from the council to the department of public works. Lesoing argues that nowhere in the ordinance does the Lincoln City Council set out the standards, guidelines, or criteria to be used by the administrative or executive agency in calculating the "costs and expenses." We believe that the words "costs and expenses" are words of common understanding and clearly provide that the executive or administrative branch of the city government is to collect the costs and expenses incurred in performing the work. If the permittee believes he has been improperly charged, he can dispute the amount charged. We cannot perceive any further

guideline that can be required where the ordinance so directly requires the city to collect the "costs and expenses" incident to the work. It seems very clear that the administrative officers are given little, if any, discretion. A legislative body is permitted to delegate to an administrative officer the power to collect a fee, as long as the fee is clearly limited as to the amount and purpose. See *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979). For this reason this assignment must be rejected.

Lesoing's third assignment of error is that § 14.70.040 is unconstitutionally vague. We are unable to perceive how one can contend that the ordinance is vague. It provides in clear and precise language what is to be done by both the city and the permittee. It is clear beyond question that § 14.70.040 means what it says: Permittees must reimburse the City of Lincoln for backfilling and repaving. Lesoing's belief that he has been overcharged, an issue which we have noted he does not bring before us, does not make the ordinance void for vagueness. See, *CSC v. Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973); *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980). The ordinance simply is not vague.

That leaves us with Lesoing's last assignment, to the effect that the city failed to comply with § 14.70.040. This argument is based upon his contention that the permit, when issued, must set out the amount of the costs to be reimbursed. The specific language in that section upon which Lesoing relies is as follows: "The costs and expenses incident thereto shall be collected from the permittee in the *manner provided for in the permit*." (Emphasis supplied.) We see nothing in the ordinance which requires that the permit set out the *amount* of the costs and expenses, but only the "*manner*" in which they shall be collected. The "manner" implies the way in which they shall be collected. The permit recites that the permittee "agrees to pay all costs of repairing said sidewalk or paving as determined by the Engineering Department of the City of Lincoln . . . ." We believe that that sets out the manner in which the costs and expenses are to be paid, to wit, as determined by the engineering department of the City of Lincoln. Obviously, the city cannot determine the costs before the work has been done; therefore,

to insist that a permit cannot be issued unless the city commits itself in the permit to the costs is to ignore the purpose of the ordinance. The purpose is to reimburse the city for its costs, a matter which cannot be determined until after the work has been completed.

We believe that the decision of the district court affirming the judgment of the municipal court was in all respects correct, and the judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF M.W.M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.F.M. AND J.M.M., APPELLANTS.

381 N.W.2d 134

Filed February 7, 1986. No. 85-122.

1. **Parental Rights.** An order terminating parental rights must be based on clear and convincing evidence.
2. **Parental Rights: Appeal and Error.** An order terminating parental rights is reviewed in this court de novo on the record, giving weight to the fact that the trial court observed the parties and witnesses and judged their credibility.
3. **Parental Rights.** A primary consideration in a case involving termination of parental rights is the best interests of the child.
4. _____. In entering an order of termination of parental rights, the court may properly take into consideration all of its earlier proceedings in the case.

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

James H. Monahan, for appellants.

Donald L. Knowles, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

Kenneth P. Weiner of Wall, Wintroub & Weiner, guardian ad litem.

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

GRANT, J.

The natural parents of M.W.M., a child under 18 years old, appeal the order of the separate juvenile court of Douglas County, Nebraska, terminating their parental rights. Appellants assign three errors: (1) That the order was contrary to law; (2) That the court erred in "finding that they were unfit parents"; and (3) That the court erred in failing to dismiss the case when 3 years had elapsed between the time "that the Court found the Appellants unfit, and the Court's action terminating their parental rights." We affirm.

An order terminating parental rights must be based on clear and convincing evidence and is reviewed in this court de novo on the record, giving weight to the fact that the trial court observed the parties and witnesses and judged their credibility. *In re Interest of M.L.B., ante* p. 396, 377 N.W.2d 521 (1985); *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984).

The first two assignments of error may be considered together, as they contest the sufficiency of the evidence to support the court's order of termination. With regard to the sufficiency of the evidence before the court, the record shows the following.

In February 1974 Child Protective Services in Douglas County received a referral concerning the alleged filthy condition of the home maintained by appellants and the delayed development of the child born December 24, 1973. From 1974 to 1977 Child Protective Services caseworkers, the Visiting Nurse Association, ENCOR (Eastern Nebraska Community Office of Retardation), the Parent-Child Center, and other agencies worked with appellants in attempts to correct the home condition.

On August 5, 1977, a petition was filed in the Douglas County Separate Juvenile Court seeking termination of the parental rights of R.F.M. and J.M.M. On November 22, 1977, the court entered an order finding that the child was one within the meaning of Neb. Rev. Stat. § 43-202(1) (Cum. Supp. 1976), which then provided that the juvenile court had exclusive original jurisdiction of any child under 18, "who is homeless or destitute, or without proper support through no fault of his parent . . . ." The order placed the child in foster care and set out

a plan for the rehabilitation of the parents and ordered the parents to comply with that plan. The record does not show the specific disposition of this 1977 proceeding, but evidence indicates that the child was returned to appellants' home in August of 1978.

On December 15, 1981, a petition was filed in the same court in a new case concerning M.W.M. This petition alleged that the child was one within the meaning of Neb. Rev. Stat. §§ 43-202(2)(b) and 43-209(2) (Reissue 1978), in that the child lacked proper parental care because of the faults or habits of his natural parents. The petition alleged, in part, that appellants were at fault in that:

> A. The residence of . . . said child, is frequently in a state of disarray, to wit: Garbage, trash, rubbish in large quantities are strewn throughout the yard; junk, trash, rubbish, dirty clothes, garbage are strewn throught [sic] the residence in such large quantities that a pathway is required for movement through the residence; the kitchen is covered with trash, junk, rubbish, decayed food on the floor, cabinets, pots, pans and dishes; a putrid odor permeates the entire residence; the residence is infested with roaches and fleas.
>
> . . . .
>
> C. Said child has been observed in school wearing clothes which were infested with cockroaches.
>
> . . . .
>
> E. On or about November 25, 1981, said child was removed from the residence of [R.F.M.] and [J.M.M.] by law enforcement authorities after a determination by said officers that the residence was unfit for human habitation.

The petition prayed that the court render appropriate orders for the care of the child and terminate the parental rights of appellants.

A detention hearing was held on January 4, 1982, pursuant to Neb. Rev. Stat. § 43-205.04 (Reissue 1978). Appellants were present with counsel. Two witnesses testified on behalf of the State, and R.F.M. testified on behalf of appellants. Martha Husebo, a police officer with the juvenile court unit of the

Omaha Police Department, testified that she went to the home of appellants on November 25, 1981, regarding a complaint from school authorities that M.W.M. was coming to school in a filthy condition with cockroaches on him, which precipitated giving the child a bath at school. The child's father let the police officer into the home. The officer testified that the house was "littered with trash wall to wall to a point where it had a path about [12 to 18 inches] wide to walk through the entire house in." The police officer then called for the identification bureau to take pictures of the "horrible mess" she observed. These pictures were received in evidence and show the condition of the home to be in the condition described by Officer Husebo. The officer testified that she did not consider the home "an inhabitable and sanitary environment for a child" and that "a child certainly shouldn't have to put up with this. The child didn't create it." The officer told the appellants that she was taking the child and that they should "start cleaning up this filthy mess."

Jan Rashid, a caseworker with Child Protective Services, testified that after she had been refused entry to appellants' home on a previous day, she returned to make a scheduled visit on November 24, 1981. On that day the caseworker entered the house with J.M.M. through the back door. She testified that she "made it through half the kitchen, but the stench of the house drove me back outside. It was terrible, the combination of urine, decayed human feces. It was an ungodly stench." The caseworker told J.M.M. that the Omaha Police Department would be called. Appellants refused to permit a cruiser officer inside the house, and the following day Officer Husebo began her investigation described above.

On December 1, 1981, appellants went to the office of Rashid. Appellants stated they had hired a woman to clean the house and had had some plumbing repaired. It was agreed that the caseworker should visit the house the next week. This visit was postponed by appellants until December 15. On this visit Rashid testified that the situation was improved, but it was "still very, very filthy, very, very infested with bugs." She further testified, "I watched [J.M.M.] make some sandwiches for [R.F.M.]. It turned my stomach. There were cockroaches

running around on the cutting board." On cross-examination this witness testified that after the first court case involving these parties was terminated in August of 1978, the child's situation was again referred to Child Protective Services in September of 1978. Child Protective Services kept that referral open until 1980 when the case was closed. During that time, the caseworkers' reports showed consistently filthy home conditions.

R.F.M. testified at this hearing to the effect that the parents' home had been cleaned up considerably by December 29, 1981. When asked about "the continual filthy conditions that have existed since 1974 or have been reported since 1974 until 1982," he testified that he had no money to hire anyone to come in and help him clean. He then admitted that services had been offered to him, but did not explain his need for professional cleaning help. He also testified that he was employed as a security guard, that his wife had not had any ill health, but that M.W.M. had epilepsy.

At the conclusion of this detention hearing, the court placed the child in foster care and ordered psychological and psychiatric testing for the child, pending an adjudication hearing, which was held on February 11, 1982.

At that hearing the parents were present with their counsel. Before any further evidence was adduced, the parents admitted certain of the allegations set forth in the petition filed in the juvenile court on December 15, 1981, in this case. Appellants specifically admitted paragraphs A, C, and E of that petition as set out above. Before accepting appellants' pleas of admission to those facts, the court asked each of the parents if the recited facts were true and if each of them knew that by admitting those facts the court could terminate his or her parental rights. Each of the parents stated that each understood and made such admissions freely. The court then found that M.W.M. was a child as defined in §§ 43-202(2)(b) and 43-209(2) and took under advisement the question of the termination of the parental rights of appellants.

The above recital sets out the facts before the court when the order terminating appellants' parental rights was made on January 9, 1985. Appellants contend that the evidence before

the court was not sufficient to support the court's order. In support of their contention appellants state in their brief at 5, "Mr. and Mrs. [M.] were determined [by the court] to be unfit parents because they were not very good at house keeping. . . . Their sole transgression is that their housekeeping and lifestyle is not socially acceptable."

In *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981), we set out the general proposition that we are not ready to terminate parental rights solely upon the lack of good housekeeping standards. We do not depart from that position. In our review of this case, however, the facts go far beyond consideration of good housekeeping. Without setting out further the factual details referred to above, we hold that the evidence before the court was clear and convincing and fully supports the court's finding that appellants' parental rights should be terminated. The facts show clearly that the court was not faced with poor housekeeping or an acceptable difference in lifestyles but, rather, a situation presenting the question whether this child should live as a human being or as a subhuman creature. The juvenile court's order was fully supported by the facts and by the law. See *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979). We further note that consideration of the best interests of the child fully supports the court's order of termination. A primary consideration in a case involving termination of parental rights is the best interests of the child. *In re Interest of M.L.B.*, *ante* p. 396, 377 N.W.2d 521 (1985). The effect on a child of being sent to school so infested with cockroaches as to require bathing at school cannot be measured. No child should be required to endure such humiliation, to say nothing of the personal hygiene problems involved.

Insofar as appellants contend that their parental rights should not have been terminated without allowing the parents an opportunity for rehabilitation, neither the law nor the facts support their position. The State is not required to provide an opportunity of rehabilitation before terminating parental rights, although the court may choose to do so. *In re Interest of M.L.B.*, *supra*; *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981). The facts of this case show that

between 1974 and the filing of these proceedings on December 15, 1981, appellants were provided time and help in the rehabilitation of their home. In 1977 a specific order of rehabilitation was offered to appellants. They have chosen not to change their way of living since 1974 and cannot now be heard to complain about the lack of a chance to change.

We find there was more than sufficient evidence to support the court's order terminating appellants' parental rights.

Appellants' remaining contention is that the court erred in failing to dismiss this case "when three years had elapsed between the time that the Court found Appellants unfit, and the Court's action terminating their parental rights." We determine that, in the procedural posture of this case, the court did not err.

As set out above, after a detention hearing on January 4, 1982, and a hearing on February 11, 1982—at which hearings the State adduced the evidence set out above, and appellants agreed the facts were true—the parties returned to court for a further hearing on March 23, 1982. On that day appellants, with their counsel, and the guardian ad litem again appeared before the court and announced that appellants had signed a relinquishment for purpose of adoption of the child. The court interrogated the parents concerning this relinquishment and then entered its order continuing the case for 9 months "pending completion of adoption."

On June 1, 1982, the appellants, through new counsel, filed an "Application for Hearing" alleging that the relinquishment was signed "under the threat of termination of parental right" and was not voluntary. Appellants, with their new counsel, appeared again before the juvenile court on June 28, 1982, and asked the court for leave to adduce evidence to substantiate the claims in their motion. The juvenile court refused to entertain a hearing on the voluntariness of the relinquishment, permitted appellants to withdraw their motion, and continued the matter for 30 days.

Appellants then filed another motion, requesting that the court "with or without further hearing rule on termination of their parental rights, or in the alternative that the Court dismiss the case." A hearing was held on this motion on July 28, 1982.

At this hearing appellants stated to the juvenile court that the state Department of Public Welfare refused to return the relinquishment which the parents had signed at the hearing of March 23, 1982, and which the appellants had attacked, as being involuntary, in their June 1, 1982, motion. The court stated its position that the voluntariness of the relinquishment and the legal disagreement between appellants and the State had to be determined in another court and that, pending such proceedings, the juvenile court would not dismiss this case.

The validity of appellants' relinquishment was contested in a habeas corpus proceeding in the district court for Douglas County. The relinquishment was finally determined, in this court, to be involuntary and therefore invalid. *McCormick v. State*, 218 Neb. 338, 354 N.W.2d 160 (1984).

After the mandate in that case was issued, the parties again appeared before the juvenile court on January 8 and 29, 1985, for determination as to the termination of appellants' parental rights. The court had retained jurisdiction of the case and that issue since March 23, 1982. The guardian ad litem began adducing evidence at the January 8, 1985, proceeding, when the proceeding was interrupted. The guardian ad litem then withdrew exhibits which had been marked and substituted certified copies of portions of the 1977 proceedings involving the parents and child. The court then recited the evidentiary record before the court, including the appellants' pleas of admission at the February 11, 1982, hearing, to the facts as set out above, and appellants' counsel's motion to dismiss. The court then stated:

> It's my understanding, now, you're all prepared at this time to submit the case based on those facts with the admission of today's motion by Mr. Monahan, which was [overruled] and the receiving of the certified copies of a previous record before Judge Moylan of this Court in 1977, I believe; is that correct, gentlemen?

All counsel, including appellants' counsel with appellants present, specifically agreed to the submission of the case on that basis.

An examination of the record in this case shows that the delay in this case between March 23, 1982, and the further

proceedings in January 1985 was precipitated solely by appellants. The appellants' execution of a relinquishment on March 23, 1982, and their subsequent legal attacks against that relinquishment forestalled further evidence by the State on the issue of termination of appellants' parental rights. Facts had been adduced at the detention hearing of January 4, 1982, which, when coupled with the parents' admissions at the hearing of February 11, 1982, were far more than sufficient to terminate parental rights.

When the matter was submitted to the court on January 8, 1985—by agreement of counsel with no further evidence adduced—the court was free to consider the entire proceedings before it. In *State v. Norwood*, 203 Neb. 201, 204, 277 N.W.2d 709, 711 (1979), we stated: "The court properly took into consideration all of its earlier proceedings. The matter before the juvenile court was a continuation of the same proceeding."

In this case the January 8, 1985, hearing was a continuation of the proceeding begun on December 15, 1981. That hearing had been interrupted and delayed by appellants' actions, set out above. The juvenile court was delayed in its determinations by appellants alone. When the parties agreed to submit the case to the court on the 1977 proceedings, the 1982 hearings, and appellants' motion to dismiss, the court did not err in entering its termination order of January 9, 1985.

AFFIRMED.

BERNIECE E. MORRIS, APPELLANT, V. GREGG F. WRIGHT, DIRECTOR OF THE DEPARTMENT OF HEALTH, STATE OF NEBRASKA, APPELLEE.

381 N.W.2d 139

Filed February 7, 1986. No. 85-188.

1. **Administrative Law: Actions: Final Orders: Statutes.** An administrative proceeding is a "pending action," within the meaning of Neb. Rev. Stat. § 49-301 (Reissue 1984), when the agency's final order is rendered.
2. **Administrative Law: Final Orders: Jurisdiction.** The power of an administrative

agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has expired.

3. **Administrative Law: Proof.** One who sought to be certified as qualified to practice clinical psychology as an existing practitioner under the provisions of Neb. Rev. Stat. § 71-3836 (Cum. Supp. 1978) had the burden of proving engagement in the full-time practice of clinical psychology as of December 1, 1976.

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

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

Robert M. Spire, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

PER CURIAM.

The appellee, director of the Department of Health, through the department's predecessor, the Board of Examiners of Psychologists, denied the application of the appellant, Berniece E. Morris, a doctor of education licensed as a psychologist, to be certified as qualified to practice clinical psychology by virtue of being an existing practitioner. Dr. Morris then sued the board in district court, seeking a vacation of the denial and an order directing the requested certification. The district court dismissed Dr. Morris' petition. Dr. Morris' assignments of error in this court concern the district court's evidentiary rulings and its determination that its scope of review was limited to determining whether the administrative denial was arbitrary, capricious, or unreasonable. The director questions the jurisdiction of the district court, and consequently of this court, claiming that no contested hearing was had and that the board's decision was not final. We affirm.

Dr. Morris applied for the aforesaid certification on May 1, 1979, under the provisions of Neb. Rev. Stat. § 71-3836 (Cum. Supp. 1978), which provided:

> After July 1, 1979, no licensed psychologist shall represent himself or herself as qualified to practice clinical psychology unless such psychologist has been certified by

> the board as so qualified. Any licensed psychologist who was engaged in the full-time practice of clinical psychology as of December 1, 1976, and who has had two years of full-time clinical experience may apply not later than July 1, 1979, for certification without examination on the basis of his or her previous experience and licensure.

The statute is now found at Neb. Rev. Stat. § 71-1,226 (Cum. Supp. 1984) and was amended effective July 19, 1980, at which time the word "department" (meaning Department of Health) was substituted for the word "board." 1980 Neb. Laws, L.B. 958.

On her application Dr. Morris stated that from 1973 on she held the position of clinical supervisor and instructor in human services at Southeast Community College. She described this work as "[t]eaching college students academic psychology and technical communication skills; clinical supervision in mental health services, multidiplinary [sic] teams, multiple handicapped services, etc." The application form also recited that she conducted a private practice which included counseling on personal problems, marital concerns, and decisionmaking, as well as consultation on learning problems.

At its June 4, 1979, meeting, which Dr. Morris did not attend, the board decided to ask Dr. Morris for additional information. Dr. Morris thereupon caused her supervisor at Southeast Community College, Dr. Donald Holm, to write a letter to the board on her behalf. Dr. Holm stated therein that Dr. Morris taught various classes at Southeast Community College, including gerontology, abnormal psychology, group skills, basic casework skills, and beginning and advanced transactional analysis. Dr. Holm also stated that Dr. Morris spent approximately 15 hours per week supervising students at such sites as Lancaster Manor and the acute care unit at the Lincoln Regional Center. Dr. Holm further opined that Dr. Morris uses the skills expected of a clinical psychologist.

In addition, Dr. Morris wrote the board a letter in which she basically described her supervision of students, the assessment techniques she uses, and her consultations with other psychologists. By stipulation the parties agreed that none of the

Southeast Community College students Dr. Morris supervised on December 1, 1976, or the 2 years immediately preceding that date were psychology majors or graduate students.

By a letter dated January 2, 1980, Dr. Morris was notified that the board would meet on January 11, 1980, and would review her application for clinical certification at that time. At this meeting, which Dr. Morris did not attend, the board unanimously decided to not grant Dr. Morris clinical certification, since she did "not appear to have been engaged in the full-time practice of clinical psychology as of December 1, 1976." Dr. Morris was informed of the board's decision by a letter dated January 17, 1980, which she received the following day.

On January 26, 1980, Dr. Morris telephoned Dr. Margaret Krusen, the board's chairwoman, questioning the denial. Dr. Krusen told Dr. Morris that she could submit further information which the board would consider at its next meeting. Dr. Morris elected instead to institute the subject suit.

The transcript does not contain the initial petition Dr. Morris filed in the district court and does not tell us when that petition was filed. However, since she received the board's notice of denial on January 18, 1980, the latest she could have seasonably initiated suit in the district court was February 18, 1980, the 17th being a Sunday. Neb. Rev. Stat. § 71-3823 (Cum. Supp. 1978). Since there is no claim that her filing was not timely nor that proper service was not obtained, we assume that Dr. Morris' initial petition was filed on or before February 18, 1980, and that she obtained appropriate service of summons upon it. Prior to and on February 18, 1980, § 71-3823 provided:

> Any person who feels aggrieved by reason of the suspension or revocation of his or her license, the denial of certification, or of the reprimand may file suit within thirty days after receiving notice of the board's order in the district court of the county of his residence, to annul or vacate the order of the board. The suit shall be filed against the board as defendant, and service of process shall be upon either the chairman or the secretary of the board. The suit shall be tried by the court without a jury

> and shall be a trial de novo, but the burden of proof shall be upon the plaintiff assailing the order of the board. The judgment of the district court may be appealed to the Supreme Court of Nebraska in the same manner as other civil cases.

Effective July 19, 1980, the foregoing statute was amended so as to substitute the director of the Department of Health for the board and to designate said director as the defending party. The language concerning the district court's standard of review, however, remained unchanged. 1980 Neb. Laws, L.B. 958. The statute was repealed effective February 24, 1984, by 1984 Neb. Laws, L.B. 481.

Dr. Morris filed a second amended petition on September 8, 1981, and named the then director of the Department of Health as the defendant. Subsequently, the current director was substituted as the defendant. Dr. Morris alleges in her operative petition, insofar as is material to her assignments of error in this court, that the board's denial was without authority, as she made timely application under § 71-3836, was a licensed psychologist, was engaged in the full-time practice of clinical psychology on December 1, 1976, and had 2 years of full-time clinical experience. In his answer the director admitted that Dr. Morris had made timely application, that she was a licensed psychologist, and that on December 1, 1976, she had 2 years of full-time clinical experience. However, the director denied that Dr. Morris was engaged in the full-time practice of clinical psychology on December 1, 1976.

The trial before the district court was had on August 28, 1984, under an agreement that the court would later determine its scope of review and rule as to the admissibility of any evidence it received which had not been presented to the board.

At the district court trial Dr. Morris expressed the opinion that both her teaching duties and her private practice involved the assessment, diagnosis, and treatment of mental, emotional, and behavioral disorders. It was also her opinion that on December 1, 1976, she was engaged in the practice of clinical psychology.

Dr. Edward J. Jacobs testified that he was familiar with the curriculum at Southeast Community College and that, in his

opinion, the skills required for teaching at that institution were the same as those required for teaching at other colleges. It was also his opinion that Dr. Morris, on December 1, 1976, was engaged in the practice of clinical psychology.

Dr. Morris also introduced into evidence at the district court trial the applications of certain other psychologists who were teaching or acting as supervisors and were certified by the board as qualified to practice clinical psychology.

Dr. Krusen testified on behalf of the director. She stated that in reviewing applications for certification the board distinguished between supervisors of persons who were authorized to practice psychology and supervisors of persons who were not so authorized, the thought being that the former requires a higher level of training.

The director also, through Dr. Krusen, offered the June 1981 guidelines of the American Psychological Association. Dr. Krusen testified that although the particular document offered is dated June 1981, the guidelines contained therein are in substance the same as those considered by the board in 1979 and 1980 when reviewing Dr. Morris' application. According to these guidelines, the supervision of a functional unit through which clinical psychological services are provided constitutes the practice of clinical psychology.

In its decision of December 20, 1984, the district court, relying on *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976), concluded that it was restricted to considering whether the order of the board was supported by substantial evidence or whether, on the contrary, its action was arbitrary, capricious, or unreasonable. Accordingly, the trial court excluded all evidence which had not been before the board, except for the 1981 APA guidelines, which the district court received in evidence.

We consider first the director's jurisdictional challenge. Neb. Rev. Stat. § 49-301 (Reissue 1984) provides, as it has at all relevant times: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

In re Application of Ochsner, 216 Neb. 480, 344 N.W.2d 632 (1984), establishes that an administrative proceeding is a "pending action" when the agency's final order is rendered. Thus, this proceeding was a pending action on January 17, 1980, the date on which the board denied certification to Dr. Morris. Therefore, the version of § 71-3823 in effect when Dr. Morris filed her initial petition applies to this action notwithstanding the statute's repeal prior to the district court's decision.

As noted earlier, the director's challenge rests on the claims that there had been no "hearing" before the board and that in any event the administrative decision was not final. No issue is raised as to the propriety of Dr. Morris' substituting the director of the Department of Health for the board after this action was commenced, and we therefore do not concern ourselves with that matter.

At the relevant time Neb. Rev. Stat. § 71-3821 (Reissue 1976) (since repealed, 1984 Neb. Laws, L.B. 481) provided for a hearing, at which evidence might be adduced before the board prior to a license being "suspended or revoked" or a "reprimand issued." When § 71-3823 was amended in 1978 to provide for judicial review of a denial of certification, no amendment was made to § 71-3821. Whatever may have been contemplated as the means of providing such an applicant due process of law, it is clear that the board considered it had enough information to act upon Dr. Morris' application at its January 11, 1980, meeting and to deny certification. The director cannot now be heard to complain that there was no "hearing." Nor is the director's position enhanced by Dr. Morris' rejection of the board's invitation to submit further information. Section 71-3823 made no provision for reconsideration of the board's denial such as to toll the time within which Dr. Morris was to institute a judicial challenge. Thus, the board lost any power it may have had to reconsider its decision once Dr. Morris filed her district court petition challenging the board's denial. See *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985), stating that the power of an administrative agency to reconsider its decision exists only until the aggrieved party files an appeal or the

statutory appeal time has expired.

Thus, the district court had jurisdiction to consider Dr. Morris' suit. Accordingly, the director's motion to dismiss this appeal must be, and hereby is, overruled.

In essence, Dr. Morris argues that the district court erred in receiving into evidence the June 1981 APA guidelines and in excluding from evidence the district court testimony of Drs. Morris and Jacobs and the evidence concerning other certified clinical psychologists.

We need not, however, address those evidentiary issues; neither do we need determine the district court's scope of review. This is so, for assuming, but not deciding, that the district court erred in admitting the 1981 APA guidelines and in excluding all the other evidence offered at the district court trial, and further assuming, but not deciding, that the district court should have tried the matter de novo, Dr. Morris is nonetheless not entitled to prevail.

Dr. Morris' claim that she met the same qualifications as did others who were certified as qualified to practice clinical psychology is, even if true, a matter we also do not decide, meaningless. The issue is whether Dr. Morris meets the requirements of § 71-3836 for certification as a clinical psychologist, not whether other individuals were improperly certified.

The dispositive fact is that although there is general opinion evidence that Dr. Morris has been engaged in clinical psychology, there is no evidence that teaching academic psychology and supervising students who are themselves not engaged in rendering clinical psychology services constitute the practice of clinical psychology. In the absence of such evidence, Dr. Morris cannot prevail whatever scope of review may be accorded the board's decision. See *Sanborn v. Weir et al.*, 95 Vt. 1, 112 A. 228 (1921) (burden of proof rests upon applicant for registration as a veterinary surgeon under grandfather clause).

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

AFFIRMED.

BOSLAUGH and CAPORALE, JJ., and COLWELL, D.J., Retired, concur in the result.

STATE OF NEBRASKA, APPELLEE, V. MARVIN L. HAVLAT, APPELLANT.

381 N.W.2d 144

Filed February 7, 1986. No. 85-252.

1. **Criminal Law: Effectiveness of Counsel.** The test for determining the effectiveness of counsel in a criminal prosecution is whether trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his or her geographical area and conscientiously protected the interests of the client.
2. **Effectiveness of Counsel: Proof.** The person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence.
3. _____: _____. Where one maintains that counsel was inadequate or ineffective, one must also show how or in what manner that alleged inadequacy prejudiced the defendant.
4. **Pleas.** A defendant should not be allowed to withdraw a plea of guilty or nolo contendere in the absence of proof by the defendant that such withdrawal is necessary to correct a manifest injustice.
5. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent a showing of an abuse of discretion by the trial court.

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

Thomas B. Donner, for appellant.

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

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

HASTINGS, J.

On October 11, 1983, a grand jury returned a true bill against the defendant on an indictment charging him with aiding and abetting delivery of marijuana, a Class III felony, and conspiracy to manufacture, distribute, or deliver marijuana, a Class III felony. Pursuant to a plea bargain, he pleaded nolo contendere to a charge of aiding and abetting the offense of possession of marijuana weighing more than 1 pound, a Class IV felony. He was sentenced to a term of imprisonment of from 20 to 40 months.

Defendant assigns as error: (1) Ineffective assistance of

counsel; (2) Finding by the district court that his plea of nolo contendere was freely, voluntarily, knowingly, and intelligently entered; (3) Denial by the trial court of defendant's motion to withdraw his plea of nolo contendere; and (4) The imposition of an excessive sentence. We affirm.

Since at least January 16, 1984, defendant was represented at all times by one of three different attorneys: pretrial counsel, trial counsel, and appellate counsel. Both pretrial and trial counsel are Lincoln attorneys. Pretrial counsel has specialized in the area of criminal defense for the last 13 years; trial counsel has specialized in trial practice for 27 years, both civil and criminal.

On December 11, 1984, while represented by trial counsel, defendant entered his plea of nolo contendere. Later, on December 13, defendant filed, pro se, a motion to withdraw that plea. Hearing was had on that motion on December 27, while defendant was still represented by trial counsel, and it was overruled.

Hearing on a second motion to withdraw defendant's plea was commenced on March 1, 1985, at which defendant was represented by his present appellate counsel. The second motion to withdraw was also overruled.

During the hearing on defendant's plea, he was thoroughly interrogated by the trial judge, who fully and fairly advised him of all of his rights and who received facts sufficient to support the plea. Defendant advised the court that he understood all of his rights and that he was waiving those rights by entering a plea of nolo contendere.

The defendant further advised the court that he had discussed all of his possible defenses with his trial attorney and that he was satisfied with the representation furnished by his lawyer. After hearing the facts related which the State expected to prove, and hearing an explanation by both defense counsel and the county attorney, the defendant reiterated that he still wanted to tender a plea of nolo contendere.

The defendant testified at length during his final hearing seeking withdrawal of his plea.

Defendant admitted having a discussion with his attorney about entering a plea, but initially, he, the defendant, did not

want to plead to a felony but would plead to a misdemeanor. The defendant did concede that at about this same time, during a conversation with his attorney, he agreed to accept the present plea agreement if the "State would not accept . . . taking the video depositions and wouldn't accept bringing my witnesses back [from California]." He testified that he would probably "do what he [counsel] wanted me to do."

The defendant testified that he did not believe he was guilty of the charges contained in the indictment and that he wanted a trial to clear the air. He alleged that he showed his trial counsel statements of five witnesses who supposedly would contradict another potential State's witness as to defendant's whereabouts but that counsel did not look at them. However, those statements do not appear in the record.

On the morning that defendant entered his plea, he said he was "strapped and worn out." He did say that he had conversations with his attorney about the merits of his case. He insisted that his attorney told him that he would either have to plead that morning or go to trial. However, defendant gave as his opinion, after the fact, that he did not believe his attorney was ready to go to trial. He based this conclusion in part on the fact that he said "we" had not seen the instate defense witnesses.

During the 4 to 5 months trial counsel represented him, the defendant claimed to have conferred with him only six times. Defendant testified that counsel failed to interview important witnesses and failed to perform certain tasks even after being asked by the defendant. However, no offer of proof was made on either point. He also complained that counsel neglected to obtain transcripts of alleged coconspirators' proceedings in other courts.

Finally, defendant claimed that although he had been given an opportunity to discuss trial tactics with his pretrial counsel, he did not have any such opportunity with trial counsel.

Both attorneys also testified. Pretrial counsel stated that he represented the defendant both as privately retained and court-appointed counsel, and during that period of time had the opportunity to discuss the merits of the particular case. As a part of that representation, counsel took a number of

depositions in California and reviewed various interviews had with witnesses living within Nebraska. He felt that those depositions were very necessary, but as to certain other planned depositions which were not taken, he did not know whether they would be absolutely necessary.

Pretrial counsel had access to the witness list of the State and gave as his opinion that it was not necessary to contact all of those witnesses, particularly where he had access to police statements and reports. Counsel also indicated that the defendant was uncooperative about appearing at depositions and became difficult to communicate with when differences arose on how to pursue the case.

Trial counsel stated that he had discussed the case with the defendant on many occasions. Counsel's computer worksheet shows numerous telephone and personal conferences with the defendant, conferences with pretrial counsel and the prosecuting attorney, review of file and research, contacts with witnesses, and other matters relating to defense of the defendant, totaling approximately 70 hours up until the time the plea of nolo contendere was tendered.

Counsel testified that depositions in California were to be taken on December 7. However, on December 5 the county attorney offered a plea bargain, in part based upon the cost of the out-of-state depositions to the county. Counsel was unable to reach the defendant until the following day, and at that time defendant decided to think about it overnight. The next day defendant called counsel twice from California. During the first call, lasting in excess of 30 minutes, there was an extensive discussion involving the pros and cons of the case, including the fact that the State would not agree to reduce the charges. The defendant wanted to think some more about the plea agreement, and then called counsel back and stated that he would accept the offer.

Counsel had no further contact with the defendant until they both appeared in court on December 11. The defendant expressed "a great deal of uncertainty as to what he wanted to do"; however, after a detailed discussion of his various rights and the consequences of entering a plea, the defendant pled no contest.

While counsel agreed that the defendant was under a great deal of stress during the arraignment, he testified that the defendant was rational and coherent and understood what was said to him. The day after the arraignment, the defendant informed counsel that he wanted to withdraw his plea.

In ruling on the final motion to withdraw the plea, the trial court made extensive findings of fact and conclusions of law. Included within those findings were: (1) Trial counsel was ready and willing to interview and depose certain witnesses in California when the defendant accepted a plea bargain, making such interviews unnecessary; (2) Counsel had statements of most of the other coconspirators, and defendant disclosed no evidence of inconsistent testimony by those witnesses; (3) Counsel had statements or transcripts from most of the witnesses detailed by the defendant, none of which disclosed inconsistent statements by them; (4) Contrary to the complaint of the defendant that he was not told about the final determination of the court's ruling on a motion to suppress, defendant knew that such motion would be taken up at the time of trial; (5) Counsel had, in spite of claims by the defendant to the contrary, fully advised defendant of the consequences and ramifications of entering a plea of nolo contendere; and (6) Defendant's plea, based on the trial court's examination of the arraignment proceedings and testimony on the motions, disclosed that he freely, voluntarily, knowingly, and intelligently tendered his plea and that trial counsel rendered constitutionally required effective assistance of counsel and did conscientiously protect the interests of the defendant. The record supports such findings.

The test for determining the effectiveness of counsel in a criminal prosecution is whether trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his or her geographical area and conscientiously protected the interests of the client. *State v. Juhl*, 218 Neb. 792, 359 N.W.2d 109 (1984). The person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. *State v. Heathman*, 216 Neb. 609, 344 N.W.2d 670 (1984). Where one maintains that counsel was inadequate or ineffective, one must also show how or in what manner that

alleged inadequacy prejudiced the defendant. *State v. Juhl, supra.*

As suggested by the findings of the trial court, defendant's complaints as to the effectiveness of counsel are limited to the complaint that he failed to interview certain witnesses. For the most part the record discloses that counsel had the necessary information either through copies of statements, police reports, or testimony in other proceedings. In other cases reasonable efforts had been made by counsel to obtain the desired interviews without success. Finally, and as to the bulk of the complaints regarding missing depositions, the defendant's agreement to participate in the plea bargain obviated any further efforts in that regard. The record also discloses no support for defendant's contention that he was not advised by counsel of the consequences and ramifications of tendering a plea.

We agree with the district court that the record discloses that defendant was afforded effective assistance of counsel, as required by law.

The record made at the time of arraignment fully supports a finding that defendant's plea was freely, voluntarily, and intelligently tendered. His only denial of guilt was a statement made by him after the fact that he did not believe he was guilty of the charges contained in the indictment. However, the plea that he tendered was to a different and lesser charge.

Other than the fact that he obviously changed his mind after the plea had been accepted, defendant afforded no credible evidence sustaining his claim of involuntariness or that he did not comprehend what he was doing at the time. A defendant should not be allowed to withdraw a plea of guilty or nolo contendere in the absence of proof by the defendant that such withdrawal is necessary to correct a manifest injustice. *State v. Jipp*, 214 Neb. 577, 334 N.W.2d 805 (1983). Such proof is lacking in this case.

Defendant's claim of excessiveness of the sentence is without merit. A sentence imposed within the statutory limits will not be disturbed on appeal absent a showing of an abuse of discretion by the trial court. *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983). The sentence of 20 to 40 months was well within the

prescribed limitation of 5 years.

Additionally, the record discloses evidence of a widespread operation involving the growing and distribution of marijuana, a 1981 harvest of from 1,500 to 2,000 pounds, and representations by the defendant to prospective growers of harvests worth $50,000 to $60,000 per year. Considering these facts, as well as the sentences received by coconspirators, there was no abuse of discretion on the part of the trial judge.

Because no error appears in the proceedings of the district court, its judgment is affirmed.

AFFIRMED.

PEGGY JO BRAUN, APPELLEE, V. FRANK RAYMOND BRAUN, APPELLANT.

380 N.W.2d 643

Filed February 7, 1986. No. 85-370.

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

Paul J. LaPuzza of Young, LaPuzza & Stoehr, for appellant.

Larry C. Johnson, for appellee.

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

PER CURIAM.

This appeal involves a domestic relations matter. The petitioner-appellee filed for dissolution of the marriage. The court granted the dissolution, awarded custody of the three minor sons to appellee, allowed reasonable visitation rights to appellant, awarded child support, and divided the couple's property. The appeal from an application to modify the decree assigns as error the failure of the trial court to find that the appellee engaged in abuse, neglect, and sexual misconduct which constituted a material change in circumstances requiring

modification of custody in the best interests of the children.

The record provides substantial detail regarding the experiences of the children in the appellee's home and while visiting the appellant. Nothing in the record is remarkable, and the appellant has not shown a change of circumstances sufficient to warrant a change of custody. We find the decision of the district court to be correct in all respects. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLINTON R. TURNER, APPELLANT.

381 N.W.2d 149

Filed February 7, 1986. No. 85-378.

1. **Trial: Evidence.** The determination of the admissibility of evidence rests within the sound discretion of the trial court.
2. **Criminal Law: Sentences.** Where one deliberately pursues a course to voluntarily become intoxicated, there is little that can be said in his behalf in mitigation of the crime or the punishment.
3. _____: _____. The lives and property of the public are entitled to protection against the criminal conduct of those who become voluntarily intoxicated.

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

Joseph F. Chilen, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

BOSLAUGH, J.

After trial to a jury the defendant, Clinton R. Turner, was convicted of attempted second degree murder, count I; first degree assault, count II; use of a firearm in commission of a felony, count III; and burglary, count VI. He was sentenced to

imprisonment for 15 to 25 years on count I, with credit for 197 days; 6 to 18 years on count II, the sentence to run concurrently with the sentence on count I; 5 to 10 years on count III, the sentence to run consecutively to the sentences on counts I and II; and 18 months to 5 years on count VI, the burglary count, the sentence to run consecutively to the sentences imposed on counts I, II, and III. He has appealed and contends the trial court erred in sustaining an objection to a question regarding the state of mind of an accomplice, in failing to consider the state of the defendant's intoxication at the time of the offense when imposing sentence, and that the sentences imposed are excessive.

The prosecution was a result of the shooting of Benny C. AcFalle by the defendant on October 10, 1984, in Fairbury, Nebraska. AcFalle, who survived, was shot twice in the head at close range and was permanently blinded in both eyes by the first shot.

The record shows that shortly after 9 p.m. on October 9, 1984, the defendant, his brother Tom Turner, and the accomplice Nicky Scott White began drinking from a pint of vodka and a fifth of whiskey. The defendant alone drank most of the vodka, with the pint being consumed by 10:30 or 11 that evening. The defendant may have also consumed whiskey and beer during this time.

Tom Turner, White, and Caprice Turner, the defendant's wife, then left the house to purchase another bottle of vodka for the defendant. The defendant had begun to act intoxicated at this time.

The defendant resumed drinking sometime after 11 p.m., when the others returned. Within an hour to an hour and a half, he consumed up to half or more of a newly purchased liter of vodka. At that point his mannerisms included loud, slurred speech; making little sense when he spoke; a staggered walk; and lack of coordination.

White testified that he then asked if anyone would like to go with him to AcFalle's apartment to borrow a guitar. The defendant said that he would go, and they left the house some 30 to 45 minutes later.

There was testimony that, before leaving, the defendant

ripped open a jacket he was wearing because he was unable to manipulate its buttons. Caprice Turner testified that the defendant then threw the jacket on the floor and that she saw a gun in the waistband of his pants. She also testified that the defendant threw the gun on the dining room table and that Nicky White said, "Let's go." The defendant picked up his jacket and walked out the door, followed by White, who had grabbed the gun from the table. Tom Turner, who was seated at the head of the dining room table, testified that he did not see a gun when the defendant dropped his coat on the floor. White did not recall the defendant's having a gun prior to arriving at the AcFalle apartment and denied that he, White, had a weapon, other than perhaps a knife, when they left the house. The defendant had no recollection of having any type of weapon in his possession.

According to White, he and the defendant drove to the AcFalle apartment at 511½ D Street, Fairbury, Nebraska, in White's truck. Turner, who was stumbling, and White went up the stairs to AcFalle's apartment. Both the defendant and White testified that the defendant entered AcFalle's apartment by falling head first after climbing through a transom above the door to the apartment. The defendant then opened the door for White.

White testified that inside the apartment he offered AcFalle a drink and said, "[L]et's party." He then went to turn on a light, and as he got halfway across the room, with his back to the defendant and the bed on which AcFalle was seated, White heard a gunshot. He turned and saw the defendant with a gun pointed at the floor in front of AcFalle. White then moved quickly to push the defendant's arm to the bed. The defendant jerked away and White said they should leave. White left and claims that he heard the second shot as he got to the stairway. White ran down the stairs and was at the bottom of the steps when the defendant got to the stairs.

AcFalle testified that Turner and White entered his apartment uninvited. Because some light filtered into his room from the hallway, he was able to identify the two men as Turner and White. He saw that the defendant had a gun.

AcFalle testified that White poured drinks on him, after

which he was yanked off the bed and kicked a number of times. The kicking ended when AcFalle managed to get back on the bed. The defendant then placed a gun to AcFalle's head while White showed him a knife. The defendant then said, "[G]ive me a thousand dollars or your valuables." AcFalle responded that he would give them his money in the bank at a later time. White then put the knife to AcFalle's neck. One of the men demanded his car keys. AcFalle told them where the keys and his car were. The defendant then stated, "[Y]ou're a faggot," and shot AcFalle. AcFalle thought he heard White say, "You shot him. You shot him," then laughter. AcFalle was then shot in the head a second time, and the two assailants ran from the apartment.

The defendant testified that he had no memory of the incident after he fell through the transom until the next morning when he was awakened to see the police. Expert psychiatric witnesses testified on behalf of both parties that the defendant's memory loss was due to his level of intoxication on the night of the crime.

The defendant's first contention is that the trial court erred when it refused to permit Tom Turner to testify to statements made by Nicky White upon his return from the AcFalle apartment on October 10, 1984. The defendant claims that Turner's testimony was admissible under the state of mind exception to the hearsay rule to show White's state of mind immediately after the shooting and, inferentially, his demeanor and actions during the shooting.

On defense counsel's direct examination Tom Turner was asked if Nicky White had said anything to him, Tom, after returning home from the shooting. The State's hearsay objection was sustained, and the defendant made the following offer of proof:

> MR. CHILEN: --- and as an offer of proof, the defendant would show that had the witness Mr. Tom Turner testified, that he would say that Nicky Scott White advised him that he was going to take the gun and boots and leave for Idaho the following morning, and if the police had not arrived, and that he was going to dispose of the boots and the guns—the gun, singular, on the way to Idaho. That ends the formal offer of proof.

The defendant argues that there was an issue at the trial as to who, in fact, shot Benny AcFalle and that the trial court's exclusion of Tom Turner's testimony deprived the jury of access to relevant evidence. Specifically, the defendant alludes to the fact of conflicting testimony about who took the gun to the apartment; the fact that AcFalle's eyes were closed when the first shot was fired; the fact that AcFalle testified in his deposition that he could not "recall that question there" when asked if it was 1, 3, or 5 minutes between when he saw the defendant holding the gun to his, AcFalle's, head and when he was shot, but at trial testified it was only a second; the fact that White asked Caprice Turner to wash his clothes on his return from AcFalle's apartment; and the fact that White, a convicted felon, planned to leave for Idaho the morning after the shooting and had previously told AcFalle that he planned to rob a bank.

"The determination of the admissibility of evidence rests within the sound discretion of the trial court." *State v. Fries*, 214 Neb. 874, 877, 337 N.W.2d 398, 401 (1983).

Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1984) provides in part:

> No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence . . . if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

See, also, *State v. Plymate*, 216 Neb. 722, 345 N.W.2d 327 (1984).

From our examination of the record, we are satisfied that the ruling on the objection to the testimony of Tom Turner resulted in no substantial prejudice to the defendant. At best, this evidence was cumulative and of doubtful relevance.

There was an abundance of evidence as to the defendant's and White's participation in the crime. Although not of controlling importance, the evidence that the defendant actually shot AcFalle was substantial.

The excluded testimony would merely have been evidence of White's intent to leave Nebraska and to conceal evidence of the

crime. Other testimony of this nature had already been properly admitted into evidence at trial. White was questioned about the excluded statements on cross-examination:

> Q. Did you tell anyone that in the event the police had not arrived by the next morning, you were going to leave for Idaho and dispose of the boots and gun on the way?
>
> A. Well, something was said to the effect that I was going back to Idaho. I had been planning on leaving the next morning anyway, even prior to the accident happening.

White also testified to emptying the gun, wiping it off, and then throwing it in the back of his truck after returning home from the scene of the crime. He also threw the boots he had worn that night into his truck because he had lost a heel at the AcFalle apartment. In an attempt to avoid prosecution he had planned to tell the authorities that his truck had been stolen. Additionally, White's testimony showed that he changed into dark clothing after returning home. This was done in an effort to avoid being seen as he returned to the AcFalle apartment to retrieve the lost boot heel. White did return to the scene of the crime but did not enter the building because the police were already there.

The defendant next contends that the trial court abused its discretion by sentencing the defendant without considering his state of intoxication at the time of the alleged crimes and that the sentences imposed are not sustained by sufficient evidence, are excessive, and are contrary to law.

At the sentencing hearing the trial court stated that he did not consider the voluntary intoxication of the defendant to be a mitigating circumstance under the circumstances of this case. We think the record fully supports this view.

In *State v. Gamron*, 186 Neb. 249, 251, 182 N.W.2d 425, 427 (1970), this court held: "Where one deliberately pursues a course to voluntarily become intoxicated, as here, particularly where defendant was fully aware of his propensity to violate the law when drunk, there is little that can be said in his behalf in mitigation of the crime or the punishment."

In the present case the presentence investigation report shows that the defendant perceives himself as having an alcohol

problem because most all of his arrests have been alcohol related. It is true that both the State and defense psychiatric expert witnesses testified that the defendant's judgment was affected by his level of intoxication on the night of the shooting. Nevertheless, in this case, as in *Gamron, supra* at 251, 182 N.W.2d at 427, "[t]he lives and property of the public are entitled to protection against the criminal conduct of those who become voluntarily intoxicated."

Sentences imposed within statutory limits will not be disturbed by this court on appeal unless the trial court abused its discretion. *State v. Richter*, 220 Neb. 551, 371 N.W.2d 125 (1985).

Among the factors to be considered in the imposition of a sentence are the defendant's age, mentality, education, experience, and social and cultural background, as well as past criminal or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. See, *State v. Richter, supra*; *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984). Another important factor is the seriousness of an offense. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985).

The defendant is nearly 27 years of age. He was convicted of assault and battery in Oklahoma in 1983 and possession of a controlled substance in Wyoming in 1984.

The defendant was convicted of a Class II felony, attempted second degree murder, which carries a penalty of from 1 to 50 years. Neb. Rev. Stat. §§ 28-304, 28-201(4)(a), 28-105(1) (Reissue 1979). He was also convicted of three Class III felonies, including first degree assault, use of a firearm in the commission of a felony, and burglary, each carrying a penalty of from 1 to 20 years' imprisonment. Neb. Rev. Stat. §§ 28-105(1), 28-308, 28-507, 28-1205 (Reissue 1979).

The defendant was sentenced to 15 to 25 years on count I, attempted second degree murder; to 6 to 18 years on the assault count, to be served concurrently with count I; to 5 to 10 years on the firearms count, to be served consecutively to counts I and II; and to 18 months to 5 years on the burglary count, consecutive to the first three counts. He was also credited with 197 days served in the county jail pending trial. The sentences

imposed, although severe, were well within the statutory limits.

The shooting of the victim was a cruel, violent, brutal, and senseless act. It is only by chance that the wounds did not prove fatal. As a result of the shooting, the victim is blinded for life and has been subjected to great pain and discomfort. Without question, such a crime merits a severe penalty.

In light of the seriousness and brutality of the offenses involved, the defendant's past record of alcohol and controlled substance abuse, and the permanence and severity of the victim's injuries, the sentences imposed in the present case were fully sustained by the record and not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

JACK B. POLLOCK, APPELLANT, V. MONFORT OF COLORADO, INC., APPELLEE.

381 N.W.2d 154

Filed February 7, 1986. No. 85-389.

1. **Workmen's Compensation.** A finding that vocational rehabilitation is for the employee's best interest is a statutory prerequisite to ordering same.
2. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case, and they will not be reversed or set aside unless clearly wrong.

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

Richard L. Huber, for appellant.

Kenneth H. Elson, for appellee.

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

CAPORALE, J.

Plaintiff, Jack B. Pollock, appeals from the determination of the Workmen's Compensation Court that defendant, Monfort of Colorado, Inc., is not obligated to provide him vocational rehabilitation services. We affirm.

Pollock is approximately 27 years old and the holder of a general equivalency diploma, having dropped out of high school in the 11th grade. In April of 1982 Pollock began working for Monfort and was functioning as a slaughterhouse maintenance mechanic on December 17, 1982, when he suffered an injury to his left hand in an accident arising out of and in the course of said employment. Specifically, four fingers of his left hand were severed when a machine on which he was replacing a bearing was inadvertently activated.

Following the accident, Pollock returned to his former work. Shortly thereafter, he bid for and obtained a better paying job as a member of a special maintenance group which installs new machines and equipment and repairs plant machinery as needed. Nonetheless, Pollock desires to enroll in a 2-year program of study in order that he may become a mechanical draftsman. The evidence shows that while Pollock has an aptitude for such work, he would need to make up a deficiency in mathematics before he could begin the associates degree program required for entering that occupation in the Hastings-Grand Island area, where Pollock is buying a home for himself and his family. The evidence further shows that the job market has few entry level jobs for mechanical draftsmen or draftswomen and that such jobs begin at about $2 per hour less than Pollock is now earning, although the top of the wage range is approximately $2 per hour more than Pollock's present earnings. There is also evidence that the mechanical drafting industry is beginning to use computers and that Pollock would have difficulty using the computer keyboard.

Neb. Rev. Stat. § 48-162.01 (Reissue 1984) provides in relevant part:

> (3) . . . When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining

and job placement, as may be reasonably necessary to restore him or her to suitable employment. . . .

. . . .

(6) Whenever the court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for total or partial disability which is or is likely to be permanent may be rehabilitated to the extent that he or she will require less care and attendance or to the extent that he or she can become gainfully employed or increase his or her earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or education, if the injured employee without reasonable cause refuses to undertake the rehabilitation, training, or educational program determined by the court or judge thereof to be suitable for him or her or refuses to be evaluated under the provisions of subsection (3) of this section, the court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under sections 48-101 to 48-151.

Pollock argues the fact that he is currently earning more than he was at the time of his injury does not mean he has not suffered a reduction of earning power. He contends that he has his present job solely because of Monfort's deference to his disability. He claims that as an at-will worker, he is not secure in his employment and because of his disability is less employable than he was before the accident. The evidence of Pollock's level of performance in his present job is in conflict. Some is that he functions as well as others, and some is that he cannot perform all the tasks required.

Pollock's focus, however, does not address the legal issue presented by this case, and we therefore do not pass upon the contentions he makes. A majority of the three-judge panel on rehearing concluded that Pollock failed to establish it was in his best interest to undertake the program he wishes. Since a finding that vocational rehabilitation is for the employee's best interest is a statutory prerequisite to ordering same, the precise question before us is whether the evidence supports the

majority's finding in that regard.

As has so often been said, findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case, and they will not be reversed or set aside unless clearly wrong. *Wilson v. City of North Platte, ante* p. 90, 375 N.W.2d 134 (1985); *Thompson v. Monfort of Colorado, ante* p. 83, 375 N.W.2d 601 (1985).

In view of the evidence concerning Pollock's inadequate background to undertake the program of study he wishes, the uncertainty of his future ability to meet the changing requirements of the industry he wishes to enter, and the uncertain availability of employment, it cannot be said the finding of the majority of the Workmen's Compensation Court, that the vocational rehabilitation desired by Pollock is not in his best interest, is clearly wrong. Indeed, on the record before us the finding is clearly correct and must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERALD MILLER, APPELLANT.
381 N.W.2d 156

Filed February 7, 1986. No. 85-396.

1. **Sentences: Due Process: Constitutional Law.** Although a defendant is entitled to due process upon sentencing, the Constitution does not require that he be given the full panoply of rights accorded when the issue is guilt or innocence.
2. **Sentences: Due Process.** Due process safeguards must be observed when a new charge leading to magnified criminal punishment is made in an enhanced sentence proceeding.
3. **Sentences: Evidence.** Trial courts have broad discretion in sentencing, both in the evidence to be considered and in the procedure by which such evidence is gathered and used.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Public Defender, for appellant.

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

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

BOSLAUGH, J.

The defendant, Jerald Miller, appeals from the finding by the district court that he was not entitled to a full due process evidentiary hearing, including confrontation of witnesses, on the issue as to whether he was a mentally disordered sex offender.

On September 10, 1984, the defendant was charged with first degree sexual assault on a child, a Class II felony under Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). On February 26, 1985, pursuant to discussions between the State and the defendant, the defendant was rearraigned on an amended information charging him with the misdemeanor offense of third degree sexual assault upon a person physically or mentally incapable of resisting or appraising the nature of his conduct. Neb. Rev. Stat. § 28-320(1)(b) (Reissue 1979). The defendant thereupon, after being fully advised as to his constitutional rights, voluntarily and intelligently entered a plea of no contest. The court accepted the defendant's plea and found him guilty.

Pursuant to Neb. Rev. Stat. § 29-2912 (Reissue 1979), the trial court ordered a presentence investigation which was to include evaluation of the defendant by a psychiatrist and a psychologist to determine whether he was a mentally disordered sex offender and whether he was treatable. Neb. Rev. Stat. § 29-2913 (Reissue 1979). After the first two reports had been received, the defendant requested a second evaluation by another psychiatrist and psychologist. § 29-2913. This request was granted.

On April 25, 1985, the defendant filed a "Motion for Evidence Hearing and Right of Confrontation" concerning the mentally disordered sex offender issue. He also filed a motion to declare the statute unconstitutional. These motions were overruled.

At the sentencing hearing the trial court considered the reports that had been received and determined that the

defendant was a treatable mentally disordered sex offender. The defendant was sentenced to imprisonment for 1 year, the sentence to be served at the Lincoln Regional Center, where he could receive treatment for the mental disorder. He was given 257 days' credit for time spent in custody awaiting trial. This appeal followed.

The defendant assigns five errors which raise but one issue: whether he was denied due process and his right of confrontation because he was not given a full evidentiary hearing on the issue as to whether he was a treatable mentally disordered sex offender.

Neb. Rev. Stat. § 29-2915 (Reissue 1979) sets out the procedure under which a defendant is to be sentenced, committed, and discharged if found to be a treatable mentally disordered sex offender. The statute provides:

> [T]he court shall, after first sentencing the defendant as provided by law for the offense for which he or she has been convicted, commit the defendant for treatment . . . until such time as the court determines . . . that the defendant is no longer mentally disordered or until the defendant has received the maximum benefit of treatment, except that no sentence to treatment shall exceed the maximum length of such offender's sentence.

The statute further provides:

> The entire proceeding to determine whether the defendant is a mentally-disordered sex offender and treatable shall be deemed a critical stage of a criminal prosecution at which the defendant shall be accorded all the rights a defendant has in sentencing proceedings. The court's decision that the defendant is a mentally-disordered sex offender and the decision to commit the defendant for treatment may be appealed.

The defendant argues that his right to due process and his right of confrontation were abridged by the trial court's denial of a full evidentiary hearing because of the decision in *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). The defendant contends that *Specht* is controlling and mandates that he be given a hearing, including confrontation of witnesses, prior to sentencing. The defendant, however,

misinterprets the decision in *Specht*. Although a defendant is entitled to due process upon sentencing, the Constitution does not require that he be given the full panoply of rights accorded when the issue is guilt or innocence. See, *Gardner v. Florida*, 430 U.S. 349, 358 n.9, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983).

In *Specht v. Patterson, supra*, the Court dealt with a challenge to Colorado's sex offenders act. In that case the defendant had been convicted under an indecent liberty statute but was sentenced under the sex offenders act which allowed for the imposition of an indeterminate term of from 1 day to life. The U.S. Supreme Court held that due process safeguards must be observed when a new charge leading to magnified criminal punishment is made in an enhanced sentence proceeding.

The Nebraska statute is distinguishable in that "no sentence to treatment shall exceed the maximum length of such offender's sentence." § 29-2915. The statute does not allow any enhancement of the defendant's sentence because he is a mentally disordered sex offender. Furthermore, the Nebraska statute recognizes that the defendant "shall be accorded all the [due process] rights a defendant has in sentencing proceedings."

Trial courts have broad discretion in sentencing, both in the evidence to be considered and in the procedure by which such evidence is gathered and used. See, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Goodpasture, supra*; *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981). More specifically, this court has stated:

> We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate.

State v. Anderson and Hochstein, supra at 72, 296 N.W.2d at 453; accord *State v. Reeves, supra*.

The U.S. Supreme Court has held that the sentencing procedure must comply with minimal due process requirements

but has refused to require the full array of trial procedural rights in the sentencing process, even in capital cases. See *Gardner v. Florida, supra.* In *Gardner* the trial court had imposed a death sentence on the basis of confidential information which had not been disclosed to the defendant or his counsel. The Court vacated the sentence because it had been imposed, at least in part, on the basis of information which the defendant had not been given an opportunity to deny or explain.

The defendant in the present case was given an opportunity to deny or explain the findings of the psychiatrists as set out in their evaluations contained in the presentence report. In fact, § 29-2913 requires that copies of the physicians' reports be given to counsel for the defendant so that there is adequate notice of the information on which the court will rely in determining the mentally disordered sex offender issue. Provided the defendant is then given an opportunity to be heard on that issue, his due process rights have been accommodated. As Justice Black in *Williams v. New York*, 337 U.S. 241, 251, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), stated:

> The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent. The right of confrontation of an accused mentally ill person is guaranteed by statute, Neb. Rev. Stat. § 83-1058 (Reissue 1981). The right accorded is "equivalent to the rights of confrontation granted by Amendments VI and XIV of the Constitution of the United States, and Article I, section 11 of the Constitution of Nebraska."

The determination of whether a convicted person is a mentally disordered sex offender and whether the person is treatable is a "critical stage" of a criminal proceeding. Neb. Rev. Stat. § 29-2915 (Reissue 1979). That a person may be

confined in the same institution as a sex offender without having the opportunity to examine the basis (if any) of the analyst's conclusion, while the mentally ill patient has had that right, does not seem to me to be consistent with due process or equal protection of the law.

SHANAHAN, J., joins in this dissent.

LINCOLN COUNTY SHERIFF'S OFFICE AND LINCOLN COUNTY, NEBRASKA, APPELLANTS, V. HELENE HORNE, APPELLEE.

381 N.W.2d 159

Filed February 7, 1986. No. 85-449.

Equal Opportunity: Final Orders: Records. Within the meaning of Neb. Rev. Stat. § 48-1120 (Reissue 1984), there has been no entry of the order of the Nebraska Equal Opportunity Commission until the date that written evidence of that order has been prepared, authoritatively signed, and placed of record in the public files of such commission.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed and remanded for further proceedings.

Charles A. Kandt, Lincoln County Attorney, for appellants.

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

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

PER CURIAM.

The respondents, Lincoln County sheriff's office and Lincoln County, appealed to the district court from an order entered by the Nebraska Equal Opportunity Commission. The district court dismissed the appeal as having been filed out of time. We reverse and remand for further proceedings.

Helene Horne filed a complaint before the Nebraska Equal Opportunity Commission against the Lincoln County sheriff's office and Lincoln County, alleging employment

discrimination on account of sex. A hearing was had before a hearing examiner on June 13, 1984. The examiner prepared a recommended order and decision on November 12, 1984.

On March 8, 1985, the recommended order of November 12 was approved by the commission. The record does not disclose whether March 8 was a regular meeting of the commission, whether it was duly convened, whether parties or counsel were notified or present, and whether any action at that time was memorialized by minutes which were required to be kept.

The parties' stipulation of facts in the district court further provides that on March 11, 1985, office personnel began typing the "actions from the NEOC meeting," and on March 12, 1985, the " 'Final Order' in the Helene Horne matter was prepared, signature-stamped, and dated 'March 8, 1985' by the office personnel; and that said 'Final Order' was mailed that same day of March 12, 1985."

Neb. Rev. Stat. § 48-1120 (Reissue 1984) provides that "the time for appeal from such order of the commission to the district court shall be limited to thirty days from the *date of the entry of the order* to which complaint is made . . . ." (Emphasis supplied.)

Apparently relying on *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984), the district court ruled that the "order was entered" on March 8, 1985, and therefore the petition on appeal, having been filed with the clerk of the district court on April 9, 1985, was filed out of time.

However, there is a distinction between *Covault* and this case. In *Covault*, the statute provided that appeals may be taken from action of the State Board of Education "within twenty days after *entry of such action* on the records of the board." (Emphasis supplied.) Neb. Rev. Stat. § 79-403 (Cum. Supp. 1984). We held in *Covault* that the action was taken (approval of transfer of property from a school district) "on that date that the board, at a duly convened meeting at which minutes were required by statute to be taken, voted to authorize the transfers." 218 Neb. at 766, 359 N.W.2d at 353.

In the present case, although the order bore a date of March 8, the record leaves little doubt but that it was signed, filed, and "entered" on March 12. In announcing its decision the trial

court recited:

> [A] judgment is entered when it's announced from the bench and when the notes are made in the trial docket sheet. However, the trial docket sheets are supposed to be synonymous with the time that the judgment is announced from the bench. And then we note that sometime following that a document labeled "Journal Entry" or "Decree" is typed-up and it's dated as of the time that the action is announced from the bench and that the trial docket sheet is made. And often it's five days, or a week, or even two weeks, or a month that the judgment is actually taken. The date that counts is the one when the judgment is announced and the action taken and the trial docket sheet made-out.
>
> In this case, why, it appears to me that the judgment was taken on March the 8th, 1985, and, although the formal order was signed or was signature-stamped, according to the stipulation on March the 12th, 1985, the judgment was entered on March the 8th, 1985.

Of course, there is nothing in the record to indicate that a docket sheet is maintained by the Nebraska Equal Opportunity Commission which would serve as notice that an order or judgment had been entered. Applying the literal language of the trial court, it would be possible for the commission to delay the physical act of transmitting its decision by means of a written, signed document for 30 days, and thereby eliminate the possibility of an appeal. Such a result would be unthinkable and could not have been the intention of the Legislature.

The recitation by the trial court must have been based on Neb. Rev. Stat. § 25-1301 (Reissue 1979), which defines "rendition of a judgment" as the act of the court in pronouncing judgment accompanied by the making of a notation on the trial docket, whereas an "entry of a judgment" is the act of the clerk in spreading the proceedings had and the relief granted on the journal of the court.

For all the record shows, there were no minutes kept by the commission nor any trial docket or journal maintained. The only thing of record which evidenced the action of the commission was the written order which, no matter what date it

bore through the process of antedating, was not in existence until March 12.

We therefore hold that within the meaning of § 48-1120 there has been no "entry of the order" of the Nebraska Equal Opportunity Commission until the date that written evidence of that order has been prepared, authoritatively signed, and placed of record in the public files of such commission.

Under our holding in this case, the appeal was perfected within the time required by law, and the district court was incorrect in ordering its dismissal. The judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GLENDA L. LITTLE, APPELLANT, V. DENNIS E. LITTLE, APPELLEE.
381 N.W.2d 161

Filed February 7, 1986. No. 85-454.

Child Custody: Modification of Decree. As a general rule, all other circumstances being equal, legitimate career changes of the custodial parent, whether they be job-related or matrimonial in nature, will support an application for changing the residence of a child placed in that parent's custody. An award of custody is not a sentence of immobilization.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with directions.

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

Paul W. Snyder of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

HASTINGS, J.

This is an appeal from an order of the district court which modified a previous marriage dissolution decree. We reverse and remand.

The original decree dissolving the marriage of the parties was entered on July 1, 1982. Custody of the minor child, Dana, who is now 8 years old, was awarded to the petitioner, with reasonable rights of visitation in the respondent. Both parties lived in the Scottsbluff area at that time.

Petitioner and her present husband were married on December 31, 1982. Her husband is employed by Frontier Airlines and was transferred to El Paso, Texas, on October 1, 1984, necessitating a move by the petitioner to join her husband. In order to permit Dana to complete the school year on May 30, petitioner did not file her application for permission to move the minor child with her until the spring of 1985.

Following an extensive hearing, the court denied petitioner's application and, instead, granted respondent's application to change custody of the minor child to him. Although concluding that the "nurturing and parenting" qualities of the parties were equal, the trial court found that it was not in the best interests of the child to move to Texas.

As a general rule, all other circumstances being equal, legitimate career changes of the custodial parent, whether they be job-related or matrimonial in nature, will support an application for changing the residence of a child placed in that parent's custody. An award of custody is not a sentence of immobilization. *Korf v. Korf, ante* p. 484, 378 N.W.2d 173 (1985); *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985).

Although it is true that Dana has other relatives in the Scottsbluff area, and such a move will reduce the opportunities for visitation with her father, to deny the move and order a change in custody will terminate the stability of the day-to-day home environment which she has enjoyed and under which she has prospered since the time of her birth.

There has been an insufficient change of circumstances necessary to support a change of custody. The record does disclose good cause to grant the application for a change of

residence.

Following the authority of *Korf* and *Boll, supra*, we are compelled to reverse the judgment of the district court and remand the cause to that court, with directions to enter judgment consistent with these findings and to make such provisions for visitation and support as may be necessary under the circumstances.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF VIGGO ERLING CHRISTENSEN, DECEASED. SHIRLEY STONE, APPELLANT, V. VERA M. BRAUNER, PERSONAL REPRESENTATIVE OF THE ESTATE OF VIGGO ERLING CHRISTENSEN, DECEASED, ET AL., APPELLEES.

381 N.W.2d 163

Filed February 14, 1986. No. 84-536.

1. **Decedents' Estates: Good Cause: Appeal and Error.** For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. Neb. Rev. Stat. § 30-2437 (Reissue 1979).
2. **Decedents' Estates: Good Cause: Words and Phrases.** For the purpose of Neb. Rev. Stat. § 30-2437 (Reissue 1979), "good cause" means a logical reason or legal ground, based on fact or law, which justifies the modification or vacation of an order.
3. **Decedents' Estates: Wills.** In determining whether to grant a motion to set aside an order admitting a will to probate, a court should consider whether neglect is excusable, whether a movant has alleged a meritorious objection to admission of a will to probate, and whether prejudice results from setting aside the probate order.

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

James G. Egley of Moyer, Moyer, Egley & Fullner, for appellant.

James C. Stecker of Robak and Stecker, for appellees.

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

SHANAHAN, J.

Shirley Stone appeals the judgment of the district court for Platte County affirming a county court judgment denying Shirley's motion to set aside the order admitting the will of Viggo E. Christensen to probate.

On April 22, 1983, Viggo Christensen executed a self-proving will, and died on June 22. Vera M. Brauner, Viggo's niece and nominated as personal representative by the will, filed a petition on July 6 for formal probate of Viggo's will and listed 21 persons, including Shirley Stone, also Viggo's niece, as heirs, devisees, and interested parties. As reflected in the "Schedule of Heirship" accompanying the petition for probate, Viggo left neither a spouse nor child surviving him, but left two sisters, a brother, several nieces and nephews, and one grandnephew, Lyle Brauner. According to his will, Viggo left a quarter section of land to Lyle Brauner and the rest of his property to his sisters and brother.

Proper notice of the hearing scheduled for August 3 regarding admission of Viggo's will to probate was issued and was received by Shirley Stone, who also received a copy of Viggo's will submitted for probate. Shirley visited with her cousins about Viggo's will and contacted a lawyer whom she instructed to contest Viggo's will, but no objection on behalf of Shirley or any other interested party was filed.

On the morning of August 3, during the hearing, Shirley learned that no objection to Viggo's will had been filed, but Shirley and her lawyer voiced no objection to continuation of the proceedings. As a result of the hearing, Viggo's will was admitted to probate on August 3. On September 1 Shirley's lawyer withdrew from the case. That same day another lawyer, on behalf of Shirley, filed a motion to vacate the August 3 order admitting Viggo's will to probate and to permit instanter filing of a pleading attached to the motion, namely, an "Answer to Petition for Formal Probate of Will, Determination of Heirs and Appointment of Personal Representative, and Objections to Probate of Will." In her tendered answer and objection, Shirley alleged that Viggo lacked testamentary capacity and that Viggo's will resulted from fraud and undue influence by Vera Brauner, Lyle Brauner, and unnamed other persons.

Shirley also alleged that Viggo, when he executed his will, had received "massive doses of morphine and other drugs administered to ease the excruciating pain of his last illness which impaired the mind of the testator as to make him incompetent to execute his will." On November 29 the county court denied Shirley's motion to vacate the August 3 order. Shirley appealed to the district court, which affirmed the county court's judgment denying Shirley's motion to vacate the order admitting Viggo's will to probate.

Neb. Rev. Stat. § 30-2437 (Reissue 1979) provides: "For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal." The time statutorily allowed for appeal from an order in formal testacy proceedings is 30 days. See Neb. Rev. Stat. § 25-1931 (Reissue 1979). Shirley's motion was timely filed, so that the sole issue is whether the motion should have been sustained.

In *DeVries v. Rix*, 203 Neb. 392, 403-04, 279 N.W.2d 89, 95 (1979), this court arrived at the meaning of "good cause shown" in reference to § 30-2437, and held:

> To equate "good cause shown" with a "showing of due diligence" is hardly a liberal construction of the term "good cause shown." Proponents would have us deny contestant the opportunity to prove the allegations made in his motion to vacate, timely filed within the literal interpretation of the appropriate statute, which, if true, would compel a finding of no valid will. To do this, recognizing that the will was admitted to probate without hearing or formal proof of due execution, could hardly be said to encourage the policy "to discover and make effective the intent of a decedent in distribution of his property."
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> Webster's Third New International Dictionary defines "good cause" as "a cause or reason sufficient in law; one that is *based on equity or justice* or that would motivate a reasonable man under all the circumstances." (Emphasis supplied.)
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> The meaning of good cause must be determined in light of all of the surrounding circumstances. Therefore, without regard to its use in the nonclaim situation, which

is inapplicable here, it is our opinion that good cause as used within the provisions of section 30-2437, R.R.S. 1943, means a logical reason or legal ground, based on fact or law, why an order should be modified or vacated. Contestant advanced such reasons or grounds in his motion within the limited time specifically provided by statute, and which if proven true, would require the vacation of the particular order attacked. He should have had an opportunity to present his evidence.

"Good cause" was construed by the Supreme Court of Colorado in *Craig v. Rider*, 651 P.2d 397 (Colo. 1982), where Craig filed a motion to vacate an order admitting a will to probate, alleging the decedent lacked testamentary capacity and was under undue influence when the decedent executed the will in question. In *Craig v. Rider, supra*, the court adopted three criteria to be considered in evaluating discretionary action disposing of a motion to set aside an order admitting a will to probate—whether neglect is excusable, whether a movant has alleged a meritorious objection to admission of a will to probate, and whether prejudice results from setting aside the probate order. As expressed by the court in *Craig v. Rider, supra* at 403, 405-06:

> The reasons for a rule of liberality in evaluating promptly filed motions to set aside default judgments are especially compelling as applied to motions to set aside orders admitting wills to probate. Persons interested in the estate of a decedent may not be intimately acquainted with the facts bearing on the grounds for a possible will contest. A challenge to a will is not a matter to be undertaken lightly, yet the Colorado Probate Code requires only ten days notice of a petition for formal probate to be given to an interested party. . . . This is a short time within which to arrange for legal counsel, conduct any necessary factual investigation, and make a considered decision whether a will contest should be undertaken. [Citation omitted.]
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> . . . .
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> . . . We conclude that the record contains sufficient allegations of a meritorious objection to admission of the will to probate and is devoid of any indication that

> prejudice would result from setting aside the order of probate and hearing Linda Lou Craig's objections to probate of the will on their merits. The critical inquiry is whether the trial court abused its discretion in determining that Linda Lou Craig had not satisfied the excusable neglect criterion by demonstrating a sufficient reason to justify her failure to object to the . . . will until after it had been admitted to probate.
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> . . . .
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> . . . [A] rule of liberality is to be applied in evaluating promptly filed motions to set aside default judgments, and particularly orders of probate. We conclude that the burden of inquiry and promptness of decision that the trial court considered necessary do not comport with the excusable neglect standard, especially when considered in the light of the rule of liberality appropriate here.
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> . . . .
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> . . . [W]e believe that the trial court abused its discretion in holding that the delay in filing the will contest was not excusable. . . . In reaching this conclusion we are impressed by the brevity of the delay, the distance between the Craigs' home and Grand Junction, the absence of close contact between the Craigs and the decedent, their lack of intimate familiarity with her mental condition, the rather extensive efforts the Craigs made to learn the facts after receiving the notice of probate, the need to engage legal counsel to institute a will contest, and the seriousness of the decision to object to the probate of a will.

From issuance of the notice of hearing for admission of Viggo's will to probate until the hearing on August 3, Shirley had approximately 1 month to investigate and verify circumstances surrounding Viggo's execution of his will. Considering the criteria—whether neglect is excusable, whether a movant has alleged a meritorious objection to admission of a will to probate, and whether prejudice results from setting aside the probate order—and liberally construing "good cause," we conclude that there was an abuse of discretion in denying Shirley's motion to vacate the order admitting Viggo's will to probate. Under the circumstances any personal neglect on the

part of Shirley in failing to file an objection to the admission of Viggo's will to probate is excusable. Shirley has alleged a meritorious objection to admitting Viggo's will to probate, if her averments regarding testamentary capacity and undue influence can be established. There is no indication of prejudice resulting from giving Shirley an opportunity to substantiate her objections to the will. Shirley has shown "good cause" under § 30-2437. See *DeVries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979).

In view of the abuse of discretion in refusing to set aside the order of August 3, 1983, we, therefore, reverse the judgment of the district court and remand this matter to the district court with direction that the August 3, 1983, order of the county court shall be set aside for further proceedings regarding admission of the last will and testament of Viggo Christensen to probate.

REVERSED AND REMANDED WITH DIRECTION.

NOLAN L. POPPE, SPECIAL ADMINISTRATOR OF THE ESTATE OF TODD NOLAN POPPE, DECEASED, APPELLANT, V. DONALD R. PETERSEN, APPELLEE.

381 N.W.2d 534

Filed February 14, 1986. No. 84-758.

1. **Directed Verdict: Evidence.** A motion for directed verdict is treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom it is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Evidence.** The existence of negligence is an issue for the trier of fact where different minds may reasonably draw different conclusions from the evidence.
3. **Directed Verdict: Negligence: Evidence.** Where the cause of an accident is controverted, the physical facts must indisputably demonstrate that a party alleged to have caused the accident did in fact cause the accident before a verdict can be directed against that party.
4. **Trial: Judgments: Verdicts: Appeal and Error.** A party who has sustained the burden and expense of a trial and has succeeded in securing the judgment of a

jury on the facts in issue has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

5. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is clearly wrong.
6. **Evidence: Appeal and Error.** Where properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.

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

Robert F. Peterson of Venteicher, Laughlin, Peterson & Lang, and Patrick J. Birmingham, for appellant.

Robert D. Mullin, Jr., of Boland, Mullin & Walsh, for appellee.

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

BOSLAUGH, J.

This is an action for personal injuries and wrongful death brought by Nolan L. Poppe as special administrator of the estate of Todd Nolan Poppe, deceased. The plaintiff's decedent died as the result of injuries sustained in an automobile accident on June 21, 1981.

At the time of the accident the plaintiff's decedent was a passenger in an automobile operated by Kurt Lamprecht. The accident occurred when the Lamprecht vehicle collided with an automobile operated by the defendant, Donald R. Petersen. The action was dismissed as to the other defendants before the case was submitted to the jury.

The jury returned a verdict for the defendant, Petersen, and the plaintiff has appealed. The plaintiff contends the trial court erred in failing to sustain the plaintiff's motion for a directed verdict on liability and in receiving evidence as to the results of blood alcohol tests performed upon the drivers involved in the accident.

The accident occurred at about 12:20 a.m. on an unpaved county road northwest of Bloomfield, Nebraska, just east of the crest of a hill. The Lamprecht vehicle was proceeding in a westerly direction; the Petersen vehicle in an easterly direction.

The accident occurred when the left front ends of the two vehicles collided head on.

At the time of the collision the defendant was on his way home alone from a party at an abandoned schoolhouse northwest of Bloomfield, Nebraska. The Lamprecht group was returning to the same party. Driving conditions were normal. Testimony at the trial showed that both drivers had been drinking. The defendant testified to drinking 11 or more beers over a 9-hour period of time. Acquaintances testified that Kurt Lamprecht may have consumed up to 20 beers at the party that night. Blood test results from both drivers were admitted into evidence over the plaintiff's objections.

At the trial both parties called accident reconstruction experts who testified concerning their opinion as to how the accident occurred. The plaintiff's expert witness, Ted Sokol, testified, based on a review of the accident report, photographs of the scene and the vehicles involved, and two visits to the site, that the accident occurred because the eastbound Petersen vehicle was across the centerline of the road at the time the impact occurred.

Relying on similar information, the defendant's expert witness, Richard Large, testified that the westbound Lamprecht vehicle was across the centerline of the road at the time of the impact and caused the accident. Critical to both Sokol's and Large's opinions was their location of a 10-foot-long gouge mark which they agreed was caused by something in the left front part of the Lamprecht vehicle. Both witnesses believed the point of impact was at the east end of the gouge mark. The significance of the location of the mark is that it tends to show the position of the Lamprecht vehicle on the road at the time of the impact. According to Sokol, the gouge mark was north of the centerline; Large thought it was south of the centerline.

The defendant testified that he thought the Lamprecht car was over the centerline at the time of the accident, that his own car was on the right side of the road, and that he had moved as far to the right-hand side as he could safely drive when he saw the oncoming headlights of the Lamprecht vehicle. The surviving passengers in the Lamprecht vehicle who were called

to testify on the plaintiff's behalf had no recollection as to how the accident occurred.

The plaintiff's motion for a directed verdict on liability, made at the close of all of the evidence, was overruled. The jury returned a unanimous verdict for the defendant, and the plaintiff's subsequent motion for a new trial was overruled.

The plaintiff's first assignment of error is that his motion for a directed verdict on liability should have been granted because the undisputed physical evidence at the trial conclusively proved that the defendant's vehicle was across the centerline of the roadway when the collision occurred.

A motion for directed verdict is treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom it is directed. *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978).

> "Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Where, however, the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination."

Floridia v. Farlee, supra at 42, 266 N.W.2d at 206 (quoting *Hoefer v. Marinan*, 195 Neb. 477, 238 N.W.2d 900 (1976)). See, also, *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978).

The existence of negligence or contributory negligence is an issue for the trier of fact in cases where "different minds may reasonably draw different conclusions from the evidence, and a directed verdict is proper only when reasonable minds cannot differ." *Fangmeyer v. Reinwald, supra* at 124-25, 263 N.W.2d at 431. This rule generally applies where two parties to an automobile accident offer conflicting versions as to how the accident occurred. *Fangmeyer v. Reinwald, supra.*

In *Fangmeyer v. Reinwald, supra*, we held that where the cause of an automobile accident in a personal injury case is controverted, the physical facts must "indisputably demonstrate" that the collision was not caused by the party

charged with negligence or contributory negligence before a verdict should be directed in favor of that party. In the present case the defendant alleged that Kurt Lamprecht's negligence was the proximate cause of the collision. The evidence as to the physical facts in this case does not "indisputably demonstrate" which driver was responsible for the collision, if not both.

Some facts were uncontroverted by the reconstruction expert witnesses. They agreed that the traveled portion of the road was 19 feet wide, with the centerline located 9.5 feet from either edge. They also agreed that there was an overlap of over 2 feet on the front end of each vehicle when they collided and that the point of impact was indicated by the east end of the gouge mark caused by some part of the Lamprecht vehicle (in the vicinity of the left front wheel) being forced into the ground after the impact.

The expert witnesses, however, did not agree regarding the location of the gouge mark in relation to the centerline. Because, according to these witnesses, the gouge mark indicated the point of impact, its location in regard to the centerline of the road determined whether the Lamprecht vehicle was left of the centerline at the time of impact. The state patrolman who made an investigation at the scene of the accident that night testified that he determined the gouge mark to be located 9 feet from the north edge of the road. The officer concluded that the gouge mark indicated the approximate point of impact because he found 87 feet of skid marks, attributed to the Lamprecht vehicle, 3 feet from the north shoulder of the road leading up to the gouge mark. The plaintiff's expert witness, Sokol, relying on the patrolman's accident report, also located the gouge mark 9 feet from the north edge of the road. He also believed that a photograph of the accident scene, taken the next day, indicated that the gouge mark was located north of the centerline. Sokol ultimately concluded that the accident occurred as a result of the defendant's eastbound vehicle being over the centerline and that none of the investigating officer's measurements were inconsistent with his, Sokol's, opinion as to how the accident occurred.

On cross-examination Sokol was questioned as to how the skid marks from the Lamprecht vehicle could lead to the gouge

mark 9 feet from the north edge of the road when the width of the car plus the distance from the skid mark to the north edge of the road placed the Lamprecht left front tire at a point 8 feet from the north edge of the road. He explained that he believed the impact had pulled the Lamprecht vehicle a foot to the south.

The defendant's expert witness, Large, based on the patrolman's measurements and an analysis of photographs of the scene, placed the gouge mark at 9 feet from the south edge of the road. He also testified that, by reference to a photograph of the defendant's vehicle taken at the accident scene, the center of the gouge mark may have been only 8 to 8.5 feet from the south edge of the road.

The plaintiff's major contention is that even if the testimony of the defendant's expert witness regarding the location of the gouge mark were accepted as true, the undisputed physical evidence would still conclusively indicate that the defendant's vehicle was over the centerline at the time of impact. He claims that placing the gouge mark at 9 feet from the south edge of the road merely places the Lamprecht vehicle over the centerline by 1 foot, i.e., 6 inches from the centerline to the gouge, then 6 inches for the width of the wheel. Because both expert witnesses testified to a 2-foot overlap of the vehicles when they collided, the plaintiff concludes that the defendant's vehicle still must have been 1 foot over the centerline for the collision to have occurred as described.

The plaintiff's contention requires an assumption that it was the left front wheel of the Lamprecht vehicle that actually caused the gouge mark. The testimony shows that neither expert witness was sure what part of the vehicle in fact made the gouge mark. Sokol, the plaintiff's expert witness, testified that he was unsure whether the wheel, rim, or some part of the frame caused the gouge mark, but he was of the opinion that it was something in the vicinity of the left front wheel.

Large, the defendant's expert witness, similarly testified that the front end, tire, or frame just behind the left front wheel of the Lamprecht vehicle caused the gouge mark. In the diagram illustrating his opinion as to the position of the vehicles at impact, he indicated that the gouge mark may have been as much as a foot to the north of the left front Lamprecht tire.

The evidence was inconclusive as to what portion of the Lamprecht vehicle caused the gouge mark. When taken in the light most favorable to the defendant, the evidence did not clearly establish that the defendant's car was over the centerline at the time of impact.

Further, there was other evidence which tended to support a conclusion that the defendant was on the right side of the road at the time of collision. The defendant testified that he was on the right side of the road at the time of the collision and that the Lamprecht car was to the left of center. The location of the defendant's car after impact and skid marks and postimpact marks leading up to the car as depicted in some of the exhibits could reasonably lead to the conclusion that the defendant's vehicle was to the right of the centerline. There was photographic evidence that most all of the fine debris and glass from the collision were located on the south half of the roadway. The witness Large testified that debris is generally a good indicator of where the accident occurred because the fine material drops once the vehicles collide and part.

The testimony of the defense expert witness, Large, also reasonably served to discredit the plaintiff's version of the accident. The 87 feet of skid marks attributed to the Lamprecht vehicle were said to be inconsistent with marks on its speedometer housing which indicated that the speedometer needle was crushed at between 50 and 60 miles per hour. He also testified that there was nothing to support Sokol's opinion that the gouge mark was a foot south of the Lamprecht skid marks. The cars moved in opposite directions on impact. Large was also critical of Sokol's method of marking the centerline of the road on a photograph so as to indicate that the gouge mark was north of the centerline.

The evidence in this case was such that different minds could reasonably draw differing conclusions regarding the defendant's alleged negligence. The trial court did not err in overruling the plaintiff's motion for a directed verdict.

Next, the plaintiff contends that assuming the case was properly submitted to the jury, the jury's disregard of the material and undisputed physical evidence in the record entitled him to a new trial.

> [A] party [who] has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue . . . has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

Sortino v. Paynter, 206 Neb. 348, 350, 292 N.W.2d 916, 917 (1980).

This court will not set aside or direct a verdict in cases where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide the issues of fact. *Koerner v. Perrella*, 213 Neb. 189, 328 N.W.2d 473 (1982).

A jury verdict will not be disturbed on appeal unless it is clearly wrong. *Koerner v. Perrella, supra.* As previously noted, there was competent evidence from which the jury could reach a verdict in favor of the defendant.

The plaintiff's final assignment of error relates to the admission into evidence of the results of blood tests performed upon both the defendant and Kurt Lamprecht. Craig Horn, the chief chemist of the Nebraska Health Department, was permitted to testify over objection as to the results of blood tests for both drivers. The plaintiff claims that the admission of these results was erroneous because the tests were taken for statistical purposes pursuant to Neb. Rev. Stat. §§ 39-6,104.07 et seq. (Reissue 1984), which required the exclusion of such evidence.

At trial the investigating officer testified that he had requested that a blood sample be taken from both drivers for statistical purposes only. Horn testified, over the plaintiff's objection, that the result of the Petersen blood alcohol test was .064 percent weight per volume ethyl alcohol. He was willing to release this result because his records did not reflect that it was taken for statistical purposes.

Horn further testified that two tests were performed on Kurt Lamprecht's blood, one for statistical purposes and one for law enforcement purposes, because the records showed a fatality accident. He would not release the result from the test taken for statistical purposes but testified that the result from the latter test showed .126 percent weight per volume ethyl alcohol. The

plaintiff did not object to this testimony, but later objected to the admission of exhibits 153 and 154, the former of which contained the test results for both drivers, while the latter contained only the Petersen result.

We need not consider the issue as to whether this evidence was improperly admitted at trial, as there was substantial other properly admitted evidence to establish the drivers' levels of intoxication. Where "properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal." *State v. Fix*, 219 Neb. 674, 676, 365 N.W.2d 471, 473 (1985); *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 322, 343 N.W.2d 903, 907 (1984).

Two of Kurt Lamprecht's friends who were with him at the party testified by deposition that Lamprecht may have consumed up to 20 beers on the night of the accident. There was also evidence that he was tonguetied and was having difficulty walking straight. Taken together with testimony that Lamprecht was 5 feet 10 inches to 5 feet 11 inches tall and weighed 165 pounds, the jury could reasonably have determined that Lamprecht was under the influence of alcohol at the time of the accident.

The defendant testified that at the time of the accident he was 5 feet 9 inches tall and weighed 210 pounds. He also testified to drinking 11 beers over a 9-hour period of time and that he was not intoxicated when he left the party just prior to the accident. From this testimony the jury could reasonably have estimated Petersen's level of intoxication at the time of the accident, without the benefit of the blood test results.

The blood test results in this case were merely cumulative evidence of the two drivers' levels of intoxication and, therefore, were not prejudicial to the plaintiff.

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

AFFIRMED.

BETHPHAGE COMMUNITY SERVICES, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. COUNTY BOARD OF PHELPS COUNTY, NEBRASKA, ET AL., APPELLANTS.

381 N.W.2d 166

Filed February 14, 1986. No. 84-817.

1. **Taxation: Appeal and Error.** In its appellate review of a question whether property is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981), the Supreme Court determines tax exemption in an equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Taxation.** Property owned by an educational organization and used exclusively for educational purposes is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981).

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed.

Lawayne L. Feit of Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, for appellants.

Susan L. Bowman and Richard P. Nelson of Peterson Nelson Johanns Morris & Holdeman, for appellee.

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

SHANAHAN, J.

The county board of Phelps County, the county board as the board of equalization for Phelps County, and Beulah Gerdes, county assessor of Phelps County (County), appeal the decision of the district court for Phelps County which held that three group homes of Bethphage Community Services, Inc. (Bethphage), were exempt from property taxation in 1983. We affirm.

Applicable in this appeal are the Nebraska Constitution and the specific statute authorizing exemption of property from taxation. "The Legislature by general law may exempt . . . property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or

user." Neb. Const. art. VIII, § 2. "The following property shall be exempt from taxes: . . . (c) Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981).

In its appellate review of a question whether property is exempt from taxation pursuant to § 77-202(1)(c), the Supreme Court determines tax exemption in an equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *Matzke v. Board of Equalization*, 167 Neb. 875, 95 N.W.2d 61 (1959).

Bethphage was formed as a Nebraska nonprofit corporation in 1982 to provide group homes for developmentally disabled persons as close to their natural homes and community setting as possible and thereby afford an alternative to placing such persons in institutions. Bethphage also operated a "sheltered workshop" where occupational training was taught to the disabled so that they might become "competitively employed" or otherwise take their place in a "normal work situation." The county board granted a tax exemption for the workshop. "Developmentally disabled" persons include those with "mental retardation" or certain disabling conditions such as epilepsy or cerebral palsy. According to the standards contained in its "Policy and Procedural Manual," Bethphage characterizes a "developmental disability" as a severe, chronic disability of a person which is attributable to mental or physical impairment, or combination of such impairments, manifested before age 22, likely to continue indefinitely, and which results in a substantial function limitation in three or more of the following major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency.

Bethphage's group homes are licensed by the State of Nebraska and are subject to regulation by the state's Office of

Mental Retardation. Although Bethphage derives some revenue from certain charges to residents of the group homes, Bethphage receives funds through the Office of Mental Retardation. Bethphage does not distribute any part of its income to its members, directors, officers, or private individuals, does not accumulate profits for distribution, and is exempt from federal income taxation. See Neb. Rev. Stat. §§ 21-1901 et seq. (Reissue 1983) (Nebraska Nonprofit Corporation Act).

Residents of the group homes receive occupational training at the sheltered workshop. When they are not at the workshop, residents of the homes, through encouragement from supervisors, correlate the day's occupational training with proper social behavior. According to a Bethphage representative, the disabled persons "placed competitively in employment situations in the community lose their work or lose their job, not because they cannot do the work, but generally because of a socially inappropriate behavior." Residents of the group home receive instruction on how to deal with prospective situations outside the workshop involving insensitive remarks or deliberate derision by fellow workers at the expense of a disabled person. At the homes, records are kept reflecting a resident's adjustment to social situations, ability to communicate, and awareness of environment, as well as fundamental and general hygiene and maintenance, in order that good personal and social habits might be developed. Correlation between social behavior and occupational training or job skill is designed to produce "normalization" in the daily life of a disabled person. Only persons who can learn and benefit from such a program may reside in the group homes.

Bethphage applied to the Phelps County assessor for a property tax exemption for 1983 concerning its three group homes. See Neb. Rev. Stat. § 77-202.01 (Reissue 1981). After the assessor denied the requested tax exemption on September 6, 1983, Bethphage requested a hearing before the Phelps County Board of Equalization, see Neb. Rev. Stat. § 77-202.02 (Reissue 1981), which, on September 27, also denied tax exemption for the group homes. As a result of Bethphage's appeal, the district court, after a trial de novo, see Neb. Rev.

Stat. § 77-202.04 (Reissue 1981), held that the group homes were used exclusively for educational and charitable purposes, were not used for financial gain or profit, and were, therefore, exempt from property taxation for the year 1983.

The County claims the district court erred in (1) holding that the group homes were property used exclusively for educational and charitable purposes; (2) holding that Bethphage's property was not owned and used for financial gain or profit to either the owner or user; and (3) failing to rule that any educational or charitable use of the property was merely incidental to use of the property as a housing facility available to residents for a charge.

Because the power and right of a state to tax property are presumed, tax exemption provisions are strictly construed, and their operation will not be extended by construction. *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965). Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation. *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961). However, this does not mean that statutory language should not receive a liberal construction to carry out the express legislative intent. *Doane College v. County of Saline, supra.*

In reference to § 77-202(1)(c), this court has held that *exclusively* means the primary or dominant use of property, not an incidental use of the property. *Ancient and Accepted Scottish Rite v. Board of County Commissioners*, 122 Neb. 586, 241 N.W. 93 (1932); *Lincoln Woman's Club v. City of Lincoln, supra*; *Doane College v. County of Saline, supra.*

In *Ancient and Accepted Scottish Rite v. Board of County Commissioners, supra*, this court interpreted Neb. Const. art. VIII, § 2, construed the statutory precursor of § 77-202(1)(c), and held *educational*

> taken in its full sense is a broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training—moral, intellectual, and physical.

122 Neb. at 593-94, 241 N.W. at 95-96. With such meaning attributed to *educational*, the court then held that temple property was utilized in "instruction and training received by [the temple's] initiates and membership, directed either to their mental or moral faculties . . . ." *Id.* at 594, 241 N.W. at 96.

More than 30 years after *Ancient and Accepted Scottish Rite v. Board of County Commissioners, supra*, this court in *Lincoln Woman's Club v. City of Lincoln, supra*, considering property used to learn about civic, national, and world government and as a site for instruction in bridge, "homemaking," book reviews, and lectures on Alcoholics Anonymous, held:

> [We have] said that education "may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training—moral, intellectual, and physical." [Citing and quoting from *Ancient and Accepted Scottish Rite v. Board of County Commissioners, supra.*]

Lincoln Woman's Club v. City of Lincoln, supra at 363, 133 N.W.2d at 459.

In substance, the County contends that activities occurring at group homes are merely incidental to operation of the facilities as a dormitory or residence for disabled persons. We cannot agree with the County's myopic view of the educational function found in the group homes.

Education should not be determined by some quantitative analysis of a formal curriculum but may be measurable in reference to training received as reflected in an individual's enhanced behavior. In its most basic sense education is simply development, as fully as possible, of an individual's given capacity, preferably for desirable qualities. Because they are special people, the residents of the group homes receive special training—education—for life beyond Bethphage. Thus, the activities at the group homes are educational within the meaning recognized by this court in *Ancient and Accepted Scottish Rite v. Board of County Commissioners, supra.*

Bethphage does not distribute any of its income to its

members, directors, officers, or private individuals and, therefore, does not use its property for financial gain or profit. See *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).

We agree with the district court that Bethphage's property was exempt from taxation in 1983 as a result of its use for an educational purpose. We realize that the district court also held that Bethphage's property was used for a charitable purpose. However, the bases for exemption from taxation, pursuant to § 77-202(1)(c), are stated in the disjunctive. Having determined that one of the uses enumerated in § 77-202(1)(c) exempts Bethphage's property from taxation, unlike Browning, regarding an additional basis for exemption, we need not "count the ways."

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE E. BEARD, APPELLANT.

381 N.W.2d 170

Filed February 14, 1986. No. 85-310.

1. **Search and Seizure.** A seizure of a person takes place if the circumstances of an involuntary encounter with the police are so intimidating as to demonstrate that a reasonable person would have believed himself or herself not free to leave.
2. **Motions to Suppress: Appeal and Error.** The Nebraska Supreme Court will not overturn the trial court's findings of fact when determining the correctness of the latter's rulings on a motion to suppress unless those findings are clearly wrong.
3. **Jury Instructions: Words and Phrases.** Nebraska Jury Instruction 14.08 correctly defines "reasonable doubt."
4. _____: _____. Nebraska Jury Instruction 14.11 correctly defines "intent."

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

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

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

CAPORALE, J.

Pursuant to the jury's verdict, defendant, Lawrence E. Beard, was adjudged guilty of murder in the second degree and of using "firearms," specifically a knife, to commit a felony. He was thereupon sentenced to imprisonment for a term of 20 years for the murder and to imprisonment for a consecutive term of 5 years for use of the knife. He assigns as error the trial court's (1) failure to suppress the statements he made to Officer James Wilson of the Omaha Police Department, (2) overruling of his objection to the reasonable doubt instruction, and (3) overruling of his objection to the intent instruction. We affirm.

On Tuesday morning, October 9, 1984, at approximately 8:30, Dennis Moody took his child to her babysitter's house and found the latter to be upset over a telephone call she had received concerning her daughter. Moody and two other men then drove to the daughter's house, where they found her 8-year-old son crying and standing in the front doorway of the house. He told them his mother was in her bedroom; upon entering, they saw the daughter lying on the bedroom floor and saw blood on the walls, floor, and bed. Finding that the daughter had no pulse, Moody caused the police to be called.

In the meantime, Seymore Hodges noticed Beard, a friend from their high school days, walking along the street. Since it was raining, Hodges offered Beard a ride. Beard accepted, stating he was going to his girl friend's house, where Hodges then drove. Police officers were already on the scene by the time Hodges and Beard arrived. Sgt. John Thrush, a regional investigator who was in charge of the situation until the homicide detectives arrived, was among the officers present. The homicide detectives, under the supervision of Sgt. Verlyn Sieh, arrived at approximately 9 a.m., after Beard. At various times, friends and relatives of the victim also arrived at the scene. Because of the rain, these people, including Beard, stood under the carport attached to the victim's house. Thrush was of

the opinion that while the men were in the carport, they were being detained until they could be questioned and were not free to leave. Wilson and another officer, on the other hand, believed that Beard and the others were not under arrest at that time and were free to leave. Beard did not believe himself free to leave.

An officer identified Beard to Wilson as a boyfriend of the victim. Wilson reported that fact to Sieh, who told Wilson to "[t]ake him [Beard] down to Central Station to see if he will talk to you." According to Wilson, the police at this point had no reason to believe that Beard was involved in the killing. Wilson stated he then told Beard, "I would like to talk to you at central station. I want to interview you." According to Beard, however, Wilson said, "I want to talk to you downtown." In any event, Beard made no complaint and was driven to police headquarters by Wilson. Beard was not searched, was not handcuffed during the trip, and rode in the front seat of the police cruiser. Taking witnesses to the police station for questioning was stated by Wilson to be normal procedure. Moody and his companions were also driven to headquarters by Thrush for questioning. Hodges, however, drove his own vehicle to the station.

Once at the police station, Wilson took Beard to an interrogation room and, in accordance with Wilson's custom, read Beard his *Miranda* rights at 9:42 a.m.

Although Sieh was also in the room part of the time, Wilson appears to have been primarily responsible for questioning Beard. Beard initially denied any involvement in the crime, but Wilson did not believe him. While denying involvement in the crime, Beard admitted he had lived with the victim on and off but said he had not been staying with her recently because they had been having problems which centered around the victim's use of narcotics and alcohol. It was because Beard did not want his 2-year-old son, who had been borne by the victim, exposed to such activity that he removed the boy from the victim's house. Beard also admitted he had been at the victim's house the night before her body was found. At some point another officer informed Wilson that the victim's 8-year-old son saw the arm of a man closing the door to his mother's bedroom Monday night

and recognized the man's voice as belonging to Beard. At another point, the record does not reveal when, Wilson told Beard that blood had been found on the latter's watch which Wilson had taken out of the interrogation room on an earlier occasion. In fact, no blood had been found on the watch. Wilson also told Beard he felt sorry for him, having to live with a woman like the victim, and that it was "best to tell the truth and get the thing over with."

Beard confessed at approximately 2:30 p.m. to having stabbed the victim. Following this, he took Wilson and another policeman to the place he claims to have hidden the clothes he had been wearing that night, as well as the knife and a telephone cord. However, none of these items were found. Beard then gave a tape-recorded statement.

In this statement, which was played for the jury at Beard's trial, Beard again described the crime and talked at length about arguments he had had with the victim.

Beard related that on Monday evening he saw a man enter the victim's house. He listened to their conversation from outside and then went back to his mother's house and got a 5-inch butcher knife. After the football game on television was over, he returned to the victim's house. When no one answered the door, he entered by hitting it with his shoulder. The victim denied that another man had been there. Beard then stabbed her in the leg; she continued her denials and slapped and kicked Beard, and he stabbed her again. Beard then washed his hands in the bathroom sink and left. At that time the victim was still talking and breathing.

The victim died from loss of blood due to multiple stab and cut wounds.

Beard's first assignment of error rests upon the trial court's overruling of his pretrial and trial motions to suppress the statements he made to Wilson.

The fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution provide, "The right of the people to be secure in their persons . . . against unreasonable . . . seizures shall not be violated . . . ." The issue raised by Beard's first assignment of error, therefore, is whether the police, lacking probable cause to arrest Beard, unreasonably seized

him, thereby rendering the confession he made while so seized inadmissible in evidence.

The first question encountered in the analysis of this issue obviously is whether there was any seizure of Beard at all. *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984), and *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982), in reliance upon the opinion of Justices Stewart and Rehnquist in *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), concluded that a person is "seized" only when, by means of physical force or a show of authority, his or her freedom of movement is restrained. However, the more recent case of *INS v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984), indicates that an impermissible seizure has taken place if the circumstances of the encounter with the police are so intimidating as to demonstrate that a reasonable person would have believed himself or herself not free to leave.

In *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), a police detective, after questioning an informant about an attempted robbery and murder "in the hope that something might turn up," *id.* at 218, ordered other detectives to "pick up" Dunaway and "bring him in," *id.* at 203, notwithstanding the fact that at that time no probable cause to arrest him existed. Dunaway was then located at a neighbor's house, taken into custody, and driven to police headquarters. Although he was not informed he was under arrest, he would have been physically restrained had he attempted to leave. The U.S. Supreme Court, based upon the finding of the state court that Dunaway had not accompanied the police voluntarily, ruled that an unconstitutional seizure had taken place. As a consequence, the incriminating statements Dunaway made after being placed in an interrogation room and given his *Miranda* warnings were held to be inadmissible in evidence.

Whether Beard voluntarily accompanied Wilson to police headquarters by not protesting and thus was not seized is a question of fact. Implicit in the trial court's rulings is the finding that Beard consented to make the trip to police headquarters. It is well established that this court will not overturn the trial court's findings of fact when determining the

correctness of the latter's rulings on motions to suppress unless those findings are clearly wrong. *State v. Horn, supra*; *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984). Thus, the question at this point in the analysis becomes whether it can be said that the trial court's finding was clearly wrong. It cannot be so said.

The fact that Beard considered himself not free to leave is immaterial, for it was not necessary that he know or have been told he had a right not to accompany Wilson. *INS v. Delgado, supra*. See, also, *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980), and *State v. Wood*, 195 Neb. 353, 238 N.W.2d 226 (1976), which hold that one asked to consent to a search need not know or be told that he or she may refuse.

It is true that one's initially consensual encounter with the police may be transformed into an unreasonable seizure or detention by subsequent events. *Dunaway v. New York, supra*. However, in the absence of evidence that Beard gave any manifestation while being questioned that he sought to revoke his earlier consent, it cannot be said the trial court's implied finding that he did not later withdraw his consent is clearly wrong. It became clear during questioning that Wilson did not believe Beard was innocent of the crime, yet at no time did Beard ask that questioning stop and he be released.

Consequently, the trial court's finding that Beard's failure to protest rendered the trip to police headquarters consensual cannot be said to be clearly wrong, and Beard's first assignment of error therefore fails.

Beard next complains that in connection with the State's burden of proof, the trial court instructed the jury in the words of the pattern instruction known as Nebraska Jury Instruction 14.08. Specifically, Beard moved to strike the italicized language in the following recitation of that instruction:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral

> certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. *You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable.* A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, *as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.*

He argues that the subject language "unconstitutionally weaken[s] the burden of proof placed on the prosecution." Brief for Appellant at 20-21. While there is authority suggesting it is perhaps better not to attempt to define "reasonable doubt" at all, some of that authority nonetheless rejects a per se rule that such an attempt requires reversal of a conviction. *United States v. Moss*, 756 F.2d 329 (4th Cir. 1985); *United States v. Regilio*, 669 F.2d 1169 (7th Cir. 1981), *cert. denied* 457 U.S. 1133, 102 S. Ct. 2959, 73 L. Ed. 2d 1350 (1982). *Moss* upheld an instruction requiring proof of such a convincing character that jurors would be willing to rely upon it without hesitation in their most important affairs. *Regilio* criticized but found harmless an instruction defining reasonable doubt as doubt based on reason. However, *United States v. Wosepka*, 757 F.2d 1006 (9th Cir. 1985), found defective an instruction defining reasonable doubt as doubt based on reason and common sense, without tying it to a requirement that jurors decide the question of guilt or innocence with the same degree of care and attention they would bring to bear in the most important of their own personal affairs.

In effect, Beard invites us to overrule *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), which specifically approved NJI 14.08 and rejected an argument that it is "confusing, contradictory, and a misstatement of the traditional understanding of 'reasonable doubt'." *Id.* at 69, 296

N.W.2d at 452. The invitation is rejected, for, unlike the situation in *Wosepka*, NJI 14.08 makes clear that a reasonable doubt exists if the uncertainty is such that in one of the graver and more important transactions of life, a reasonable and prudent person would hesitate to accept the represented facts as true and in relying and acting upon them.

In his third and last assignment of error, Beard contends the trial court erred in not striking, pursuant to his motion, the italicized language in Nebraska Jury Instruction 14.11:

> The intent required by Instruction ____ is a material element of the crime charged against the defendant. *Intent is a mental process and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible of proof by direct evidence. It may, however,* be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the criminal intent required by Instruction ____. If you have any reasonable doubt with respect to either, you must find the defendant not guilty.

Beard further moved that in place of the stricken language the words "Intent can" be inserted so that the second sentence would read: "Intent can be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct."

His contention is that somehow the language of the pattern instruction at issue constitutes an argument for the prosecution. The situation is in fact quite to the contrary.

It is true that in *Francis v. Franklin*, ____ U.S. ____, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985), the U.S. Supreme Court declared invalid instructions which presumed acts to be the product of one's will and presumed that one intended the natural and probable consequences of those acts, but stated

that such presumptions might "be rebutted." The Court held the instructions violated the fourteenth amendment requirement that a state prove beyond a reasonable doubt every element of a crime. *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), also invalidated an instruction which stated the law presumed one intends the ordinary consequences of an act. NJI 14.11, however, makes no presumptions; rather, it accurately describes the nature of intent and describes how it is proved, leaving the jury free to determine whether the defendant committed the acts in question and possessed the requisite criminal intent.

We adhere to our prior approvals of NJI 14.11. *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981); *State v. Keeton*, 199 Neb. 405, 259 N.W.2d 277 (1977).

Each of Beard's assignments of error being without merit, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

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Actions

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7. A medical malpractice action arises, for the purpose of determining the admissibility into evidence of a written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made.
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8. When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must allege and prove all the facts essential to a strict compliance with the prescribed conditions.
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9. An administrative proceeding is a "pending action," within the meaning of Neb. Rev. Stat. § 49-301 (Reissue 1984), when the agency's final order is rendered.
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Administrative Law

1. If one chooses to represent himself or herself before a tribunal, one must accept the consequences of one's own failure to properly

present sufficient evidence to sustain one's burden.
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2. The authority to delegate discretionary and quasi-judicial powers to agency subordinates is implied where the powers bestowed upon an agency head are impossible of personal execution.
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4. An administrative proceeding is a "pending action," within the meaning of Neb. Rev. Stat. § 49-301 (Reissue 1984), when the agency's final order is rendered.
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5. The power of an administrative agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has expired.
Morris v. Wright 837
6. One who sought to be certified as qualified to practice clinical psychology as an existing practitioner under the provisions of Neb. Rev. Stat. § 71-3836 (Cum. Supp. 1978) had the burden of proving engagement in the full-time practice of clinical psychology as of December 1, 1976.
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Adverse Possession

1. 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 a claim of ownership for a full 10-year period.
Young v. Lacy 511
2. Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period.
Young v. Lacy 511
3. The sufficiency of the possession in an adverse possession case depends upon the character of the land and the use that can reasonably be made of it.
Young v. Lacy 511
4. Title may not be quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period.
Young v. Lacy 511
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to the true owner.
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Agriculture

Experienced grain producers who regularly grow and market grain on the open market as the principal means of providing for their livelihood, and by reason of such occupation have acquired and possess knowledge or skill peculiar to the practices and operations of grain marketing, are merchants within the meaning of Neb. U.C.C. §§ 2-104 and 2-201 (Reissue 1980).
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Alienation of Affections

1. In an alienation of affections case, the plaintiff is entitled to the damages which are the natural, probable consequence of the act complained of.
Vacek v. Ames 333
2. There is no mathematical method or formula for determining appropriate compensation in an alienation of affections case.
Vacek v. Ames 333
3. In an alienation of affections case, evidence as to the defendant's income and financial condition may be admissible as proof as to how the alienation was accomplished.
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1. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.
Rezac v. Rezac 516
2. The fixing of alimony or distribution of property rests in the sound discretion of the district court, and in the absence of an abuse of discretion, will not be disturbed on appeal.
Rezac v. Rezac 516
Burhoop v. Burhoop 657
3. Awards of alimony and child support will not be disturbed on appeal unless the record establishes that the trial court abused its discretion.
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4. The ultimate test for the division of property as well as an award of alimony is reasonableness as determined by the facts of each case.
Maricle v. Maricle 552
Burhoop v. Burhoop 657
5. It is an abuse of discretion to award alimony in excess of the earning capacity of the paying party.
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6. The actual earning capacity of a spouse is frequently more important than the profitability of that spouse's business in determining the propriety of an award of alimony.
Burhoop v. Burhoop 657
7. The earning capacity of both spouses must be considered in making a determination of alimony.
Burhoop v. Burhoop 657

Annexation

1. Neither Neb. Rev. Stat. § 14-373 nor § 19-3101 (Reissue 1983) applies where a city of the metropolitan class seeks to adopt an ordinance annexing land adjacent to the city's boundaries.
S.I.D. No. 95 v. City of Omaha 272
2. The act of annexation is a matter of statewide concern, and therefore the state statutes, and not the city charter provision, are controlling.
S.I.D. No. 95 v. City of Omaha 272
3. The determination of the City of Omaha, Nebraska, to annex or not to annex outlying property is a purely municipal concern, but this is not true of the annexation process which necessarily affects property outside the municipality and persons who are not inhabitants of the city. The protection of such persons and property is a matter of state concern, and in fulfillment of its duties in this respect, the state must fix the rules and regulations pertaining to annexation procedures.
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4. A municipality cannot annex property for revenue purposes only.
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Antenuptial Agreements

1. The burden of proof regarding the validity of an antenuptial contract is on the party asserting its invalidity.
In re Estate of Peterson 792
2. "Fair disclosure," in the context of an antenuptial agreement, contemplates that each spouse shall be given information of a general and approximate nature concerning the net worth of the other.
In re Estate of Peterson 792
3. Neb. Rev. Stat. § 30-2316 (Reissue 1979) provides that the parties to a valid antenuptial agreement may waive the right to elect a share of both real and personal property of a deceased spouse.
In re Estate of Peterson 792
4. The effect of an antenuptial contract in which the parties agree to be bound by present and future laws is to be determined by the statutes in effect at the time of the death of the party to the agreement whose estate is attempting to effectuate the agreement.
In re Estate of Peterson 792

Appeal and Error

1. On an appeal to this court of an action under Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), the findings of the trial court will not be disturbed unless clearly wrong.
Oldenburg v. State 1

2. In a disciplinary proceeding the determination as to whether discipline should be imposed and what discipline is appropriate is made upon a de novo review of the record.
State ex rel. NSBA v. Kelly 8

3. Harmless error forms no basis for reversal of a judgment on the verdict of a jury.
Fuel Exploration, Inc. v. Novotny 17

4. A party cannot be heard to complain of error which he or she was instrumental in bringing about.
Fuel Exploration, Inc. v. Novotny 17

5. Motions for continuances are addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on such motions will not be disturbed on appeal.
State v. Broomhall 27
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6. In determining whether or not the trial court has abused its discretion in refusing to grant a continuance, it is proper to look to the entire record in the case.
State v. Broomhall 27

7. Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.
State v. Broomhall 27

8. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prejudiced from having a fair trial.
State v. Broomhall 27

9. Failure to comply with Neb. Ct. R. 16A (rev. 1983) requiring that a copy of the brief assigning the unconstitutionality of a statute be served upon the Attorney General in those cases in which he is not already a party is fatal to a consideration of the issue by the Nebraska Supreme Court.
City of Lincoln v. Bruce 61

10. The Supreme Court is not bound by the ground purportedly used by the trial court as the basis for granting summary judgment.
Sommerfeld v. City of Seward 76

11. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court,

the Supreme Court will affirm.
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Prorok v. County of Custer 789

12. Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong.
Thompson v. Monfort of Colorado 83
Aldrich v. ASARCO, Inc. 126
Gibson v. City of Lincoln 304

13. In reviewing workmen's compensation cases this court is not free to weigh the facts anew. Our standard of review accords to the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing the same force and effect as a jury verdict in a civil case, and they will not be reversed or set aside unless clearly wrong.
Wilson v. City of North Platte 90
Cemer v. Huskoma Corp. 175
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Pollock v. Monfort of Colorado 859

14. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence.
Wilson v. City of North Platte 90

15. It has long been the rule in this jurisdiction that habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error.
Mayfield v. Hartmann 122

16. The writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error.
Mayfield v. Hartmann 122

17. With respect to questions about a statute, a court's role is limited to interpretation and application of statutes, irrespective of a court's personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.
Anderson v. Peterson 149

18. In a proceeding in error the jurisdiction of the court does not attach until there is presented to it, within the 1-month limitation contained in Neb. Rev. Stat. § 25-1931 (Reissue 1979), a duly authenticated transcript containing the final order or judgment of which complaint is made.
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19. The mere production of unauthenticated original papers does not constitute a transcript within the meaning of Neb. Rev. Stat. § 25-1905 (Reissue 1979).
Moell v. Mennonite Deaconess Home & Hosp. 168
20. An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter.
Moell v. Mennonite Deaconess Home & Hosp. 168
21. A motion for a change of venue is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless a clear abuse of discretion is shown.
State v. Navarrete 171
22. An appeal is disposed on the basis of the theory presented by the pleadings on which a case has been tried.
Foltz v. Northwestern Bell Tel. Co. 201
23. In a bench trial, that is, all factual determinations made by a judge and not by a jury, we apply the principle or "presumption" that the trial court will consider only relevant and otherwise admissible evidence so that an erroneous admission of evidence during a bench trial will not result in a reversal, if there is relevant and admissible evidence to sustain the trial court's judgment. The foregoing principle, likewise, applies to a rehearing before the Nebraska Workmen's Compensation Court.
Gibson v. City of Lincoln 304
24. 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. Loschen 315
State v. Smith 406
State v. Whitmore 450
State v. Dobbins 778
State v. Havlat 845
25. The Nebraska Supreme Court will not disturb a trial court's finding that one is a mentally disordered sex offender whose disorder is nontreatable unless it can be said that such declaration was an abuse of discretion.
State v. Reddick 322
26. When a statute is constitutionally suspect, the Supreme Court will endeavor to interpret it in a manner consistent with the Constitution.
In re Estate of Steppuhn 329
27. A jury verdict may not be set aside unless it is clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
Vacek v. Ames 333
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28. Upon an appeal from an order of the Public Service Commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
In re Application of Red Carpet Limo. Serv., Inc. 340
29. If there is evidence to sustain the finding of the Public Service Commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary.
In re Application of Red Carpet Limo. Serv., Inc. 340
30. The findings and conclusions of the trial court in an action at law tried without a jury have the effect of a jury verdict and will not be set aside by the Nebraska Supreme Court unless they are clearly wrong.
Lis v. Moser Well Drilling & Serv. 349
31. The Nebraska Supreme Court reviews equitable matters de novo on the record, taking into consideration the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than another.
Ridenour v. Farm Bureau Ins. Co. 353
32. The standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected.
State v. Michalski 380
33. Under the strict scrutiny test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.
State v. Michalski 380
34. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
State v. Michalski 380
35. Because the right to travel has been characterized as fundamental, courts examine statutes impairing that right using the strict scrutiny standard of review.
State v. Michalski 380
36. When evaluating whether a sentence constitutes cruel and unusual punishment, courts consider (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals for like offenses in the same jurisdiction, and (3) the

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State v. Michalski 380

37. An order terminating parental rights is reviewed de novo on the record, 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.
In re Interest of M.L.B. 396
In re Interest of M.W.M. 829

38. It is the general rule that a ground of error must be raised and passed on in the intermediate court before it may be reviewed in a higher court.
In re Interest of M.L.B. 396

39. As a general rule, it is not prejudicial error to admit evidence which is simply cumulative of other competent evidence.
State v. Smith 406
State v. Harrison 521

40. The question of whether defendant had the requisite intent to commit a wrongful act is one of fact which, if resolved against the defendant by the trial court based on evidence, will not be interfered with on appeal unless so lacking in probative force that we can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
State v. Smith 406

41. It is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions.
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42. On an appeal from an order revoking a motor vehicle operator's license under the implied consent law, the findings of the trial court are reviewed de novo as in equity.
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43. On appeal to the district court the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal.
Jamros v. Jensen 426

44. The transcript filed on an appeal to the Supreme Court is limited in content by the Supreme Court rules; when those rules are ignored by the attorney requesting the transcript, the attorney will be taxed personally with the costs of its preparation.
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45. Factual findings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong, looking at a totality

of the circumstances.
State v. Whitmore 450
State v. Beard 891
46. Under the harmless error rule, for an error to be prejudicial, it must be demonstrated that the State's case was significantly less persuasive had the disputed testimony been excluded.
State v. Whitmore 450
47. We are not required to disturb an otherwise entirely appropriate sentence solely because someone else was treated more leniently.
State v. Whitmore 450
48. If a sufficient record exists which establishes the grounds for the revocation of probation by clear and convincing evidence, such revocation need not be reversed solely and only on the ground that, through inadvertence, a complete record of the revocation hearing was not preserved.
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49. The Nebraska Supreme Court is not free to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.
State v. Schulz 473
50. It is plain error to have no showing in the record that defendant either had assistance of counsel or waived such at the time of her conviction if the conviction is used for enhancement purposes.
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51. This court will not take judicial notice of a municipal ordinance which is not in the record.
State v. Richter 487
52. The fixing of alimony or distribution of property rests in the sound discretion of the district court, and in the absence of an abuse of discretion, will not be disturbed on appeal.
Rezac v. Rezac 516
Burhoop v. Burhoop 657
53. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
Rezac v. Rezac 516
Black v. Black 533
54. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.
Bernadt v. Suburban Air, Inc. 537
55. Awards of alimony and child support will not be disturbed on appeal unless the record establishes that the trial court abused its discretion.
Maricle v. Maricle 552
56. Only issues properly presented to and passed upon by the district court may be raised on appeal to the Supreme 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.
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57. 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.
Earl v. Earl 574

58. On appeal this court will not set aside a finding of fact made by the trial court unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or is in disregard of the rules of evidence or the law.
Agrex, Inc. v. Schrant 604

59. Consideration on appeal to this court of a case will be limited to errors assigned and *discussed*.
Agrex, Inc. v. Schrant 604
State v. Topete 771

60. In determining the weight of the evidence, we will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
Wisch v. Jensen 609

61. A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
State v. Warnke 625

62. A sentence of probation is a final and appealable order from which an appeal must be taken within 1 month.
State v. Jacobson 639

63. The general rule that if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is harmless rests on the premise that the nature of the cumulative evidence is such that no prejudice results from its improper admission.
Barry v. Bohi 651
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64. It is presumed that the improper admission into evidence of an opinion of the medical review panel rendered in accordance with the provisions of the Nebraska Hospital-Medical Liability Act results in prejudice.
Barry v. Bohi 651

65. Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions that includes that evidence.
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66. Where there is no bill of exceptions, we are limited to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment.
West Town Homeowners Assn. v. Schneider 674

67. In the absence of an abuse of discretion, a trial court's decision permitting an amendment to a pleading will be affirmed.
Bump v. Firemens Ins. Co. 678

68. Any claimed error based on the issues specified by the trial court may be waived by failure to object to the report on the pretrial conference and cannot be asserted for review by this court.
Bump v. Firemens Ins. Co. 678

69. A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.
Bump v. Firemens Ins. Co. 678

70. The exclusive remedy for relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property.
Xerox Corp. v. Karnes 691

71. When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
Xerox Corp. v. Karnes 691

72. 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.
Grace v. Grace 695

73. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal

unless there is an abuse of discretion.
State v. Moore 706
74. In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
State v. Surber 714
75. An action to declare a conveyance fraudulent as to a creditor invokes equity jurisdiction of a court. On appeal an equitable action for declaration of a fraudulent conveyance is a trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Gifford-Hill & Co. v. Stoller 757
76. Failure to inform a defendant of the right to counsel does not constitute error when the defendant has had the benefit of counsel before the court.
State v. Mindrup 773
77. A defendant may not waive the reading of a document which would have advised him or her of the nature of the offense and later complain that the plea of guilty was entered in ignorance of the nature of the offense.
State v. Mindrup 773
78. The scope of review in a case where the State appeals a sentence is whether there was an abuse of discretion.
State v. Dobbins 778
79. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.
State v. Norfolk 810
80. For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. Neb. Rev. Stat. § 30-2437 (Reissue 1979).
In re Estate of Christensen 872
81. A party who has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
Poppe v. Petersen 877
82. In its appellate review of a question whether property is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981), the Supreme Court determines tax exemption in an

equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Bethphage Com. Servs. v. County Board 886

Appurtenances

1. The term "fixture" refers to a chattel which is capable of existing separate and apart from realty, but which, by actual annexation and appropriation to the use or purpose of the realty with the intention of making it a permanent accession thereto, becomes a part of the realty.
Fuel Exploration, Inc. v. Novotny 17
2. Once a chattel becomes a fixture, it is treated as a part of the realty and may not be removed therefrom except by the owner of the realty.
Fuel Exploration, Inc. v. Novotny 17
3. A "trade fixture" is not considered part of the realty and may be removed therefrom by the trade fixture's owner, so long as the removal does not cause substantial damage to the realty.
Fuel Exploration, Inc. v. Novotny 17
4. Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case.
Fuel Exploration, Inc. v. Novotny 17
5. The intention of the party making the annexation is to be inferred from the nature of the articles affixed, the relation between the parties, the situation of the party making the annexation, the nature of the structure, the mode of annexation, and the purpose or use for which the annexation has been made.
Fuel Exploration, Inc. v. Novotny 17
6. Generally, in the absence of statute any permanent improvement placed upon land of another by one having no interest or title in the land, without the landowner's consent, prima facie becomes a part of the realty and belongs to the owner of the land, although it was placed thereon by mistake or with a view of enforcing an adverse right in the land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership.
Fuel Exploration, Inc. v. Novotny 17
7. The right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

Arrests

1. Reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test.
   Fulmer v. Jensen 582
2. The establishment of reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test in accordance with Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984).
   Wisch v. Jensen 609

Attorney and Client

A claimant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.
League v. Vanice 34

Attorney Fees

1. Attorney fees may be assessed against a party whom the court determines is responsible for conduct during the course of litigation which is vexatious and unfounded to the extent it constitutes bad faith toward the other party to the litigation.
   Stratman v. Hagen 157
2. 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.
   Earl v. Earl 574
3. The burden is upon the one claiming an attorney fee in a class action to show that a *net* benefit was conferred upon the class.
   Hill v. City of Lincoln 719

Attorneys at Law

1. Any action to recover damages based on alleged professional negligence shall be commenced within 2 years next after the alleged act or omission providing the basis for such action.
   Suzuki v. Holthaus 72
2. A cause of action for damages for professional negligence accrues at the time of the act or omission causing the injury.
   Suzuki v. Holthaus 72
3. The transcript filed on an appeal to the Supreme Court is limited in content by the Supreme Court rules; when those rules are ignored by the attorney requesting the transcript, the attorney will be taxed personally with the costs of its preparation.
   Pierce v. City of Ogallala 433

Banks and Banking

1. A joint account is an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.
Uttecht v. Norwest Bank of Norfolk 222
2. A party to an account is one who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account.
Uttecht v. Norwest Bank of Norfolk 222
3. Without qualifying any other statutory right to setoff or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to setoff against the account in which the party has a present right of withdrawal. The amount of the account subject to setoff is that proportion to which the debtor is beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.
Uttecht v. Norwest Bank of Norfolk 222
4. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.
Uttecht v. Norwest Bank of Norfolk 222
5. Net contribution is the sum of all deposits made by or for a party to a joint account as of a given time, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any dividends or interest included in the current balance.
Uttecht v. Norwest Bank of Norfolk 222
6. Absent allegations and proof of fraud, contractual arrangements between a bank and its depositors with respect to the bank's right of setoff may supersede statutory provisions.
Uttecht v. Norwest Bank of Norfolk 222
7. Under Neb. Rev. Stat. § 30-2703(a) (Reissue 1979), a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
Craig v. Hastings State Bank 746
8. Under Neb. Rev. Stat. § 30-2713 (Reissue 1979) and in the absence of an agreement otherwise providing, a bank can set off the debt of a depositor having an account with the bank, but only to the extent of the debtor's present beneficial interest in that account.

When there is a joint account and proof of net contributions, the amount of the debtor's beneficial interest in such joint account is determined by the net contributions rule required by Neb. Rev. Stat. §§ 30-2703(a) and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

9. Under the net contributions rule of Neb. Rev. Stat. § 30-2703(a) (Reissue 1979) and in the absence of an agreement otherwise providing, if it is established that a nondebtor party to the account has funded all or part of the beneficial interest in an account, a bank has no right of setoff against the beneficial interest contributed by the nondebtor depositor.
Craig v. Hastings State Bank 746

10. In the absence of an agreement otherwise providing, if a person has a present right to withdraw funds from a joint account and is indebted to the financial institution where the account is maintained, the financial institution has a right to set off against such indebtedness the debtor's beneficial interest in the account as determined by the net contributions rule of ownership in accordance with Neb. Rev. Stat. §§ 30-2703 and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

Blood, Breath, and Urine Tests

1. A refusal to submit to a chemical test for purposes of the implied consent law occurs when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it.
Jamros v. Jensen 426

2. A motorist's conduct may constitute a refusal for purposes of an implied consent statute.
Jamros v. Jensen 426

3. The State is entitled to have a chemical test administered at a time when it will be effective to disclose blood alcohol content in relation to the time when the vehicle was operated.
Jamros v. Jensen 426

4. A delay in chemical testing is not prejudicial unless it materially affects the results of the test.
Jamros v. Jensen 426

5. Without an implied consent advisement a motorist cannot be cited for a refusal.
Jamros v. Jensen 426

6. A motorist's justifiable refusal to submit to a chemical test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both.
Jamros v. Jensen 426

7. Physical inability to perform a breath test may excuse conduct which might otherwise be treated as a refusal.
Jamros v. Jensen 426
8. A condition precedent to a valid request by an officer to submit to a chemical test under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) is that the officer must have reasonable grounds to believe that the licensee was either driving a motor vehicle or in the actual physical control of same while under the influence of alcoholic liquor.
Emmons v. Jensen 444
9. The term "reasonable," as applied to refusals to submit to a chemical test under the implied consent law, is an ordinary term which finds adequate interpretation in common usage and understanding.
Fulmer v. Jensen 582
10. There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law.
Fulmer v. Jensen 582
11. Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
Fulmer v. Jensen 582
12. Reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test.
Fulmer v. Jensen 582
13. The establishment of reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test in accordance with Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984).
Wisch v. Jensen 609
14. To constitute a refusal to submit to a chemical test required under the implied consent law, the only understanding required by the licensee is an understanding that he is being asked to take a test.
Wisch v. Jensen 609
15. A motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such driver's initial refusal to take the test requested by the arresting officer.
Wisch v. Jensen 609

Breach of Contract

1. Absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages.
Polski v. Powers 361

2. An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
Allan v. Massey-Ferguson, Inc. 528

Breach of Warranty

A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.
Allan v. Massey-Ferguson, Inc. 528

Case Disapproved

The instruction previously authorized by *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), requiring a jury to consider an undercover agent's testimony with care greater than that given a disinterested witness' testimony, is disapproved and has been supplanted by NJI 1.41 concerning a witness' credibility and weight to be given a witness' testimony.
State v. Fletcher 562

Case Overruled

To the extent that *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), is in conflict with this opinion, it is overruled.
First Nat. Bank v. Bolzer 415

Causes of Action

1. Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition.
League v. Vanice 34

2. A claimant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.
League v. Vanice 34

3. A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade

or violate such right or interest, has caused a breach of that duty.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

4. A plaintiff's right to amend the wording in his specimen petition filed under Neb. Rev. Stat. § 44-2840 (Reissue 1978) in his petition later filed in the district court is the same as a plaintiff's right to amend any other petition, so long as the matter submitted to the court is the same matter submitted to the medical review panel.
Jacobs v. Goetowski 281

5. An objection that there is another case pending between the parties for the same cause may be raised by demurrer to a petition, but only when the pendency of the other action is shown on the face of the petition.
Kash v. McDermott & Miller 297

6. A defendant may file a plea in abatement when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief.
Kash v. McDermott & Miller 297

7. A cause of action for criminal conversation exists in Nebraska.
Vacek v. Ames 333

8. An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
Allan v. Massey-Ferguson, Inc. 528

9. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.
Allan v. Massey-Ferguson, Inc. 528

10. A cause of action for professional malpractice accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action.
Tiwald v. Dewey 547

11. A cause of action arising while a patient and health care provider are subject to the Nebraska Hospital-Medical Liability Act is to be adjudicated in accordance with the provisions of the act.
Barry v. Bohi 651

Child Custody

1. In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests

of the children.
Riddle v. Riddle 109
2. In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child.
Riddle v. Riddle 109
Kennedy v. Kennedy 724
3. An award of custody to a parent should not be interpreted as a sentence of immobilization. A custodial parent will not be placed in a position of deciding between custody of one's child and a different career, be it job-related or matrimonial.
Korf v. Korf 484
Little v. Little 870
4. An award of joint custody of minor children is not favored. Such an award must be reserved for the most rare of cases.
Korf v. Korf 484
5. The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider.
Grace v. Grace 695
6. 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.
Grace v. Grace 695
7. 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.
Kennedy v. Kennedy 724

8. 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.
Kennedy v. Kennedy 724
9. The burden of proving the existence of a material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
Kennedy v. Kennedy 724
10. Generally, before the court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.
Vanderzee v. Vanderzee 738
11. Generally, the best policy in divorce cases is to keep minor children within the jurisdiction, but the welfare of the child is the paramount consideration.
Vanderzee v. Vanderzee 738
12. Community ties are an important factor to be considered in determining whether to allow a child to be removed from the state.
Vanderzee v. Vanderzee 738
13. The effective denial of visitation rights by removal to another jurisdiction is a factor to be considered in determining the best interests of the child.
Vanderzee v. Vanderzee 738

Child Support

Awards of alimony and child support will not be disturbed on appeal unless the record establishes that the trial court abused its discretion.
Maricle v. Maricle 552

Claims

1. Prejudgment interest may be recovered on claims which are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. If 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.
Hill v. City of Lincoln 719
2. Where the existence of an overpayment is dependent upon an interpretation of a statute and there is a reasonable dispute over its

meaning so as to require a suit for declaratory judgment in order to clarify it, a claim based upon such a determination cannot be said to be liquidated and no prejudgment interest would be allowed.
Hill v. City of Lincoln 719

Class Actions

The burden is upon the one claiming an attorney fee in a class action to show that a *net* benefit was conferred upon the class.
Hill v. City of Lincoln 719

Collateral Attack

1. Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a "collateral attack."
Mayfield v. Hartmann 122
2. Only a void judgment is subject to collateral attack.
Mayfield v. Hartmann 122
3. It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
Mayfield v. Hartmann 122

Confessions

1. An in-custody statement voluntarily made without the benefit of *Miranda* warnings is admissible if it is not the product of interrogation.
State v. Taylor 114
2. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
State v. Whitmore 450
3. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect amounts to interrogation under *Miranda*.
State v. Whitmore 450
4. Where there is no expectation of an admission and the police conduct is not an attempt to obtain an admission, there is no interrogation.
State v. Whitmore 450
5. A neutral question which falls within the class of brief, spontaneous reactions to the situation then confronting a police officer, and was not designed to obtain evidence to establish guilt,

is not interrogation under *Miranda*.
State v. Whitmore 450
6. Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of a *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. If a defendant to be interrogated is indigent, the defendant must also be informed that a lawyer will be appointed to represent the defendant.
State v. Norfolk 810
7. The test for determining admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement.
State v. Norfolk 810

Consideration

In the case of intent established under Neb. Rev. Stat. § 36-401 (Reissue 1978), consideration given by the grantee or transferee becomes immaterial and does not preclude a finding that a debtor intended to hinder, delay, or defraud a creditor, lest the law approve acquisition of property tainted with fraud. Adequate consideration given by a grantee with fraudulent intent will not sustain a conveyance against a creditor's claim to set aside a transaction pursuant to § 36-401.
Gifford-Hill & Co. v. Stoller 757

Constitutional Law

1. An ordinance is presumed to be constitutional, and its unconstitutionality must be clearly established.
City of Lincoln v. Bruce 61
2. A statute is presumed to be constitutional, and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only.
Mayfield v. Hartmann 122
State ex rel. Wright v. Pepperl 664
3. The right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
4. The factors to be considered in determining whether punishment is unconstitutionally cruel and unusual are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences

imposed for commission of the same crime in other jurisdictions.
State v. Loschen 315
State v. Michalski 380

5. Regardless 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.
State v. Loschen 315

6. The failure of the State to treat a mentally disordered sex offender whose disorder is nontreatable does not constitute cruel and unusual punishment such as to violate either the eighth amendment to the federal Constitution or article I, § 9, of the Nebraska Constitution.
State v. Reddick 322

7. A defendant who pleads guilty to a felony or misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights.
State v. Porchia 327

8. When a statute is constitutionally suspect, the Supreme Court will endeavor to interpret it in a manner consistent with the Constitution.
In re Estate of Steppuhn 329

9. The common law and equity jurisdiction granted the district court by the Constitution cannot be legislatively limited or controlled.
In re Estate of Steppuhn 329

10. Equal protection guarantees that similar persons will be dealt with similarly by the government.
State v. Michalski 380

11. The standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected.
State v. Michalski 380

12. Under the strict scrutiny test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.
State v. Michalski 380

13. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to

accomplish that end.
State v. Michalski 380
14. Driving is not a fundamental right, and drunk drivers are not a suspect class.
State v. Michalski 380
15. Given a statute's presumption of validity and the legislature's inherent power to classify for legitimate purposes, a challenger bears a heavy burden in demonstrating that the classification is arbitrary and not rationally related to a legitimate governmental end.
State v. Michalski 380
16. An overinclusive classification burdens a wider than necessary range of individuals, extending beyond those persons possessing the trait contributing to the mischief or evil the legislature seeks to eradicate.
State v. Michalski 380
17. An underinclusive classification exists when all persons in the class are indeed perpetrators of the mischief or evil the state wishes to eliminate, but others who possess the same undesirable trait remain outside the class.
State v. Michalski 380
18. The classification made in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), that is, the line drawn between drivers who are drunk and drivers who are sober, is one rationally related to a legitimate governmental end.
State v. Michalski 380
19. A driver's license is an "entitlement," the revocation or suspension of which requires procedural due process guaranteed by the fourteenth amendment.
State v. Michalski 380
20. Because the right to travel has been characterized as fundamental, courts examine statutes impairing that right using the strict scrutiny standard of review.
State v. Michalski 380
21. To be in a position to challenge the constitutionality of a statute, a party must be adversely affected by the provisions at issue.
State v. Michalski 380
22. The eighth amendment's proscription of cruel and unusual punishment prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed.
State v. Michalski 380
23. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.
State v. Michalski 380

24. The generally accepted rule of construction is that state constitutional provisions relating to property taxes do not apply to excise taxes.
State v. Galyen 497
25. A tax imposed upon the privilege of doing business is in fact an excise tax and not a property tax and, as such, is not required to be levied by valuation uniformly and proportionately.
State v. Galyen 497
26. The imposition of an excise tax need not be uniform and proportionate but, rather, may be imposed upon each transaction.
State v. Galyen 497
27. If a tax levy is for a public purpose, it is no objection to its validity that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed.
State v. Galyen 497
28. The inability of government to enforce an act to its fullest does not affect the constitutionality of the act.
State v. Galyen 497
29. The constitutional requirement of reasonable certainty in statutory language is satisfied by the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.
Fulmer v. Jensen 582
30. While the Legislature cannot delegate its lawmaking powers, it can make laws which become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.
Fulmer v. Jensen 582
31. Evidence obtained in the implied consent context is not testimonial or communicative in nature and does not fall within the privilege against self-incrimination.
Fulmer v. Jensen 582
32. Because the Revisor of Statutes has a continuing duty to publish the laws of Nebraska as adopted by the Legislature and not otherwise declared unconstitutional by the Supreme Court, an application for a writ of mandamus to compel the proper publication of the laws is not subject to a claim that the action is barred by a 4-year statute of limitations.
State ex rel. Wright v. Pepperl 664
33. The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to any other public official.
State ex rel. Wright v. Pepperl 664
34. Unless and until a law is declared unconstitutional by the Supreme Court, the authority granted to the Revisor of Statutes in Neb. Rev. Stat. § 49-705(2)(c), (d), and (e) (Reissue 1984) does not

become operative.
State ex rel. Wright v. Pepperl 664

35. The Revisor of Statutes has no right nor duty to pass upon the constitutionality of legislative acts not determined by this court to be unconstitutional, and therefore has no right to raise the constitutionality of an act as a defense to his or her failure to publish the law as enacted by the Legislature.
State ex rel. Wright v. Pepperl 664

36. The failure of the State to produce an officer's preliminary notes or recordings is not a violation of the fourth amendment to the U.S. Constitution when those notes or recordings are transferred to a report and destroyed as regular practice, so long as such notes or recordings are not destroyed in bad faith.
State v. Surber 714

37. A written petition to enter a plea of guilty which itemizes a defendant's constitutional rights and the range of penalties for the offense charged does not in and of itself establish that a defendant knowingly, voluntarily, and intelligently pled guilty.
State v. Mindrup 773

38. Although a defendant is entitled to due process upon sentencing, the Constitution does not require that he be given the full panoply of rights accorded when the issue is guilt or innocence.
State v. Miller 862

Contracts

1. Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price.
Anderson v. Peterson 149

2. Generally, competitive bidding statutes are strictly construed against public authorities required to obtain a public letting. However, statutes requiring competitive bidding, although strictly construed, should not be extended beyond their clear implication.
Anderson v. Peterson 149

3. Neb. Rev. Stat. § 23-324.05 (Reissue 1983), requiring competitive bidding in a county's acquisition of "supplies, materials, [and] equipment," contemplates expenditures for tangible personal property to be used by or furnished to any county officer, office, department, institution, board, or other agency of county government, except election supplies, materials, and equipment. An expenditure for replacement of a courthouse's heating and air-conditioning system is in the nature of a capital expenditure for long-term or permanent betterment of a county's building and

constitutes capital improvement of a county's real property.
Anderson v. Peterson 149

4. Absent allegations and proof of fraud, contractual arrangements between a bank and its depositors with respect to the bank's right of setoff may supersede statutory provisions.
Uttecht v. Norwest Bank of Norfolk 222

5. Three tests are appropriately applied to determine if a transaction has been completely integrated: (1) Was the written contract complete; did it include the whole or only a part of the transaction? (2) Does the evidence outside the writing vary or controvert the written terms? (3) Was the writing intended to cover the whole transaction, as shown by the conduct and language of the parties and the surrounding circumstances?
Cleasby v. Leo A. Daly Co. 254

6. The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing.
Cleasby v. Leo A. Daly Co. 254

7. In a personal service contract there is an implied condition that the employee will be able to perform at the time stipulated for performance.
Cleasby v. Leo A. Daly Co. 254

8. Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
Cleasby v. Leo A. Daly Co. 254

9. A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangements.
Zimmerman v. Martindale 344

10. When an agreement not covered by the Uniform Commercial Code 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.
Zimmerman v. Martindale 344

11. To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. Further, in order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point and that nothing be left open for a future arrangement.
Zimmerman v. Martindale 344

12. A suit on a contract presents an action at law.
Lis v. Moser Well Drilling & Serv. 349

13. One seeking recovery in a contract action has the burden of proving damages with as much certainty as the case permits.
Lis v. Moser Well Drilling & Serv. 349

14. If a construction contract is substantially performed, the damages which the owner suffers because of defective workmanship or the use of unsuitable materials are measured by the reasonable cost of remedying the defects, if remediable; if the defects are not remediable without reconstruction of or material injury to a substantial portion of the improvement, the damages are measured by the difference between the value of the improvement as constructed compared to what its value would have been if constructed according to the contract.
Lis v. Moser Well Drilling & Serv. 349

15. An action for reformation is equitable in nature.
Ridenour v. Farm Bureau Ins. Co. 353

16. Reformation is decreed in order to effectuate the real agreement of the parties when a written instrument does not represent their true intent.
Ridenour v. Farm Bureau Ins. Co. 353

17. Reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.
Ridenour v. Farm Bureau Ins. Co. 353

18. Reformation conforms an erroneous written agreement to the antecedent agreement of the parties; that is to say, to the agreement entered into prior to the execution of the erroneous written agreement.
Ridenour v. Farm Bureau Ins. Co. 353

19. There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.
Ridenour v. Farm Bureau Ins. Co. 353

20. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
Polski v. Powers 361

21. Absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages.
Polski v. Powers 361

22. While the rule is generally to the effect that unliquidated demands do not bear interest until the amounts have been liquidated, the rule is otherwise where the parties have contracted to do otherwise.
First Nat. Bank v. Bolzer 415

23. Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable. Thus, if the contract provides for a certain rate of interest until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity.
First Nat. Bank v. Bolzer 415

24. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
First Nat. Bank v. Bolzer 415

25. The general rule has been said to be that in the absence of fraud one who signs a written agreement is bound by its terms whether or not he can read; a person unable to read is still bound by contracts which he signs and which are otherwise valid and enforceable. A party's mere ignorance, occasioned by his limited intelligence and understanding of the language and of the contents of the contract which he voluntarily executes, is not, in the absence of fraud, a ground for avoiding it, although it is different from what he supposed; one who is unable to read is not permitted to make contracts without the usual precaution to ascertain what they mean.
First Nat. Bank v. Bolzer 415

26. In an insured's action against an insurance company on its policy, as a general rule limitations of liability, and loss from an excepted cause, are matters of defense to be specifically pled by the insurer.
Bump v. Firemens Ins. Co. 678

27. While a court is not free to speculate about terms absent from a written contract and will not rewrite a contract which expresses the intent of the parties, a court will construe uncertain, indefinite, or ambiguous terms in a written contract.
Craig v. Hastings State Bank 746

28. Where a questioned clause in a written contract may be fairly interpreted in more than one way, there is ambiguity to be resolved by a court as a matter of law.
Craig v. Hastings State Bank 746

29. When contractual language is ambiguous, a court will construe such language against the party preparing the contract, especially where the language is embodied in a preprinted form.
Craig v. Hastings State Bank 746

30. Although a provision is not ambiguous merely because such provision is general enough to encompass more than one transaction or option, virtually unlimited breadth of a contractual

provision cannot be ignored in assessing ambiguity in a provision.
Craig v. Hastings State Bank 746

31. Where specific terms characterizing or enumerating a class are followed by general words capable of including more than the class specified, the general terms are construed to refer to the same nature or kind as that of the class specified.
Craig v. Hastings State Bank 746

32. Under Neb. Rev. Stat. § 30-2703(a) (Reissue 1979), a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
Craig v. Hastings State Bank 746

33. Under Neb. Rev. Stat. § 30-2713 (Reissue 1979) and in the absence of an agreement otherwise providing, a bank can set off the debt of a depositor having an account with the bank, but only to the extent of the debtor's present beneficial interest in that account. When there is a joint account and proof of net contributions, the amount of the debtor's beneficial interest in such joint account is determined by the net contributions rule required by Neb. Rev. Stat. §§ 30-2703(a) and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

34. Under the net contributions rule of Neb. Rev. Stat. § 30-2703(a) (Reissue 1979) and in the absence of an agreement otherwise providing, if it is established that a nondebtor party to the account has funded all or part of the beneficial interest in an account, a bank has no right of setoff against the beneficial interest contributed by the nondebtor depositor.
Craig v. Hastings State Bank 746

35. In the absence of an agreement otherwise providing, if a person has a present right to withdraw funds from a joint account and is indebted to the financial institution where the account is maintained, the financial institution has a right to set off against such indebtedness the debtor's beneficial interest in the account as determined by the net contributions rule of ownership in accordance with Neb. Rev. Stat. §§ 30-2703 and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

36. Accepting payments late does not discharge the guarantor unless such late payments are due to an extension agreement entered into between the creditor and the debtor, supported by valid consideration and binding on the parties.
Murphy v. Stuart Fertilizer Co. 767

37. The burden of proof regarding the validity of an antenuptial contract is on the party asserting its invalidity.
In re Estate of Peterson 792

38. The law has long been that a person who signs a contract without reading it cannot later relieve himself of its burdens.
In re Estate of Peterson 792
39. "Fair disclosure," in the context of an antenuptial agreement, contemplates that each spouse shall be given information of a general and approximate nature concerning the net worth of the other.
In re Estate of Peterson 792
40. Neb. Rev. Stat. § 30-2316 (Reissue 1979) provides that the parties to a valid antenuptial agreement may waive the right to elect a share of both real and personal property of a deceased spouse.
In re Estate of Peterson 792
41. The effect of an antenuptial contract in which the parties agree to be bound by present and future laws is to be determined by the statutes in effect at the time of the death of the party to the agreement whose estate is attempting to effectuate the agreement.
In re Estate of Peterson 792
42. An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
Lumbard v. Western Fire Ins. Co. 804
43. If an insurance policy is ambiguous, it will be construed in favor of the insured.
Lumbard v. Western Fire Ins. Co. 804
44. An ambiguity exists only when a policy can be interpreted to have two or more reasonable meanings.
Lumbard v. Western Fire Ins. Co. 804
45. An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
Lumbard v. Western Fire Ins. Co. 804
46. A policy provision covering burglary only if felonious exit from the premises be by actual force and violence, as evidenced by visible marks made by tools, explosives, electricity, or chemicals upon, or physical damage to, the interior of the premises at the place of such exit, is enforceable.
Lumbard v. Western Fire Ins. Co. 804

Controlled Substances

A party claiming that the sale of a controlled substance was exempt has the burden of proof that an exemption was applicable.
State v. Taylor 114

Conversion

1. Where property is subject to a security interest, an exercise of dominion or control over the property which is inconsistent with the rights of the secured party constitutes, as to him, a conversion

of the property, and there may be conversion of the property by a secured party where his acts are in defiance of the rights of others in the property.
Chadron Energy Corp. v. First Nat. Bank 590
2. The measure of damages for conversion is the market value of the converted property at the time of the conversion.
Chadron Energy Corp. v. First Nat. Bank 590

Conveyances

1. An action to declare a conveyance fraudulent as to a creditor invokes equity jurisdiction of a court. On appeal an equitable action for declaration of a fraudulent conveyance is a trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Gifford-Hill & Co. v. Stoller 757
2. Under Neb. Rev. Stat. § 36-401 (Reissue 1978), the burden of proof is on a creditor to prove, by clear and convincing evidence, that a debtor intended to hinder, delay, or defraud the creditor by an alleged fraudulent conveyance.
Gifford-Hill & Co. v. Stoller 757
3. Regarding intent to hinder, delay, or defraud required under Neb. Rev. Stat. § 36-401 (Reissue 1978), intent, as any other subjective state or mental element, may be proved by circumstantial or direct evidence.
Gifford-Hill & Co. v. Stoller 757
4. Good faith, among other characteristics, encompasses an absence of or freedom from intent to defraud. A lack of good faith is demonstrated by a transferee's participation in a plan to hinder creditors, even though the transfer may be supported by adequate consideration.
Gifford-Hill & Co. v. Stoller 757
5. In the case of intent established under Neb. Rev. Stat. § 36-401 (Reissue 1978), consideration given by the grantee or transferee becomes immaterial and does not preclude a finding that a debtor intended to hinder, delay, or defraud a creditor, lest the law approve acquisition of property tainted with fraud. Adequate consideration given by a grantee with fraudulent intent will not sustain a conveyance against a creditor's claim to set aside a transaction pursuant to § 36-401.
Gifford-Hill & Co. v. Stoller 757

Corroboration

1. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper

foundation is laid.
State v. Taylor 114
2. Corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
State v. Taylor 114

Costs

The transcript filed on an appeal to the Supreme Court is limited in content by the Supreme Court rules; when those rules are ignored by the attorney requesting the transcript, the attorney will be taxed personally with the costs of its preparation.
Pierce v. City of Ogallala 433

Courts

1. Courts are required to presume that a legislative body, in enacting ordinances, acted within its authority, and the burden rests on those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or general welfare.
City of Lincoln v. Bruce 61
2. The Supreme Court is not bound by the ground purportedly used by the trial court as the basis for granting summary judgment.
Sommerfeld v. City of Seward 76
3. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
Sommerfeld v. City of Seward 76
Prorok v. County of Custer 789
4. The court, not the jury, decides as a preliminary matter the extent to which a transaction is embodied in the writing.
Cleasby v. Leo A. Daly Co. 254
5. The county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
In re Estate of Steppuhn 329
6. The common law and equity jurisdiction granted the district court by the Constitution cannot be legislatively limited or controlled.
In re Estate of Steppuhn 329
7. In common law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
In re Estate of Steppuhn 329
8. The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to any other

public official.
State ex rel. Wright v. Pepperl 664
9. When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
Xerox Corp. v. Karnes 691
10. Under Neb. Rev. Stat. § 29-1919 (Reissue 1979), on determination that a discovery order has not been complied with, the trial court has broad discretion to enter such other order as it deems just under the circumstances.
State v. Surber 714
11. The rules of this court require the district court to provide a court reporter whenever a litigant requests the presence of the court reporter.
Kennedy v. Kennedy 724

Criminal Conversation

A cause of action for criminal conversation exists in Nebraska.
Vacek v. Ames 333

Criminal Law

1. Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.
State v. Hansen 103
2. In order to establish probable cause to associate property with criminal activity, all that is required is that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.
State v. Hansen 103
3. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents

that may conceal the object of the search.
State v. Hansen 103
4. A party claiming that the sale of a controlled substance was exempt has the burden of proof that an exemption was applicable.
State v. Taylor 114
5. Consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault upon a child.
State v. Navarrete 171
6. Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
State v. Loschen 315
7. The factors to be considered in determining whether punishment is unconstitutionally cruel and unusual are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
State v. Loschen 315
State v. Michalski 380
8. Regardless 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.
State v. Loschen 315
9. The eighth amendment's proscription of cruel and unusual punishment prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed.
State v. Michalski 380
10. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.
State v. Michalski 380
11. The intent with which an act is done is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Smith 406
State v. Ewing 462
12. A penal statute must be strictly construed, but should also be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purposes for which it serves.
State v. Ewing 462
State v. Schulz 473
13. The underlying purpose of Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) is to prevent the public from willfully furnishing erroneous information to law enforcement officers and thus

interfering with the performance of their duties.
State v. Ewing 462
14. The phrase "the investigation of an actual criminal matter" as used in Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) requires that there be a legitimate and valid investigation of facts which could constitute a predicate criminal offense.
State v. Ewing 462
15. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1979), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Richter 487
16. A defendant is entitled to be represented by counsel at all critical stages of a criminal proceeding against him, which includes the trial itself.
State v. Richter 487
17. Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters.
State v. Richter 487
18. The requirement of Neb. Rev. Stat. § 29-1804.05 (Cum. Supp. 1984) is that before counsel be provided at public expense for a criminal defendant, there be a "reasonable inquiry to determine" the defendant's "financial condition."
State v. Richter 487
19. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1979), a court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Richter 487
20. The exercise of the right to the assistance of counsel is subject to the necessities of sound judicial administration and requires a balancing of a criminal defendant's right to a reasonable opportunity to prepare for trial and to consult counsel with the necessity for the orderly and prompt disposition of cases in the orderly course of the administration of justice.
State v. Richter 487
21. Where a criminal defendant is financially able to engage an attorney, he may not use his neglect in hiring one as a legitimate reason for delay.
State v. Richter 487
22. The instruction previously authorized by *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), requiring a jury to consider an

undercover agent's testimony with care greater than that given a disinterested witness' testimony, is disapproved and has been supplanted by NJI 1.41 concerning a witness' credibility and weight to be given a witness' testimony.
State v. Fletcher 562

23. The general rule which is followed by the Supreme Court is that where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count.
State v. Fletcher 562

24. Where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act and need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in the violation.
State v. Parker 570

25. Where a single crime may be committed under a number of different theories, the defendant is not entitled to an instruction that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty.
State v. Parker 570

26. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.
Fulmer v. Jensen 582

27. The time within which an instate prisoner must be tried under Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Cum. Supp. 1984) begins to run after the county attorney for the county in which an indictment, information, or complaint is pending receives notice from the Department of Correctional Services of the prisoner's request for a final determination of a pending Nebraska indictment, information, or complaint.
State v. Soule 619

28. A continuance granted at an instate prisoner's request in the county court where a complaint is pending against such a prisoner operates to extend the time within which such a prisoner must be brought to trial under Neb. Rev. Stat. § 29-3805 (Cum. Supp. 1984).
State v. Soule 619

29. Restitution imposed under Neb. Rev. Stat. § 28-427 (Reissue 1979) is not a criminal penalty to be imposed as punishment for the crime, but is in the nature of a civil or administrative penalty or

sanction.
State v. Holmes 629

30. Restitution differs from forfeiture in that it is unnecessary to identify money found in the possession of the defendant as the money received by the defendant from a particular sale of drugs.
State v. Holmes 629

31. An order under Neb. Rev. Stat. § 28-427 (Reissue 1979) that the defendant make restitution creates a debt in favor of the State which can be satisfied from any funds belonging to the defendant.
State v. Holmes 629

32. An order for restitution under Neb. Rev. Stat. § 28-427 (Reissue 1979) may be made at the time of the sentencing, but there is no statutory requirement that it be made at that time, and it is not a part of the sentence.
State v. Holmes 629

33. The rule as to admission of evidence of other crimes or acts is one of relevance.
State v. Moore 706

34. In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
State v. Surber 714

35. Theft by receiving stolen property consists of receiving, retaining, or disposing of stolen movable property of another knowing or believing that it has been stolen, unless the property was received, retained, or disposed of with intention to restore it to the owner.
State v. Holman 730

36. The test for determining the effectiveness of counsel in a criminal prosecution is whether trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his or her geographical area and conscientiously protected the interests of the client.
State v. Havlat 845

37. Where one deliberately pursues a course to voluntarily become intoxicated, there is little that can be said in his behalf in mitigation of the crime or the punishment.
State v. Turner 852

38. The lives and property of the public are entitled to protection against the criminal conduct of those who become voluntarily intoxicated.
State v. Turner 852

Crops

Experienced grain producers who regularly grow and market grain on the open market as the principal means of providing for their livelihood, and by reason of such occupation have acquired and possess knowledge or skill peculiar to the practices and operations of grain marketing, are merchants within the meaning of Neb. U.C.C. §§ 2-104 and 2-201 (Reissue 1980).
Agrex, Inc. v. Schrant 604

Damages

1. Any action to recover damages based on alleged professional negligence shall be commenced within 2 years next after the alleged act or omission providing the basis for such action.
Suzuki v. Holthaus 72
2. A cause of action for damages for professional negligence accrues at the time of the act or omission causing the injury.
Suzuki v. Holthaus 72
3. All damages, present or prospective, which are caused by the exercise of eminent domain must be compensated and recovered in the original condemnation proceeding. A final award in a condemnation proceeding for the acquisition of a right-of-way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
4. Damages recoverable in a condemnation case are determined by the extent of the taking and a condemner's rights actually acquired, not by a condemner's use resulting from less than full exercise of a right acquired by eminent domain.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
5. A promissory stipulation not contained in the condemner's petition cannot affect the extent of the taking or the amount of the damages to be awarded.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
6. Testimony offered by a condemner to diminish the taking stated in the condemnation petition or to describe anything less than full exercise of rights acquired by eminent domain is irrelevant to the question of damages caused by the condemner's appropriation.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
7. If the 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 could not have caused the result.
London v. Stewart 265
8. In an alienation of affections case, the plaintiff is entitled to the damages which are the natural, probable consequence of the act complained of.
Vacek v. Ames 333

9. There is no mathematical method or formula for determining appropriate compensation in an alienation of affections case.
Vacek v. Ames 333
10. One seeking recovery in a contract action has the burden of proving damages with as much certainty as the case permits.
Lis v. Moser Well Drilling & Serv. 349
11. If a construction contract is substantially performed, the damages which the owner suffers because of defective workmanship or the use of unsuitable materials are measured by the reasonable cost of remedying the defects, if remediable; if the defects are not remediable without reconstruction of or material injury to a substantial portion of the improvement, the damages are measured by the difference between the value of the improvement as constructed compared to what its value would have been if constructed according to the contract.
Lis v. Moser Well Drilling & Serv. 349
12. Proof of damages to a mathematical certainty is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
Lis v. Moser Well Drilling & Serv. 349
13. Not only does Neb. U.C.C. § 9-504(3) (Reissue 1980) and the requirement that a security interest must be sold in a commercially reasonable manner affect the right of a creditor to obtain a deficiency judgment but, likewise, the failure to sell a security interest in a commercially reasonable manner affords to a debtor the right to sue for damages for any surplus which the debtor does not realize by reason of the creditor's having failed to dispose of the property in a commercially reasonable manner.
Chadron Energy Corp. v. First Nat. Bank 590
14. Even though a sale may produce a surplus, if in fact a sale in a commercially reasonable manner would have produced a larger surplus, the failure of the debtor to sell the security in a commercially reasonable manner has caused the debtor damages which the debtor has a right to recover in a proper action.
Chadron Energy Corp. v. First Nat. Bank 590
15. The measure of damages for conversion is the market value of the converted property at the time of the conversion.
Chadron Energy Corp. v. First Nat. Bank 590

Debtors and Creditors

1. Without qualifying any other statutory right to setoff or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to setoff against the account in which the party has a present right of withdrawal. The amount of the account subject to setoff is that proportion to which the debtor is

beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.
Uttecht v. Norwest Bank of Norfolk 222

2. Under Neb. Rev. Stat. § 30-2713 (Reissue 1979) and in the absence of an agreement otherwise providing, a bank can set off the debt of a depositor having an account with the bank, but only to the extent of the debtor's present beneficial interest in that account. When there is a joint account and proof of net contributions, the amount of the debtor's beneficial interest in such joint account is determined by the net contributions rule required by Neb. Rev. Stat. §§ 30-2703(a) and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

3. Under the net contributions rule of Neb. Rev. Stat. § 30-2703(a) (Reissue 1979) and in the absence of an agreement otherwise providing, if it is established that a nondebtor party to the account has funded all or part of the beneficial interest in an account, a bank has no right of setoff against the beneficial interest contributed by the nondebtor depositor.
Craig v. Hastings State Bank 746

4. In the absence of an agreement otherwise providing, if a person has a present right to withdraw funds from a joint account and is indebted to the financial institution where the account is maintained, the financial institution has a right to set off against such indebtedness the debtor's beneficial interest in the account as determined by the net contributions rule of ownership in accordance with Neb. Rev. Stat. §§ 30-2703 and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

5. An action to declare a conveyance fraudulent as to a creditor invokes equity jurisdiction of a court. On appeal an equitable action for declaration of a fraudulent conveyance is a trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Gifford-Hill & Co. v. Stoller 757

6. Under Neb. Rev. Stat. § 36-401 (Reissue 1978), the burden of proof is on a creditor to prove, by clear and convincing evidence, that a debtor intended to hinder, delay, or defraud the creditor by an alleged fraudulent conveyance.
Gifford-Hill & Co. v. Stoller 757

7. Regarding intent to hinder, delay, or defraud required under Neb. Rev. Stat. § 36-401 (Reissue 1978), intent, as any other subjective state or mental element, may be proved by circumstantial or direct

evidence.
Gifford-Hill & Co. v. Stoller 757
8. Good faith, among other characteristics, encompasses an absence of or freedom from intent to defraud. A lack of good faith is demonstrated by a transferee's participation in a plan to hinder creditors, even though the transfer may be supported by adequate consideration.
Gifford-Hill & Co. v. Stoller 757
9. In the case of intent established under Neb. Rev. Stat. § 36-401 (Reissue 1978), consideration given by the grantee or transferee becomes immaterial and does not preclude a finding that a debtor intended to hinder, delay, or defraud a creditor, lest the law approve acquisition of property tainted with fraud. Adequate consideration given by a grantee with fraudulent intent will not sustain a conveyance against a creditor's claim to set aside a transaction pursuant to § 36-401.
Gifford-Hill & Co. v. Stoller 757
10. Accepting payments late does not discharge the guarantor unless such late payments are due to an extension agreement entered into between the creditor and the debtor, supported by valid consideration and binding on the parties.
Murphy v. Stuart Fertilizer Co. 767

Decedents' Estates

1. The county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
In re Estate of Steppuhn 329
2. In common law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
In re Estate of Steppuhn 329
3. Neb. Rev. Stat. § 30-2316 (Reissue 1979) provides that the parties to a valid antenuptial agreement may waive the right to elect a share of both real and personal property of a deceased spouse.
In re Estate of Peterson 792
4. The effect of an antenuptial contract in which the parties agree to be bound by present and future laws is to be determined by the statutes in effect at the time of the death of the party to the agreement whose estate is attempting to effectuate the agreement.
In re Estate of Peterson 792
5. For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. Neb. Rev. Stat. § 30-2437 (Reissue 1979).
In re Estate of Christensen 872
6. For the purpose of Neb. Rev. Stat. § 30-2437 (Reissue 1979), "good cause" means a logical reason or legal ground, based on

fact or law, which justifies the modification or vacation of an order.
In re Estate of Christensen 872
7. In determining whether to grant a motion to set aside an order admitting a will to probate, a court should consider whether neglect is excusable, whether a movant has alleged a meritorious objection to admission of a will to probate, and whether prejudice results from setting aside the probate order.
In re Estate of Christensen 872

Declaratory Judgments

Where the existence of an overpayment is dependent upon an interpretation of a statute and there is a reasonable dispute over its meaning so as to require a suit for declaratory judgment in order to clarify it, a claim based upon such a determination cannot be said to be liquidated and no prejudgment interest would be allowed.
Hill v. City of Lincoln 719

Demurrer

1. An objection that there is another case pending between the parties for the same cause may be raised by demurrer to a petition, but only when the pendency of the other action is shown on the face of the petition.
Kash v. McDermott & Miller 297
2. A demurrer and a plea in abatement are different with respect to the role of evidence in the proceedings.
Kash v. McDermott & Miller 297
3. Where the petition fails to state facts sufficient to constitute a cause of action, the petition is subject to a demurrer.
Utsumi v. City of Grand Island 783

Directed Verdict

1. On a motion for directed verdict the moving party is deemed to have admitted as true all the relevant evidence received 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 from such evidence.
Fuel Exploration, Inc. v. Novotny 17
2. A party against whom a motion for directed verdict is aimed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. A court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom.
Foltz v. Northwestern Bell Tel. Co. 201
Cleasby v. Leo A. Daly Co. 254
Bernadt v. Suburban Air, Inc. 537

3. A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
Cleasby v. Leo A. Daly Co. 254
Mitchell v. Kesting 506
Bernadt v. Suburban Air, Inc. 537
Poppe v. Petersen 877
4. Ordinarily, the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper.
Utsumi v. City of Grand Island 783
5. Where the cause of an accident is controverted, the physical facts must indisputably demonstrate that a party alleged to have caused the accident did in fact cause the accident before a verdict can be directed against that party.
Poppe v. Petersen 877

Disciplinary Proceedings

1. In a disciplinary proceeding the determination as to whether discipline should be imposed and what discipline is appropriate is made upon a de novo review of the record.
State ex rel. NSBA v. Kelly 8
2. In a disciplinary proceeding the charges must be established by a clear preponderance of the evidence.
State ex rel. NSBA v. Kelly 8
3. Implicit in the oath of an attorney and in the license to practice law are the requirements of proper demeanor and restraint from practices which serve to discredit the legal system.
State ex rel. NSBA v. Kelly 8
4. Conduct which brings reproach upon the legal profession constitutes grounds for discipline.
State ex rel. NSBA v. Kelly 8
5. The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.
State ex rel. NSBA v. Kelly 8

Divorce

1. For good cause shown, in proceedings to dissolve a marriage, where paternity of a child affected by the dissolution proceedings

is an issue to be resolved, blood group testing and other information bearing upon paternity of the child are proper areas for discovery under the Nebraska Discovery Rules (rev. 1983).
Younkin v. Younkin 134

2. In a proper case the proceeds from the settlement of a personal injury claim may be considered to be a part of the marital estate.
Maricle v. Maricle 552

Double Jeopardy

1. For an information to be sufficient it must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
State v. McGee 557

2. An indictment or information alone need not be full protection against double jeopardy, because a defendant may allege and prove facts outside the record in support of a plea of former adjudication.
State v. McGee 557

Due Process

1. A driver's license is an "entitlement," the revocation or suspension of which requires procedural due process guaranteed by the fourteenth amendment.
State v. Michalski 380

2. Because the right to travel has been characterized as fundamental, courts examine statutes impairing that right using the strict scrutiny standard of review.
State v. Michalski 380

3. Although a defendant is entitled to due process upon sentencing, the Constitution does not require that he be given the full panoply of rights accorded when the issue is guilt or innocence.
State v. Miller 862

4. Due process safeguards must be observed when a new charge leading to magnified criminal punishment is made in an enhanced sentence proceeding.
State v. Miller 862

Effectiveness of Counsel

1. The test for determining the effectiveness of counsel in a criminal prosecution is whether trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his or her geographical area and conscientiously protected the interests of the client.
State v. Havlat 845

2. The person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence.
State v. Havlat 845
3. Where one maintains that counsel was inadequate or ineffective, one must also show how or in what manner that alleged inadequacy prejudiced the defendant.
State v. Havlat 845

Eminent Domain

1. All damages, present or prospective, which are caused by the exercise of eminent domain must be compensated and recovered in the original condemnation proceeding. A final award in a condemnation proceeding for the acquisition of a right-of-way is conclusive upon the parties thereto as to all matters necessarily within the issues joined, although not formally litigated.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
2. Damages recoverable in a condemnation case are determined by the extent of the taking and a condemner's rights actually acquired, not by a condemner's use resulting from less than full exercise of a right acquired by eminent domain.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
3. A promissory stipulation not contained in the condemner's petition cannot affect the extent of the taking or the amount of the damages to be awarded.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
4. Testimony offered by a condemner to diminish the taking stated in the condemnation petition or to describe anything less than full exercise of rights acquired by eminent domain is irrelevant to the question of damages caused by the condemner's appropriation.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
5. It is a principle of law, or a "presumption," in eminent domain that a condemner will exercise all rights acquired and use the property appropriated to the full extent.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

Employer and Employee

1. The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment.
Cleasby v. Leo A. Daly Co. 254
2. In a personal service contract there is an implied condition that the employee will be able to perform at the time stipulated for performance.
Cleasby v. Leo A. Daly Co. 254

Equal Opportunity

Within the meaning of Neb. Rev. Stat. § 48-1120 (Reissue 1984), there has been no entry of the order of the Nebraska Equal Opportunity

Commission until the date that written evidence of that order has been prepared, authoritatively signed, and placed of record in the public files of such commission.
Lincoln Co. Sheriff's Office v. Horne 867

Equal Protection

1. Equal protection guarantees that similar persons will be dealt with similarly by the government.
State v. Michalski 380
2. The standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected.
State v. Michalski 380

Equity

1. An action to determine the interests of adverse parties in a fund held by a stakeholder is equitable in nature.
Smith v. Baker's Local No. 433 Welfare Fund 215
2. The county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
In re Estate of Steppuhn 329
3. The common law and equity jurisdiction granted the district court by the Constitution cannot be legislatively limited or controlled.
In re Estate of Steppuhn 329
4. In common law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
In re Estate of Steppuhn 329
5. An action for reformation is equitable in nature.
Ridenour v. Farm Bureau Ins. Co. 353
6. The Nebraska Supreme Court reviews equitable matters de novo on the record, taking into consideration the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than another.
Ridenour v. Farm Bureau Ins. Co. 353
7. An action to declare a conveyance fraudulent as to a creditor invokes equity jurisdiction of a court. On appeal an equitable action for declaration of a fraudulent conveyance is a trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Gifford-Hill & Co. v. Stoller 757

Estoppel

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity,

from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
Stratman v. Hagen 157

Evidence

1. The presumption that a party lacking memory of an accident exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.
Oldenburg v. State 1
2. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prejudiced from having a fair trial.
State v. Broomhall 27
3. A claimant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.
League v. Vanice 34
4. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence.
Wilson v. City of North Platte 90
5. Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.
State v. Hansen 103
6. In order to establish probable cause to associate property with criminal activity, all that is required is that the facts available to the officer would warrant a man of reasonable caution in the

belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.
State v. Hansen 103

7. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
State v. Hansen 103

8. In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child.
Riddle v. Riddle 109
Kennedy v. Kennedy 724

9. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.
State v. Taylor 114

10. A recording is admissible unless the unintelligible portions of the tape recording are so substantial as to render the recording as a whole untrustworthy.
State v. Taylor 114

11. For good cause shown, in proceedings to dissolve a marriage, where paternity of a child affected by the dissolution proceedings is an issue to be resolved, blood group testing and other information bearing upon paternity of the child are proper areas for discovery under the Nebraska Discovery Rules (rev. 1983).
Younkin v. Younkin 134

12. Error in the ruling on a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing is cured by a verdict of guilty if the evidence at trial is sufficient to sustain a finding of guilt beyond a reasonable doubt.
State v. Navarrete 171

13. A jury may consider the physical appearance of the defendant together with other circumstances in determining his age.
State v. Navarrete 171

14. Any matter admitted under Rule 36 of the Nebraska Discovery Rules, promulgated by the Nebraska Supreme Court on January 1, 1983, is conclusively established unless the court on motion

permits withdrawal or amendment of the admission.
Macklem v. Valley Bank of Union County 227
15. Marginally relevant evidence which is outweighed by the danger of *unfair* prejudice, confusion, or misleading the jury should be excluded.
London v. Stewart 265
16. Where the evidence is conflicting as to the negligence of a party and the proximate cause of an accident, those issues must be submitted to the jury.
London v. Stewart 265
17. In a bench trial, that is, all factual determinations made by a judge and not by a jury, we apply the principle or "presumption" that the trial court will consider only relevant and otherwise admissible evidence so that an erroneous admission of evidence during a bench trial will not result in a reversal, if there is relevant and admissible evidence to sustain the trial court's judgment. The foregoing principle, likewise, applies to a rehearing before the Nebraska Workmen's Compensation Court.
Gibson v. City of Lincoln 304
18. In an alienation of affections case, evidence as to the defendant's income and financial condition may be admissible as proof as to how the alienation was accomplished.
Vacek v. Ames 333
19. To obtain reformation the evidence must be clear, convincing, and satisfactory.
Ridenour v. Farm Bureau Ins. Co. 353
20. Clear, convincing, and satisfactory evidence is present when there has been produced in the trier of fact a firm belief or conviction that a fact to be proved exists.
Ridenour v. Farm Bureau Ins. Co. 353
21. Neb. Rev. Stat. § 28-321(2) (Cum. Supp. 1984) excludes evidence of a victim's past sexual behavior unless evidence offered by the defendant at an in camera hearing shows that (1) the victim's past sexual behavior with anyone other than the defendant has some bearing on the question whether the defendant is the source of physical evidence in the prosecution for sexual assault or (2) the victim's past sexual behavior with a defendant is related to the issue of the victim's consent to the sexual act involved in the prosecution of the defendant, provided that such evidence demonstrates some reasonably associative relationship between the victim's past sexual behavior and the sexual act for which the defendant is prosecuted and, further provided, that such evidence shows a victim's pattern of conduct or behavior which may be construed as consent to the sexual act charged against the defendant.
State v. Hopkins 367

22. Admissibility of evidence concerning a victim's past sexual behavior with a defendant is controlled by Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984), which is a statutory species of relevant evidence and permits evidence of a victim's prior sexual relations with a defendant when such evidence is offered by the defendant on the issue of whether the victim consented.
State v. Hopkins 367

23. For the purposes of Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984), in order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant.
State v. Hopkins 367

24. Although evidence of a victim's past sexual behavior may be admissible under Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984) on the issue of consent, the trial court, nevertheless, may apply the balance found in Rule 403 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-403 (Reissue 1979)), that is, exclusion if the probative value of the otherwise relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
State v. Hopkins 367

25. As a general rule, it is not prejudicial error to admit evidence which is simply cumulative of other competent evidence.
State v. Smith 406

26. The intent with which an act is done is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Smith 406

27. If a sufficient record exists which establishes the grounds for the revocation of probation by clear and convincing evidence, such revocation need not be reversed solely and only on the ground that, through inadvertence, a complete record of the revocation hearing was not preserved.
State v. Schulz 473

28. It is the province of the trial court, not the jury, to determine the admissibility of evidence. Once the trial court has made a determination as to admissibility, the jury is not required to reexamine that ruling.
State v. Harrison 521
State v. Norfolk 810
State v. Turner 852

29. It is the jury's province to weigh the evidence and judge the credibility of witnesses and their testimony. The jury has the right to credit or reject any part or the whole of the testimony heard.
State v. Harrison 521

30. A requested jury instruction which directs the attention of the jury to and unduly emphasizes a part of the evidence is erroneous and should be refused.
State v. Harrison 521

31. A declaration offered to show the defendant's state of mind which is too remote in point of time should be excluded as lacking probative value.
State v. Harrison 521

32. Generally, any error in excluding evidence that is cumulative is nonprejudicial.
State v. Harrison 521

33. In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance.
State v. Harrison 521

34. A party-applicant who consents at a hearing upon an application for a liquor license to the receipt into evidence by the Nebraska Liquor Control Commission of proceedings involving a prior application by the same party for the same license may not thereafter complain of the consideration by the commission of such prior proceedings with respect to the pending application.
Richards v. Neb. Liq. Control Comm. 542

35. Evidence obtained in the implied consent context is not testimonial or communicative in nature and does not fall within the privilege against self-incrimination.
Fulmer v. Jensen 582

36. In determining the weight of the evidence, we will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
Wisch v. Jensen 609

37. A medical malpractice action arises, for the purpose of determining the admissibility into evidence of a written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made.
Barry v. Bohi 651

38. The general rule that if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is harmless rests on the premise that the nature of the cumulative evidence is such that no prejudice results from its improper admission.
Barry v. Bohi 651
Poppe v. Petersen 877
39. It is presumed that the improper admission into evidence of an opinion of the medical review panel rendered in accordance with the provisions of the Nebraska Hospital-Medical Liability Act results in prejudice.
Barry v. Bohi 651
40. The rule as to admission of evidence of other crimes or acts is one of relevance.
State v. Moore 706
41. "Relevant evidence," as defined in Neb. Rev. Stat. § 27-401 (Reissue 1979), "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
State v. Moore 706
42. The failure of the State to produce an officer's preliminary notes or recordings is not a violation of the fourth amendment to the U.S. Constitution when those notes or recordings are transferred to a report and destroyed as regular practice, so long as such notes or recordings are not destroyed in bad faith.
State v. Surber 714
43. A sentencing judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed.
State v. Dobbins 778
State v. Miller 862
44. Evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination of a proper sentence.
State v. Dobbins 778
45. The trial court has broad latitude in receiving evidence at a sentencing hearing.
State v. Dobbins 778
46. The test for determining admissibility of a statement obtained by police deception is whether that deception produced a false or untrustworthy confession or statement.
State v. Norfolk 810
47. A motion for directed verdict is treated as an admission of the truth of all material and relevant evidence submitted on behalf of

the party against whom it is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
Poppe v. Petersen 877

48. The existence of negligence is an issue for the trier of fact where different minds may reasonably draw different conclusions from the evidence.
Poppe v. Petersen 877

49. Where the cause of an accident is controverted, the physical facts must indisputably demonstrate that a party alleged to have caused the accident did in fact cause the accident before a verdict can be directed against that party.
Poppe v. Petersen 877

Expert Witnesses

1. A general foundational objection does not reach the qualifications of an expert witness.
State v. Taylor 114

2. As a result of Rule 705, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-705 (Cum. Supp. 1984)), where cross-examination of an expert witness discloses there is no adequate factual basis for an expert's opinion, such opinion is irrelevant (Rule 401, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-401 (Reissue 1979)), is inadmissible (Rule 402, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-402 (Reissue 1979)), and should be stricken from consideration by a jury on proper motion of the party adversely affected by such irrelevant evidence.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

3. An expert's opinion based on a misinterpretation or misconception of applicable law renders the opinion irrelevant.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

4. Rule 703, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-703 (Reissue 1979)), clearly contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than a requirement of firsthand knowledge as the only source of information for an expert's opinion.
Gibson v. City of Lincoln 304

5. Generally, an expert witness' firsthand knowledge is a factor which may affect such witness' credibility and weight given to the testimony from that expert, but presence or absence of firsthand knowledge does not, by itself, necessarily establish preference or priority in evidentiary value.
Gibson v. City of Lincoln 304

6. The admission of opinion testimony of an expert is generally discretionary with the trial court, and the determination of its weight is largely a matter for the jury. A general objection as to

foundation to a question requesting the opinion of a witness does not reach the issue of the qualification of the witness as an expert.
Bernadt v. Suburban Air, Inc. 537

7. Both the court and opposing counsel are entitled to know that an objection goes to the qualifications of the witness as an expert rather than to the factual foundation for the opinion.
Bernadt v. Suburban Air, Inc. 537

8. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.
Bernadt v. Suburban Air, Inc. 537

Extradition and Detainer

Once the Governor has granted extradition, a court 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.
Scaggs v. Miller 98

False Reporting

1. The underlying purpose of Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) is to prevent the public from willfully furnishing erroneous information to law enforcement officers and thus interfering with the performance of their duties.
State v. Ewing 462

2. The phrase "the investigation of an actual criminal matter" as used in Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) requires that there be a legitimate and valid investigation of facts which could constitute a predicate criminal offense.
State v. Ewing 462

Fees

1. Usually, when a municipal corporation has power to make or provide for the making of improvements, it has power to make arrangements to meet the expense thereof. In the absence of express direction by statute, the method to be adopted is within the discretion of the proper municipal authorities.
City of Lincoln v. Lesoing 823

2. A legislative body is permitted to delegate to an administrative officer the power to collect a fee, as long as the fee is clearly limited as to the amount and purpose.
City of Lincoln v. Lesoing 823

Final Orders

1. A sentence of probation is a final and appealable order from

which an appeal must be taken within 1 month.
State v. Jacobson 639
2. An administrative proceeding is a "pending action," within the meaning of Neb. Rev. Stat. § 49-301 (Reissue 1984), when the agency's final order is rendered.
Morris v. Wright 837
3. The power of an administrative agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has expired.
Morris v. Wright 837
4. Within the meaning of Neb. Rev. Stat. § 48-1120 (Reissue 1984), there has been no entry of the order of the Nebraska Equal Opportunity Commission until the date that written evidence of that order has been prepared, authoritatively signed, and placed of record in the public files of such commission.
Lincoln Co. Sheriff's Office v. Horne 867

Foreclosure

A mortgagee's lien in a foreclosure action covers only the premises that were the subject of the foreclosure petition.
Dupuy v. Western State Bank 230

Fraud

1. Reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.
Ridenour v. Farm Bureau Ins. Co. 353
2. An action to declare a conveyance fraudulent as to a creditor invokes equity jurisdiction of a court. On appeal an equitable action for declaration of a fraudulent conveyance is a trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Gifford-Hill & Co. v. Stoller 757
3. Under Neb. Rev. Stat. § 36-401 (Reissue 1978), the burden of proof is on a creditor to prove, by clear and convincing evidence, that a debtor intended to hinder, delay, or defraud the creditor by an alleged fraudulent conveyance.
Gifford-Hill & Co. v. Stoller 757
4. Regarding intent to hinder, delay, or defraud required under Neb. Rev. Stat. § 36-401 (Reissue 1978), intent, as any other subjective state or mental element, may be proved by circumstantial or direct evidence.
Gifford-Hill & Co. v. Stoller 757
5. Good faith, among other characteristics, encompasses an absence of or freedom from intent to defraud. A lack of good faith is

demonstrated by a transferee's participation in a plan to hinder creditors, even though the transfer may be supported by adequate consideration.
Gifford-Hill & Co. v. Stoller 757

6. In the case of intent established under Neb. Rev. Stat. § 36-401 (Reissue 1978), consideration given by the grantee or transferee becomes immaterial and does not preclude a finding that a debtor intended to hinder, delay, or defraud a creditor, lest the law approve acquisition of property tainted with fraud. Adequate consideration given by a grantee with fraudulent intent will not sustain a conveyance against a creditor's claim to set aside a transaction pursuant to § 36-401.
Gifford-Hill & Co. v. Stoller 757

Good Cause

1. Upon a motion containing an allegation of fact which, if true, constitutes good cause to set aside or modify a decree dissolving a marriage, a court must grant an evidentiary hearing on the motion to set aside or modify the dissolution decree.
Younkin v. Younkin 134

2. For good cause shown, in proceedings to dissolve a marriage, where paternity of a child affected by the dissolution proceedings is an issue to be resolved, blood group testing and other information bearing upon paternity of the child are proper areas for discovery under the Nebraska Discovery Rules (rev. 1983).
Younkin v. Younkin 134

3. For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. Neb. Rev. Stat. § 30-2437 (Reissue 1979).
In re Estate of Christensen 872

4. For the purpose of Neb. Rev. Stat. § 30-2437 (Reissue 1979), "good cause" means a logical reason or legal ground, based on fact or law, which justifies the modification or vacation of an order.
In re Estate of Christensen 872

Guaranty

1. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
First Nat. Bank v. Bolzer 415

2. Under an absolute guaranty of payment there is no condition as to demand and notice of default.
First Nat. Bank v. Bolzer 415

3. Accepting payments late does not discharge the guarantor unless such late payments are due to an extension agreement entered into

between the creditor and the debtor, supported by valid consideration and binding on the parties.
Murphy v. Stuart Fertilizer Co. 767
4. A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults.
Murphy v. Stuart Fertilizer Co. 767

Guardians and Conservators

1. An intermediate account of a conservator is an adjudication of the matters considered in connection therewith only if made upon hearing and notice to all interested parties.
In re Conservatorship of Estate of Lindauer 146
2. The duties of a conservator are of a continuing nature, and, as a general rule, the statute of limitations does not apply to his duty to account to the protected person and his right to compensation.
In re Conservatorship of Estate of Lindauer 146

Habeas Corpus

1. Once the Governor has granted extradition, a court 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.
Scaggs v. Miller 98
2. It has long been the rule in this jurisdiction that habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error.
Mayfield v. Hartmann 122
3. The writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error.
Mayfield v. Hartmann 122

Hearsay

1. Rule 703, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-703 (Reissue 1979)), clearly contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than a requirement of firsthand knowledge as the only source of information for an expert's opinion.
Gibson v. City of Lincoln 304
2. A declaration offered to show the defendant's state of mind which is too remote in point of time should be excluded as lacking probative value.
State v. Harrison 521
3. Under Rule 801(4)(b)(iv) of the Nebraska Evidence Rules, a statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant within the scope

of agency or employment.
Bump v. Firemens Ins. Co. 678

Highways

It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care.

Oldenburg v. State 1

Homicide

In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance.

State v. Harrison 521

Implied Consent Law

1. On an appeal from an order revoking a motor vehicle operator's license under the implied consent law, the findings of the trial court are reviewed de novo as in equity.

Jamros v. Jensen 426
Emmons v. Jensen 444
Wisch v. Jensen 609

2. On appeal to the district court the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal.

Jamros v. Jensen 426

3. A refusal to submit to a chemical test for purposes of the implied consent law occurs when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it.

Jamros v. Jensen 426

4. A motorist's conduct may constitute a refusal for purposes of an implied consent statute.

Jamros v. Jensen 426

5. The State is entitled to have a chemical test administered at a time when it will be effective to disclose blood alcohol content in relation to the time when the vehicle was operated.

Jamros v. Jensen 426

6. A delay in chemical testing is not prejudicial unless it materially affects the results of the test.
Jamros v. Jensen 426
7. Without an implied consent advisement a motorist cannot be cited for a refusal.
Jamros v. Jensen 426
8. A motorist's justifiable refusal to submit to a chemical test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both.
Jamros v. Jensen 426
9. Physical inability to perform a breath test may excuse conduct which might otherwise be treated as a refusal.
Jamros v. Jensen 426
10. A condition precedent to a valid request by an officer to submit to a chemical test under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) is that the officer must have reasonable grounds to believe that the licensee was either driving a motor vehicle or in the actual physical control of same while under the influence of alcoholic liquor.
Emmons v. Jensen 444
11. The term "reasonable," as applied to refusals to submit to a chemical test under the implied consent law, is an ordinary term which finds adequate interpretation in common usage and understanding.
Fulmer v. Jensen 582
12. There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law.
Fulmer v. Jensen 582
13. Evidence obtained in the implied consent context is not testimonial or communicative in nature and does not fall within the privilege against self-incrimination.
Fulmer v. Jensen 582
14. Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
Fulmer v. Jensen 582
15. Reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test.
Fulmer v. Jensen 582
16. The establishment of reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test in accordance with Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984).
Wisch v. Jensen 609
17. To constitute a refusal to submit to a chemical test required under the implied consent law, the only understanding required by the

licensee is an understanding that he is being asked to take a test.
Wisch v. Jensen 609

18. A motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such driver's initial refusal to take the test requested by the arresting officer.
Wisch v. Jensen 609

Independent Contractor

1. If an employer, accepting and resuming possession of work by an independent contractor, could have known from a reasonable inspection that there was a defect in the work, such employer may be liable for a third person's injury caused by that defective work.
Foltz v. Northwestern Bell Tel. Co. 201

2. One employing an independent contractor may be liable for damages resulting from injury caused by the contractor's negligence, when, by rule of law or statute, the duty to guard against the risk is nondelegable. A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from delegated duties negligently performed.
Foltz v. Northwestern Bell Tel. Co. 201

3. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
Foltz v. Northwestern Bell Tel. Co. 201

4. One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious responsibility and liability for proper performance of that nondelegable duty.
Foltz v. Northwestern Bell Tel. Co. 201

5. Exoneration of an independent contractor from a charge of negligence also exonerates the independent contractor's employer from vicarious liability dependent on that contractor's negligence.
Foltz v. Northwestern Bell Tel. Co. 201

Indictments and Informations

1. Where an indictment or information sets forth the crime in the language of the statute or the equivalent thereof, it is sufficient.
State v. McGee 557

2. For an information to be sufficient it must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
State v. McGee 557

3. An indictment or information alone need not be full protection against double jeopardy, because a defendant may allege and prove facts outside the record in support of a plea of former adjudication.
State v. McGee 557
4. The general rule which is followed by the Supreme Court is that where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count.
State v. Fletcher 562

Injunction

1. Injunctive relief is a discretionary remedy dependent upon the circumstances of the case.
Young v. Lacy 511
2. Injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
Young v. Lacy 511

Insurance

1. A welfare fund which has made payments in the nature of health care benefits to a member on the assumption that the member was not entitled to workmen's compensation is not a subrogee and is not entitled to share in any part of a settlement of a claim made by the member against the employer under the Workmen's Compensation Act.
Smith v. Baker's Local No. 433 Welfare Fund 215
2. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
Polski v. Powers 361
3. Absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages.
Polski v. Powers 361
4. In an insured's action against an insurance company on its policy, as a general rule limitations of liability, and loss from an excepted cause, are matters of defense to be specifically pled by the insurer.
Bump v. Firemens Ins. Co. 678
5. An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
Lumbard v. Western Fire Ins. Co. 804

6. If an insurance policy is ambiguous, it will be construed in favor of the insured.
Lumbard v. Western Fire Ins. Co. 804
7. An ambiguity exists only when a policy can be interpreted to have two or more reasonable meanings.
Lumbard v. Western Fire Ins. Co. 804
8. An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
Lumbard v. Western Fire Ins. Co. 804
9. A policy provision covering burglary only if felonious exit from the premises be by actual force and violence, as evidenced by visible marks made by tools, explosives, electricity, or chemicals upon, or physical damage to, the interior of the premises at the place of such exit, is enforceable.
Lumbard v. Western Fire Ins. Co. 804

Intent

1. The intention of the party making the annexation is to be inferred from the nature of the articles affixed, the relation between the parties, the situation of the party making the annexation, the nature of the structure, the mode of annexation, and the purpose or use for which the annexation has been made.
Fuel Exploration, Inc. v. Novotny 17
2. To determine legislative intent we generally consider the subject matter of the whole act, as well as the particular topic of a statute containing the questioned language. In judicial construction of a statute, the statutory language will be given its ordinary and popular meaning, and a statute is open to construction only if the statute is ambiguous.
Anderson v. Peterson 149
3. Reasons underlying valid legislation are left first to the Legislature and ultimately to the electorate.
Anderson v. Peterson 149
4. Absent an expression of intent, the court will presume that the mortgagee intended that which would prove most advantageous to it.
Dupuy v. Western State Bank 230
5. In matters involving joint ownership a tenancy in common is ordinarily presumed, and in order to find a joint tenancy the court must find a clear expression of an intent to create a joint tenancy.
In re Estate of Steppuhn 329
6. Reformation is decreed in order to effectuate the real agreement of the parties when a written instrument does not represent their true intent.
Ridenour v. Farm Bureau Ins. Co. 353

7. There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.
Ridenour v. Farm Bureau Ins. Co. 353
8. The intent with which an act is done is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Smith 406
State v. Ewing 462
9. The question of whether defendant had the requisite intent to commit a wrongful act is one of fact which, if resolved against the defendant by the trial court based on evidence, will not be interfered with on appeal unless so lacking in probative force that we can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
State v. Smith 406
10. The intent of the parties is of prime concern in determining whether a partnership exists.
In re Estate of Wells 741
11. Regarding intent to hinder, delay, or defraud required under Neb. Rev. Stat. § 36-401 (Reissue 1978), intent, as any other subjective state or mental element, may be proved by circumstantial or direct evidence.
Gifford-Hill & Co. v. Stoller 757
12. Good faith, among other characteristics, encompasses an absence of or freedom from intent to defraud. A lack of good faith is demonstrated by a transferee's participation in a plan to hinder creditors, even though the transfer may be supported by adequate consideration.
Gifford-Hill & Co. v. Stoller 757
13. In the case of intent established under Neb. Rev. Stat. § 36-401 (Reissue 1978), consideration given by the grantee or transferee becomes immaterial and does not preclude a finding that a debtor intended to hinder, delay, or defraud a creditor, lest the law approve acquisition of property tainted with fraud. Adequate consideration given by a grantee with fraudulent intent will not sustain a conveyance against a creditor's claim to set aside a transaction pursuant to § 36-401.
Gifford-Hill & Co. v. Stoller 757

Interest

1. While the rule is generally to the effect that unliquidated demands do not bear interest until the amounts have been liquidated, the rule is otherwise where the parties have contracted to do otherwise.
First Nat. Bank v. Bolzer 415
2. Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and

on default in payment, such contract controls and the rate thus fixed is recoverable, provided the rate is not unconscionable. Thus, if the contract provides for a certain rate of interest until the principal sum is paid, such contract generally will control the recovery as to the rate after maturity.
First Nat. Bank v. Bolzer 415

Interpreters

1. The appointment of an interpreter for an accused at trial is a matter resting largely in the discretion of the trial court.
State v. Topete 771
2. Even though a defendant might not speak grammatically correct English, where the record satisfactorily demonstrates that such defendant had a sufficient command of the English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint an interpreter.
State v. Topete 771
3. If a defendant understands and communicates reasonably well in the English language, the mere fact that such defendant might be able to accomplish self-expression a little better in another language does not warrant utilizing an interpreter at trial.
State v. Topete 771

Investigative Stops

1. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.
Fulmer v. Jensen 582
2. Upon stopping a vehicle for a traffic violation, it is lawful to detain the driver while checking the registration and the license of the driver.
State v. Holman 730
3. Roadside questioning of a driver detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of *Miranda*.
State v. Holman 730

Joint Accounts

1. A joint account is an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.
Uttecht v. Norwest Bank of Norfolk 222
2. A party to an account is one who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account.
Uttecht v. Norwest Bank of Norfolk 222
3. Without qualifying any other statutory right to setoff or lien and subject to any contractual provision, if a party to a multiple-party

account is indebted to a financial institution, the financial institution has a right to setoff against the account in which the party has a present right of withdrawal. The amount of the account subject to setoff is that proportion to which the debtor is beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.
Uttecht v. Norwest Bank of Norfolk 222

4. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.
Uttecht v. Norwest Bank of Norfolk 222

5. Net contribution is the sum of all deposits made by or for a party to a joint account as of a given time, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any dividends or interest included in the current balance.
Uttecht v. Norwest Bank of Norfolk 222

6. Under Neb. Rev. Stat. § 30-2703(a) (Reissue 1979), a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
Craig v. Hastings State Bank 746

7. Under Neb. Rev. Stat. § 30-2713 (Reissue 1979) and in the absence of an agreement otherwise providing, a bank can set off the debt of a depositor having an account with the bank, but only to the extent of the debtor's present beneficial interest in that account. When there is a joint account and proof of net contributions, the amount of the debtor's beneficial interest in such joint account is determined by the net contributions rule required by Neb. Rev. Stat. §§ 30-2703(a) and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

8. Under the net contributions rule of Neb. Rev. Stat. § 30-2703(a) (Reissue 1979) and in the absence of an agreement otherwise providing, if it is established that a nondebtor party to the account has funded all or part of the beneficial interest in an account, a bank has no right of setoff against the beneficial interest contributed by the nondebtor depositor.
Craig v. Hastings State Bank 746

9. In the absence of an agreement otherwise providing, if a person has a present right to withdraw funds from a joint account and is indebted to the financial institution where the account is

maintained, the financial institution has a right to set off against such indebtedness the debtor's beneficial interest in the account as determined by the net contributions rule of ownership in accordance with Neb. Rev. Stat. §§ 30-2703 and 30-2701(6) (Reissue 1979).
Craig v. Hastings State Bank 746

Joint Tenancy

In matters involving joint ownership a tenancy in common is ordinarily presumed, and in order to find a joint tenancy the court must find a clear expression of an intent to create a joint tenancy.
In re Estate of Steppuhn 329

Judgments

1. Harmless error forms no basis for reversal of a judgment on the verdict of a jury.
Fuel Exploration, Inc. v. Novotny 17
2. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
Sommerfeld v. City of Seward 76
Prorok v. County of Custer 789
3. Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a "collateral attack."
Mayfield v. Hartmann 122
4. Only a void judgment is subject to collateral attack.
Mayfield v. Hartmann 122
5. It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
Mayfield v. Hartmann 122
6. A statute is presumed to be constitutional, and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only.
Mayfield v. Hartmann 122
7. The findings and conclusions of the trial court in an action at law tried without a jury have the effect of a jury verdict and will not be set aside by the Nebraska Supreme Court unless they are clearly wrong.
Lis v. Moser Well Drilling & Serv. 349
8. Not only does Neb. U.C.C. § 9-504(3) (Reissue 1980) and the requirement that a security interest must be sold in a commercially reasonable manner affect the right of a creditor to obtain a deficiency judgment but, likewise, the failure to sell a security

interest in a commercially reasonable manner affords to a debtor the right to sue for damages for any surplus which the debtor does not realize by reason of the creditor's having failed to dispose of the property in a commercially reasonable manner.
Chadron Energy Corp. v. First Nat. Bank 590

9. A party who has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
Poppe v. Petersen 877

Judicial Notice

This court will not take judicial notice of a municipal ordinance which is not in the record.
State v. Richter 487

Juries

1. A jury may consider the physical appearance of the defendant together with other circumstances in determining his age.
State v. Navarrete 171
2. Marginally relevant evidence which is outweighed by the danger of *unfair* prejudice, confusion, or misleading the jury should be excluded.
London v. Stewart 265
3. A jury verdict may not be set aside unless it is clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
Vacek v. Ames 333
4. Where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury.
Mitchell v. Kesting 506
5. It is the province of the trial court, not the jury, to determine the admissibility of evidence. Once the trial court has made a determination as to admissibility, the jury is not required to reexamine that ruling.
State v. Harrison 521
6. It is the jury's province to weigh the evidence and judge the credibility of witnesses and their testimony. The jury has the right to credit or reject any part or the whole of the testimony heard.
State v. Harrison 521
7. Where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act and need not be unanimous in its conclusion as to which of several consistent theories it

believes resulted in the violation.
State v. Parker 570
8. Where a single crime may be committed under a number of different theories, the defendant is not entitled to an instruction that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty.
State v. Parker 570

Jurisdiction

1. It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
Mayfield v. Hartmann 122
2. In a proceeding in error the jurisdiction of the court does not attach until there is presented to it, within the 1-month limitation contained in Neb. Rev. Stat. § 25-1931 (Reissue 1979), a duly authenticated transcript containing the final order or judgment of which complaint is made.
Moell v. Mennonite Deaconess Home & Hosp. 168
3. An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter.
Moell v. Mennonite Deaconess Home & Hosp. 168
4. The county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
In re Estate of Steppuhn 329
5. The common law and equity jurisdiction granted the district court by the Constitution cannot be legislatively limited or controlled.
In re Estate of Steppuhn 329
6. In common law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
In re Estate of Steppuhn 329
7. A juvenile court has no statutory authority to place children adjudged under Neb. Rev. Stat. § 43-247(1) (Reissue 1984) with the Department of Social Services.
In re Interest of C.G. and G.G.T. 409
8. The power of an administrative agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has expired.
Morris v. Wright 837

Juror Qualifications

A juror need not be totally ignorant of the facts and issues involved. It is sufficient if a juror can lay aside his impression or opinion and

render a verdict based on the evidence presented in court.
State v. Navarrete 171

Jury Instructions

1. A trial court has a duty to properly analyze, summarize, and submit to the jury the substance of allegations of negligence in a tort petition.
Foltz v. Northwestern Bell Tel. Co. 201
2. It is the duty of the trial court to instruct the jury only on issues which are pleaded and which find support in the evidence.
London v. Stewart 265
3. Where the evidence is conflicting as to the negligence of a party and the proximate cause of an accident, those issues must be submitted to the jury.
London v. Stewart 265
4. The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable the jury to accomplish the purpose desired.
First Nat. Bank v. Bolzer 415
5. It is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions.
First Nat. Bank v. Bolzer 415
6. A requested jury instruction which directs the attention of the jury to and unduly emphasizes a part of the evidence is erroneous and should be refused.
State v. Harrison 521
7. In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance.
State v. Harrison 521
8. The instruction previously authorized by *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), requiring a jury to consider an undercover agent's testimony with care greater than that given a disinterested witness' testimony, is disapproved and has been supplanted by NJI 1.41 concerning a witness' credibility and weight to be given a witness' testimony.
State v. Fletcher 562
9. Where a single crime may be committed under a number of different theories, the defendant is not entitled to an instruction

that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty.
State v. Parker 570

10. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.
Bump v. Firemens Ins. Co. 678

11. Nebraska Jury Instruction 14.08 correctly defines "reasonable doubt."
State v. Beard 891

12. Nebraska Jury Instruction 14.11 correctly defines "intent."
State v. Beard 891

Juvenile Courts

1. 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 must be conducted under the direction of the juvenile court.
In re Interest of M.L.B. 396

2. A juvenile court has no statutory authority to place children adjudged under Neb. Rev. Stat. § 43-247(1) (Reissue 1984) with the Department of Social Services.
In re Interest of C.G. and G.G.T. 409

Legislature

1. To determine legislative intent we generally consider the subject matter of the whole act, as well as the particular topic of a statute containing the questioned language. In judicial construction of a statute, the statutory language will be given its ordinary and popular meaning, and a statute is open to construction only if the statute is ambiguous.
Anderson v. Peterson 149
Uttecht v. Norwest Bank of Norfolk 222

2. Reasons underlying valid legislation are left first to the Legislature and ultimately to the electorate.
Anderson v. Peterson 149

3. By enacting the Municipal and Rural Domestic Ground Water Transfers Permit Act, Neb. Rev. Stat. §§ 46-638 to 46-650 (Reissue 1984), as a part of Nebraska's policy, the Legislature has altered certain aspects of common law governing use of ground water, such as exoneration from the common-law prohibition against transfer of ground water and elimination of use on overlying land as a factor in determining reasonable and

beneficial use of ground water.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

4. A sanitary and improvement district, like a municipal corporation, is a creation of the Legislature. The Legislature may prescribe how and in what manner this legal entity may be created, and, by the same token, as is true with municipal corporations, may determine how it can be discontinued.
S.I.D. No. 95 v. City of Omaha 272

5. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard-and-fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.
State v. Galyen 497

6. While the Legislature cannot delegate its lawmaking powers, it can make laws which become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.
Fulmer v. Jensen 582

Liability

1. In a case of bystander recovery for negligent infliction of emotional distress, recovery based on the reasonable foreseeability of the harm is a more logical and just method of determining liability than the "zone of danger" rule.
James v. Lieb 47

2. The factors to be considered in determining liability for negligent infliction of emotional distress are not intended to be fixed guidelines but, rather, are factors to be taken into account by the court in assessing the degree of foreseeability of emotional injury to the plaintiff.
James v. Lieb 47

3. The determination of liability sustained in a case of negligent infliction of emotional distress depends on a number of factors, including where, when, and how the injury to the victim entered into the consciousness of the plaintiff.
James v. Lieb 47

4. If an employer, accepting and resuming possession of work by an independent contractor, could have known from a reasonable inspection that there was a defect in the work, such employer may be liable for a third person's injury caused by that defective work.
Foltz v. Northwestern Bell Tel. Co. 201

5. One employing an independent contractor may be liable for damages resulting from injury caused by the contractor's negligence, when, by rule of law or statute, the duty to guard against the risk is nondelegable. A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from delegated duties negligently performed.
Foltz v. Northwestern Bell Tel. Co. 201

6. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
Foltz v. Northwestern Bell Tel. Co. 201

7. One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious responsibility and liability for proper performance of that nondelegable duty.
Foltz v. Northwestern Bell Tel. Co. 201

8. Exoneration of an independent contractor from a charge of negligence also exonerates the independent contractor's employer from vicarious liability dependent on that contractor's negligence.
Foltz v. Northwestern Bell Tel. Co. 201

9. If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.
London v. Stewart 265

10. If the 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 could not have caused the result.
London v. Stewart 265

11. A city is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its streets so that they will be reasonably safe for a person using them while that traveler is exercising reasonable and ordinary caution and prudence.
Gilbert v. City of Tekamah 614

Libel and Slander

1. Statements made at an investigation held pursuant to the grievance procedure under the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (1982), and an operating agreement and relevant to the subject of the hearing are absolutely privileged.
Kloch v. Ratcliffe 241

2. Where a qualified privilege exists, there can be no recovery without proof of malice.
Kloch v. Ratcliffe 241
3. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information.
Kloch v. Ratcliffe 241
4. In order to prove malice the plaintiff must show that the defendant knew that the statement was false or that the statement was made with a reckless disregard as to its truth or falsity.
Kloch v. Ratcliffe 241

Licenses and Permits

1. Driving is not a fundamental right, and drunk drivers are not a suspect class.
State v. Michalski 380
2. A driver's license is an "entitlement," the revocation or suspension of which requires procedural due process guaranteed by the fourteenth amendment.
State v. Michalski 380

Liens

1. Absent stipulation to the contrary, title and right to possession remain in the mortgagor, and the mortgagee holds only a lien upon the property.
Dupuy v. Western State Bank 230
2. A lien and a mortgage are not synonymous; a lien is more comprehensive than a mortgage.
Dupuy v. Western State Bank 230
3. A mortgage instrument creates and evidences a lien securing a debt.
Dupuy v. Western State Bank 230
4. A mortgagee's lien in a foreclosure action covers only the premises that were the subject of the foreclosure petition.
Dupuy v. Western State Bank 230
5. Multiple liens can be evidenced in one mortgage instrument.
Dupuy v. Western State Bank 230
6. A Nebraska agister's lien for services and care rendered to livestock owned by a Nebraska resident is not superior to a perfected security interest filed before the agister's lien, unless the security interest holder agrees in writing to the contract for the feed and care of the livestock involved.
Washington County Bank v. Red Socks Stables 300

Limitations of Actions

1. If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of

action, must show some excuse tolling the operation and bar of the statute.
League v. Vanice 34
2. *Discovery*, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer.
League v. Vanice 34
3. Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained.
League v. Vanice 34
4. A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
League v. Vanice 34
5. Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition.
League v. Vanice 34
6. Any action to recover damages based on alleged professional negligence shall be commenced within 2 years next after the alleged act or omission providing the basis for such action.
Suzuki v. Holthaus 72
7. A cause of action for damages for professional negligence accrues at the time of the act or omission causing the injury.
Suzuki v. Holthaus 72
8. A statute of limitations may begin to run at some time before the full extent of damages is sustained.
Suzuki v. Holthaus 72
9. The duties of a conservator are of a continuing nature, and, as a general rule, the statute of limitations does not apply to his duty to account to the protected person and his right to compensation.
In re Conservatorship of Estate of Lindauer 146
10. If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
Cemer v. Huskoma Corp. 175
11. Under Neb. Rev. Stat. § 44-2844 (Reissue 1978), the running of the statute of limitations is interrupted during the medical review proceedings and recommences 90 days after the medical review

panel issues its opinion.
Jacobs v. Goetowski 281
12. An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
Allan v. Massey-Ferguson, Inc. 528
13. The time when a statute of limitations commences to run must be determined by the facts of each case.
Tiwald v. Dewey 547
14. A cause of action for professional malpractice accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action.
Tiwald v. Dewey 547
15. In medical malpractice cases a period of limitations or repose begins to run when the treatment rendered after and relating to the act or omission complained of is completed.
Barry v. Bohi 651
16. A medical malpractice action arises, for the purpose of determining the admissibility into evidence of a written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made.
Barry v. Bohi 651
17. Because the Revisor of Statutes has a continuing duty to publish the laws of Nebraska as adopted by the Legislature and not otherwise declared unconstitutional by the Supreme Court, an application for a writ of mandamus to compel the proper publication of the laws is not subject to a claim that the action is barred by a 4-year statute of limitations.
State ex rel. Wright v. Pepperl 664

Liquor Licenses

1. An applicant for a liquor license before the Nebraska Liquor Control Commission has the burden to show that the granting of such license is or will be required by the present or future public convenience and necessity.
Richards v. Neb. Liq. Control Comm. 542
2. The Nebraska Liquor Control Commission, while having broad discretion in the granting or denial of an application for a liquor license, must base its findings upon substantial evidence and may not be arbitrary or capricious.
Richards v. Neb. Liq. Control Comm. 542
3. A party-applicant who consents at a hearing upon an application for a liquor license to the receipt into evidence by the Nebraska Liquor Control Commission of proceedings involving a prior application by the same party for the same license may not

thereafter complain of the consideration by the commission of such prior proceedings with respect to the pending application.
Richards v. Neb. Liq. Control Comm. 542

Livestock

A Nebraska agister's lien for services and care rendered to livestock owned by a Nebraska resident is not superior to a perfected security interest filed before the agister's lien, unless the security interest holder agrees in writing to the contract for the feed and care of the livestock involved.
Washington County Bank v. Red Socks Stables 300

Mandamus

1. Because the Revisor of Statutes has a continuing duty to publish the laws of Nebraska as adopted by the Legislature and not otherwise declared unconstitutional by the Supreme Court, an application for a writ of mandamus to compel the proper publication of the laws is not subject to a claim that the action is barred by a 4-year statute of limitations.
State ex rel. Wright v. Pepperl 664
2. It is generally held that mandamus only lies to enforce the performance of a ministerial act or duty, and not to control judicial discretion.
State ex rel. Wright v. Pepperl 664

Master and Servant

1. If an employer, accepting and resuming possession of work by an independent contractor, could have known from a reasonable inspection that there was a defect in the work, such employer may be liable for a third person's injury caused by that defective work.
Foltz v. Northwestern Bell Tel. Co. 201
2. One employing an independent contractor may be liable for damages resulting from injury caused by the contractor's negligence, when, by rule of law or statute, the duty to guard against the risk is nondelegable. A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from delegated duties negligently performed.
Foltz v. Northwestern Bell Tel. Co. 201
3. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
Foltz v. Northwestern Bell Tel. Co. 201
4. One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious responsibility and liability for proper performance of that

nondelegable duty.
Foltz v. Northwestern Bell Tel. Co. 201
5. Exoneration of an independent contractor from a charge of negligence also exonerates the independent contractor's employer from vicarious liability dependent on that contractor's negligence.
Foltz v. Northwestern Bell Tel. Co. 201

Medical Malpractice

1. Under Neb. Rev. Stat. § 44-2844 (Reissue 1978), the running of the statute of limitations is interrupted during the medical review proceedings and recommences 90 days after the medical review panel issues its opinion.
Jacobs v. Goetowski 281
2. A plaintiff's right to amend the wording in his specimen petition filed under Neb. Rev. Stat. § 44-2840 (Reissue 1978) in his petition later filed in the district court is the same as a plaintiff's right to amend any other petition, so long as the matter submitted to the court is the same matter submitted to the medical review panel.
Jacobs v. Goetowski 281
3. A cause of action for professional malpractice accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action.
Tiwald v. Dewey 547
4. In order to qualify for the protection of the Nebraska Hospital-Medical Liability Act, the health care provider must file with the director of the Department of Insurance proof of certain financial responsibility and pay the surcharges levied under the act.
Barry v. Bohi 651
5. A cause of action arising while a patient and health care provider are subject to the Nebraska Hospital-Medical Liability Act is to be adjudicated in accordance with the provisions of the act.
Barry v. Bohi 651
6. In medical malpractice cases a period of limitations or repose begins to run when the treatment rendered after and relating to the act or omission complained of is completed.
Barry v. Bohi 651
7. A medical malpractice action arises, for the purpose of determining the admissibility into evidence of a written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made.
Barry v. Bohi 651
8. It is presumed that the improper admission into evidence of an opinion of the medical review panel rendered in accordance with the provisions of the Nebraska Hospital-Medical Liability Act

results in prejudice.
Barry v. Bohi 651

Mental Distress

1. In a case of bystander recovery for negligent infliction of emotional distress, recovery based on the reasonable foreseeability of the harm is a more logical and just method of determining liability than the "zone of danger" rule.
James v. Lieb 47
2. The factors to be considered in determining liability for negligent infliction of emotional distress are not intended to be fixed guidelines but, rather, are factors to be taken into account by the court in assessing the degree of foreseeability of emotional injury to the plaintiff.
James v. Lieb 47
3. In an action for negligent infliction of emotional distress, negligence must be measured against the particular set of facts and circumstances present in each case.
James v. Lieb 47
4. In an action for negligent infliction of emotional distress, the relationship between the plaintiff and victim is the most crucial in determining foreseeability.
James v. Lieb 47
5. Relationship within a certain degree of consanguinity is not required to prove a sufficient relationship for recovery in an action for negligent infliction of emotional distress.
James v. Lieb 47
6. A marital or intimate familial relationship will be required for recovery in an action for negligent infliction of emotional distress. Extended family members will usually have a heavy burden proving a sufficiently close bond to allow recovery.
James v. Lieb 47
7. If a plaintiff in a negligent infliction of emotional distress case experiences actual sensory perception of the accident, the requirement of proximity will be satisfied.
James v. Lieb 47
8. The determination of liability sustained in a case of negligent infliction of emotional distress depends on a number of factors, including where, when, and how the injury to the victim entered into the consciousness of the plaintiff.
James v. Lieb 47
9. In a case of negligent infliction of emotional distress, the emotional trauma must result from either death or serious injury to the victim.
James v. Lieb 47
10. In order to recover in a case of negligent infliction of emotional distress, the plaintiff need not necessarily evidence some

concurrent physical injury resulting from the emotional trauma. While concurrent physical injury is highly persuasive, it is not necessary given the current state of medical science and advances in psychology.
James v. Lieb 47

Mentally Disordered Sex Offender

1. The Nebraska Supreme Court will not disturb a trial court's finding that one is a mentally disordered sex offender whose disorder is nontreatable unless it can be said that such declaration was an abuse of discretion.
State v. Reddick 322
2. The failure of the State to treat a mentally disordered sex offender whose disorder is nontreatable does not constitute cruel and unusual punishment such as to violate either the eighth amendment to the federal Constitution or article I, § 9, of the Nebraska Constitution.
State v. Reddick 322
3. A mentally disordered sex offender for whom a program of treatment will not lead to a cure is "nontreatable" within the meaning of Neb. Rev. Stat. § 29-2914 (Reissue 1979).
State v. Reddick 322

Miranda Rights

1. An in-custody statement voluntarily made without the benefit of *Miranda* warnings is admissible if it is not the product of interrogation.
State v. Taylor 114
2. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
State v. Whitmore 450
3. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect amounts to interrogation under *Miranda*.
State v. Whitmore 450
4. Where there is no expectation of an admission and the police conduct is not an attempt to obtain an admission, there is no interrogation.
State v. Whitmore 450
5. A neutral question which falls within the class of brief, spontaneous reactions to the situation then confronting a police officer, and was not designed to obtain evidence to establish guilt,

is not interrogation under *Miranda*.
State v. Whitmore 450
6. There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law.
Fulmer v. Jensen 582
7. The *Miranda* procedures were not meant to preclude law enforcement personnel from performing their traditional investigatory functions such as general on-the-scene questioning.
State v. Holman 730
8. Roadside questioning of a driver detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of *Miranda*.
State v. Holman 730
9. Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of a *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. If a defendant to be interrogated is indigent, the defendant must also be informed that a lawyer will be appointed to represent the defendant.
State v. Norfolk 810
10. In reference to a waiver of the rights designated in the *Miranda* warning, *intelligent* is not synonymous with *prudent*, and intelligence is not equated with wisdom.
State v. Norfolk 810
11. To determine whether a defendant acted intelligently regarding a waiver of any right designated in the *Miranda* warning, the proper standard is whether a defendant, at the time of the waiver, possessed the capacity to understand and act in response to the *Miranda* warning given by an interrogating officer.
State v. Norfolk 810

Modification of Decree

1. In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.
Riddle v. Riddle 109
2. In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the

immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child.
Riddle v. Riddle 109
Kennedy v. Kennedy 724

3. Upon a motion containing an allegation of fact which, if true, constitutes good cause to set aside or modify a decree dissolving a marriage, a court must grant an evidentiary hearing on the motion to set aside or modify the dissolution decree.
Younkin v. Younkin 134

4. 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.
Kennedy v. Kennedy 724

5. 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.
Kennedy v. Kennedy 724

6. The burden of proving the existence of a material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
Kennedy v. Kennedy 724

7. As a general rule, all other circumstances being equal, legitimate career changes of the custodial parent, whether they be job-related or matrimonial in nature, will support an application for changing the residence of a child placed in that parent's custody. An award of custody is not a sentence of immobilization.
Little v. Little 870

Mortgages

1. A mortgage is a special interest in real property consisting of a security for a debt or obligation.
Dupuy v. Western State Bank 230

2. Absent stipulation to the contrary, title and right to possession remain in the mortgagor, and the mortgagee holds only a lien upon the property.
Dupuy v. Western State Bank 230

3. A lien and a mortgage are not synonymous; a lien is more comprehensive than a mortgage.
Dupuy v. Western State Bank 230

4. A mortgage instrument creates and evidences a lien securing a debt.
Dupuy v. Western State Bank 230

5. Absent an expression of intent, the court will presume that the mortgagee intended that which would prove most advantageous to it.
Dupuy v. Western State Bank 230
6. A mortgagee's lien in a foreclosure action covers only the premises that were the subject of the foreclosure petition.
Dupuy v. Western State Bank 230
7. Multiple liens can be evidenced in one mortgage instrument.
Dupuy v. Western State Bank 230

Motions for Continuance

1. Motions for continuances are addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on such motions will not be disturbed on appeal.
State v. Broomhall 27
State v. Richter 487
2. In determining whether or not the trial court has abused its discretion in refusing to grant a continuance, it is proper to look to the entire record in the case.
State v. Broomhall 27
3. Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.
State v. Broomhall 27
4. A continuance granted at an instate prisoner's request in the county court where a complaint is pending against such a prisoner operates to extend the time within which such a prisoner must be brought to trial under Neb. Rev. Stat. § 29-3805 (Cum. Supp. 1984).
State v. Soule 619

Motions to Suppress

1. Factual findings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong, looking at a totality of the circumstances.
State v. Whitmore 450
State v. Beard 891
2. A motion to suppress can only be made by a person who had a reasonable expectation of privacy in the area searched and where the evidence was seized.
State v. Holman 730

Motor Carriers

1. An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the

Public Service Commission.
In re Application of Red Carpet Limo. Serv., Inc. 340

2. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
In re Application of Red Carpet Limo. Serv., Inc. 340

Motor Vehicles

1. It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care.
Oldenburg v. State 1

2. The presumption that a party lacking memory of an accident exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.
Oldenburg v. State 1

3. Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.
State v. Hansen 103

4. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
State v. Hansen 103

5. Driving is not a fundamental right, and drunk drivers are not a suspect class.
State v. Michalski 380

6. The classification made in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), that is, the line drawn between drivers who are drunk and drivers who are sober, is one rationally related to a legitimate

governmental end.
State v. Michalski 380
7. A driver's license is an "entitlement," the revocation or suspension of which requires procedural due process guaranteed by the fourteenth amendment.
State v. Michalski 380
8. Because the right to travel has been characterized as fundamental, courts examine statutes impairing that right using the strict scrutiny standard of review.
State v. Michalski 380
9. Where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury.
Mitchell v. Kesting 506
10. Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.
Mitchell v. Kesting 506
11. It is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law.
Mitchell v. Kesting 506
12. Upon stopping a vehicle for a traffic violation, it is lawful to detain the driver while checking the registration and the license of the driver.
State v. Holman 730
13. Roadside questioning of a driver detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of *Miranda*.
State v. Holman 730

Municipal Corporations

1. Courts are required to presume that a legislative body, in enacting ordinances, acted within its authority, and the burden rests on those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or general welfare.
City of Lincoln v. Bruce 61
2. *Ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality.
Sommerfeld v. City of Seward 76
3. A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive

matters; and does not rise to the dignity of an ordinance.
Sommerfeld v. City of Seward 76
4. Generally, an ordinance cannot be amended, repealed, or suspended by a resolution.
Sommerfeld v. City of Seward 76
5. Neither Neb. Rev. Stat. § 14-373 nor § 19-3101 (Reissue 1983) applies where a city of the metropolitan class seeks to adopt an ordinance annexing land adjacent to the city's boundaries.
S.I.D. No. 95 v. City of Omaha 272
6. The act of annexation is a matter of statewide concern, and therefore the state statutes, and not the city charter provision, are controlling.
S.I.D. No. 95 v. City of Omaha 272
7. The determination of the City of Omaha, Nebraska, to annex or not to annex outlying property is a purely municipal concern, but this is not true of the annexation process which necessarily affects property outside the municipality and persons who are not inhabitants of the city. The protection of such persons and property is a matter of state concern, and in fulfillment of its duties in this respect, the state must fix the rules and regulations pertaining to annexation procedures.
S.I.D. No. 95 v. City of Omaha 272
8. A municipality cannot annex property for revenue purposes only.
S.I.D. No. 95 v. City of Omaha 272
9. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
S.I.D. No. 95 v. City of Omaha 272
10. A sanitary and improvement district, like a municipal corporation, is a creation of the Legislature. The Legislature may prescribe how and in what manner this legal entity may be created, and, by the same token, as is true with municipal corporations, may determine how it can be discontinued.
S.I.D. No. 95 v. City of Omaha 272
11. Usually, when a municipal corporation has power to make or provide for the making of improvements, it has power to make arrangements to meet the expense thereof. In the absence of express direction by statute, the method to be adopted is within the discretion of the proper municipal authorities.
City of Lincoln v. Lesoing 823

Negligence

1. In actions under Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), the State Tort Claims Act, all questions of negligence and contributory negligence shall be determined initially by the trial court.
Oldenburg v. State 1

2. It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care.
Oldenburg v. State 1
3. The presumption that a party lacking memory of an accident exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.
Oldenburg v. State 1
4. In a case of bystander recovery for negligent infliction of emotional distress, recovery based on the reasonable foreseeability of the harm is a more logical and just method of determining liability than the "zone of danger" rule.
James v. Lieb 47
5. The factors to be considered in determining liability for negligent infliction of emotional distress are not intended to be fixed guidelines but, rather, are factors to be taken into account by the court in assessing the degree of foreseeability of emotional injury to the plaintiff.
James v. Lieb 47
6. In an action for negligent infliction of emotional distress, negligence must be measured against the particular set of facts and circumstances present in each case.
James v. Lieb 47
7. In an action for negligent infliction of emotional distress, the relationship between the plaintiff and victim is the most crucial in determining foreseeability.
James v. Lieb 47
8. Relationship within a certain degree of consanguinity is not required to prove a sufficient relationship for recovery in an action for negligent infliction of emotional distress.
James v. Lieb 47
9. A marital or intimate familial relationship will be required for recovery in an action for negligent infliction of emotional distress. Extended family members will usually have a heavy burden proving a sufficiently close bond to allow recovery.
James v. Lieb 47
10. If a plaintiff in a negligent infliction of emotional distress case experiences actual sensory perception of the accident, the requirement of proximity will be satisfied.
James v. Lieb 47
11. The determination of liability sustained in a case of negligent infliction of emotional distress depends on a number of factors,

including where, when, and how the injury to the victim entered into the consciousness of the plaintiff.
James v. Lieb 47

12. In a case of negligent infliction of emotional distress, the emotional trauma must result from either death or serious injury to the victim.
James v. Lieb 47

13. In order to recover in a case of negligent infliction of emotional distress, the plaintiff need not necessarily evidence some concurrent physical injury resulting from the emotional trauma. While concurrent physical injury is highly persuasive, it is not necessary given the current state of medical science and advances in psychology.
James v. Lieb 47

14. Exoneration of an independent contractor from a charge of negligence also exonerates the independent contractor's employer from vicarious liability dependent on that contractor's negligence.
Foltz v. Northwestern Bell Tel. Co. 201

15. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
London v. Stewart 265

16. An intervening cause is one which comes into active operation in producing the result after the negligence of the defendant.
London v. Stewart 265

17. An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.
London v. Stewart 265

18. If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.
London v. Stewart 265

19. If the 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 could not have caused the result.
London v. Stewart 265

20. Where the evidence is conflicting as to the negligence of a party and the proximate cause of an accident, those issues must be submitted to the jury.
London v. Stewart 265

21. Absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages.
Polski v. Powers 361
22. Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.
Mitchell v. Kesting 506
23. It is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law.
Mitchell v. Kesting 506
24. A city is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its streets so that they will be reasonably safe for a person using them while that traveler is exercising reasonable and ordinary caution and prudence.
Gilbert v. City of Tekamah 614
25. The burden is on the plaintiff to establish that the political subdivision was negligent and that its negligent act or omission was the proximate cause of the injury or damage or that it was a cause that proximately contributed to it.
Gilbert v. City of Tekamah 614
26. Ordinarily, the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper.
Utsumi v. City of Grand Island 783
27. One who is capable of understanding and discretion, and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent or contributorily negligent.
Utsumi v. City of Grand Island 783
28. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it.
Utsumi v. City of Grand Island 783
29. As used in the law of negligence, proximate cause is that cause which, in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury or loss, and without which the injury or loss would not have occurred.
Prorok v. County of Custer 789
30. The existence of negligence is an issue for the trier of fact where different minds may reasonably draw different conclusions from the evidence.
Poppe v. Petersen 877

31. Where the cause of an accident is controverted, the physical facts must indisputably demonstrate that a party alleged to have caused the accident did in fact cause the accident before a verdict can be directed against that party.
Poppe v. Petersen 877

Notice

1. Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained.
League v. Vanice 34
2. If an employer does not have actual notice or knowledge of an employee's injury, Neb. Rev. Stat. § 48-133 (Reissue 1984) requires written notice to the employer concerning the employee's injury to be compensated under the Workmen's Compensation Act.
Thompson v. Monfort of Colorado 83
3. Knowledge of an employee's injury, gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer, is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 1984).
Thompson v. Monfort of Colorado 83
4. A company nurse's knowledge about an employee's injury is imputed to the company-employer. Such imputation of knowledge to the employer equally results from a company's medical technician acquiring knowledge while providing on-the-job health service for an employee of the employer.
Thompson v. Monfort of Colorado 83
5. In place of indispensable written notice, Neb. Rev. Stat. § 48-133 (Reissue 1984) contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further.
Thompson v. Monfort of Colorado 83
6. An intermediate account of a conservator is an adjudication of the matters considered in connection therewith only if made upon hearing and notice to all interested parties.
In re Conservatorship of Estate of Lindauer 146
7. Under an absolute guaranty of payment there is no condition as to demand and notice of default.
First Nat. Bank v. Bolzer 415
8. The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 23-2420 (Reissue 1983), is a condition precedent to the institution

of suit against a political subdivision.
Utsumi v. City of Grand Island 783

Ordinances

1. An ordinance is presumed to be constitutional, and its unconstitutionality must be clearly established.
City of Lincoln v. Bruce 61
2. In the absence of clear and satisfactory evidence to the contrary, a zoning ordinance is presumed to be valid.
City of Lincoln v. Bruce 61
3. Zoning ordinances should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
City of Lincoln v. Bruce 61
4. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
City of Lincoln v. Bruce 61
5. Generally, a zoning ordinance will not be applied immediately to a use which the ordinance renders nonconforming.
City of Lincoln v. Bruce 61
6. Ordinances which limit and plan for the elimination of nonconforming uses generally are enforceable.
City of Lincoln v. Bruce 61
7. Courts are required to presume that a legislative body, in enacting ordinances, acted within its authority, and the burden rests on those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or general welfare.
City of Lincoln v. Bruce 61
8. *Ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality.
Sommerfeld v. City of Seward 76
9. A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance.
Sommerfeld v. City of Seward 76
10. Generally, an ordinance cannot be amended, repealed, or suspended by a resolution.
Sommerfeld v. City of Seward 76

11. Neither Neb. Rev. Stat. § 14-373 nor § 19-3101 (Reissue 1983) applies where a city of the metropolitan class seeks to adopt an ordinance annexing land adjacent to the city's boundaries.
S.I.D. No. 95 v. City of Omaha 272
12. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
S.I.D. No. 95 v. City of Omaha 272
13. This court will not take judicial notice of a municipal ordinance which is not in the record.
State v. Richter 487

Other Acts

The rule as to admission of evidence of other crimes or acts is one of relevance.
State v. Moore 706

Parental Rights

1. Failure of a parent to correct a situation injurious to the life and normal development of a child may support an order of termination of parental rights, even though such child has not as yet manifested permanent damage.
In re Interest of S.P., N.P., and L.P. 165
In re Interest of R.L.T. 251
2. An order terminating parental rights is reviewed de novo on the record, 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.
In re Interest of M.L.B. 396
In re Interest of M.W.M. 829
3. An order terminating parental rights must be based on clear and convincing evidence.
In re Interest of M.L.B. 396
In re Interest of M.W.M. 829
4. The primary consideration in any case involving termination of parental rights is the best interests of the child.
In re Interest of M.L.B. 396
In re Interest of M.W.M. 829
5. It is generally in a child's best interests that a final disposition be made without delay.
In re Interest of M.L.B. 396
6. The right of a parent to custody and control of his or her children is not an inalienable right.
In re Interest of M.L.B. 396
7. The public has a paramount interest in the protection of the children from neglect.
In re Interest of M.L.B. 396

8. The fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated.
In re Interest of M.L.B. 396
9. There is no requirement for a court to implement a rehabilitation plan for the parents of a child found to be dependent and neglected.
In re Interest of M.L.B. 396
10. It is not the law in Nebraska that parental rights may not be terminated unless a parent is given a reasonable opportunity for rehabilitation.
In re Interest of M.L.B. 396
11. The court may order a parent to make reasonable efforts to rehabilitate, and a parent's failure in such rehabilitative efforts is another independent reason justifying termination of parental rights.
In re Interest of M.L.B. 396
12. 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 must be conducted under the direction of the juvenile court.
In re Interest of M.L.B. 396
13. In entering an order of termination of parental rights, the court may properly take into consideration all of its earlier proceedings in the case.
In re Interest of M.W.M. 829

Partnerships

1. The existence of a partnership is a question of fact under the evidence.
In re Estate of Wells 741
2. The intent of the parties is of prime concern in determining whether a partnership exists.
In re Estate of Wells 741
3. The burden of establishing the existence of a partnership is upon the party asserting that such a relationship exists.
In re Estate of Wells 741
4. A partnership is a contract of two or more competent persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
In re Estate of Wells 741

Paternity

1. For good cause shown, in proceedings to dissolve a marriage,

where paternity of a child affected by the dissolution proceedings is an issue to be resolved, blood group testing and other information bearing upon paternity of the child are proper areas for discovery under the Nebraska Discovery Rules (rev. 1983).
Younkin v. Younkin 134

2. Visitation of a child born out of wedlock may be awarded to the alleged father of the child only if there is a court determination, in an appropriate action, that the person seeking visitation is the father of the child.
Stratman v. Hagen 157

Penalties and Forfeitures

1. Restitution imposed under Neb. Rev. Stat. § 28-427 (Reissue 1979) is not a criminal penalty to be imposed as punishment for the crime, but is in the nature of a civil or administrative penalty or sanction.
State v. Holmes 629

2. Restitution differs from forfeiture in that it is unnecessary to identify money found in the possession of the defendant as the money received by the defendant from a particular sale of drugs.
State v. Holmes 629

Physicians and Surgeons

1. Under Neb. Rev. Stat. § 44-2844 (Reissue 1978), the running of the statute of limitations is interrupted during the medical review proceedings and recommences 90 days after the medical review panel issues its opinion.
Jacobs v. Goetowski 281

2. A plaintiff's right to amend the wording in his specimen petition filed under Neb. Rev. Stat. § 44-2840 (Reissue 1978) in his petition later filed in the district court is the same as a plaintiff's right to amend any other petition, so long as the matter submitted to the court is the same matter submitted to the medical review panel.
Jacobs v. Goetowski 281

Plea in Abatement

1. Error in the ruling on a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing is cured by a verdict of guilty if the evidence at trial is sufficient to sustain a finding of guilt beyond a reasonable doubt.
State v. Navarrete 171

2. A defendant may file a plea in abatement when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief.
Kash v. McDermott & Miller 297

3. A plea in abatement is a dilatory and technical plea and is not, as a rule, favored by the courts.
Kash v. McDermott & Miller 297
4. A demurrer and a plea in abatement are different with respect to the role of evidence in the proceedings.
Kash v. McDermott & Miller 297

Pleadings

1. If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
League v. Vanice 34
2. A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
League v. Vanice 34
3. Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition.
League v. Vanice 34
4. A claimant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.
League v. Vanice 34
5. A promissory stipulation not contained in the condemner's petition cannot affect the extent of the taking or the amount of the damages to be awarded.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
6. An appeal is disposed on the basis of the theory presented by the pleadings on which a case has been tried.
Foltz v. Northwestern Bell Tel. Co. 201
7. A mortgagee's lien in a foreclosure action covers only the premises that were the subject of the foreclosure petition.
Dupuy v. Western State Bank 230
8. A plaintiff's right to amend the wording in his specimen petition filed under Neb. Rev. Stat. § 44-2840 (Reissue 1978) in his petition later filed in the district court is the same as a plaintiff's right to amend any other petition, so long as the matter submitted to the court is the same matter submitted to the medical review panel.
Jacobs v. Goetowski 281

9. An objection that there is another case pending between the parties for the same cause may be raised by demurrer to a petition, but only when the pendency of the other action is shown on the face of the petition.
Kash v. McDermott & Miller 297
10. The fact that a petition may have initially sought equitable relief is not binding. A petition in equity may be changed by amendment into an action at law, or vice versa, and it may be amended to seek redress in the form of damages as well as equitable relief.
Chadron Energy Corp. v. First Nat. Bank 590
11. A special appearance is in the nature of a plea in abatement, and it is governed by the same rules.
West Town Homeowners Assn. v. Schneider 674
12. The burden of proving the facts necessary to sustain a special appearance is on the party pleading it.
West Town Homeowners Assn. v. Schneider 674
13. In the absence of an abuse of discretion, a trial court's decision permitting an amendment to a pleading will be affirmed.
Bump v. Firemens Ins. Co. 678
14. Generally, issues delineated in an unaltered pretrial order supplant the issues raised in the pleadings.
Bump v. Firemens Ins. Co. 678
15. In an insured's action against an insurance company on its policy, as a general rule limitations of liability, and loss from an excepted cause, are matters of defense to be specifically pled by the insurer.
Bump v. Firemens Ins. Co. 678
16. Where the petition fails to state facts sufficient to constitute a cause of action, the petition is subject to a demurrer.
Utsumi v. City of Grand Island 783
17. The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 23-2420 (Reissue 1983), is a condition precedent to the institution of suit against a political subdivision.
Utsumi v. City of Grand Island 783
18. When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must allege and prove all the facts essential to a strict compliance with the prescribed conditions.
Utsumi v. City of Grand Island 783

Pleas

1. A factual basis for a plea of nolo contendere may be established by examination of the presentence report.
State v. Loschen 315
2. A defendant who pleads guilty to a felony or misdemeanor in which a sentence of imprisonment is legally permissible is entitled

to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights.
State v. Porchia 327

3. A written petition to enter a plea of guilty which itemizes a defendant's constitutional rights and the range of penalties for the offense charged does not in and of itself establish that a defendant knowingly, voluntarily, and intelligently pled guilty.
State v. Mindrup 773

4. Failure to inform a defendant of the right to counsel does not constitute error when the defendant has had the benefit of counsel before the court.
State v. Mindrup 773

5. A defendant may not waive the reading of a document which would have advised him or her of the nature of the offense and later complain that the plea of guilty was entered in ignorance of the nature of the offense.
State v. Mindrup 773

6. It does not matter how a defendant comes to understand the possible penalty for an offense, so long as he or she was aware of it at the time of the plea.
State v. Mindrup 773

7. The use of a written petition to plead guilty is discouraged.
State v. Mindrup 773

8. A defendant should not be allowed to withdraw a plea of guilty or nolo contendere in the absence of proof by the defendant that such withdrawal is necessary to correct a manifest injustice.
State v. Havlat 845

Police Officers and Sheriffs

1. Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.
State v. Hansen 103

2. In order to establish probable cause to associate property with criminal activity, all that is required is that the facts available to the officer would warrant a man of reasonable caution in the

belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.
State v. Hansen 103

3. The underlying purpose of Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) is to prevent the public from willfully furnishing erroneous information to law enforcement officers and thus interfering with the performance of their duties.
State v. Ewing 462

4. The phrase "the investigation of an actual criminal matter" as used in Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) requires that there be a legitimate and valid investigation of facts which could constitute a predicate criminal offense.
State v. Ewing 462

5. An officer may seize evidence and contraband if it is discovered inadvertently while it is in plain view and the officer has a right to be in the place where he has such a view.
State v. Holman 730

6. The *Miranda* procedures were not meant to preclude law enforcement personnel from performing their traditional investigatory functions such as general on-the-scene questioning.
State v. Holman 730

Political Subdivisions

1. Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price.
Anderson v. Peterson 149

2. Generally, competitive bidding statutes are strictly construed against public authorities required to obtain a public letting. However, statutes requiring competitive bidding, although strictly construed, should not be extended beyond their clear implication.
Anderson v. Peterson 149

3. Neb. Rev. Stat. § 23-324.05 (Reissue 1983), requiring competitive bidding in a county's acquisition of "supplies, materials, [and] equipment," contemplates expenditures for tangible personal property to be used by or furnished to any county officer, office, department, institution, board, or other agency of county government, except election supplies, materials, and equipment. An expenditure for replacement of a courthouse's heating and air-conditioning system is in the nature of a capital expenditure for long-term or permanent betterment of a county's building and

constitutes capital improvement of a county's real property.
Anderson v. Peterson 149

4. A city is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its streets so that they will be reasonably safe for a person using them while that traveler is exercising reasonable and ordinary caution and prudence.
Gilbert v. City of Tekamah 614

5. The burden is on the plaintiff to establish that the political subdivision was negligent and that its negligent act or omission was the proximate cause of the injury or damage or that it was a cause that proximately contributed to it.
Gilbert v. City of Tekamah 614

Political Subdivisions Tort Claims Act

The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 23-2420 (Reissue 1983), is a condition precedent to the institution of suit against a political subdivision.
Utsumi v. City of Grand Island 783

Prejudgment Interest

1. Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984).
First Nat. Bank v. Bolzer 415

2. Prejudgment interest may be recovered on claims which are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. If 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.
Hill v. City of Lincoln 719

3. Where the existence of an overpayment is dependent upon an interpretation of a statute and there is a reasonable dispute over its meaning so as to require a suit for declaratory judgment in order to clarify it, a claim based upon such a determination cannot be said to be liquidated and no prejudgment interest would be allowed.
Hill v. City of Lincoln 719

Preliminary Hearings

Error in the ruling on a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing is cured by a verdict of guilty if the evidence at trial is sufficient to sustain a finding of

guilt beyond a reasonable doubt.
State v. Navarrete 171

Presentence Reports

A factual basis for a plea of nolo contendere may be established by examination of the presentence report.
State v. Loschen 315

Presumptions

1. The presumption that a party lacking memory of an accident exercised reasonable care for his own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced.
Oldenburg v. State 1
2. An ordinance is presumed to be constitutional, and its unconstitutionality must be clearly established.
City of Lincoln v. Bruce 61
3. In the absence of clear and satisfactory evidence to the contrary, a zoning ordinance is presumed to be valid.
City of Lincoln v. Bruce 61
4. Courts are required to presume that a legislative body, in enacting ordinances, acted within its authority, and the burden rests on those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or general welfare.
City of Lincoln v. Bruce 61
5. A statute is presumed to be constitutional, and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only.
Mayfield v. Hartmann 122
State ex rel. Wright v. Pepperl 664
6. It is a principle of law, or a "presumption," in eminent domain that a condemner will exercise all rights acquired and use the property appropriated to the full extent.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
7. Absent an expression of intent, the court will presume that the mortgagee intended that which would prove most advantageous to it.
Dupuy v. Western State Bank 230
8. In a bench trial, that is, all factual determinations made by a judge and not by a jury, we apply the principle or "presumption" that the trial court will consider only relevant and otherwise admissible evidence so that an erroneous admission of evidence during a bench trial will not result in a reversal, if there is relevant and admissible evidence to sustain the trial court's judgment. The

foregoing principle, likewise, applies to a rehearing before the Nebraska Workmen's Compensation Court.
Gibson v. City of Lincoln 304

9. In matters involving joint ownership a tenancy in common is ordinarily presumed, and in order to find a joint tenancy the court must find a clear expression of an intent to create a joint tenancy.
In re Estate of Steppuhn 329

10. There is a strong presumption that a written instrument correctly expresses the intention of the parties to it.
Ridenour v. Farm Bureau Ins. Co. 353

11. Given a statute's presumption of validity and the legislature's inherent power to classify for legitimate purposes, a challenger bears a heavy burden in demonstrating that the classification is arbitrary and not rationally related to a legitimate governmental end.
State v. Michalski 380

Pretrial Conferences

1. Pretrial conferences are conducted to simplify and narrow issues presented in a case. Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried.
Bump v. Firemens Ins. Co. 678

2. Generally, issues delineated in an unaltered pretrial order supplant the issues raised in the pleadings.
Bump v. Firemens Ins. Co. 678

3. Any claimed error based on the issues specified by the trial court may be waived by failure to object to the report on the pretrial conference and cannot be asserted for review by this court.
Bump v. Firemens Ins. Co. 678

Pretrial Motions

1. Upon a motion containing an allegation of fact which, if true, constitutes good cause to set aside or modify a decree dissolving a marriage, a court must grant an evidentiary hearing on the motion to set aside or modify the dissolution decree.
Younkin v. Younkin 134

2. For good cause shown, in proceedings to dissolve a marriage, where paternity of a child affected by the dissolution proceedings is an issue to be resolved, blood group testing and other information bearing upon paternity of the child are proper areas for discovery under the Nebraska Discovery Rules (rev. 1983).
Younkin v. Younkin 134

3. Whatever rights a litigant may have concerning discovery, such rights are not unlimited. Subject to mandatory provisions of the Nebraska Discovery Rules and appropriate statutes, discovery procedures, including a time limit for completion of discovery, are

matters for judicial discretion exercisable to control orderly progression of cases toward trial.
Bump v. Firemens Ins. Co. 678

4. Under Neb. Rev. Stat. § 29-1919 (Reissue 1979), on determination that a discovery order has not been complied with, the trial court has broad discretion to enter such other order as it deems just under the circumstances.
State v. Surber 714

5. The failure of the State to produce an officer's preliminary notes or recordings is not a violation of the fourth amendment to the U.S. Constitution when those notes or recordings are transferred to a report and destroyed as regular practice, so long as such notes or recordings are not destroyed in bad faith.
State v. Surber 714

Prior Convictions

It is plain error to have no showing in the record that defendant either had assistance of counsel or waived such at the time of her conviction if the conviction is used for enhancement purposes.
State v. Ozmun 481

Prisoners

1. The time within which an instate prisoner must be tried under Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Cum. Supp. 1984) begins to run after the county attorney for the county in which an indictment, information, or complaint is pending receives notice from the Department of Correctional Services of the prisoner's request for a final determination of a pending Nebraska indictment, information, or complaint.
State v. Soule 619

2. A continuance granted at an instate prisoner's request in the county court where a complaint is pending against such a prisoner operates to extend the time within which such a prisoner must be brought to trial under Neb. Rev. Stat. § 29-3805 (Cum. Supp. 1984).
State v. Soule 619

Probable Cause

1. In order to establish probable cause to associate property with criminal activity, all that is required is that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.
State v. Hansen 103

2. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
State v. Hansen 103
3. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.
Fulmer v. Jensen 582
4. Reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test.
Fulmer v. Jensen 582
5. The establishment of reasonable grounds for arrest and arrest are conditions precedent to a valid request to submit to a chemical test in accordance with Neb. Rev. Stat. § 39-669.08(2) (Reissue 1984).
Wisch v. Jensen 609
6. Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime. A practical, nontechnical probability that incriminating evidence is involved is all that is required.
State v. Holman 730

Probation and Parole

1. If a sufficient record exists which establishes the grounds for the revocation of probation by clear and convincing evidence, such revocation need not be reversed solely and only on the ground that, through inadvertence, a complete record of the revocation hearing was not preserved.
State v. Schulz 473
2. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979) provides the Nebraska Evidence Rules (Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979 & Cum. Supp. 1984)) do not apply to proceedings for the granting or revoking of probation.
State v. Ozmun 481
3. The court should consider the whole record, including probative evidence of matters arising subsequent to conviction, but a violation of one of the terms of probation is sufficient for revocation.
State v. Ozmun 481
4. Upon revocation of probation the court may then impose on the offender such punishment as might have been imposed originally for the crime for which such defendant was convicted.
State v. Jacobson 639
5. A sentence of probation is a final and appealable order from which an appeal must be taken within 1 month.
State v. Jacobson 639

6. A grant of probation will not be disturbed on appeal unless there appears to be an abuse of discretion.
State v. Dobbins 778

Proof

1. In a replevin action the burden is on the plaintiff to show the facts necessary to recover existed at the time the action was commenced; what takes place thereafter is immaterial in the consideration and determination of the merits of the case.
Fuel Exploration, Inc. v. Novotny 17
2. A plaintiff in replevin must prove the interest pled; proof of a special ownership interest does not support an allegation of a general ownership interest.
Fuel Exploration, Inc. v. Novotny 17
3. A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
League v. Vanice 34
4. Relationship within a certain degree of consanguinity is not required to prove a sufficient relationship for recovery in an action for negligent infliction of emotional distress.
James v. Lieb 47
5. A marital or intimate familial relationship will be required for recovery in an action for negligent infliction of emotional distress. Extended family members will usually have a heavy burden proving a sufficiently close bond to allow recovery.
James v. Lieb 47
6. If a plaintiff in a negligent infliction of emotional distress case experiences actual sensory perception of the accident, the requirement of proximity will be satisfied.
James v. Lieb 47
7. One seeking public assistance has the burden of proving entitlement to the benefits.
Dobrovolny v. Dunning 67
8. If one chooses to represent himself or herself before a tribunal, one must accept the consequences of one's own failure to properly present sufficient evidence to sustain one's burden.
Dobrovolny v. Dunning 67
9. A party claiming that the sale of a controlled substance was exempt has the burden of proof that an exemption was applicable.
State v. Taylor 114
10. Where a qualified privilege exists, there can be no recovery without proof of malice.
Kloch v. Ratcliffe 241
11. In order to prove malice the plaintiff must show that the defendant knew that the statement was false or that the statement was made with a reckless disregard as to its truth or falsity.
Kloch v. Ratcliffe 241

12. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
S.I.D. No. 95 v. City of Omaha 272
13. In an alienation of affections case, evidence as to the defendant's income and financial condition may be admissible as proof as to how the alienation was accomplished.
Vacek v. Ames 333
14. An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission.
In re Application of Red Carpet Limo. Serv., Inc. 340
15. One seeking recovery in a contract action has the burden of proving damages with as much certainty as the case permits.
Lis v. Moser Well Drilling & Serv. 349
16. Proof of damages to a mathematical certainty is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
Lis v. Moser Well Drilling & Serv. 349
17. Clear, convincing, and satisfactory evidence is present when there has been produced in the trier of fact a firm belief or conviction that a fact to be proved exists.
Ridenour v. Farm Bureau Ins. Co. 353
18. An applicant for a liquor license before the Nebraska Liquor Control Commission has the burden to show that the granting of such license is or will be required by the present or future public convenience and necessity.
Richards v. Neb. Liq. Control Comm. 542
19. A question put to a witness which calls for an answer based upon conjecture and speculation does not constitute proper proof on an issue.
Agrex, Inc. v. Schrant 604
20. The burden is on the plaintiff to establish that the political subdivision was negligent and that its negligent act or omission was the proximate cause of the injury or damage or that it was a cause that proximately contributed to it.
Gilbert v. City of Tekamah 614
21. The burden of proving the facts necessary to sustain a special appearance is on the party pleading it.
West Town Homeowners Assn. v. Schneider 674
22. The burden is upon the one claiming an attorney fee in a class action to show that a *net* benefit was conferred upon the class.
Hill v. City of Lincoln 719

23. The burden of proving the existence of a material change of circumstances affecting the best interests of the children is on the party seeking modification of the custody award.
Kennedy v. Kennedy 724
24. The burden of establishing the existence of a partnership is upon the party asserting that such a relationship exists.
In re Estate of Wells 741
25. The party charged with the burden of proof must establish by a preponderance of the evidence the issue essential to recovery.
In re Estate of Wells 741
26. Under Neb. Rev. Stat. § 36-401 (Reissue 1978), the burden of proof is on a creditor to prove, by clear and convincing evidence, that a debtor intended to hinder, delay, or defraud the creditor by an alleged fraudulent conveyance.
Gifford-Hill & Co. v. Stoller 757
27. Regarding intent to hinder, delay, or defraud required under Neb. Rev. Stat. § 36-401 (Reissue 1978), intent, as any other subjective state or mental element, may be proved by circumstantial or direct evidence.
Gifford-Hill & Co. v. Stoller 757
28. When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must allege and prove all the facts essential to a strict compliance with the prescribed conditions.
Utsumi v. City of Grand Island 783
29. The burden of proof regarding the validity of an antenuptial contract is on the party asserting its invalidity.
In re Estate of Peterson 792
30. One who sought to be certified as qualified to practice clinical psychology as an existing practitioner under the provisions of Neb. Rev. Stat. § 71-3836 (Cum. Supp. 1978) had the burden of proving engagement in the full-time practice of clinical psychology as of December 1, 1976.
Morris v. Wright 837
31. The person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence.
State v. Havlat 845
32. Where one maintains that counsel was inadequate or ineffective, one must also show how or in what manner that alleged inadequacy prejudiced the defendant.
State v. Havlat 845

Property

1. The term "fixture" refers to a chattel which is capable of existing separate and apart from realty, but which, by actual annexation and appropriation to the use or purpose of the realty with the

intention of making it a permanent accession thereto, becomes a part of the realty.
Fuel Exploration, Inc. v. Novotny 17

2. Once a chattel becomes a fixture, it is treated as a part of the realty and may not be removed therefrom except by the owner of the realty.
Fuel Exploration, Inc. v. Novotny 17

3. A "trade fixture" is not considered part of the realty and may be removed therefrom by the trade fixture's owner, so long as the removal does not cause substantial damage to the realty.
Fuel Exploration, Inc. v. Novotny 17

4. Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case.
Fuel Exploration, Inc. v. Novotny 17

5. The intention of the party making the annexation is to be inferred from the nature of the articles affixed, the relation between the parties, the situation of the party making the annexation, the nature of the structure, the mode of annexation, and the purpose or use for which the annexation has been made.
Fuel Exploration, Inc. v. Novotny 17

6. Generally, in the absence of statute any permanent improvement placed upon land of another by one having no interest or title in the land, without the landowner's consent, prima facie becomes a part of the realty and belongs to the owner of the land, although it was placed thereon by mistake or with a view of enforcing an adverse right in the land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership.
Fuel Exploration, Inc. v. Novotny 17

7. Neb. Rev. Stat. § 23-324.05 (Reissue 1983), requiring competitive bidding in a county's acquisition of "supplies, materials, [and] equipment," contemplates expenditures for tangible personal property to be used by or furnished to any county officer, office, department, institution, board, or other agency of county government, except election supplies, materials, and equipment. An expenditure for replacement of a courthouse's heating and air-conditioning system is in the nature of a capital expenditure for long-term or permanent betterment of a county's building and constitutes capital improvement of a county's real property.
Anderson v. Peterson 149

8. The right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

9. A mortgage is a special interest in real property consisting of a security for a debt or obligation.
Dupuy v. Western State Bank 230

10. Absent stipulation to the contrary, title and right to possession remain in the mortgagor, and the mortgagee holds only a lien upon the property.
Dupuy v. Western State Bank 230

11. Where property is subject to a security interest, an exercise of dominion or control over the property which is inconsistent with the rights of the secured party constitutes, as to him, a conversion of the property, and there may be conversion of the property by a secured party where his acts are in defiance of the rights of others in the property.
Chadron Energy Corp. v. First Nat. Bank 590

Property Division

1. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.
Rezac v. Rezac 516

2. The fixing of alimony or distribution of property rests in the sound discretion of the district court, and in the absence of an abuse of discretion, will not be disturbed on appeal.
Rezac v. Rezac 516
Black v. Black 533

3. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
Rezac v. Rezac 516

4. The division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably.
Black v. Black 533

5. Ultimately, the test for division of property in a dissolution case is one of reasonableness.
Black v. Black 533

6. There is no mathematical formula by which awards of division of property can be precisely determined, because each depends upon the facts of the particular case.
Black v. Black 533

7. The debts of the parties should be considered in making a property division.
Black v. Black 533

8. Losses as well as gains should be divided equitably between the parties in a dissolution case.
Black v. Black 533

9. The ultimate test for the division of property as well as an award of alimony is reasonableness as determined by the facts of each case.
Maricle v. Maricle 552
Burhoop v. Burhoop 657
10. In a proper case the proceeds from the settlement of a personal injury claim may be considered to be a part of the marital estate.
Maricle v. Maricle 552
11. 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.
Earl v. Earl 574
12. Awards of property jointly owned by divorced parties are not usually commended. When a proper situation presents itself, the trial court does not abuse its discretion in awarding the parties an undivided one-half interest in the property.
Burhoop v. Burhoop 657
13. How property, inherited by a party before or during the marriage, will be considered in determining division of property must depend upon the facts of the particular case and the equities involved.
Grace v. Grace 695

Prosecuting Attorneys

Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.
State v. Loschen 315

Proximate Cause

1. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
London v. Stewart 265
2. An intervening cause is one which comes into active operation in producing the result after the negligence of the defendant.
London v. Stewart 265
3. An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.
London v. Stewart 265
4. If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects

of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.
London v. Stewart 265

5. Where the evidence is conflicting as to the negligence of a party and the proximate cause of an accident, those issues must be submitted to the jury.
London v. Stewart 265

6. The burden is on the plaintiff to establish that the political subdivision was negligent and that its negligent act or omission was the proximate cause of the injury or damage or that it was a cause that proximately contributed to it.
Gilbert v. City of Tekamah 614

7. As used in the law of negligence, proximate cause is that cause which, in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury or loss, and without which the injury or loss would not have occurred.
Prorok v. County of Custer 789

Public Assistance

One seeking public assistance has the burden of proving entitlement to the benefits.
Dobrovolny v. Dunning 67

Public Officers and Employees

1. Because the Revisor of Statutes has a continuing duty to publish the laws of Nebraska as adopted by the Legislature and not otherwise declared unconstitutional by the Supreme Court, an application for a writ of mandamus to compel the proper publication of the laws is not subject to a claim that the action is barred by a 4-year statute of limitations.
State ex rel. Wright v. Pepperl 664

2. It is generally held that mandamus only lies to enforce the performance of a ministerial act or duty, and not to control judicial discretion.
State ex rel. Wright v. Pepperl 664

3. From a reading of Neb. Rev. Stat. §§ 49-705, 49-765, and 49-767 (Reissue 1984), the Revisor of Statutes is obligated by law to print and publish the laws as enacted by the Legislature, and not to exercise his or her own discretion in excising a portion of the law.
State ex rel. Wright v. Pepperl 664

4. The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to any other public official.
State ex rel. Wright v. Pepperl 664

5. Unless and until a law is declared unconstitutional by the Supreme Court, the authority granted to the Revisor of Statutes in Neb.

Rev. Stat. § 49-705(2)(c), (d), and (e) (Reissue 1984) does not become operative.
State ex rel. Wright v. Pepperl 664

6. The Revisor of Statutes has no right nor duty to pass upon the constitutionality of legislative acts not determined by this court to be unconstitutional, and therefore has no right to raise the constitutionality of an act as a defense to his or her failure to publish the law as enacted by the Legislature.
State ex rel. Wright v. Pepperl 664

Public Purpose

1. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard-and-fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.
State v. Galyen 497

2. If a tax levy is for a public purpose, it is no objection to its validity that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed.
State v. Galyen 497

Public Service Commission

1. An applicant for a certificate of public convenience and necessity has the burden of showing that the authority he seeks is required by the public convenience and necessity, and the determination of that issue is peculiarly within the discretion and expertise of the Public Service Commission.
In re Application of Red Carpet Limo. Serv., Inc. 340

2. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
In re Application of Red Carpet Limo. Serv., Inc. 340

3. Upon an appeal from an order of the Public Service Commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
In re Application of Red Carpet Limo. Serv., Inc. 340

4. If there is evidence to sustain the finding of the Public Service Commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary.
In re Application of Red Carpet Limo. Serv., Inc. 340

Records

1. The transcript filed on an appeal to the Supreme Court is limited in content by the Supreme Court rules; when those rules are ignored by the attorney requesting the transcript, the attorney will be taxed personally with the costs of its preparation.
Pierce v. City of Ogallala 433

2. If a sufficient record exists which establishes the grounds for the revocation of probation by clear and convincing evidence, such revocation need not be reversed solely and only on the ground that, through inadvertence, a complete record of the revocation hearing was not preserved.
State v. Schulz 473

3. A party-applicant who consents at a hearing upon an application for a liquor license to the receipt into evidence by the Nebraska Liquor Control Commission of proceedings involving a prior application by the same party for the same license may not thereafter complain of the consideration by the commission of such prior proceedings with respect to the pending application.
Richards v. Neb. Liq. Control Comm. 542

4. Assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions that includes that evidence.
West Town Homeowners Assn. v. Schneider 674

5. Where there is no bill of exceptions, we are limited to an examination of the pleadings. If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment.
West Town Homeowners Assn. v. Schneider 674

6. The rules of this court require the district court to provide a court reporter whenever a litigant requests the presence of the court reporter.
Kennedy v. Kennedy 724

7. Within the meaning of Neb. Rev. Stat. § 48-1120 (Reissue 1984), there has been no entry of the order of the Nebraska Equal Opportunity Commission until the date that written evidence of that order has been prepared, authoritatively signed, and placed of record in the public files of such commission.
Lincoln Co. Sheriff's Office v. Horne 867

Reformation

1. An action for reformation is equitable in nature.
   Ridenour v. Farm Bureau Ins. Co. 353
2. Reformation is decreed in order to effectuate the real agreement of the parties when a written instrument does not represent their true intent.
   Ridenour v. Farm Bureau Ins. Co. 353
3. Reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.
   Ridenour v. Farm Bureau Ins. Co. 353
4. Reformation conforms an erroneous written agreement to the antecedent agreement of the parties; that is to say, to the agreement entered into prior to the execution of the erroneous written agreement.
   Ridenour v. Farm Bureau Ins. Co. 353
5. To obtain reformation the evidence must be clear, convincing, and satisfactory.
   Ridenour v. Farm Bureau Ins. Co. 353

Replevin

1. In a replevin action the burden is on the plaintiff to show the facts necessary to recover existed at the time the action was commenced; what takes place thereafter is immaterial in the consideration and determination of the merits of the case.
   Fuel Exploration, Inc. v. Novotny 17
2. A plaintiff in replevin must prove the interest pled; proof of a special ownership interest does not support an allegation of a general ownership interest.
   Fuel Exploration, Inc. v. Novotny 17

Restitution

1. Restitution imposed under Neb. Rev. Stat. § 28-427 (Reissue 1979) is not a criminal penalty to be imposed as punishment for the crime, but is in the nature of a civil or administrative penalty or sanction.
   State v. Holmes 629
2. Restitution differs from forfeiture in that it is unnecessary to identify money found in the possession of the defendant as the money received by the defendant from a particular sale of drugs.
   State v. Holmes 629
3. An order under Neb. Rev. Stat. § 28-427 (Reissue 1979) that the defendant make restitution creates a debt in favor of the State which can be satisfied from any funds belonging to the defendant.
   State v. Holmes 629
4. An order for restitution under Neb. Rev. Stat. § 28-427 (Reissue 197) may be made at the time of the sentencing, but there is no

statutory requirement that it be made at that time, and it is not a part of the sentence.
State v. Holmes 629

Right to Counsel

1. If one chooses to represent himself or herself before a tribunal, one must accept the consequences of one's own failure to properly present sufficient evidence to sustain one's burden.
Dobrovolny v. Dunning 67
2. It is plain error to have no showing in the record that defendant either had assistance of counsel or waived such at the time of her conviction if the conviction is used for enhancement purposes.
State v. Ozmun 481
3. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1979), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Richter 487
4. A defendant is entitled to be represented by counsel at all critical stages of a criminal proceeding against him, which includes the trial itself.
State v. Richter 487
5. Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters.
State v. Richter 487
6. The requirement of Neb. Rev. Stat. § 29-1804.05 (Cum. Supp. 1984) is that before counsel be provided at public expense for a criminal defendant, there be a "reasonable inquiry to determine" the defendant's "financial condition."
State v. Richter 487
7. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1979), a court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Richter 487
8. The exercise of the right to the assistance of counsel is subject to the necessities of sound judicial administration and requires a balancing of a criminal defendant's right to a reasonable opportunity to prepare for trial and to consult counsel with the necessity for the orderly and prompt disposition of cases in the orderly course of the administration of justice.
State v. Richter 487

9. Where a criminal defendant is financially able to engage an attorney, he may not use his neglect in hiring one as a legitimate reason for delay.
State v. Richter 487
10. Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
Fulmer v. Jensen 582
11. Failure to inform a defendant of the right to counsel does not constitute error when the defendant has had the benefit of counsel before the court.
State v. Mindrup 773
12. Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of a *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. If a defendant to be interrogated is indigent, the defendant must also be informed that a lawyer will be appointed to represent the defendant.
State v. Norfolk 810

Rules of Evidence

1. As a result of Rule 705, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-705 (Cum. Supp. 1984)), where cross-examination of an expert witness discloses there is no adequate factual basis for an expert's opinion, such opinion is irrelevant (Rule 401, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-401 (Reissue 1979)), is inadmissible (Rule 402, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-402 (Reissue 1979)), and should be stricken from consideration by a jury on proper motion of the party adversely affected by such irrelevant evidence.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
2. An expert's opinion based on a misinterpretation or misconception of applicable law renders the opinion irrelevant.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
3. An underlying objective of the Nebraska Evidence Rules (Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979 & Cum. Supp. 1984)) is inexpensive efficiency in presentation of relevant evidence. The Nebraska Evidence Rules are construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly

determined.
Gibson v. City of Lincoln 304

4. Rule 703, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-703 (Reissue 1979)), clearly contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than a requirement of firsthand knowledge as the only source of information for an expert's opinion.
Gibson v. City of Lincoln 304

5. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979) provides the Nebraska Evidence Rules (Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979 & Cum. Supp. 1984)) do not apply to proceedings for the granting or revoking of probation.
State v. Ozmun 481

6. Under Rule 801(4)(b)(iv) of the Nebraska Evidence Rules, a statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant within the scope of agency or employment.
Bump v. Firemens Ins. Co. 678

Rules of the Supreme Court

1. Failure to comply with Neb. Ct. R. 16A (rev. 1983) requiring that a copy of the brief assigning the unconstitutionality of a statute be served upon the Attorney General in those cases in which he is not already a party is fatal to a consideration of the issue by the Nebraska Supreme Court.
City of Lincoln v. Bruce 61

2. The transcript filed on an appeal to the Supreme Court is limited in content by the Supreme Court rules; when those rules are ignored by the attorney requesting the transcript, the attorney will be taxed personally with the costs of its preparation.
Pierce v. City of Ogallala 433

3. The rules of this court require the district court to provide a court reporter whenever a litigant requests the presence of the court reporter.
Kennedy v. Kennedy 724

Sales

1. Not only does Neb. U.C.C. § 9-504(3) (Reissue 1980) and the requirement that a security interest must be sold in a commercially reasonable manner affect the right of a creditor to obtain a deficiency judgment but, likewise, the failure to sell a security interest in a commercially reasonable manner affords to a debtor the right to sue for damages for any surplus which the debtor does not realize by reason of the creditor's having failed to dispose of the property in a commercially reasonable manner.
Chadron Energy Corp. v. First Nat. Bank 590

2. Even though a sale may produce a surplus, if in fact a sale in a commercially reasonable manner would have produced a larger surplus, the failure of the debtor to sell the security in a commercially reasonable manner has caused the debtor damages which the debtor has a right to recover in a proper action.
Chadron Energy Corp. v. First Nat. Bank 590

Sanitary and Improvement Districts

A sanitary and improvement district, like a municipal corporation, is a creation of the Legislature. The Legislature may prescribe how and in what manner this legal entity may be created, and, by the same token, as is true with municipal corporations, may determine how it can be discontinued.
S.I.D. No. 95 v. City of Omaha 272

Search and Seizure

1. Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.
State v. Hansen 103
2. In order to establish probable cause to associate property with criminal activity, all that is required is that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.
State v. Hansen 103
3. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
State v. Hansen 103
4. Generally, for a seizure of property to be valid it must be made pursuant to a validly authorized search warrant or under exigent circumstances or under some other recognized exception.
State v. Holman 730
5. A motion to suppress can only be made by a person who had a reasonable expectation of privacy in the area searched and where

the evidence was seized.
State v. Holman 730
6. An officer may seize evidence and contraband if it is discovered inadvertently while it is in plain view and the officer has a right to be in the place where he has such a view.
State v. Holman 730
7. A seizure of a person takes place if the circumstances of an involuntary encounter with the police are so intimidating as to demonstrate that a reasonable person would have believed himself or herself not free to leave.
State v. Beard 891

Security Interests

1. A mortgage is a special interest in real property consisting of a security for a debt or obligation.
Dupuy v. Western State Bank 230
2. A Nebraska agister's lien for services and care rendered to livestock owned by a Nebraska resident is not superior to a perfected security interest filed before the agister's lien, unless the security interest holder agrees in writing to the contract for the feed and care of the livestock involved.
Washington County Bank v. Red Socks Stables 300
3. Not only does Neb. U.C.C. § 9-504(3) (Reissue 1980) and the requirement that a security interest must be sold in a commercially reasonable manner affect the right of a creditor to obtain a deficiency judgment but, likewise, the failure to sell a security interest in a commercially reasonable manner affords to a debtor the right to sue for damages for any surplus which the debtor does not realize by reason of the creditor's having failed to dispose of the property in a commercially reasonable manner.
Chadron Energy Corp. v. First Nat. Bank 590
4. Even though a sale may produce a surplus, if in fact a sale in a commercially reasonable manner would have produced a larger surplus, the failure of the debtor to sell the security in a commercially reasonable manner has caused the debtor damages which the debtor has a right to recover in a proper action.
Chadron Energy Corp. v. First Nat. Bank 590
5. The fact that collateral may be transferred voluntarily or involuntarily as provided by Neb. U.C.C. § 9-311 (Reissue 1980) does not destroy or adversely affect a prior perfected security interest.
Chadron Energy Corp. v. First Nat. Bank 590
6. In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place.
Chadron Energy Corp. v. First Nat. Bank 590
7. A security interest is defined as an interest in property which secures payment of performance of an obligation. If the

underlying obligation ceases to exist, so does the interest securing it.
Chadron Energy Corp. v. First Nat. Bank 590

8. Where property is subject to a security interest, an exercise of dominion or control over the property which is inconsistent with the rights of the secured party constitutes, as to him, a conversion of the property, and there may be conversion of the property by a secured party where his acts are in defiance of the rights of others in the property.
Chadron Energy Corp. v. First Nat. Bank 590

9. The measure of damages for conversion is the market value of the converted property at the time of the conversion.
Chadron Energy Corp. v. First Nat. Bank 590

Self-Incrimination

Evidence obtained in the implied consent context is not testimonial or communicative in nature and does not fall within the privilege against self-incrimination.
Fulmer v. Jensen 582

Sentences

1. The factors to be considered in determining whether punishment is unconstitutionally cruel and unusual are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
State v. Loschen 315
State v. Michalski 380

2. Regardless 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.
State v. Loschen 315

3. 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. Loschen 315
State v. Whitmore 450
State v. Havlat 845

4. The eighth amendment's proscription of cruel and unusual punishment prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed.
State v. Michalski 380

5. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.
State v. Michalski 380

6. When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless the record reveals an abuse of discretion.
State v. Smith 406
7. We are not required to disturb an otherwise entirely appropriate sentence solely because someone else was treated more leniently.
State v. Whitmore 450
8. The court should consider the whole record, including probative evidence of matters arising subsequent to conviction, but a violation of one of the terms of probation is sufficient for revocation.
State v. Ozmun 481
9. A sentence validly imposed takes effect from the time it is pronounced, and a subsequent sentence fixing a different term is a nullity.
State v. Holmes 629
10. An order for restitution under Neb. Rev. Stat. § 28-427 (Reissue 1979) may be made at the time of the sentencing, but there is no statutory requirement that it be made at that time, and it is not a part of the sentence.
State v. Holmes 629
11. Upon revocation of probation the court may then impose on the offender such punishment as might have been imposed originally for the crime for which such defendant was convicted.
State v. Jacobson 639
12. A sentencing judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed.
State v. Dobbins 778
State v. Miller 862
13. Evidence regarding a defendant's life, character, and previous conduct, as well as prior convictions, is highly relevant to the determination of a proper sentence.
State v. Dobbins 778
14. The scope of review in a case where the State appeals a sentence is whether there was an abuse of discretion.
State v. Dobbins 778
15. The trial court has broad latitude in receiving evidence at a sentencing hearing.
State v. Dobbins 778
16. Where one deliberately pursues a course to voluntarily become intoxicated, there is little that can be said in his behalf in mitigation of the crime or the punishment.
State v. Turner 852

17. The lives and property of the public are entitled to protection against the criminal conduct of those who become voluntarily intoxicated.
State v. Turner 852
18. Although a defendant is entitled to due process upon sentencing, the Constitution does not require that he be given the full panoply of rights accorded when the issue is guilt or innocence.
State v. Miller 862
19. Due process safeguards must be observed when a new charge leading to magnified criminal punishment is made in an enhanced sentence proceeding.
State v. Miller 862

Sexual Assault

1. Consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault upon a child.
State v. Navarrete 171
2. Neb. Rev. Stat. § 28-321(2) (Cum. Supp. 1984) excludes evidence of a victim's past sexual behavior unless evidence offered by the defendant at an in camera hearing shows that (1) the victim's past sexual behavior with anyone other than the defendant has some bearing on the question whether the defendant is the source of physical evidence in the prosecution for sexual assault or (2) the victim's past sexual behavior with a defendant is related to the issue of the victim's consent to the sexual act involved in the prosecution of the defendant, provided that such evidence demonstrates some reasonably associative relationship between the victim's past sexual behavior and the sexual act for which the defendant is prosecuted and, further provided, that such evidence shows a victim's pattern of conduct or behavior which may be construed as consent to the sexual act charged against the defendant.
State v. Hopkins 367
3. Admissibility of evidence concerning a victim's past sexual behavior with a defendant is controlled by Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984), which is a statutory species of relevant evidence and permits evidence of a victim's prior sexual relations with a defendant when such evidence is offered by the defendant on the issue of whether the victim consented.
State v. Hopkins 367
4. For the purposes of Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984), in order that a victim's past consensual sexual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which

is the subject of the prosecuted charge against the defendant.
State v. Hopkins 367

5. Although evidence of a victim's past sexual behavior may be admissible under Neb. Rev. Stat. § 28-321(2)(b) (Cum. Supp. 1984) on the issue of consent, the trial court, nevertheless, may apply the balance found in Rule 403 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-403 (Reissue 1979)), that is, exclusion if the probative value of the otherwise relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
State v. Hopkins 367

Speedy Trial

1. The time within which an instate prisoner must be tried under Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Cum. Supp. 1984) begins to run after the county attorney for the county in which an indictment, information, or complaint is pending receives notice from the Department of Correctional Services of the prisoner's request for a final determination of a pending Nebraska indictment, information, or complaint.
State v. Soule 619

2. A continuance granted at an instate prisoner's request in the county court where a complaint is pending against such a prisoner operates to extend the time within which such a prisoner must be brought to trial under Neb. Rev. Stat. § 29-3805 (Cum. Supp. 1984).
State v. Soule 619

Statutes

1. A legislative act will not be permitted to operate retroactively where it invalidates or impairs contractual obligations or interferes with vested rights.
City of Lincoln v. Bruce 61

2. A statute is presumed to be constitutional, and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only.
Mayfield v. Hartmann 122
State ex rel. Wright v. Pepperl 664

3. Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price.
Anderson v. Peterson 149

4. Generally, competitive bidding statutes are strictly construed against public authorities required to obtain a public letting. However, statutes requiring competitive bidding, although strictly construed, should not be extended beyond their clear implication.
Anderson v. Peterson 149
5. To determine legislative intent we generally consider the subject matter of the whole act, as well as the particular topic of a statute containing the questioned language. In judicial construction of a statute, the statutory language will be given its ordinary and popular meaning, and a statute is open to construction only if the statute is ambiguous.
Anderson v. Peterson 149
6. Reasons underlying valid legislation are left first to the Legislature and ultimately to the electorate.
Anderson v. Peterson 149
7. With respect to questions about a statute, a court's role is limited to interpretation and application of statutes, irrespective of a court's personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.
Anderson v. Peterson 149
8. In considering the meaning of a statute, this court will, if possible, discover the legislative intent from the language of the statute and give it effect. We will not read a statute as if open to construction as a matter of course.
Uttecht v. Norwest Bank of Norfolk 222
9. Absent allegations and proof of fraud, contractual arrangements between a bank and its depositors with respect to the bank's right of setoff may supersede statutory provisions.
Uttecht v. Norwest Bank of Norfolk 222
10. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.
S.I.D. No. 95 v. City of Omaha 272
11. When a statute is constitutionally suspect, the Supreme Court will endeavor to interpret it in a manner consistent with the Constitution.
In re Estate of Steppuhn 329
12. The standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected.
State v. Michalski 380
13. Under the strict scrutiny test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the

means employed in the statute must be such that no less restrictive alternative exists.
State v. Michalski 380
14. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
State v. Michalski 380
15. Given a statute's presumption of validity and the legislature's inherent power to classify for legitimate purposes, a challenger bears a heavy burden in demonstrating that the classification is arbitrary and not rationally related to a legitimate governmental end.
State v. Michalski 380
16. An overinclusive classification burdens a wider than necessary range of individuals, extending beyond those persons possessing the trait contributing to the mischief or evil the legislature seeks to eradicate.
State v. Michalski 380
17. An underinclusive classification exists when all persons in the class are indeed perpetrators of the mischief or evil the state wishes to eliminate, but others who possess the same undesirable trait remain outside the class.
State v. Michalski 380
18. The classification made in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), that is, the line drawn between drivers who are drunk and drivers who are sober, is one rationally related to a legitimate governmental end.
State v. Michalski 380
19. Because the right to travel has been characterized as fundamental, courts examine statutes impairing that right using the strict scrutiny standard of review.
State v. Michalski 380
20. To be in a position to challenge the constitutionality of a statute, a party must be adversely affected by the provisions at issue.
State v. Michalski 380
21. A penal statute must be strictly construed, but should also be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purposes for which it serves.
State v. Ewing 462
State v. Schulz 473
22. The Nebraska Supreme Court is not free to read a meaning into a statute that is not there, nor to read anything direct and plain out

of a statute.
State v. Schulz 473

23. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard-and-fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.
State v. Galyen 497

24. The inability of government to enforce an act to its fullest does not affect the constitutionality of the act.
State v. Galyen 497

25. The authority to delegate discretionary and quasi-judicial powers to agency subordinates is implied where the powers bestowed upon an agency head are impossible of personal execution.
Fulmer v. Jensen 582

26. The constitutional requirement of reasonable certainty in statutory language is satisfied by the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.
Fulmer v. Jensen 582

27. While the Legislature cannot delegate its lawmaking powers, it can make laws which become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.
Fulmer v. Jensen 582

28. The heading, or catchline, to a statute is supplied in the compilation of the statutes and does not constitute any part of the law.
State v. Holmes 629

29. Because the Revisor of Statutes has a continuing duty to publish the laws of Nebraska as adopted by the Legislature and not otherwise declared unconstitutional by the Supreme Court, an application for a writ of mandamus to compel the proper publication of the laws is not subject to a claim that the action is barred by a 4-year statute of limitations.
State ex rel. Wright v. Pepperl 664

30. From a reading of Neb. Rev. Stat. §§ 49-705, 49-765, and 49-767 (Reissue 1984), the Revisor of Statutes is obligated by law to print and publish the laws as enacted by the Legislature, and not to exercise his or her own discretion in excising a portion of the law.
State ex rel. Wright v. Pepperl 664

31. The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to any other public official.
State ex rel. Wright v. Pepperl 664
32. Unless and until a law is declared unconstitutional by the Supreme Court, the authority granted to the Revisor of Statutes in Neb. Rev. Stat. § 49-705(2)(c), (d), and (e) (Reissue 1984) does not become operative.
State ex rel. Wright v. Pepperl 664
33. The Revisor of Statutes has no right nor duty to pass upon the constitutionality of legislative acts not determined by this court to be unconstitutional, and therefore has no right to raise the constitutionality of an act as a defense to his or her failure to publish the law as enacted by the Legislature.
State ex rel. Wright v. Pepperl 664
34. The effect of an antenuptial contract in which the parties agree to be bound by present and future laws is to be determined by the statutes in effect at the time of the death of the party to the agreement whose estate is attempting to effectuate the agreement.
In re Estate of Peterson 792
35. An administrative proceeding is a "pending action," within the meaning of Neb. Rev. Stat. § 49-301 (Reissue 1984), when the agency's final order is rendered.
Morris v. Wright 837

Streets and Sidewalks

A city is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its streets so that they will be reasonably safe for a person using them while that traveler is exercising reasonable and ordinary caution and prudence.
Gilbert v. City of Tekamah 614

Subrogation

A welfare fund which has made payments in the nature of health care benefits to a member on the assumption that the member was not entitled to workmen's compensation is not a subrogee and is not entitled to share in any part of a settlement of a claim made by the member against the employer under the Workmen's Compensation Act.
Smith v. Baker's Local No. 433 Welfare Fund 215

Summary Judgment

1. The Supreme Court is not bound by the ground purportedly used by the trial court as the basis for granting summary judgment.
Sommerfeld v. City of Seward 76
2. Before summary judgment may be granted, the court must determine there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving

party is entitled to judgment as a matter of law.
Pierce v. City of Ogallala 433
Tiwald v. Dewey 547
Prorok v. County of Custer 789

3. In a hearing on a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
Pierce v. City of Ogallala 433

4. A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
Allan v. Massey-Ferguson, Inc. 528
Gilbert v. City of Tekamah 614
Utsumi v. City of Grand Island 783

5. The burden is on the party moving for summary judgment to show that no issues of material fact exist, and unless that party can conclusively do so, the motion must be overruled.
Allan v. Massey-Ferguson, Inc. 528
Gilbert v. City of Tekamah 614

6. In considering a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
Allan v. Massey-Ferguson, Inc. 528

7. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.
Gilbert v. City of Tekamah 614

Supreme Court

Unless and until a law is declared unconstitutional by the Supreme Court, the authority granted to the Revisor of Statutes in Neb. Rev. Stat. § 49-705(2)(c), (d), and (e) (Reissue 1984) does not become operative.
State ex rel. Wright v. Pepperl 664

Tape Recordings

1. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.
State v. Taylor 114

2. A recording is admissible unless the unintelligible portions of the tape recording are so substantial as to render the recording as a

whole untrustworthy.
State v. Taylor 114

Taxation

1. An excise tax is a tax imposed on the performance of an act.
State v. Galyen 497
2. A property tax is a tax levied on both real and personal property; the amount of the tax being dependent on the value of the property, generally expressed as a uniform rate per thousand of valuation.
State v. Galyen 497
3. A tax imposed upon the doing of an act is an excise tax and not a property tax.
State v. Galyen 497
4. The generally accepted rule of construction is that state constitutional provisions relating to property taxes do not apply to excise taxes.
State v. Galyen 497
5. A tax imposed upon the privilege of doing business is in fact an excise tax and not a property tax and, as such, is not required to be levied by valuation uniformly and proportionately.
State v. Galyen 497
6. The imposition of an excise tax need not be uniform and proportionate but, rather, may be imposed upon each transaction.
State v. Galyen 497
7. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard-and-fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.
State v. Galyen 497
8. If a tax levy is for a public purpose, it is no objection to its validity that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed.
State v. Galyen 497
9. A tax levied on property which has been assessed at a value in excess of its actual value is not void.
Xerox Corp. v. Karnes 691
10. The exclusive remedy for relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property.
Xerox Corp. v. Karnes 691

11. In its appellate review of a question whether property is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981), the Supreme Court determines tax exemption in an equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Bethphage Com. Servs. v. County Board 886

12. Property owned by an educational organization and used exclusively for educational purposes is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981).
Bethphage Com. Servs. v. County Board 886

Tenancy in Common

In matters involving joint ownership a tenancy in common is ordinarily presumed, and in order to find a joint tenancy the court must find a clear expression of an intent to create a joint tenancy.
In re Estate of Steppuhn 329

Termination of Employment

The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment.
Cleasby v. Leo A. Daly Co. 254

Testimony

1. Testimony offered by a condemner to diminish the taking stated in the condemnation petition or to describe anything less than full exercise of rights acquired by eminent domain is irrelevant to the question of damages caused by the condemner's appropriation.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

2. Under the harmless error rule, for an error to be prejudicial, it must be demonstrated that the State's case was significantly less persuasive had the disputed testimony been excluded.
State v. Whitmore 450

Theft

Theft by receiving stolen property consists of receiving, retaining, or disposing of stolen movable property of another knowing or believing that it has been stolen, unless the property was received, retained, or disposed of with intention to restore it to the owner.
State v. Holman 730

Time

1. Any action to recover damages based on alleged professional negligence shall be commenced within 2 years next after the

alleged act or omission providing the basis for such action.
Suzuki v. Holthaus 72
2. A cause of action for damages for professional negligence accrues at the time of the act or omission causing the injury.
Suzuki v. Holthaus 72
3. In a proceeding in error the jurisdiction of the court does not attach until there is presented to it, within the 1-month limitation contained in Neb. Rev. Stat. § 25-1931 (Reissue 1979), a duly authenticated transcript containing the final order or judgment of which complaint is made.
Moell v. Mennonite Deaconess Home & Hosp. 168
4. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
First Nat. Bank v. Bolzer 415
5. The State is entitled to have a chemical test administered at a time when it will be effective to disclose blood alcohol content in relation to the time when the vehicle was operated.
Jamros v. Jensen 426
6. A delay in chemical testing is not prejudicial unless it materially affects the results of the test.
Jamros v. Jensen 426
7. An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
Allan v. Massey-Ferguson, Inc. 528
8. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.
Allan v. Massey-Ferguson, Inc. 528
9. The time when a statute of limitations commences to run must be determined by the facts of each case.
Tiwald v. Dewey 547
10. A cause of action for professional malpractice accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action.
Tiwald v. Dewey 547
11. The time within which an instate prisoner must be tried under Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Cum. Supp. 1984) begins

to run after the county attorney for the county in which an indictment, information, or complaint is pending receives notice from the Department of Correctional Services of the prisoner's request for a final determination of a pending Nebraska indictment, information, or complaint.
State v. Soule 619

12. A continuance granted at an instate prisoner's request in the county court where a complaint is pending against such a prisoner operates to extend the time within which such a prisoner must be brought to trial under Neb. Rev. Stat. § 29-3805 (Cum. Supp. 1984).
State v. Soule 619

13. A sentence of probation is a final and appealable order from which an appeal must be taken within 1 month.
State v. Jacobson 639

14. In medical malpractice cases a period of limitations or repose begins to run when the treatment rendered after and relating to the act or omission complained of is completed.
Barry v. Bohi 651

15. A medical malpractice action arises, for the purpose of determining the admissibility into evidence of a written opinion rendered by the medical review panel, upon the occurrence of the act or omission of which complaint is made.
Barry v. Bohi 651

Tort Claims Act

1. In actions under Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), the State Tort Claims Act, all questions of negligence and contributory negligence shall be determined initially by the trial court.
Oldenburg v. State 1

2. On an appeal to this court of an action under Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), the findings of the trial court will not be disturbed unless clearly wrong.
Oldenburg v. State 1

Torts

In a proper case the proceeds from the settlement of a personal injury claim may be considered to be a part of the marital estate.
Maricle v. Maricle 552

Trial

1. A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense.
League v. Vanice 34

2. A claimant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the lawyer-client

privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.
League v. Vanice 34

3. Tape recordings of relevant and material conversations are admissible as evidence of such conversations and in corroboration of oral testimony of the conversations, provided proper foundation is laid.
State v. Taylor 114

4. A general foundational objection does not reach the qualifications of an expert witness.
State v. Taylor 114

5. As a result of Rule 705, Nebraska Evidence Rules (Neb. Rev. Stat. § 27-705 (Cum. Supp. 1984)), where cross-examination of an expert witness discloses there is no adequate factual basis for an expert's opinion, such opinion is irrelevant (Rule 401, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-401 (Reissue 1979)), is inadmissible (Rule 402, Nebraska Evidence Rules, Neb. Rev. Stat. § 27-402 (Reissue 1979)), and should be stricken from consideration by a jury on proper motion of the party adversely affected by such irrelevant evidence.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

6. A trial court has a duty to properly analyze, summarize, and submit to the jury the substance of allegations of negligence in a tort petition.
Foltz v. Northwestern Bell Tel. Co. 201

7. Any matter admitted under Rule 36 of the Nebraska Discovery Rules, promulgated by the Nebraska Supreme Court on January 1, 1983, is conclusively established unless the court on motion permits withdrawal or amendment of the admission.
Macklem v. Valley Bank of Union County 227

8. In a bench trial, that is, all factual determinations made by a judge and not by a jury, we apply the principle or "presumption" that the trial court will consider only relevant and otherwise admissible evidence so that an erroneous admission of evidence during a bench trial will not result in a reversal, if there is relevant and admissible evidence to sustain the trial court's judgment. The foregoing principle, likewise, applies to a rehearing before the Nebraska Workmen's Compensation Court.
Gibson v. City of Lincoln 304

9. As a general rule, it is not prejudicial error to admit evidence which is simply cumulative of other competent evidence.
State v. Smith 406

10. The question of whether defendant had the requisite intent to commit a wrongful act is one of fact which, if resolved against the defendant by the trial court based on evidence, will not be

interfered with on appeal unless so lacking in probative force that we can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
State v. Smith 406

11. Under the harmless error rule, for an error to be prejudicial, it must be demonstrated that the State's case was significantly less persuasive had the disputed testimony been excluded.
State v. Whitmore 450

12. A defendant is entitled to be represented by counsel at all critical stages of a criminal proceeding against him, which includes the trial itself.
State v. Richter 487

13. The exercise of the right to the assistance of counsel is subject to the necessities of sound judicial administration and requires a balancing of a criminal defendant's right to a reasonable opportunity to prepare for trial and to consult counsel with the necessity for the orderly and prompt disposition of cases in the orderly course of the administration of justice.
State v. Richter 487

14. Where a criminal defendant is financially able to engage an attorney, he may not use his neglect in hiring one as a legitimate reason for delay.
State v. Richter 487

15. Where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury.
Mitchell v. Kesting 506

16. It is the province of the trial court, not the jury, to determine the admissibility of evidence. Once the trial court has made a determination as to admissibility, the jury is not required to reexamine that ruling.
State v. Harrison 521
State v. Norfolk 810
State v. Turner 852

17. It is the jury's province to weigh the evidence and judge the credibility of witnesses and their testimony. The jury has the right to credit or reject any part or the whole of the testimony heard.
State v. Harrison 521

18. A declaration offered to show the defendant's state of mind which is too remote in point of time should be excluded as lacking probative value.
State v. Harrison 521

19. Only issues properly presented to and passed upon by the district court may be raised on appeal to the Supreme 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.
State v. Fletcher 562

20. A question put to a witness which calls for an answer based upon conjecture and speculation does not constitute proper proof on an issue.
Agrex, Inc. v. Schrant 604

21. A witness should not be allowed to express an opinion on an inadequate basis.
Agrex, Inc. v. Schrant 604

22. In determining the weight of the evidence, we will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
Wisch v. Jensen 609

23. The general rule that if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is harmless rests on the premise that the nature of the cumulative evidence is such that no prejudice results from its improper admission.
Barry v. Bohi 651

24. It is presumed that the improper admission into evidence of an opinion of the medical review panel rendered in accordance with the provisions of the Nebraska Hospital-Medical Liability Act results in prejudice.
Barry v. Bohi 651

25. In the absence of an abuse of discretion, a trial court's decision permitting an amendment to a pleading will be affirmed.
Bump v. Firemens Ins. Co. 678

26. Pretrial conferences are conducted to simplify and narrow issues presented in a case. Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried.
Bump v. Firemens Ins. Co. 678

27. Under Rule 801(4)(b)(iv) of the Nebraska Evidence Rules, a statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant within the scope of agency or employment.
Bump v. Firemens Ins. Co. 678

28. Whatever rights a litigant may have concerning discovery, such rights are not unlimited. Subject to mandatory provisions of the Nebraska Discovery Rules and appropriate statutes, discovery procedures, including a time limit for completion of discovery, are matters for judicial discretion exercisable to control orderly

progression of cases toward trial.
Bump v. Firemens Ins. Co. 678

29. A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.
Bump v. Firemens Ins. Co. 678

30. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
State v. Moore 706

31. The rules of this court require the district court to provide a court reporter whenever a litigant requests the presence of the court reporter.
Kennedy v. Kennedy 724

32. The party charged with the burden of proof must establish by a preponderance of the evidence the issue essential to recovery.
In re Estate of Wells 741

33. The appointment of an interpreter for an accused at trial is a matter resting largely in the discretion of the trial court.
State v. Topete 771

34. Even though a defendant might not speak grammatically correct English, where the record satisfactorily demonstrates that such defendant had a sufficient command of the English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint an interpreter.
State v. Topete 771

35. If a defendant understands and communicates reasonably well in the English language, the mere fact that such defendant might be able to accomplish self-expression a little better in another language does not warrant utilizing an interpreter at trial.
State v. Topete 771

36. Ordinarily, the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper.
Utsumi v. City of Grand Island 783

37. A lay witness, when testifying on the basis of firsthand knowledge, can relate specific objective observations of a person's conduct, condition, or behavior, notwithstanding that such witness may not be allowed to offer his opinion as to the person's sanity.
State v. Norfolk 810

38. A party who has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
Poppe v. Petersen 877

Uniform Commercial Code

1. Not only does Neb. U.C.C. § 9-504(3) (Reissue 1980) and the requirement that a security interest must be sold in a commercially reasonable manner affect the right of a creditor to obtain a deficiency judgment but, likewise, the failure to sell a security interest in a commercially reasonable manner affords to a debtor the right to sue for damages for any surplus which the debtor does not realize by reason of the creditor's having failed to dispose of the property in a commercially reasonable manner.
Chadron Energy Corp. v. First Nat. Bank 590
2. Even though a sale may produce a surplus, if in fact a sale in a commercially reasonable manner would have produced a larger surplus, the failure of the debtor to sell the security in a commercially reasonable manner has caused the debtor damages which the debtor has a right to recover in a proper action.
Chadron Energy Corp. v. First Nat. Bank 590
3. The fact that collateral may be transferred voluntarily or involuntarily as provided by Neb. U.C.C. § 9-311 (Reissue 1980) does not destroy or adversely affect a prior perfected security interest.
Chadron Energy Corp. v. First Nat. Bank 590
4. In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place.
Chadron Energy Corp. v. First Nat. Bank 590
5. A security interest is defined as an interest in property which secures payment of performance of an obligation. If the underlying obligation ceases to exist, so does the interest securing it.
Chadron Energy Corp. v. First Nat. Bank 590
6. Where property is subject to a security interest, an exercise of dominion or control over the property which is inconsistent with the rights of the secured party constitutes, as to him, a conversion of the property, and there may be conversion of the property by a secured party where his acts are in defiance of the rights of others in the property.
Chadron Energy Corp. v. First Nat. Bank 590
7. The measure of damages for conversion is the market value of the converted property at the time of the conversion.
Chadron Energy Corp. v. First Nat. Bank 590
8. Experienced grain producers who regularly grow and market grain on the open market as the principal means of providing for

their livelihood, and by reason of such occupation have acquired and possess knowledge or skill peculiar to the practices and operations of grain marketing, are merchants within the meaning of Neb. U.C.C. §§ 2-104 and 2-201 (Reissue 1980).
Agrex, Inc. v. Schrant 604

9. Whether a party in a specific instance was a merchant under the Uniform Commercial Code is a question of fact.
Agrex, Inc. v. Schrant 604

Valuation

1. A tax levied on property which has been assessed at a value in excess of its actual value is not void.
Xerox Corp. v. Karnes 691
2. The exclusive remedy for relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property.
Xerox Corp. v. Karnes 691

Venue

A motion for a change of venue is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless a clear abuse of discretion is shown.
State v. Navarrete 171

Verdicts

1. Error in the ruling on a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing is cured by a verdict of guilty if the evidence at trial is sufficient to sustain a finding of guilt beyond a reasonable doubt.
State v. Navarrete 171
2. A party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.
Vacek v. Ames 333
3. A jury verdict may not be set aside unless it is clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.
Vacek v. Ames 333
Poppe v. Petersen 877
4. Where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act and need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in the violation.
State v. Parker 570

5. Where a single crime may be committed under a number of different theories, the defendant is not entitled to an instruction that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty.
State v. Parker 570
6. A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
State v. Warnke 625
7. A party who has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
Poppe v. Petersen 877

Visitation

1. Visitation of a child born out of wedlock may be awarded to the alleged father of the child only if there is a court determination, in an appropriate action, that the person seeking visitation is the father of the child.
Stratman v. Hagen 157
2. The effective denial of visitation rights by removal to another jurisdiction is a factor to be considered in determining the best interests of the child.
Vanderzee v. Vanderzee 738

Waiver

1. A defendant who pleads guilty to a felony or misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights.
State v. Porchia 327
2. It is plain error to have no showing in the record that defendant either had assistance of counsel or waived such at the time of her conviction if the conviction is used for enhancement purposes.
State v. Ozmun 481
3. Any claimed error based on the issues specified by the trial court may be waived by failure to object to the report on the pretrial conference and cannot be asserted for review by this court.
Bump v. Firemens Ins. Co. 678
4. A defendant may not waive the reading of a document which would have advised him or her of the nature of the offense and later complain that the plea of guilty was entered in ignorance of

the nature of the offense.
State v. Mindrup 773

5. Neb. Rev. Stat. § 30-2316 (Reissue 1979) provides that the parties to a valid antenuptial agreement may waive the right to elect a share of both real and personal property of a deceased spouse.
In re Estate of Peterson 792

6. In reference to a waiver of the rights designated in the *Miranda* warning, *intelligent* is not synonymous with *prudent*, and intelligence is not equated with wisdom.
State v. Norfolk 810

7. To determine whether a defendant acted intelligently regarding a waiver of any right designated in the *Miranda* warning, the proper standard is whether a defendant, at the time of the waiver, possessed the capacity to understand and act in response to the *Miranda* warning given by an interrogating officer.
State v. Norfolk 810

Waters

1. By enacting the Municipal and Rural Domestic Ground Water Transfers Permit Act, Neb. Rev. Stat. §§ 46-638 to 46-650 (Reissue 1984), as a part of Nebraska's policy, the Legislature has altered certain aspects of common law governing use of ground water, such as exoneration from the common-law prohibition against transfer of ground water and elimination of use on overlying land as a factor in determining reasonable and beneficial use of ground water.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

2. The right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, § 21.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180

Wills

In determining whether to grant a motion to set aside an order admitting a will to probate, a court should consider whether neglect is excusable, whether a movant has alleged a meritorious objection to admission of a will to probate, and whether prejudice results from setting aside the probate order.
In re Estate of Christensen 872

Wiretaps

An application for a wiretap shall include sufficient facts which will support a believable conclusion that reasonable or ordinary investigatory techniques had been tried and had failed, or appeared unlikely to succeed, in obtaining evidence regarding a defendant's illegal activity.
State v. Whitmore 450

Witnesses

1. As the "trier of fact," the Workmen's Compensation Court is the sole judge of the credibility of witnesses and the weight to be given to testimony. Entering into a resolution by the Workmen's Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
Thompson v. Monfort of Colorado 83
Gibson v. City of Lincoln 304

2. The instruction previously authorized by *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), requiring a jury to consider an undercover agent's testimony with care greater than that given a disinterested witness' testimony, is disapproved and has been supplanted by NJI 1.41 concerning a witness' credibility and weight to be given a witness' testimony.
State v. Fletcher 562

3. A question put to a witness which calls for an answer based upon conjecture and speculation does not constitute proper proof on an issue.
Agrex, Inc. v. Schrant 604

4. A witness should not be allowed to express an opinion on an inadequate basis.
Agrex, Inc. v. Schrant 604

5. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
State v. Moore 706

6. The appointment of an interpreter for an accused at trial is a matter resting largely in the discretion of the trial court.
State v. Topete 771

7. Even though a defendant might not speak grammatically correct English, where the record satisfactorily demonstrates that such defendant had a sufficient command of the English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint an interpreter.
State v. Topete 771

8. If a defendant understands and communicates reasonably well in the English language, the mere fact that such defendant might be able to accomplish self-expression a little better in another language does not warrant utilizing an interpreter at trial.
State v. Topete 771

9. A lay witness, when testifying on the basis of firsthand knowledge, can relate specific objective observations of a person's conduct, condition, or behavior, notwithstanding that such witness may not be allowed to offer his opinion as to the person's sanity.
State v. Norfolk 810

Words and Phrases

1. The term "fixture" refers to a chattel which is capable of existing separate and apart from realty, but which, by actual annexation and appropriation to the use or purpose of the realty with the intention of making it a permanent accession thereto, becomes a part of the realty.
Fuel Exploration, Inc. v. Novotny 17
2. *Conceal* means to hide, secrete, or withhold from the knowledge of others; to withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight; or to hide or withdraw from observation, cover or keep from sight, or prevent discovery of.
League v. Vanice 34
3. *Discovery*, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer.
League v. Vanice 34
4. *Ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality.
Sommerfeld v. City of Seward 76
5. A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance.
Sommerfeld v. City of Seward 76
6. Earning power is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.
Aldrich v. ASARCO, Inc. 126
7. Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price.
Anderson v. Peterson 149

8. Neb. Rev. Stat. § 23-324.05 (Reissue 1983), requiring competitive bidding in a county's acquisition of "supplies, materials, [and] equipment," contemplates expenditures for tangible personal property to be used by or furnished to any county officer, office, department, institution, board, or other agency of county government, except election supplies, materials, and equipment. An expenditure for replacement of a courthouse's heating and air-conditioning system is in the nature of a capital expenditure for long-term or permanent betterment of a county's building and constitutes capital improvement of a county's real property.
Anderson v. Peterson 149
9. Injury is an invasion of any legally protected interest of another, while damage is a loss, detriment, or harm sustained by reason of an injury.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
10. A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty.
Sorensen v. Lower Niobrara Nat. Resources Dist. 180
11. One employing an independent contractor may be liable for damages resulting from injury caused by the contractor's negligence, when, by rule of law or statute, the duty to guard against the risk is nondelegable. A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from delegated duties negligently performed.
Foltz v. Northwestern Bell Tel. Co. 201
12. Net contribution is the sum of all deposits made by or for a party to a joint account as of a given time, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any dividends or interest included in the current balance.
Uttecht v. Norwest Bank of Norfolk 222
13. A mortgage is a special interest in real property consisting of a security for a debt or obligation.
Dupuy v. Western State Bank 230
14. A mentally disordered sex offender for whom a program of treatment will not lead to a cure is "nontreatable" within the meaning of Neb. Rev. Stat. § 29-2914 (Reissue 1979).
State v. Reddick 322
15. Clear, convincing, and satisfactory evidence is present when there has been produced in the trier of fact a firm belief or conviction that a fact to be proved exists.
Ridenour v. Farm Bureau Ins. Co. 353
16. The phrase "the investigation of an actual criminal matter" as used in Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984) requires

that there be a legitimate and valid investigation of facts which could constitute a predicate criminal offense.
State v. Ewing 462

17. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1979), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Richter 487

18. The term "reasonable," as applied to refusals to submit to a chemical test under the implied consent law, is an ordinary term which finds adequate interpretation in common usage and understanding.
Fulmer v. Jensen 582

19. A security interest is defined as an interest in property which secures payment of performance of an obligation. If the underlying obligation ceases to exist, so does the interest securing it.
Chadron Energy Corp. v. First Nat. Bank 590

20. Experienced grain producers who regularly grow and market grain on the open market as the principal means of providing for their livelihood, and by reason of such occupation have acquired and possess knowledge or skill peculiar to the practices and operations of grain marketing, are merchants within the meaning of Neb. U.C.C. §§ 2-104 and 2-201 (Reissue 1980).
Agrex, Inc. v. Schrant 604

21. Restitution imposed under Neb. Rev. Stat. § 28-427 (Reissue 1979) is not a criminal penalty to be imposed as punishment for the crime, but is in the nature of a civil or administrative penalty or sanction.
State v. Holmes 629

22. Restitution differs from forfeiture in that it is unnecessary to identify money found in the possession of the defendant as the money received by the defendant from a particular sale of drugs.
State v. Holmes 629

23. "Relevant evidence," as defined in Neb. Rev. Stat. § 27-401 (Reissue 1979), "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
State v. Moore 706

24. Theft by receiving stolen property consists of receiving, retaining, or disposing of stolen movable property of another knowing or believing that it has been stolen, unless the property was received, retained, or disposed of with intention to restore it to the owner.
State v. Holman 730

25. Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime. A practical, nontechnical probability that incriminating evidence is involved is all that is required.
State v. Holman 730
26. A partnership is a contract of two or more competent persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
In re Estate of Wells 741
27. A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults.
Murphy v. Stuart Fertilizer Co. 767
28. As used in the law of negligence, proximate cause is that cause which, in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury or loss, and without which the injury or loss would not have occurred.
Prorok v. County of Custer 789
29. "Fair disclosure," in the context of an antenuptial agreement, contemplates that each spouse shall be given information of a general and approximate nature concerning the net worth of the other.
In re Estate of Peterson 792
30. In reference to a waiver of the rights designated in the *Miranda* warning, *intelligent* is not synonymous with *prudent*, and intelligence is not equated with wisdom.
State v. Norfolk 810
31. For the purpose of Neb. Rev. Stat. § 30-2437 (Reissue 1979), "good cause" means a logical reason or legal ground, based on fact or law, which justifies the modification or vacation of an order.
In re Estate of Christensen 872
32. Nebraska Jury Instruction 14.08 correctly defines "reasonable doubt."
State v. Beard 891
33. Nebraska Jury Instruction 14.11 correctly defines "intent."
State v. Beard 891

Workmen's Compensation

1. As the "trier of fact," the Workmen's Compensation Court is the sole judge of the credibility of witnesses and the weight to be given to testimony. Entering into a resolution by the Workmen's Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying

before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
Thompson v. Monfort of Colorado 83
Gibson v. City of Lincoln 304

2. Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong.
Thompson v. Monfort of Colorado 83
Gibson v. City of Lincoln 304

3. If an employer does not have actual notice or knowledge of an employee's injury, Neb. Rev. Stat. § 48-133 (Reissue 1984) requires written notice to the employer concerning the employee's injury to be compensated under the Workmen's Compensation Act.
Thompson v. Monfort of Colorado 83

4. Knowledge of an employee's injury, gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer, is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 1984).
Thompson v. Monfort of Colorado 83

5. A company nurse's knowledge about an employee's injury is imputed to the company-employer. Such imputation of knowledge to the employer equally results from a company's medical technician acquiring knowledge while providing on-the-job health service for an employee of the employer.
Thompson v. Monfort of Colorado 83

6. In place of indispensable written notice, Neb. Rev. Stat. § 48-133 (Reissue 1984) contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that, therefore, the employer should investigate the matter further.
Thompson v. Monfort of Colorado 83

7. In reviewing workmen's compensation cases this court is not free to weigh the facts anew. Our standard of review accords to the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing the same force and effect as a jury verdict in a civil case, and they will not be reversed or set aside unless clearly wrong.
Wilson v. City of North Platte 90
Aldrich v. ASARCO, Inc. 126
Cemer v. Huskoma Corp. 175
Pollock v. Monfort of Colorado 859

8. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence.
Wilson v. City of North Platte 90

9. Earning power is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.
Aldrich v. ASARCO, Inc. 126

10. There is no numerical formula for determining earning power or the loss of earning power due to an injury.
Aldrich v. ASARCO, Inc. 126

11. When a workman has reached his maximum recovery, the remaining disability is permanent and he is no longer entitled to compensation for temporary disability.
Aldrich v. ASARCO, Inc. 126

12. The compensation court may prescribe the procedure to be followed if an injured workman desires to obtain the benefit of rehabilitation services under the statute.
Aldrich v. ASARCO, Inc. 126

13. If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
Cemer v. Huskoma Corp. 175

14. A welfare fund which has made payments in the nature of health care benefits to a member on the assumption that the member was not entitled to workmen's compensation is not a subrogee and is not entitled to share in any part of a settlement of a claim made by the member against the employer under the Workmen's Compensation Act.
Smith v. Baker's Local No. 433 Welfare Fund 215

15. In a bench trial, that is, all factual determinations made by a judge and not by a jury, we apply the principle or "presumption" that the trial court will consider only relevant and otherwise admissible evidence so that an erroneous admission of evidence during a bench trial will not result in a reversal, if there is relevant and admissible evidence to sustain the trial court's judgment. The foregoing principle, likewise, applies to a rehearing before the

Nebraska Workmen's Compensation Court.
Gibson v. City of Lincoln 304
16. Regarding facts determined and findings made upon rehearing in the Nebraska Workmen's Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court.
Gibson v. City of Lincoln 304
17. The Workmen's Compensation Act provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment.
P.A.M. v. Quad L. Assocs. 642
18. Injuries caused by intentional assaults are compensable if they arise out of, or result from, a risk connected with the employment.
P.A.M. v. Quad L. Assocs. 642
19. An employee injured on the premises of the employer where he works while coming to work or leaving after work is within the course of his employment under the Nebraska Workmen's Compensation Act.
P.A.M. v. Quad L. Assocs. 642
20. A finding that vocational rehabilitation is for the employee's best interest is a statutory prerequisite to ordering same.
Pollock v. Monfort of Colorado 859

Zoning

1. In the absence of clear and satisfactory evidence to the contrary, a zoning ordinance is presumed to be valid.
City of Lincoln v. Bruce 61
2. Zoning ordinances should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
City of Lincoln v. Bruce 61
3. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
City of Lincoln v. Bruce 61
4. Generally, a zoning ordinance will not be applied immediately to a use which the ordinance renders nonconforming.
City of Lincoln v. Bruce 61