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INDIAN HILLS COMMUNITY CHURCH, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLEES.

NEBRASKA CONFERENCE OF THE CHURCH OF THE BRETHREN, ALSO KNOWN AS THE ANTELOPE PARK CHURCH OF THE BRETHREN AND THE CHURCH OF THE BRETHREN OF NEBRASKA, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLEES.

412 N.W.2d 459

Filed September 18, 1987. Nos. 85-896, 85-897.

1. **Constitutional Law: Taxation: Statutes.** The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
2. **Constitutional Law: Legislature.** A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.
3. **Constitutional Law: Taxation: Legislature.** Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
4. **Taxation: Presumptions.** 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.
5. _____: _____. An exemption from taxation is never presumed. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
6. **Taxation: Proof.** The burden of proving exemption from taxation is on the party claiming such exemption.
7. **Taxation.** Under Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984), an integral part of the process to obtain a tax exemption is reapplication for such exemption, that is, a new application, before a previously granted exemption has expired. Failure to make reapplication for exemption or file a new application as required by § 77-202.03 results in cessation of the tax exemption when the current exemption expires.
8. **Taxation: Statutes.** Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are clear and comprehensive and constitute a complete

and comprehensive act dealing with the matter of tax exemptions.

9. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

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

Beverly Evans Grenier of Steven D. Burns, P.C., and Douglas W. Marolf, for appellants.

Patrick M. Heng, Deputy Lancaster County Attorney, for appellees.

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

SHANAHAN, J.

In separate cases consolidated for appeal, Indian Hills Community Church and Nebraska Conference of the Church of the Brethren (appellants) appeal judgments of the district court for Lancaster County, affirming the Lancaster County Board of Equalization's actions by which real estate of the appellants was placed on the county tax rolls for 1984 on account of appellants' failure to file an application for tax exemption in accordance with Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984). We affirm.

Neb. Const. art. VIII, § 2, provides: "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. Rev. Stat. § 77-202(1) (Cum. Supp. 1984) provides:

> 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 (i) owned or used for financial gain or profit to either the owner or user, (ii) used

for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.

Neb. Rev. Stat. § 77-202.01 (Reissue 1981) states:

> Any person, corporation, or organization seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of sections 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner. Any person, corporation, or organization seeking tax exempt status for any tangible personal property except motor vehicles shall apply for exemption to the county assessor by January 1, 1970. The county assessor shall examine the application and recommend either taxable or exempt status for the real property or tangible personal property except motor vehicles to the county board of equalization by February 1 following.

Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984) states in part:

> (1) When real or tangible personal property except motor vehicles has been exempted from taxation as provided by sections 77-202.01 to 77-202.07, *it shall continue to be exempt for a period of four years* from January 1 of the year following adoption of sections 77-202.01 to 77-202.07; *Provided*, that each owner of real or tangible personal property except motor vehicles so exempt shall file an affidavit with the county assessor by January 1 of each intervening year certifying that the use of each exempted real or tangible personal property except motor vehicles has not changed during the year. *On or before the expiration of such exemption, a new application shall be filed on which the procedure shall be the same as provided for other applications under the provisions of sections 77-202.01 to 77-202.07. If any person, corporation, or organization shall seek a new tax exemption for any real or tangible personal property except motor vehicles in any year, he, she, or it shall apply on or before September 15 of the year of application* as

> provided in section 77-202.01 and procedure thereon shall be the same as provided for other applications under the provisions of sections 77-202.01 to 77-202.07 . . . .

(Emphasis supplied.) (We note that § 77-202.01 was amended in 1984 and 1986 and § 77-202.03 was amended in 1986, but such amendments do not affect disposition of the present appeals.)

The parties stipulated facts relative to appellants' claims for tax-exempt property. Each of the appellants owns real estate in Lancaster County, and each filed an "Exemption Application" for the tax year 1980 pursuant to § 77-202.01, claiming exempt status under § 77-202(1)(c) (religious purposes). Appellants' property was exempted from taxation in 1980, and such exemption continued in 1981, 1982, and 1983, when appellants, as required by § 77-202.03, filed an "Affidavit of Use for Continued Tax Exemption" for each of those years after 1980. Without statutory authority or obligation to do so, in November of 1983 the county assessor's office mailed to each appellant a form application for exemption of property from taxation in 1984. That form had been completed by the county assessor, except that part of the application pertaining to a description of the property's use and the signature of the person authorized to sign on behalf of the applicant. Accompanying the exemption application was an explanatory letter from the assessor, reciting the mandatory filing requirement to retain tax-exempt status. Before September 15 in each year prior to 1984, the county sent a second notice to organization-taxpayers which had failed to file an application for exemption, but such practice was discontinued in 1984. Appellants failed to file an exemption application by September 15, 1984, as required by § 77-202.03. On November 19, 1984, the county clerk, on behalf of the board of equalization, mailed a letter to each appellant, informing appellants regarding a prospective hearing before the board concerning requested tax exemptions as well as appellants' failure to file an application for exemption and the county assessor's recommendation that appellants' property be returned to the tax rolls for 1984. At the hearing before the county board of equalization on December 11, 1984, appellants adduced testimony that the 1984 use of

appellants' property was the same as existed in 1980 through 1983, namely, religious purposes. On January 15, 1985, the board of equalization denied tax exemption for each appellant's property, which was then returned to the tax rolls for 1984. Included in each stipulation is the statement:

> [Appellant's] use of the property in question was the same for the tax year 1984 as it was in the previous years. The [appellant's] property is property which otherwise would 'be exempt from taxes' pursuant to Neb. Rev. Stat. §77-202(c) [sic] had the proper filings been made to acquire such exemption.

For 1984, the board of equalization returned previously exempt property of three other organizations (Lincoln Hospital Association, Way of Holiness Church, and Kramer Community Cemetery) to the tax rolls because those organizations failed to file an application for tax exemption authorized under § 77-202(1)(c).

In the district court, appellants asserted that the county board of equalization's action is "contrary to the laws of the United States [and the] State of Nebraska." The district court found appellants had failed to prove entitlement to tax-exempt status for their property because appellants did not file the application required by § 77-202.03. Also, the district court found that the board of equalization's "decision placing [appellants'] property on the tax rolls for Lancaster County for the tax year 1984 is not in violation of the Constitution of the United States or the State of Nebraska."

Appellants' first assignment of error is, in substance, the contention that the parties' stipulation contains the concession, and, therefore, the admission, that appellants' property, through unaltered use (religious purposes) from 1980 through 1983, is exempt from taxation, notwithstanding absence of the application for tax-exempt status of appellants' property. We do not construe the stipulation to the effect suggested by appellants. The stipulation simply acknowledges that appellants' use of real estate has remained the same since grant of the exemption in 1980 and that such use would qualify appellants' property for exemption under § 77-202(1)(c), if the proper document, namely, an application for exemption, had

been filed as required by law. Appellants' first assignment of error is without merit.

Appellants next claim that the district court erred in finding that the board of equalization's action did not violate the establishment and free-exercise clauses of the first amendment to the U.S. Constitution. While appellants do not contend that it is unconstitutional to tax property owned by a religious organization, appellants do argue that denial of tax-exempt status for property owned by a religious organization which has not filed the proper application for tax exemption affords preferential treatment for those religious organizations which file applications to exempt their property from taxation. To support their argument, appellants rely on *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), where the U.S. Supreme Court held that a New York statute allowing tax exemption to churches was not unconstitutional as an attempt to establish, sponsor, or support religion or as an interference with the free exercise of religion. Although the *Walz* Court, quoting from *Gibbons v. District of Columbia*, 116 U.S. 404, 6 S. Ct. 427, 29 L. Ed. 680 (1886), did recognize that " '[i]n the exercise of this [taxing] power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation . . . ,' " 397 U.S. at 679, nothing in *Walz* supports a premise or conclusion that the first amendment to the U.S. Constitution prohibits a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation.

In *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982), the U.S. Supreme Court held that a Minnesota statute imposing registration and reporting requirements on religious organizations that solicit more than 50 percent of their funds from nonmembers discriminated against such organizations in violation of the establishment clause of the first amendment. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. However, the *Larson* Court noted:

> We agree with the Court of Appeals that appellees and others claiming the benefits of the religious-organization exemption should not automatically enjoy those benefits. . . . Rather, in order to receive them, appellees may be required by the State to prove that the Unification Church is a religious organization within the meaning of the Act.

Id. at 255 n.30. Thus, the U.S. Supreme Court has recognized that states may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.

The Nebraska Constitution does not extend an automatic tax exemption to property of a religious organization. "The Legislature by general law *may* exempt . . . property owned and used exclusively for educational, religious, charitable, or cemetery purposes . . . ." (Emphasis supplied.) Neb. Const. art. VIII, § 2.

A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision. See, *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950); *State, ex rel. Walker, v. Board of Commissioners*, 141 Neb. 172, 3 N.W.2d 196 (1942); 16 C.J.S. *Constitutional Law* § 46 (1984). Some illustrative provisions of the Nebraska Constitution which are self-executing and, therefore, which require no legislative implementation are art. I, § 21 (just compensation required for private property taken or damaged for public use), see *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985); art. I, § 13 (access to courts of Nebraska; remedy and justice without denial or delay), see *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952); and art. VIII, § 3 (redemption from sales for nonpayment of real estate taxes), see *County of Lancaster v. Schwarz*, 153 Neb. 472, 45 N.W.2d 432 (1950). The Nebraska Constitution also contains provisions which are not self-executing and, consequently,

require legislation to carry such provisions into effect; for example, art. V, § 22 ("The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought"), see *Patteson v. Johnson*, 219 Neb. 852, 367 N.W.2d 123 (1985); and art. VIII, § 1 ("The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct"), see *Laub v. Furnas County*, 104 Neb. 402, 177 N.W. 749 (1920). Therefore, we hold that Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.

This is the first opportunity for this court to address the question whether property of a religious organization may be denied tax-exempt status as a result of the owner's failure to file an application for exemption. However, the general law regarding application of tax-exemption statutes is clear. "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." *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 889, 381 N.W.2d 166, 169 (1986). An exemption from taxation is never presumed. *North Platte Lodge, B. P. O. E., v. Board of Equalization*, 125 Neb. 841, 252 N.W. 313 (1934). "Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation." *Bethphage Com. Servs. v. County Board, supra* at 889, 381 N.W.2d at 169. See, also, *Iota Benefit Assn. v. County of Douglas*, 165 Neb. 330, 85 N.W.2d 726 (1957). The burden of proving exemption from taxation is on the party claiming such exemption. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).

Section 77-202.03, which is the statute governing the questions involved in the cases now under review and which specified the duration of a tax exemption for the property of the appellants, in substance provided that, if property is exempted from taxation in any given year, such exemption may continue for each of the 3 successive years after grant of such exemption if the property owner annually and timely files the specified

affidavit. To obtain an additional tax exemption on expiration of the 4-year exemption but before September 15 in the year of a subsequent application, an owner must file a new application and must again show that the property qualifies for the exemption from taxation, for example, property used exclusively for religious purposes. See § 77-202(1)(c). Cf. *Potts v. Board of Equalization*, 213 Neb. 37, 328 N.W.2d 175 (1982). We hold that, under § 77-202.03, an integral part of the process to obtain a tax exemption is reapplication for such exemption, that is, "a new application," before a previously granted exemption has expired. Failure to make reapplication for exemption or file a new application as required by § 77-202.03 results in cessation of the tax exemption when the current exemption expires. Courts in other jurisdictions have reached the same conclusion in their construction of tax-exemption statutes similar to § 77-202.03. See, *Highland Church of Christ v. Powell*, 644 S.W.2d 177 (Tex. App. 1982); *Catholic Institute of Pittsburgh, Pa. v. Board of Property Assessment, Appeals and Review*, 55 Pa. Commw. 545, 423 A.2d 1114 (1980).

In their next assignment of error, appellants maintain that the mandatory language of § 77-202(1)(c) controls the procedural requirements, namely, application for tax exemption, prescribed in §§ 77-202.01 and 77-202.03. We have recognized that the provisions of Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are " 'clear and comprehensive' " and " 'constitute a complete and comprehensive act dealing with the matter of tax exemptions. . . .' " *Campus Lt. Hse. Min. v. Buffalo Cty. Bd. of Equal.*, 225 Neb. 271, 274, 404 N.W.2d 46, 48 (1987). "As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." *Wounded Shield v. Gunter*, 225 Neb. 327, 333, 405 N.W.2d 9, 13 (1987). See, also, *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985). In construing the statutes concerning the tax exemption involved in these appeals, we are not restricted to tunnel vision focused on one statute isolated from its related

statutory companions. Rather, we read the various sections of the tax-exemption statutes in conjunction with, and in the light of, one another. The Legislature has provided a full and complete procedure for those organizations seeking a tax exemption for their property. Because a tax exemption such as that involved in the present appeals is not constitutionally required, but is a matter of legislative grace, we decline to hold that the exemption specified in § 77-202(1)(c) pertaining to property of religious organizations is automatic and uncontrolled by the procedural requirements of §§ 77-202.01 and 77-202.03.

Next, appellants contend that the county's belated publication of a list of tax-exempt real estate, that is, a publication on October 24, 1984, rather than publication during September of that year, see § 77-202.03(2), and the county's failure to prepare a tax list "into a suitable book," see Neb. Rev. Stat. § 77-1613 (Reissue 1986), operate as a dispensation from compliance with the application requirement found in §§ 77-202.01 and 77-202.03. Whatever may be the consequences of the county's tardy publication or shortcoming in the transcription of assessments, revitalization of appellants' expired tax exemption is not among them. Appellants' contention about tax lists has no merit.

In their penultimate assignment of error, appellants maintain that the county board's action in returning appellants' property to the tax rolls is a contravention of Neb. Rev. Stat. § 77-1734.01 (Reissue 1986), which states in part:

> (1) In case of payment made of any taxes as a result of a clerical error on the part of taxing officials of the state, county, or other political subdivision of the state, or any taxpayer, the county treasurer is authorized to refund that portion of the tax paid as a result of the clerical error upon verification by the county assessor or other taxing official that such error has been made and upon approval by the county board.

Appellants characterize their failure to file the application for exemption as a "clerical error." However, § 77-1734.01 relates to a situation where a tax or part of a tax has been paid "as a result of the clerical error." Appellants have paid no tax;

hence, § 77-1734.01 is inapplicable in the present cases. See *School Dist. of Minatare v. County of Scotts Bluff*, 189 Neb. 395, 401, 202 N.W.2d 825, 829 (1972): "The only requirement of the statute [§ 77-1734.01] is that some portion of the tax was paid as a result of the 'clerical error.' " Section 77-1734.01 does not exonerate appellants from the application required by §§ 77-202.01 and 77-202.03. We leave to the Legislature whether an organization may be absolved from failure to file an application to exempt its property from taxation. Presently, Nebraska statutes provide no such excuse for failure to file the application for exemption required under §§ 77-202.01 and 77-202.03.

Finally, regarding the county board of equalization's disposition of appellants' claimed exemption, appellants assert that their treatment received differs from the otherwise favorable treatment given to other organizations which failed to file an application for tax exemption. The record does not reflect a shadow of substance for such assertion, which we, therefore, dismiss accordingly.

Appellants have assigned other errors attributable to the district court but have not discussed such assignments of error in their brief. To be considered by this court, errors must be assigned and discussed in the brief claiming that prejudicial error has occurred. See, Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986); *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985).

The judgments of the district court affirming the action of the board of equalization of Lancaster County, that is, placing appellants' property on the tax rolls for the year 1984, are affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

LINDA BAY, APPELLANT, V. JOHN J. HOUSE, APPELLEE.

412 N.W.2d 466

Filed September 18, 1987. No. 85-952.

1. **Expert Witnesses: Appeal and Error.** The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
2. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
3. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.

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

Paul Korslund of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

Alan L. Plessman, for appellee.

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

COLWELL, D.J., Retired.

Appellant, Linda Bay, received a $10,000 judgment against appellee, John J. House, for personal injuries from an auto accident. Bay appeals, claiming inadequate damages and assigning these errors: (1) The jury verdict was wholly inadequate and contrary to the evidence on damages, and (2) the court erred in excluding medical testimony bearing on her damages. We affirm.

During the evening hours of Thursday, June 24, 1982, Bay was driving north in her car on a paved highway. House was driving south on the same highway; he drove his van across the median into Bay's path. The vehicles did not collide. In avoiding a collision, Bay believed that she bumped her left knee on the car instrument panel, sustaining an injury. At that time, Bay was married, was the mother of two children ages 5 and 10

years, and was employed 20 hours a week at K-Mart at $3.90 per hour, performing duties that required some heavy lifting.

A brief summary of some medical facts shows that after the accident she drove her car home; she waited until Saturday, June 26, before going to the emergency room in a Lincoln, Nebraska, hospital, where she was told she had a hamstring pull. On Monday she returned to work for about 3 weeks until her family doctor referred her to Dr. David Heiser, an orthopedic surgeon, who diagnosed her injury as a knee contusion and recommended a set of exercises, telling her she could return to work on November 16, 1982. She was next referred to Dr. Frederick Hathaway, an orthopedic surgeon, who performed arthroscopic surgery on November 15, 1982, with the diagnosis that both surfaces of the kneecap were injured. In December 1982, Bay fell at her home when her knee "gave out." She worked from January through March 1983. In September 1983, Dr. Hathaway performed the second surgery on her knee, when a screw was inserted in the knee, moving the patellar tendon medially to relieve pressure.

Bay returned to work in January 1984, for about 2 months. She was examined by Dr. William Fulcher, an orthopedic surgeon, on February 1, 1984. Trial began in October 1985.

EXCLUSION OF MEDICAL TESTIMONY

The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987). "[T]o obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown." *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 450, 406 N.W.2d 337, 343 (1987).

The excluded evidence relates to the depositions of both Dr. Hathaway, the treating doctor, and Dr. Fulcher, a consulting doctor.

Dr. Hathaway earlier stated that he was unable "to make any kind of estimate as to future medical expenses." Following that, his excluded testimony was that he anticipated that Bay would have future expenses and that it was possible Bay would need further medication and therapy for pain and discomfort in her knee. Appellee's objection to these opinions on the bases of

speculation and no foundation was sustained. Dr. Fulcher's excluded opinions were that it was possible that a person with Bay's knee injury could have a temporary weakness in her leg muscle, which could cause her to fall, and that it was possible that she might need more surgery. Appellee's objection to that testimony as speculative and lacking foundation was sustained. Under the state of that record, there was no abuse of the trial court's discretion in excluding that testimony.

INADEQUACY OF VERDICT

A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Bashus v. Turner*, 218 Neb. 17, 352 N.W.2d 161 (1984).

On the issues of medical damages and proximate cause, Bay places reliance on the stipulation that if Dr. Hathaway were called as a witness, he would testify that the medical expenses of $7,350.73 were fair and reasonable and necessary for Bay's treatment and that they were proximately caused by the June 24, 1982, accident. The jury as trier of the facts need only consider that stipulation along with all of the other evidence on the issues presented by the court's instructions. We also consider it, *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982), along with the whole record.

Bay argues that the evidence shows a loss of wages in excess of $5,070, the stipulated medical expenses were $7,350.73, and those damages alone exceeded the verdict; therefore, the jury did not consider her damages for pain and suffering, disability, future medical expenses, and loss of future earning power. Problems with that argument include contrary and conflicting evidence on the issues of cause, intervening cause, extent of the claimed injury, and damages.

It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986).

There were many conflicts in the evidence relating to the

nature of Bay's injury, the course of treatment, the effect of the December 1982 fall at her home, the improvement of the condition of her knee, her ability to work, and the loss of wages. The jury could find that the evidence of future medical expenses and loss of future earning power was inconclusive. Her treating doctor only limited her work to preclude heavy lifting and climbing. Bay testified that she only looked at a few places for work and that she really wanted a part-time bookkeeping job, so that she could stay at home with her two children.

The jury resolved the conflicts in the evidence, and we cannot say that the verdict was either clearly erroneous or the result of mistake, or that the jury disregarded the evidence.

AFFIRMED.

ALICE M. HUEY, APPELLEE, V. DAVID DEAN HUEY, APPELLANT.

412 N.W.2d 83

Filed September 18, 1987. No. 85-962.

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

John J. Respeliers and Thomas K. Harmon of Respeliers and DiMari, for appellant.

Jon S. Okun of Higgins, Okun & Calkins, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

David Dean Huey has appealed from the property division and award of alimony and child support contained in the decree dissolving his marriage to Alice M. Huey.

The decree awarded Alice child support in the amount of $300 per month for each of the parties' three children and alimony of $200 per month for 24 consecutive months.

Reviewing the record de novo, as we are required to do in cases of this nature, we find no abuse of discretion. *Nickel v. Nickel*, 225 Neb. 810, 408 N.W.2d 301 (1987).

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

AFFIRMED.

MERICA FREELIN FOOKS, APPELLEE, V. JEFFREY NATHAN FOOKS, APPELLANT.

412 N.W.2d 469

Filed September 18, 1987. No. 86-052.

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

Michael J. O'Bradovich, for appellant.

No appearance for appellee.

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

PER CURIAM.

This appeal is directed toward the child support provisions of a decree of dissolution. The court ordered appellant to pay the sum of $127 per month child support for each of two children, increasing periodically until the children reach majority. The court further ordered payment of a portion of monthly child care expenses, not to exceed $171 per month, to be paid by appellant.

We have adopted child support guidelines to be effective October 1, 1987, which would fix the support obligation at approximately $253 per month for support (assuming the approximately equal income of the parties, as is the case here). The guidelines also specify that day care expenses are to be considered independently of the support amount. We are aware of the necessity in this case of child care for the two children of

tender years (6 and 3).

We are also aware that the appellant's net income is $850 per month. The ability of the appellant to pay, without completely removing any incentive but to run to avoid payments, it seems to us, cannot be fixed at an amount above $350 per month total support for the two children, including child care contributions. See *Salmon v. Salmon*, 219 Neb. 899, 367 N.W.2d 142 (1985). It is therefore the order of this court that the appellant, Jeffrey Nathan Fooks, pay $250 per month for support, and $100 per month for day care expenses, or a total of $350 per month. All such amounts are to be paid to the clerk of the district court. The order of the district court, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

JACK PARKER, APPELLEE AND CROSS-APPELLEE, V. SAINT ELIZABETH COMMUNITY HEALTH CENTER, APPELLEE AND CROSS-APPELLANT, STATE OF NEBRASKA, SECOND INJURY FUND, APPELLANT AND CROSS-APPELLEE.

412 N.W.2d 469

Filed September 18, 1987. No. 86-814.

1. **Workers' Compensation: Second Injury Fund.** If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual, and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the employer, then the employer is only required to pay for that portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.
2. _____: _____. The Second Injury Fund concept was created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability.
3. **Workers' Compensation: Appeal and Error.** The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are

not clearly wrong.

4. **Judgments: Appeal and Error.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.
5. **Workers' Compensation.** Permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his or her previous occupation or in any other established field of employment for which he or she is fitted. Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact.
6. _____. A worker should not be denied compensation benefits for what is currently total permanent disability simply because his or her employability and earning capacity might become enhanced by rehabilitation and the permanent disability possibly reduced at some time in the future.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Spire, Attorney General, Martel J. Bundy, and Janie C. Castaneda, for appellant.

Scott A. Burcham of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Parker.

Anne E. Winner of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee Saint Elizabeth Community Health Center.

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

HASTINGS, J.

This is an appeal from the Workers' Compensation Court by the State of Nebraska, Second Injury Fund (Fund). The principal legal question involved is whether, in cases of enhanced disability due to an earlier injury or disability, the Fund is obligated to pay benefits for other than permanent disability and an attorney fee where applicable. A subsidiary factual issue raised by Saint Elizabeth Community Health Center (Health Center) on cross-appeal is whether responsibility for the present degree of Jack Parker's permanent partial disability should be apportioned between the Fund and the Health Center. We affirm.

Parker had polio as a child. As a result, Parker wore a brace on his right leg, and, in order to walk, he had to put his weight

on his left leg and swing his right leg forward. On his Health Center employment application Parker indicated that he had had polio, wore a brace, and had back injury or low back pain. Parker testified that the way he had to walk caused slight discomfort in his back.

According to the stipulation of the parties, on July 15, 1982, Parker experienced a compensable injury by falling off a ladder while employed as an x-ray technician by the Health Center. He felt immediate pain in his left knee and in his back. Parker was hospitalized overnight and did not return to work until August 29, 1982. He continued to have trouble with his left knee and had increased back pain. Parker testified that because of the injury he favored his left knee, which changed his gait and put more strain on his back.

Parker was admitted to the hospital for arthroscopic surgery on September 29, 1983, and returned to work on November 1. He was terminated from the Health Center in September of 1985 for producing poor quality x-ray films. He had been put on probation for poor quality work in 1982 before the accident occurred. Parker testified that after the accident he tended not to retake poor quality films because walking was painful and he did not want to push the x-ray machine back to the patient's location.

After being terminated from the Health Center, Parker sold home water treatment systems. His pain became worse, and he resigned at the end of April 1986 and has not worked since that time.

On rehearing, the three-judge panel found that as a result of the injury, Parker incurred medical and hospital expenses and was temporarily totally disabled from July 15 through August 28, 1982, from September 29 through October 31, 1983, and from May 1 through July 24, 1986, which was the date of the rehearing, and that he would remain temporarily totally disabled for an indefinite period of time. The Workers' Compensation Court also found that Parker had suffered a 15-percent permanent partial impairment of his left leg as a result of the accident and injury.

The court further found that at the time of Parker's accident and injury he had a preexisting permanent partial impairment

resulting from polio. The court found that the disability that Parker suffered to his body as a whole as a result of the accident and injury, combined with the preexisting impairment, resulted in a disability substantially greater than that which would have resulted from the last injury considered alone. The court found that the Health Center had knowledge of Parker's preexisting impairment and thus found that the Fund should be liable for a portion of the benefits awarded to Parker.

The court found that Parker was entitled to benefits of $180 per week for 23 2/7 weeks of temporary total disability compensation to the date of the rehearing and was entitled to benefits of $180 per week for so long in the future as he should remain totally disabled. The court also found that Parker was entitled to benefits of $180 per week for 32 1/4 weeks for the 15-percent permanent partial disability to his left leg. The court additionally found that when Parker's total disability should cease, he shall be entitled to compensation for any residual permanent partial disability to his body as a whole due to the accident and injury. The court further found that the injury that Parker suffered would of itself have caused only a 5-percent permanent partial disability to the body as a whole, and thus the Fund was liable for the additional disability.

The court therefore ordered that Parker recover from the Health Center the sum of $180 per week for a period of 11 1/7 weeks for temporary total disability compensation through October 31, 1983, and thereafter and in addition thereto the sum of $180 per week for 32 1/4 weeks for the 15-percent permanent partial disability to his left leg, and thereafter and in addition thereto the sum of $9.20 per week for 288 6/7 weeks for the 5-percent permanent partial disability to his body as a whole, less a credit for temporary total disability already paid. The court also ordered the Health Center to pay Parker's medical expenses already incurred and any future medical and hospital expenses reasonably necessary as a result of the accident and injury. The Health Center was also ordered to pay attorney fees of $1,000.

The court ordered that Parker recover from the Fund the sum of $170.80 per week for temporary total disability from and after May 1, 1986, up to the date of the rehearing and

thereafter so long in the future as Parker shall remain totally disabled. If Parker remains totally disabled for longer than 300 weeks, the Fund was ordered to pay $180 per week for so long as he shall remain totally disabled. If Parker's total disability ceases before the expiration of 300 weeks, the Fund was ordered to pay compensation for that permanent partial disability that Parker thereafter suffers in excess of 5 percent.

The court also found that as a result of the accident and injury Parker was unable to perform work for which he has previous training or experience and was entitled to vocational rehabilitation services and approved his participating in an 18-month program at Southeast Community College resulting in an associate degree in business.

The Fund appeals from the award on rehearing, alleging that the Workers' Compensation Court erred in providing that the Fund be responsible for paying $170.80 per week for so long as Parker should remain temporarily totally disabled, including the period that he is undergoing vocational rehabilitation. The Fund also alleges that the court erred in providing that the 32 1/4 weeks of compensation awarded to Parker for the 15-percent permanent partial disability to his left leg should not reduce the 300-week period of compensation to which he is entitled for the disability to his body as a whole.

On cross-appeal, the Health Center alleges that the court erred in assessing responsibility to the Health Center for the entire 15-percent permanent partial disability to Parker's left leg.

Neb. Rev. Stat. § 48-128 (Reissue 1984) provides in pertinent part:

> If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined

> disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself; and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund.

The Fund argues that because the statute mentions only permanent partial or permanent total disability, the Fund should be liable only for permanent benefits and not for temporary benefits, including those paid while a plaintiff is undergoing vocational rehabilitation. However, the purpose of the Fund is as follows:

> If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the employer, then the employer is only required to pay for that portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.

Benson v. Barnes & Barnes Trucking, 217 Neb. 865, 874-75, 354 N.W.2d 127, 133 (1984). Such funds were created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability. See 2 A. Larson, The Law of Workmen's Compensation § 59.31(a) (1987).

In the present case, but for the preexisting condition of polio, the torn medial meniscus that Parker suffered as a result of the accident would not have resulted in total disability. Dr. Garvin testified by deposition that, but for the polio, Parker probably

would have been able to return to his job as an x-ray technician after undergoing his surgery for a torn meniscus. He further testified that Parker was no longer able to push the x-ray machine around, that Parker had difficulty climbing ladders and with prolonged walking or standing, and that those problems would be permanent in nature. Dr. Garvin concluded by stating that in his opinion Parker would only be able to do work where he could sit most of the time and not work under pressure and that he would have difficulty engaging in any employment that would require him to be on his feet or to ambulate for any significant period of time.

In his written report found in the record Dr. Garvin stated:

> Because it has been my observation that the job of an x-ray technician requires a rather significant amount of walking, some elements of lifting, and general requirements for mobility, including pushing machines about the hospital to obtain x-rays, I feel that it is unlikely that Mr. Parker can return to that type of activity. In terms of future employment, I would feel that an occupation that would allow Mr. Parker to sit and not be required to constantly move above [sic], would be of benefit for him. He does have rather severe limitations in his ability to walk long distances, to climb ladders, to lift heavy objects over 20 or 30 lbs., not only because of his pre-existing polio condition, but also because of the more recent injuries to his low back as well as his left knee as a result of the fall from the ladder in July of 1982.

Tom Steel, a counselor with Nebraska Division of Rehabilitation Services of the State Department of Education, evaluated Parker and testified by deposition that based on his examination of the medical reports and his own observations as to the pain Parker seemed to be suffering from during his evaluation, Parker would have to have a strictly sedentary type of employment and could not return to that work for which he had already been trained. It was Steel's opinion that Parker would have to be retrained so as to qualify as an accountant or bookkeeper and that Parker was capable of completing such training.

Parker himself testified that his condition had been getting

progressively worse, that he cannot even mow his lawn, that he has difficulty walking up stairs, and that he cannot work as an x-ray technician. He tried selling water treatment systems, but had to quit that because of the pain in his back. He also stated that he could no longer do real estate sales work or retail sales work, both of which he had done before. He had applied for jobs at convenience stores, even though that would require some standing, but had been unsuccessful. He knew of no sedentary-type job for which he had the necessary education, experience, or training. There was no type of work that he felt he could do physically without vocational training.

By whatever name it called Parker's condition, the compensation court correctly found as a matter of fact that Parker was, and until rehabilitated would continue to be, totally disabled. The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong. *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987). Furthermore, a proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. *Caradori v. Hamilton*, 193 Neb. 500, 227 N.W.2d 850 (1975).

Parker's physician testified that Parker could no longer do the things necessary to be an x-ray technician and could do no job that would require him to stand, walk, or lift in a significant manner. He said that condition was permanent. Tom Steel concluded that Parker could not return to work for which he had been trained and, in effect, until retrained was unable to obtain a meaningful sedentary job. Parker's own testimony supported that conclusion.

> Permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he is fitted. [Citation omitted.]
>
> Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact.

Boults v. Church, 200 Neb. 319, 320-21, 263 N.W.2d 478,

479-80 (1978).

A similar situation was addressed in *Pollard v. Wright's Tree Service, Inc.*, 212 Neb. 187, 322 N.W.2d 397 (1982). The plaintiff had undergone several back operations unrelated to his employment with the defendant, and the employer knew of these prior problems. During the course and scope of employment, the plaintiff slipped and fell, injuring his neck. The employer paid the appropriate weekly rate during the plaintiff's recuperation period of about 2 years. The remainder of the plaintiff's 300-week maximum benefits for partial disability was assessed to the employer at 7 1/2 percent permanent partial disability, with the Fund responsible for the balance. The Fund was also ordered to pay the plaintiff's benefits in full after the expiration of the 300-week period and "for the duration of plaintiff's total disability." *Id.* at 190, 322 N.W.2d at 401. The court also found that the plaintiff was entitled to vocational rehabilitation services.

The Fund in *Pollard* contended that because the compensation court did not specifically find that the plaintiff's total disability was permanent, the Fund was not liable until such a finding was made. This court stated:

> Essentially, the fund argues that the requirement of vocational rehabilitation indicates that total disability at the present time might be reduced to some lesser percentage of partial permanent disability in the future as the result of such training, and that therefore present total disability is not a fixed, stable, or nonrecoverable disability and consequently is not permanent. It argues that unless there is a finding that total disability is permanent, it must be regarded as temporary and the fund cannot be held liable until that specific finding of fixed and permanent disability is made. We disagree.

Id. at 192-93, 322 N.W.2d at 402.

This court found in *Pollard* that the Fund was liable for the plaintiff's disability in excess of the 7 1/2 percent that he would have incurred without the prior disability. Because the plaintiff could not return to the kind of work for which he had training and experience, he was at the present time totally and permanently disabled, although that disability might be

reduced when vocational rehabilitation was complete. The court reasoned as follows: "The plaintiff should not be denied compensation for what is currently total permanent disability simply because his employability and earning capacity might become enhanced by rehabilitation and his permanent disability possibly reduced at some time in the future." *Id.* at 194, 322 N.W.2d at 402.

In the present case Parker should not be denied compensation simply because the Workers' Compensation Court used the term "temporary" instead of "permanent," nor should the Health Center be required to pay this compensation. Parker would not be totally disabled, nor would he need vocational rehabilitation, but for the polio. Thus, to carry out the purposes of the Fund, the court correctly ordered that the Fund pay temporary total disability benefits to Parker.

Parker started his vocational rehabilitation program on July 10, 1986, and the Fund believes it should not be liable for any payments during this program. We do not agree. Payments during vocational rehabilitation are covered in Neb. Rev. Stat. § 48-121(5) (Reissue 1984), which states: "The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing rehabilitation." Again, we do not agree that the term "temporary" relieves the Fund from liability. Parker would not need vocational rehabilitation but for the polio. Thus, the Fund was properly assessed payments during this time.

Section 48-121(5) provides that the employer should pay benefits while an employee undergoes rehabilitation. In *Pollard v. Wright's Tree Service, Inc., supra*, the Fund was determined to be an employer for the purposes of awarding attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1978). The logical extension of this determination is that the Fund may also be considered a statutory employer for the purposes of payment of disability during rehabilitation. Thus, the Fund's first assignment of error is without merit.

The Fund's second assignment of error involves § 48-121. This section was discussed in *Norris v. Iowa Beef Processors*, 224 Neb. 867, 877, 402 N.W.2d 658, 666-67 (1987):

> "Section 48-121 . . . provides for compensation for

> three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore. Disability under subdivisions (1) and (2) refers to loss of employability and earning capacity, and not to functional and medical loss alone. [Citations omitted.] Thus losses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability. [Citations omitted.] . . ."

Quoting *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977).

Section 48-121(2) provides for a 300-week limitation on payments for partial disability and states that should total disability be followed by partial disability, the period of 300 weeks shall be reduced by the number of weeks during which compensation was paid for such total disability. The compensation court in the present case noted that § 48-121 does not provide that the 300-week period should additionally be reduced by the number of weeks during which compensation is paid for a disability under subsection (3). The court also noted that subsections (1) and (2) compensate impairments of the body as a whole in terms of loss of employability and earning capacity, while subsection (3) compensates impairments of scheduled members on the basis of loss of physical function. See *Norris v. Iowa Beef Processors, supra*. Thus, it determined that the 32 1/4 weeks of compensation to which Parker is entitled by reason of the 15-percent permanent partial impairment to his left leg should not reduce the 300-week period of compensation to which he is entitled by reason of the disability that he suffered to his body as a whole.

We agree that § 48-121 does not require that the 300-week period of compensation be reduced by the number of weeks during which compensation is paid under subsection (3). Therefore, the Fund's second assignment of error is also meritless.

On cross-appeal, the Health Center contends that it should be held liable for only 10 percent of the 15-percent permanent partial disability to Parker's left knee, with the Fund responsible for the remaining 5 percent. The Health Center argues that because Parker did not have developed muscles due to the polio, he was unable to fully rehabilitate his leg.

As previously stated, in reviewing workers' compensation cases, this court does not reweigh the facts. In a review of a workers' compensation case, the findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987).

The Health Center points out that Dr. Garvin testified by deposition that, generally speaking, a healthy individual with good quadriceps and hamstrings can rehabilitate himself or herself to about a 10-percent loss of function after medial meniscus arthroscopic surgery. However, Dr. Garvin also testified that permanent partial disability after such surgery ranges from 5 percent to 20 percent. In addition, the following exchange took place:

> Q. And you have, as I understand, assessed a 15 percent disability to the left leg as a result of the medial meniscus surgery?
>
> A. Correct.
>
> Q. All right. And Doctor, had Mr. Parker been able to — not have polio and have well developed quadriceps and hamstrings, would he have been able to rehabilitate himself in a greater fashion so that it would have reduced that disability rating that you had — you have given to us?
>
> . . . .
>
> A. Well again, it's somewhat speculative because every case in this business is very individual. And it's possible that a normal, active individual could wind up with a lesser loss of function. Or it's possible he could wind up with more of a loss of function if the rehabilitation program didn't work for one reason or another, or if the — if the individual didn't cooperate. So that I guess I, you know, I —

Because there was evidence that even a healthy individual may rehabilitate himself or herself to a 15-percent permanent partial disability, the court was not clearly wrong in finding that Parker's entire 15-percent permanent partial disability should be assessed against the Health Center, and this assignment of error is without merit.

The judgment of the Workers' Compensation Court is affirmed. Parker is awarded $1,000 for services of his attorney in this court, to be assessed jointly against the Second Injury Fund and Saint Elizabeth Community Health Center.

AFFIRMED.

DARWIN NICE, APPELLEE, V. IBP, INC., APPELLANT.

412 N.W.2d 477

Filed September 18, 1987. No. 86-933.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Expert Witnesses: Appeal and Error.** As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
3. **Expert Witnesses.** A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.
4. **Workers' Compensation: Appeal and Error.** The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Wayne E. Boyd of Smith & Boyd, for appellant.

LeRoy J. Sturgeon of Smith & Smith, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

This is an appeal in a proceeding under the Nebraska Workers' Compensation Act. The plaintiff, Darwin Nice, alleged that he sustained a back injury as a result of accidents occurring on June 4, 1985, and January 13, 1983, while employed by the defendant, IBP, inc., as a beef trimmer in its plant in Dakota City, Nebraska.

After the hearing before a single judge, the compensation court found that the plaintiff was involved in an accident on June 4, 1985, but there was no evidence of temporary or permanent disability as a result of that accident. The court further found that a previous award as the result of the January 13, 1983, accident was res judicata, and the plaintiff was not entitled to recover any additional compensation as the result of either accident.

On rehearing the compensation court found, with one judge dissenting, that the plaintiff had incurred hospital and medical expenses as a result of the injury received in the accident on June 4, 1985, and was temporarily totally disabled as a result of the injury. The court further found that in addition to compensation, the plaintiff was entitled to vocational rehabilitation services. From that award, the defendant has appealed.

The principal issues in this case are whether the evidence is sufficient to support a finding that Nice's disability is the result of an accident arising out of and in the course of his employment, and whether there has been any increase in disability that can be attributed to the accident on June 4, 1985.

> The findings of fact made by the [compensation court] after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the [compensation court] may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award.

Neb. Rev. Stat. § 48-185 (Reissue 1984).

> "Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. . . ."

Mendoza v. Omaha Meat Processors, 225 Neb. 771, 779, 408 N.W.2d 280, 285-86 (1987).

The three-judge panel based its award on the expert testimony of Drs. Blume, Keane, Isgreen, and Dougherty. The compensation court chose to believe the testimony of Drs. Blume and Dougherty, who stated by way of deposition that Nice's 1985 injury aggravated his preexisting condition. At the same time, the court rejected the testimony of Dr. Isgreen, who concluded that Nice's condition was not aggravated by the 1985 accident.

Dr. Martin's, Dr. Dougherty's, and Dr. Blume's depositions all state with varying degrees of specificity that the 1985 accident played some role in "lighting up" Nice's preexisting back problems. Dr. Martin stated: "[T]he June '85 accident probably aggravated the previous conditions." Dr. Blume stated: "[T]he accident sustained in 1985 has aggravated a preexisting condition . . . . [T]he patient is suffering from the accident in 1985 with low back and leg pain condition," and Dr. Dougherty stated: "[T]he incident of '85, I suppose that could have aggravated it. . . . That probably aggravated it." Dr. Isgreen, on the other hand, stated that the past accidents encountered by Nice would not be aggravating to Nice's preexisting condition.

As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court. *Ward v. City of Mitchell*, 224 Neb. 711, 400 N.W.2d 862 (1987).

The defendant argues that because Drs. Martin and Blume did not have opportunity to examine Nice at the time of both his 1983 and his 1985 accidents, they have no basis for concluding that the 1985 accident aggravated his condition. This was an issue to be resolved by the trier of fact. In *Zaleski v. Farmland*

Foods, 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985), we held that:

> A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.

Upon the record before us, we cannot conclude that the three-judge panel was "clearly wrong" in finding that Nice's June 4, 1985, accident aggravated his preexisting condition.

The final issue for consideration is the award of vocational rehabilitation. An injured employee is entitled to vocational rehabilitation services:

> 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.

Neb. Rev. Stat. § 48-162.01(3) (Reissue 1984).

A determination made by the compensation court after rehearing is accorded great deference: "The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong." *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 62, 387 N.W.2d 709, 713-14 (1986); *Hewson v. Stevenson*, 225 Neb. 254, 404 N.W.2d 35 (1987); *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986); *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986).

The defendant relies on Nice's assertions that he continued to work for IBP at a regular job, that he was able to perform that job, and that he was not under a continuing course of medical treatment after the June 1985 accident.

All of the physicians who treated Nice restricted his working activities significantly, and Drs. Martin, Blume, and Keane

specifically raised the issue of vocational rehabilitation or retraining.

In his deposition, Dr. Martin stated:

> And the other thing I've suggested to him, which I think he should go through, rehab training and go for a different job. I don't care what he does. I don't think he's going to be able to do physical work anywhere, no matter whether it's Iowa beef or a farm. I don't care where it's at. I just think he's not going to be able to do it.
>
> . . . .
>
> . . . I advised him to go into rehab and try to do something different.

Dr. Blume stated:

> I told the patient if he can, avoid to do any heavy lifting, and that if he has the opportunity, to walk around, and that he should try to see if he can get less strenuous physical activity in his work activity.
>
> . . . .
>
> . . . And that he should be retrained for a kind of job that he can perform with the least amount of back pain and discomfort.

Finally, Dr. Keane stated: "Would authorize vocational rehabilitation for him if that would be helpful or if necessary in order to try to get him to have a different job. . . . Again, I don't believe he's going to be able to do heavy work. He's a candidate for vocational rehabilitation."

The evidence supports the compensation court's award of vocational rehabilitation. The judgment is affirmed.

The plaintiff is allowed $1,000 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THEODORE W. PARSONS, JR., APPELLANT.

412 N.W.2d 480

Filed September 18, 1987. No. 86-934.

1. **Verdicts: Appeal and Error.** On appeal, the verdict of the district court will not be reversed if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support it.
2. **Trial: Evidence: Presumptions.** In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
3. **Homicide: Photographs.** Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification.

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

J. William Gallup, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

WHITE, J.

This is an appeal from the district court for Douglas County. The appellant, Theodore W. Parsons, Jr., waived a jury trial and was found guilty of first degree murder and the use of a firearm to commit a felony for the killing of Burke High School teacher Jill Garlock. Appellant was sentenced to life imprisonment for the first degree murder conviction and a consecutive sentence of 5 years on the firearm conviction. This appeal follows.

The appellant met the deceased in the summer of 1979 while he was stationed at Offutt Air Force Base. The two became romantically involved later that year, living together on and off from that time on. In 1985 the appellant was transferred to Scott Air Force Base, located in Belleville, Illinois, and was stationed there at the time of the offense which gave rise to this case.

On April 9, 1986, Parsons and Garlock had a particularly serious argument on the telephone, during which the deceased informed him that she wished to terminate their relationship. At about 12:30 in the morning of April 10, Parsons left Scott Air Force Base and drove to Omaha with the hope of reconciling with Garlock. He arrived in Omaha at 8:30 or 9 a.m. and went directly to Garlock's house, where, knowing that she would not be home until approximately 10 o'clock that night, he parked his car in her garage and slept for several hours. After awakening, Parsons went out, and returned to Garlock's home at approximately 3:30 or 4 p.m. At that time he parked his car away from the home, fearing that the deceased would not return home if she knew he was at the house. Parsons possessed a key to the home and a remote-control garage door opener. Parsons again left, for dinner, and returned, again parking his car some distance from the Garlock residence. The deceased returned home around 10:15 p.m.

Parsons stated that the victim called someone when she returned home, during which time he waited upstairs. At this time Garlock did not know he was in her home. Parsons went downstairs after she got off the telephone and found her asleep on the couch. He woke her, and the two began to argue. Parsons stated that Garlock was very angry that he had come to Omaha. The two argued for some time, and finally Garlock stated that she was tired and wanted to go to bed. She reiterated that their relationship was over. Parsons said that he told the victim that he now had nothing to look forward to, to which she allegedly asked why he did not kill himself. Parsons stated that he told the deceased that he had considered suicide and asked her if his suicide would bother her. She answered no. The argument continued in her bedroom, ending when Garlock went to bed. Parsons then went across the hall to another bedroom, where he had left his belongings. He retrieved his .357 Magnum, returned to Garlock's room where she was sleeping, and shot and killed her. Jill Garlock died as a result of this single gunshot wound to her head.

The body of the victim was discovered on the morning of April 11 by a Burke High School assistant principal. The appellant was arrested upon his return to Scott Air Force Base,

and later confessed to the murder.

On appeal, the appellant assigns as error that the district court erred in refusing to grant his motions to dismiss both at the close of the State's case and at the conclusion of the trial. Appellant also assigns as error the lower court's admitting into evidence photographs of the victim's body and a tape recording of a conversation between the victim and the dispatcher of the Nebraska State Patrol. We affirm.

Addressing his first assignment of error, Parsons argues that there was insufficient evidence to support a conviction of first degree murder. Taking the evidence in the light most favorable to the State, *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986), we find that there is sufficient evidence to support the verdict.

The appellant centers his argument around the testimony of the officers who interrogated him and to whom he stated that he waited until the deceased was asleep before shooting her. The record reveals that Parsons stated that he waited so that Garlock would not feel any pain. The evidence shows that Parsons had to go across the hall to retrieve his gun from another bedroom, where he had left his belongings. Parsons testified that he watched the victim cry for a little while and went to get the gun to see her reaction to his putting the gun to his head. Parsons never woke the victim before he fired. The appellant admits that he hid his presence from the victim until sometime after she returned home by parking his car away from the Garlock residence and by remaining upstairs while the victim was on the phone. Parsons also stated that when entering the deceased's bedroom with the gun, he kept the weapon hidden behind his back. At trial a psychiatrist testified that although the appellant's actions showed impulsiveness, they also illustrated some deliberation, noting the single, aimed gunshot to the victim's head. This evidence, if believed by the trier of fact, is sufficient to support a conviction of first degree murder. *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

Appellant also argues that the testimony of the officers is inherently unreliable, as the notes taken at the interrogation were destroyed, thereby eliminating cross-examination of the

testimony. In *El-Tabech*, we stated:

> [T]he Supreme Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, 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.

Id. at 405, 405 N.W.2d at 592. This assignment of error is without merit.

The appellant's next assignment of error alleges that a taped conversation between the deceased and the dispatcher for the Nebraska State Patrol was improperly admitted into evidence, arguing that the district court was unduly influenced by the tape. The tape consists of a conversation during which the victim asks the help of the State Patrol in locating her boyfriend, identified as Ted Parsons, en route from Illinois to Omaha. The victim is noticeably upset and expresses concern for her welfare.

It is axiomatic that the trial court is given broad discretion in the admission of evidence, and such rulings will not be overturned on appeal absent a showing of an abuse of discretion. *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987). In cases in which there is no jury, there is a presumption that only competent, relevant evidence is considered. *State v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985). The assignment is without merit.

Finally, Parsons argues that certain pictures of the victim were incorrectly admitted into evidence and unduly influenced the judge in his deliberations. The pictures at issue include: (1) a photo of the victim at the scene, showing head and hand wounds; (2) a photo of the victim at the scene, showing lividity; (3) a photo of the victim at the scene, showing the exit wound; (4) a photo of the victim at the scene, showing the entrance wound and markings from the powder burns; (5) a photo of the bedding, before the victim was removed, showing the path of the bullet; (6) a photo of the top pillow, before the victim was removed, showing the bullet hole; (7) a photo of the victim's head and hand, showing the hand wound; (8) a photo of the victim's body supine on the morgue stretcher; (9) a photo of

the entrance wound, with the area cleaned; (10) a photo of the exit wound, with the area cleaned; and (11) a photo of the hand wound, with the area cleaned.

The appellant bases his argument on a comment by the district court judge that he considered the evidence in the case until 4:30 a.m., arguing that the photos were prejudicial and were incorrectly used in the court's deliberations. As noted above, we presume that the court considered only competent and relevant evidence in its deliberations. *State v. Thierstein, supra*. The appellant has not shown otherwise.

Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification. *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986); *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984). The gruesome nature of photos alone will not keep them from the trier of fact, so long as the probative value is not outweighed by the prejudicial effect. *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983). The photos were admitted for the above purposes, and we cannot say that the photos were unduly prejudicial or that their probative value was outweighed by their prejudicial effect. The appellant has not shown that the district court abused its discretion in admitting the photos. *State v. Threet, supra*. This assignment is also without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS E. SORICH, APPELLANT.

412 N.W.2d 484

Filed September 18, 1987. No. 86-979.

1. **Criminal Law: Trial: Prisoners.** Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.

2. **Criminal Law: Trial: Prisoners: Escape.** When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Pursuant to a verdict, defendant-appellant, Douglas E. Sorich, was adjudged guilty of escape in violation of Neb. Rev. Stat. § 28-912(1) (Reissue 1985). He was thereafter sentenced to imprisonment for a period of 1 year. In his appeal to this court, he assigns as error, through his attorney, the district court's failure to declare a mistrial because he was displayed to the jury "wearing identifiable jail clothes." In addition, Sorich, on his own behalf, apparently asks that we reverse his conviction and dismiss the charge for a variety of other reasons. We affirm.

As the result of a prior felony conviction, Sorich was incarcerated, assigned to a work release program, and employed as a printing press operator in Omaha. Sorich was informed of the limitations on his movements while in the program and on March 11, 1986, signed a "Community Release Program Agreement and Honor Pledge," which recites in part:

> I understand that:
>
> 1) Extended limits shall mean the Post Care Center to which I am assigned and its immediate area;
>
> 2) Extended limits shall also mean the most direct route to and from my place of employment/school and the assigned Post Care Center;
>
> 3) Extended limits shall include those areas necessary in the course of my normal employment/studies and those areas which have been authorized by Program personnel.
>
> I have been advised and understand that failure to

> remain within the extended limits as hereinabove set forth may be deemed as ESCAPE from custody and may be prosecuted to the fullest extent of applicable state law.

(Emphasis omitted.)

Nonetheless, on the evening of May 19, 1986, Sorich failed to return to the center after work and was accordingly listed as an escapee. He was continuously absent until 10:10 p.m. on June 1, 1986, when he voluntarily returned to the center. Sorich was thereupon placed under arrest, and trial on this escape charge followed.

After Sorich, through his attorney, had informed the court there was no objection to his being tried while wearing prison clothing, the attorney, sometime before conducting his voir dire examination of the venirepersons empaneled for the case, moved for a mistrial on the ground that requiring Sorich to stand trial in "his jail garb," an "orange jumpsuit," would unfairly prejudice his cause. In overruling the motion the court questioned the timeliness of the motion and observed that, in any event, the nature of the charge was such that the State, to be successful, would have to prove that at the time Sorich absented himself from the center, he was incarcerated for having committed a felony.

Indeed, a stipulation to that effect was entered into by Sorich and the State and put before the jury. Further, Sorich took the stand in his own defense and admitted that he was at that time incarcerated for having committed a felony, specifically, theft by deception.

Relying on *People v. Shaw*, 381 Mich. 467, 164 N.W.2d 7 (1969), Sorich urges that when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted. While we agree such should be the general rule, we must observe that when such a defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing. As noted in *United States ex rel. Stahl v. Henderson*, 472 F.2d 556 (5th Cir. 1973), *cert. denied* 411 U.S. 971, 93 S. Ct. 2166, 36 L. Ed. 2d 694, no prejudice can result from seeing that which is already known. See, also, *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Thus, assuming, but not

deciding, that Sorich's motion for mistrial was timely made and properly raised the issue of his dress, denial of the motion was not prejudicially erroneous in this case.

On his own behalf Sorich also appears to claim that the lower court erred in overruling his motions to dismiss the escape charge on a number of grounds which may be summarized as claiming that (1) he was unlawfully singled out for prosecution; (2) there was no "escape" within the meaning of § 28-912(1); (3) he had no "intent" to escape; (4) he was "privileged" to escape; (5) his attorney was ineffective; (6) § 28-912(1) is unconstitutionally vague and overbroad, thereby depriving him of due process and equal protection of the laws; (7) he was deprived of his privilege against self-incrimination; and (8) his sentence is excessive and subjects him to double jeopardy. The record fails to support any of those claims.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

EVA SHARON BURTON, APPELLEE, V. RANDY ALAN BURTON, APPELLANT.

412 N.W.2d 486

Filed September 18, 1987. No. 87-021.

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

Gregory A. Pivovar, for appellant.

No appearance for appellee.

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

PER CURIAM.

This is an appeal from a decree of dissolution entered by the district court for Sarpy County, Nebraska. Husband appeals, alleging that the district court abused its discretion in

determining the amount of child support to be paid by the husband and in dividing property between the parties.

> In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987).

From our review de novo on the record in these proceedings, we find no abuse of discretion by the district court.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF IOWA EX REL. JANET C. PETERSEN, APPELLEE, V. DENNIS FRANK MINER, APPELLANT.

412 N.W.2d 832

Filed September 25, 1987. No. 85-142.

1. **Foreign Judgments: Child Support.** Under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.
2. **Foreign Judgments: Child Support: Minors.** In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.

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

James M. Haney, for appellant.

William L. Monahan, for appellee.

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

WHITE, J.

This is an appeal from an order of the district court for Douglas County, which ordered appellant father to pay support for a child who resided in Iowa and was in the custody of appellee mother.

The action originated in Iowa under the Iowa equivalent of the Nebraska Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984) (URESA). In the petition filed in Iowa (the initiating state), the appellee alleged that under the terms of an Iowa divorce decree the appellant obligor owed a duty of support for two dependent children, Penny Miner, born February 2, 1966, and Tim Miner, born December 17, 1964. Appellee requested enforcement against appellant, who was alleged to be living in Omaha, Nebraska.

A judgment of support was entered directing the matter to be forwarded to the district court for Douglas County. Notice was served on appellant. At the time of the hearing Tim Miner was an adult under both Nebraska law (at 19) and Iowa law (at 18). No further action was had with respect to Tim Miner. The court entered judgment for certain arrearages due the appellee on account of Penny Miner. No appeal was taken from this order, and it is final.

The decree of the Iowa court in the divorce case, which modified a previous decree, mentions a third child, Wendy Miner. No provision or order for support of Wendy is contained in the divorce decree before us. There is no mention of Wendy in the reciprocal petition or the Douglas County District Court decrees in response to that petition. In August 1984 a motion was filed in the district court for Douglas County, alleging that through oversight Wendy's name was omitted from the reciprocal petition and subsequent order of the district court for Shelby County, Iowa. The applicant prayed that the order of support be modified to include Wendy and to order appellant obligor to pay support. The modification was ordered, and this appeal follows.

Appellant, in his assignments of error, alleges that the district court lacked jurisdiction to find a duty of support for Wendy which had not been established by the trial court in the initiating state. For reasons that will follow, we hold that the district court properly found that appellant had a duty to support his child, Wendy, and was correct in ordering payments in support.

Appellant asserts that URESA was enacted *only* for the purpose of enforcing foreign support orders "and not for modification, increase, or decrease of rights due to a prior decree." Brief for Appellant at 10. This position misstates case law as well as the language of the statutes. This court has previously held that "[u]nder [URESA] the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state." *Chisholm v. Chisholm*, 197 Neb. 828, 830, 251 N.W.2d 171, 173 (1977). In addition, the act itself provides that its purpose is "to improve and extend by reciprocal legislation the enforcement of *duties of support*." (Emphasis supplied.) § 42-762. These "duties of support" are not limited to duties previously imposed by a sister state. They include duties "imposable by law or by order, decree, or judgment of any court . . . ." § 42-763(b). Finally, "imposable by law" is defined as imposable by both common law and statutory law. § 42-763(e).

It seems clear from the face of the act that not only existing orders of support but also existing duties of support which have not been the subject of adjudication may be enforced under part III of URESA. §§ 42-768 et seq. Secondary authorities, as well as courts in other jurisdictions, are in accord with this proposition. One expert, Professor W.J. Brockelbank, has stated that it is a "misconception" that

> only *orders* of support of one state will be enforced in another under the Act. In fact it is "all duties," and the duty, of course, may grow out of the order of support or a judgment or decree but is equally a duty if it never has received judicial attention and now is the basis of litigation for the first time under the Act.

W. Brockelbank, Interstate Enforcement of Family Support 39 (F. Infausto 2d ed. 1971).

Many other jurisdictions have held, and we agree, that the "[p]rovisions of URESA make clear that its applicability is not dependent on the existence of other proceedings." *England v. England*, 337 N.W.2d 681, 683 (Minn. 1983). URESA has often been interpreted to require application of the act in cases in which a duty to support a child is "imposable" by either common law or statutory law. See, e.g., *Johnson v. Ross*, 405 N.E.2d 569 (Ind. App. 1980); *Olson v. Olson*, 534 S.W.2d 526 (Mo. App. 1976); *State ex rel. State of Cal., etc. v. Lagoy*, 54 Or. App. 164, 634 P.2d 289 (1981).

In a URESA proceeding, the initiating state need not determine whether a duty of support exists. Ordinarily, the duty of a parent to support his or her child is imposable by the responding state, even though no previous order of support exists. *Commonwealth of Virginia v. Autry*, 293 Md. 53, 441 A.2d 1056 (1982). See, also, *State ex rel. Alleman v. Shoats*, 101 N.M. 512, 684 P.2d 1177 (1984).

Appellant is concerned that URESA is being used to *create* a duty of support rather than merely *enforcing* such duty. He is correct that URESA "itself creates no duties of family support but leaves this to the legislatures of the several states." Unif. Reciprocal Enforcement of Support Act, Prefatory Note, 9B U.L.A. 382 (rev. 1968). Appellant's obligation to support his minor children was not created by URESA. The common law and statutory laws of most states, including Nebraska and Iowa, provide that parents have an obligation to support their minor children. *Coffey v. Coffey*, 205 Neb. 191, 286 N.W.2d 753 (1980); *In re Marriage of Hoak*, 364 N.W.2d 185 (Iowa 1985). In this case, URESA was used only to enforce appellant's legal obligation to contribute to the support of his children. The act did not independently create this obligation.

Appellant also asserts, in his assignments of error, that the district court erred in finding that the legal age of majority would be governed by Nebraska law, age 19 (Neb. Rev. Stat. § 38-101 (Reissue 1984)), rather than Iowa law, age 18 (Iowa Code Ann. § 599.1 (West 1981)). We hold that the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support. *Neff v. Johnson*, 391 S.W.2d 760 (Tex. Civ. App. 1965); *Jane S. D. v.*

Francis X. D., 110 Misc. 2d 737, 442 N.Y.S.2d 918 (1981).

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

KENNETH G. STREMMEL, APPELLEE, V. ROSELLA J. KINNEY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, DONALD DAEGES, DOING BUSINESS AS OMAHA REAL ESTATE COMPANY, THIRD-PARTY DEFENDANT, APPELLEE.

412 N.W.2d 834

Filed September 25, 1987. No. 85-619.

Contracts: Proof. Where, in a suit on a contract, the plaintiff's evidence establishes acceptance of the offer, it is the burden of the offeree to establish that the offeree revoked the acceptance prior to communication of the acceptance to the offeror.

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

Christine P. Costantakos, for appellant.

William E. Pfeiffer of Spielhagen & Pfeiffer, Associates, for appellee Stremmel.

John M. Burns of Schmid, Ford, Mooney & Frederick, P.C., for appellee Daeges.

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

PER CURIAM.

This is an appeal from the district court for Douglas County. Rosella J. Kinney appeals from the district court's decree of specific performance ordering the appellant to comply with the uniform purchase agreement entered into between herself and appellee Kenneth G. Stremmel. The facts relevant to this appeal are as follows.

Sometime in September of 1981, real estate broker and third-party defendant in this case, Donald Daeges, investigated

the ownership of certain fourplexes located in Omaha on North 52d Street. Through his research Daeges determined that the appellant owned one of the buildings. Daeges then contacted Kinney to determine whether she was interested in selling her fourplex. She replied that she had, in fact, been thinking of selling. The two met on October 15, 1981, and entered into a listing agreement at a selling price of $72,500.

Thereafter, Daeges contacted Stremmel, to whom he had previously sold property and who owned a fourplex immediately adjacent to the appellant's. On October 19 Stremmel submitted a uniform purchase agreement, offering to buy Kinney's fourplex at a price of $65,000. Daeges testified that the offer was shown to Kinney, who signed the acceptance portion of the agreement conditioned upon a selling price of $67,000. On October 20 Daeges took the counteroffer to Stremmel, who rejected it and executed another uniform purchase agreement, offering to purchase the fourplex at a price of $66,000. Kinney signed the acceptance portion of the uniform purchase agreement, which is the subject of this litigation, that same day.

On or about the 26th of October, the appellant told Daeges that she was unwilling to complete the sale for various reasons. Stremmel testified that a "couple of weeks" later he was told that the appellant was not going to complete the agreement. Stremmel testified that on and after October 20 he was ready, willing, and able to complete the contract.

Stremmel filed a petition on May 13, 1982, for specific performance. With her amended answer Kinney also filed a third-party petition for declaratory judgment, joining Daeges. Stremmel's petition for specific performance was granted, and appellant's third-party petition for declaratory judgment was dismissed. Appellant's motion for new trial was denied. This appeal follows.

Appellant now alleges as error that the district court's decree of specific performance was not supported by clear and convincing evidence and that the lower court's dismissal of her motion for declaratory judgment was erroneous. Finding that the appellee Stremmel met his burden of proving a valid and binding contract, we affirm.

Appellant supports her first assignment of error by arguing that Stremmel did not prove a valid and legally enforceable contract, as he failed to prove that the appellant's acceptance was communicated to him prior to the communication of the appellant's rejection of the offer and revocation of acceptance. The rules regarding this matter were thoroughly discussed in *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945), where we said:

> "The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action." . . .
>
> . . . .
>
> "The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party."

(Citations omitted.) *Id.* at 125, 18 N.W.2d at 650-51.

In this case the burden was on the appellant to establish, by a preponderance of the evidence, that she had revoked her acceptance of the offer prior to communication of her acceptance to the offeror. Once the contract was offered and received in evidence, if no other evidence was offered by the seller, the buyer would be entitled to judgment. This rule of proof properly places the burden on the party who would suffer loss if the issue were not established. *Id.*

The defendant in *Kuehnle v. Augustin*, 333 Ill. 31, 164 N.E. 194 (1928), asserted a similar failure in the bargaining process. In that case the Illinois Supreme Court held that in a suit for specific performance it was the defendant's burden to establish that she withdrew her offer before the contract was executed by the plaintiff.

The record in this case indicates that the seller in her answer never denied the existence of a contract. Quite to the contrary, she alleged that in fact there was a contract, but argued that it would be inequitable for the court to enforce the terms of the contract. Specifically, she alleged, "[T]he purchase agreement

described in plaintiff's Petition is an invalid contract at law and without adequate and sufficient consideration, and specific performance should be denied." Nowhere in her answer did she allege that she had revoked her acceptance of the offer, thereby preventing the contract from coming into being. As such, we are precluded from considering the issue.

The appellant relies on our earlier decision in *Pribil v. Ruther*, 200 Neb. 161, 262 N.W.2d 460 (1978). In *Pribil* evidence was adduced by the seller that she rejected the offer 3 days before the contract was delivered to the buyer. The principal issue in the case was whether the defendant had effectively rejected the plaintiff's offer and revoked her acceptance of the offer before the acceptance had been communicated to the plaintiff. In *Pribil* we found that the evidence did not show the acceptance was communicated to the plaintiff and thus became effective before the defendant changed her mind and rejected the offer. Unlike *Pribil*, there was no issue as to whether the plaintiff herein, as part of his prima facie case, proved a communicated acceptance.

The evidence, such as it is, is that the contract on its face was accepted on October 20, 1981, the date it was signed. By producing this contract the buyer established the existence of a binding contract. In 17A C.J.S. *Contracts* § 581 at 1119 (1963), it is said: "A contract is presumed to have been executed on the day of its date." Further, *id.* at 1120, it is said: "Where a written agreement signed by one of the parties is found in the possession of the other party, in the absence of other proof it is presumed to have been duly delivered . . . ." Further, in *Dodd v. Kemnitz*, 74 Neb. 634, 636, 104 N.W. 1069, 1070 (1905), we said: "[T]he possession of a written agreement is *prima facie* evidence only of a delivery."

Unlike *Pribil*, the seller herein produced no affirmative evidence that her rejection occurred before her acceptance was communicated. Who had the burden to prove offer and acceptance versus rejection was never an issue in the *Pribil* case, as disclosed by the briefs filed in this court. For these reasons, the appellant's reliance on *Pribil* is unfounded.

Appellant's second assignment of error is that the district court erred in its judgment dismissing appellant's request for

declaratory relief against third-party defendant Daeges. In support of this contention appellant reasserts her claim as to the validity of the uniform purchase agreement of October 20, 1981. In light of the discussion above, this claim has no merit.

Appellant also asserts a breach of fiduciary duty on the part of third-party defendant Daeges, entitling her to equitable rescission. Our review of equitable actions is by trial de novo. In a trial de novo this court is to retry issues of fact and reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court, subject to the rule that where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another. *Schmeckpeper v. Koertje*, 222 Neb. 800, 388 N.W.2d 51 (1986). Having reviewed the record, we find that the trial court properly dismissed appellant's third-party petition, and we affirm.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IMOGENE JONES, APPELLANT, V. JAMES JEFFREY MALLOY, D.C., APPELLEE.

412 N.W.2d 837

Filed September 25, 1987. No. 85-791.

1. **Health Care Providers: Malpractice: Limitations of Actions.** When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
2. **Health Care Providers: Presumptions.** Consent to medical treatment will be presumed, in the absence of fraud or misrepresentation.
3. **Health Care Providers: Words and Phrases.** Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment.
4. **Health Care Providers: Informed Consent: Words and Phrases.** Informed

consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

5. **Health Care Providers: Malpractice: Informed Consent.** The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
6. **Health Care Providers: Malpractice: Expert Witnesses: Proof.** Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
7. **Health Care Providers: Malpractice: Informed Consent: Expert Witnesses: Proof.** Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
8. **Health Care Providers: Malpractice: Informed Consent: Proof.** Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
9. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom the motion for a directed verdict is made, the case may not be decided as a matter of law.

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

Thomas R. Wolff, for appellant.

Joseph F. Bataillon and Robert M. Slovek of Sodoro, Daly & Sodoro, for appellee.

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

WHITE, J.

The plaintiff, Imogene Jones, appeals from the verdict in favor of the defendant, James Jeffrey Malloy, D.C. Her petition alleged two causes of action: first, that Dr. Malloy performed a chiropractic manipulation on her without her consent (battery); and second, that Dr. Malloy negligently failed to inform or explain the risks of the procedure he

performed upon her, resulting in a lack of informed consent. Dr. Malloy moved for and was granted a directed verdict on the battery issue, and the jury decided against the plaintiff on the informed consent issue.

Jones asserts on appeal that the trial court committed five errors warranting reversal: first, that the directed verdict in favor of the defendant on the battery issue (lack of consent) was improper; second, that an instruction on lack of consent was improperly rejected; third, that the court improperly denied the plaintiff one of her theories of recovery; fourth, that the court should have granted the plaintiff's motion for directed verdict on the issue of lack of consent; and fifth, that the court should have granted the plaintiff's motion for directed verdict on the issue of informed consent.

About October 1, 1975, Jones was operated on by Dr. Craig Poindexter for a herniated or ruptured disk in her lower back at the L5-S1 interspace. After rehabilitation she experienced no further back problems until late in 1981, when she suffered shoulder pain related to the waterbed she had recently acquired. This led her to seek Dr. Malloy's services. At this time he took a patient history, was informed of her previous back surgery, and treated her for her shoulder pain. She visited him six more times before her visit in the late morning of September 3, 1982, for treatment for a "crick" in her neck.

Dr. Malloy admitted at trial that "she [Jones] asked me not to work on her low back" and that she would not even permit him to x ray her lower back. Jones' testimony agrees with Dr. Malloy's about her concerns regarding her lower back, but thereafter the testimony from the two parties differs.

According to Jones, Dr. Malloy had never touched her lower back in the course of the treatments for her shoulder and neck pain until September 3, 1982. On that day he was treating her upper back, as he usually did, when suddenly he pressed sharply with the heels of his hands on her lower back. Jones compared the sensation as similar to being struck. She cried out in pain and arose from the treatment table. After receiving assurances from Dr. Malloy that he would manipulate only her neck, she again lay on the table. Dr. Malloy treated her neck without further incident, and Jones left, still in pain, for an

appointment she had in her capacity as a Mary Kay Cosmetics consultant. The pain worsened and ultimately resulted in surgery in Texas on March 28, 1983.

Dr. Malloy testified that he has never treated Jones' lower back. His practice was to palpate the spine, using a series of tests to look for imbalances, each time she would come into the office. He checked her pelvis each visit for signs of imbalance, and during the September 3, 1982, visit, the tests he performed, which involved touching her pelvis, revealed an alignment problem, an apparent posterior inferior rotation of the right ilium in relationship to the left. After testing her, he stated, "I'm going to manipulate your pelvis." Jones made no response. When he palpated her pelvis with his hand to locate the contact point where the tissue attaches, she reported tenderness but no sharp pain, which was to be expected due to the misalignment. He thrust downward to correct the position of the ilium. No change resulted, so he repeated the procedure from the other side. After four manipulations he achieved some correction, but did not proceed with other types of treatment due to her prohibition against working on her lower back.

Dr. Malloy testified that throughout the manipulations Jones never reported pain or told him to stop and that he would have stopped if she had requested it of him. After he manipulated her neck, she left the office. She called back several hours later, complaining of pain.

The table upon which Jones lay was designed to move so that when he thrust with his hand on her pelvis, the table would drop and the contact points move with a minimum of force or risk. Dr. Malloy testified that the manipulation presented no significant risks and that the risk to her was no greater because of her surgery than to the average patient. He manipulated the ilia at the sacroiliac joint which, for Jones, was 1 to 2 inches away from the lower back, or L5-S1 area, where she had had surgery. He contends that the area he manipulated is not part of the lower back.

Only one doctor of chiropractic, other than the defendant, testified as to the standard of care for chiropractors in the State of Nebraska. Dr. Michael Mueller testified that the pelvis is not considered to be part of the lower back and that, in his opinion,

he would feel authorized to adjust a patient's neck, thoracic, and pelvic areas, even if told not to treat the lower back. He further opined that the manipulation performed on Jones by Dr. Malloy was unlikely to rotate or to affect her lower back. He felt the risk posed by the manipulation to be insignificant and stated that the failure to discuss the risks did not violate the standard of care required in this situation. He also responded to Jones' allegation that Dr. Malloy had never touched her lower back before he suddenly came down hard across her lower back by saying that no chiropractor would thrust down upon an area with his hand without palpating the area first.

The parties called several orthopedic and neurological surgeons to the stand to testify on the issues of causation and damages. The diagnosis concurred upon is that the pain is due to a pinched nerve at the site of the previous surgery due to lateral recessed stenosis (narrowing) at the nerve root at the L5-S1 area. The opinions differ as to the cause of this problem, creating an issue of fact. Some testimony links it to the manipulation, while some considered the problem a consequence over time of the previous surgery, complicated by natural degenerative wear and tear and arthritic spurring and, therefore, not caused by the manipulation. Whether the manipulation or the packed bags of Mary Kay wares carried by Jones in her job caused the symptom to flare was also at issue, as was the amount of damages.

Appellant's first four assignments of error relate to the issue of initial consent to treatment. The district court sustained defendant's motion for directed verdict on this issue.

Appellant first argues that the district court erred because it based its ruling on an inapplicable statute of limitations. Plaintiff's amended petition alleged that defendant's failure to obtain consent to perform treatment to the lower back area constituted a battery. The argument presented by defendant in furtherance of the motion for a directed verdict asserted that the statute of limitations had run as to battery. Neb. Rev. Stat. § 25-208 (Reissue 1985) provides that an action for battery must be brought within 1 year and an action for malpractice must be brought within 2 years. The plaintiff's first petition was filed 1 year 3 months 3 days after the treatment in question occurred.

The record does not give a clear indication as to the basis for the trial judge's decision on the directed verdict. Immediately preceding the ruling defendant argued that the motion was based on the fact that the statute of limitations had run as to battery. If this was the basis of the district court's decision, we hold that the court was in error; however, in this case the error was harmless. Medical treatment is invariably performed in good faith for the patient's benefit, and not for antisocial reasons. Further, it is the failure to obtain adequate consent, which is usually an unintentional omission, that is the grounds for the complaint, rather than an intentionally injurious act. *Trogun v. Fruchtman*, 58 Wis. 2d 569, 207 N.W.2d 297 (1973). The identical claim was submitted in the malpractice action.

Requiring consent to treatment is more a recognition of a patient's right to self-determination than a preventative of battery or right to be free from contact. We hold that when an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.

This is not to say that plaintiff was denied an action based on lack of initial consent to treatment. We begin with the proposition that consent to treatment will be presumed, in the absence of fraud or misrepresentation. *Mosslander v. Armstrong*, 90 Neb. 774, 134 N.W. 922 (1912). As a practical matter, health professionals cannot be required to obtain express consent before each touch or test they perform on a patient. Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment. *Banks v Wittenberg*, 82 Mich. App. 274, 266 N.W.2d 788 (1978).

Appellant nowhere alleges that she gave no consent to be treated by Dr. Malloy, nor does she allege fraud or misrepresentation. It can be implied that appellant consented to treatment by Dr. Malloy by her voluntary act of seeking such treatment. The question of whether Dr. Malloy overstepped the bounds of that initial consent by failing to inform his patient of the risks associated with manipulation of her pelvis is an issue of negligence analyzed according to his duty of disclosure under the circumstances in this case. It is an issue of informed

consent.

In this case, even if the district court erroneously directed a verdict on the issue of initial consent to treatment (battery) based on a view that the battery statute of limitations had run, there was no prejudice to plaintiff's case. The basis for the plaintiff's malpractice claim was grounded in the law of informed consent. The trial court was not required to instruct the jury on a battery/lack of consent theory. The first four assignments of error are without merit.

Appellant's fifth assignment of error states that the district court should have granted her motion for directed verdict on the issue of informed consent. Based on the following analysis, we hold that plaintiff's motion for a directed verdict was properly overruled on the issue of informed consent.

The Legislature has defined informed consent within the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2816 (Reissue 1984), as follows:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

It is clear that the provisions of Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1984) apply only to those health care providers who "qualify" under the act. In this case involving a chiropractor, the act apparently does not apply. To begin with, the appellee does not plead the protection of the act. Further, after review of the legislative history of the act, it is at best ambiguous as to whether it would apply to chiropractors, even if they attempted to qualify thereunder.

However, this court believes that the informed consent language contained within §§ 44-2816 and 44-2820 correctly and accurately reflects the majority view of the law in this

country today. The majority of states adhere to the "professional" theory of the nature of a physician's duty of disclosure in informed consent cases. See, Studer, *The Doctrine of Informed Consent: Protecting the Patient's Right to Make Informed Health Care Decisions*, 48 Mont. L. Rev. 85 (1987); 61 Am. Jur. 2d *Physicians, Surgeons, etc.* § 188 (1981). This court recently held that Nebraska, through its Legislature, has committed to such a "professional" theory in malpractice cases based on lack of informed consent. *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987). For the sake of uniformity of law and given that this theory is the majority view, we choose to adopt the language of §§ 44-2816 and 44-2820 for purposes of malpractice actions against chiropractors. Other jurisdictions have likewise held that the rules of law pertaining to medical malpractice, including informed consent, apply to chiropractors as they would to physicians. *Roberson v. Counselman*, 235 Kan. 1006, 686 P.2d 149 (1984); *Bakewell v. Kahle*, 125 Mont. 89, 232 P.2d 127 (1951); *Hartfiel v. Owen*, 618 S.W.2d 902 (Tex. Civ. App. 1981).

The principal issue in this case is whether Dr. Malloy was negligent based on a breach of his duty to disclose the risks inherent in manipulating plaintiff's pelvis in light of her admonition regarding her lower back. The extent of Dr. Malloy's duty must be measured against what information other chiropractors in the locality or in similar localities would have ordinarily provided under like circumstances. On several occasions this court has held that whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony. *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987). Such expert testimony is also required for informed consent cases as to the standard of care for a particular profession. *Smith v. Weaver, supra*. In addition,

> Before the plaintiff may recover any damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she

been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.

§ 44-2820.

At trial plaintiff presented expert chiropractic evidence from Dr. Mueller as to the proper standard of care. In addition, numerous orthopedic and neurological surgeons testified as to causation and damages. All of this evidence created issues of fact that only the trier of fact could determine. If there is any evidence which will sustain a finding for the party against whom the motion for directed verdict is made, the case may not be decided as a matter of law. *Lambelet v. Novak*, 225 Neb. 229, 404 N.W.2d 28 (1987).

The proper standard of care and duty of disclosure, the issue of causation, and the extent of damages were all questions for the jury after hearing the testimony in this trial. Plaintiff's motion for a directed verdict on the issue of informed consent was properly overruled.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RICHARD R. DUFF, JR., APPELLANT.

412 N.W.2d 843

Filed September 25, 1987. No. 86-880.

1. **Search Warrants: Probable Cause.** In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
2. _____: _____. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
3. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given,

and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

4. **Search Warrants: Affidavits: Presumptions.** An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
5. **Search Warrants: Probable Cause: Appeal and Error.** In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.

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

Donald W. Kleine of Kleine Law Office, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

After a trial to the court, the defendant, Richard R. Duff, Jr., was convicted of second degree murder and use of a firearm in the commission of a felony. He was sentenced to imprisonment for 12 years on the murder count and 3 to 5 years for use of a weapon, the sentences to run consecutively. The defendant has appealed and contends that his motion to suppress evidence seized in a search pursuant to warrant should have been sustained and that the evidence is not sufficient to support the finding of guilty.

The record shows that on February 8, 1985, the defendant, his girlfriend, Beverly Hill, and a male friend, Robert Winston, proceeded to the Bali-Hi Lounge at 24th and Hamilton Streets in Omaha, Nebraska. They found seats at the bar and began drinking alcoholic beverages. After approximately 10 or 15 minutes, the defendant walked over to the entrance of the lounge, where he came into contact with the victim, Edward Hughes. The defendant and the victim then engaged in conversation.

The defendant testified that the conversation involved drugs and that the victim was attempting to locate a "set," known as

Ritalin and Talwin. The defendant and the victim walked outside the lounge so that the proprietor of the Bali-Hi would not hear the conversation. Once outside, the defendant claims that he was struck by the victim, Hughes, and two other men known to the defendant as Red and Truman. According to Duff, Red displayed a pistol. When Duff saw the pistol, he drew his own pistol. Duff admitted that he often carried the gun because he feared he would meet with "this particular person" who had made previous threats to Duff.

The defendant described his pistol as a .38-caliber semiautomatic which was loaded. After drawing his gun, the defendant fired a shot. Red then fired a shot, and the defendant fired a second shot. While the defendant fired four additional shots, Red, Truman, and Hughes attempted to enter the package portion of the lounge. One shot was fired by the defendant from the middle of the street in front of the Bali-Hi, and two were fired from the sidewalk across the street from the Bali-Hi.

Beverly Hill testified that she left the lounge after being told by the bar owner to "go outside and see about Richard." She saw the defendant standing across the street from the lounge, yelling at someone across the street from him. She joined the defendant, and together they walked away from the Bali-Hi toward her aunt's home.

Officer Felends Marion was called to the scene. When he entered the package-store portion of the Bali-Hi he found the victim lying on the floor in the rear of the store, suffering from gunshot wounds. Rescue personnel arrived and took the victim to a hospital, where he died from the wounds.

On February 15, 1985, the defendant was arrested. On the same day, a search warrant was obtained for 1615 Spencer Street, the defendant's residence. Various drug paraphernalia, spent shell casings, personal papers, and ammunition were seized during the search at 1615 Spencer Street.

The defendant moved to suppress all evidence seized at 1615 Spencer Street, alleging that the supporting affidavit lacked probable cause, contained incorrect and false information, and was procured in bad faith. The motion was overruled on February 14, 1986.

The defendant contends that the affidavit which was the basis for the search warrant failed to establish probable cause because it was based upon hearsay, did not contain a factual basis upon which the reliability of the informants' statements could be determined, and did not contain a factual basis for the affiant's belief in the credibility of the informants.

The affidavit contained a summary of the facts the police had discovered from their investigation of the shooting. The police knew that the victim had been killed by rounds fired from a .38-caliber handgun. The purpose of the search was to find the weapon and similar ammunition. Several eyewitnesses had observed the defendant at the scene, firing a gun in the direction of the Bali-Hi Lounge. The defendant had admitted to the police that he was at the scene of the crime at the time of the shooting and had talked with the victim, but denied having a gun in his possession at that time and denied that he had shot the victim.

The statements of the eyewitnesses tended to corroborate each other and, to some extent, were corroborated by the statements of the defendant to the police.

In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984); *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause. *Arnold, supra*. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Arnold, supra; Gates, supra*.

In *State v. Payne*, 201 Neb. 665, 670, 271 N.W.2d 350, 352

(1978), we held: "An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable." *State v. King*, 207 Neb. 270, 298 N.W.2d 168 (1980). See, also, *State v. Gilreath*, 215 Neb. 466, 339 N.W.2d 288 (1983). In determining whether or not an individual is a citizen informant, *Payne* requires that the "affidavit affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred." 201 Neb. at 670, 271 N.W.2d at 353. A citizen informant has been defined as

> "a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. [Citations.] It is reasonable for police officers to act upon the reports of such an observer of criminal activity. [Citations.] [¶] A 'citizen-informant' is distinguished from a mere informer who gives a tip to law enforcement officers that a person is engaged in the course of criminal conduct. [Citations.] Thus, experienced stool pigeons or persons criminally involved or disposed are not regarded as 'citizen-informants' because they are generally motivated by something other than good citizenship. [Citations.]"

People v. Smith, 17 Cal. 3d 845, 850-51, 553 P.2d 557, 560, 132 Cal. Rptr. 397, 400 (1976), citing *People v. Schulle*, 51 Cal. App. 3d 809, 124 Cal. Rptr. 585 (1975).

Once an individual is considered to be a citizen informant,

> " 'Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause.' . . . 'Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable.' "

State v. Ybanez, 210 Neb. 42, 44, 313 N.W.2d 30, 32 (1981), citing *State v. King, supra*. Courts are willing to find citizen

informants reliable because such individuals generally have no motive to falsify. *United States v. Ross*, 713 F.2d 389 (8th Cir. 1983); *United States v. Gagnon*, 635 F.2d 766 (10th Cir. 1980), *cert. denied* 451 U.S. 1018, 101 S. Ct. 3008, 69 L. Ed. 2d 390 (1981).

In *Illinois v. Gates, supra*, the U.S. Supreme Court abandoned the "two-pronged" test, known as the *Aguilar-Spinelli* test, and adopted a more liberal "totality of the circumstances" approach. This approach does not disregard the informant's reliability, veracity, or basis of knowledge, but instead, it allows these factors to be considered as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." 462 U.S. at 230. The adoption of this more flexible approach requires a practical rather than technical analysis of probable cause:

> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

462 U.S. at 231-32, citing *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

In the *Gates* case, the U.S. Supreme Court set forth the standard by which to review the sufficiency of the affidavit:

> [A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli, supra*, at 419. "A grudging or negative attitude by reviewing courts toward warrants," *Ventresca*, 380 U.S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting

> affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, at 109.
>
> . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U.S. 257, 271 (1960).

Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

Shortly after the *Gates* decision, the U.S. Supreme Court further clarified the intent and the effect of its holding in *Gates*: "We did not merely refine or qualify the 'two-pronged test.' We rejected it as hypertechnical and divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Massachusetts v. Upton*, 466 U.S. 727, 732, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984), citing *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

This court has adopted the "totality of the circumstances" rule established by *Gates*. *State v. Abraham*, 218 Neb. 475, 356 N.W.2d 877 (1984); *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983); *State v. Williams*, 214 Neb. 923, 336 N.W.2d 605 (1983). Under this standard, the question is whether, under the totality of the circumstances, the issuing magistrate had a "substantial basis" for his finding that the affidavit established probable cause.

The appellant's primary assertion is that the information obtained from the witnesses and contained in the affidavit lacked proof of reliability or credibility. Pursuant to *Gates* and *Upton*, these facts do not require independent proof.

The affidavit involved in this case permits an inference that all four witnesses were citizen informants, and not police tipsters or professional informants. Each witness related that he or she was in the area of 24th and Hamilton at the time of the shooting. Witness No. 1 resided in the area and witnessed the shooting. Witness No. 2 and witness No. 3 also witnessed the event. Witness No. 4 was in the area visiting his uncle, witness

No. 1, when he observed the incident. There is nothing in the affidavit to suggest that the witnesses were anything but eyewitnesses, and thus citizen informants. They all related personal observations, not rumor or speculation. While the identities of the witnesses were not disclosed to the magistrate, their identities were known to the affiant officer. Lack of identification is not fatal to the validity of the affidavit because the credibility of each witness could be inferred from the specificity of their recollections of the events of February 8, 1985. The fact that each witness' report of the incidents of February 8 corroborates generally the reports of the other witnesses lends strong support for the credibility of the information contained in the affidavit. We have held that "[c]onstitutional policy demands that doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *State v. Payne*, 201 Neb. 665, 671, 271 N.W.2d 350, 353 (1978). Also, great deference should be paid to the issuing magistrate's determination of probable cause. *Illinois v. Gates, supra*, citing *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

Viewing the affidavit under the "totality of the circumstances" approach, we conclude that the issuing magistrate had a substantial basis on which to find probable cause. The evidence seized pursuant to the search was admissible.

The second assignment of error alleges that the evidence was insufficient to support appellant's conviction.

> [I]t is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.

State v. Nesbitt, ante p. 32, 39-40, 409 N.W.2d 314, 318-19 (1987). See, also, *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

The evidence of the State, if believed, was sufficient to prove

that the defendant was at the Bali-Hi Lounge on February 8, 1985, at approximately 10:30 p.m., and that he engaged in a dispute with the decedent, drew his gun, and fired numerous shots, one of which fatally injured the victim.

The defendant testified and admitted that he was carrying a gun on February 8, 1985, that he was involved in a dispute with the victim, and that he fired his gun numerous times in the vicinity of the Bali-Hi Lounge.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN H. REED, APPELLANT.

412 N.W.2d 848

Filed September 25, 1987. No. 86-888.

Jurisdiction: Appeal and Error. Where a notice of appeal was not filed within 1 month from the entry of the final order appealed from, as required by Neb. Rev. Stat. § 25-1912(1) (Reissue 1985), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

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

John H. Reed, pro se.

Robert M. Spire, Attorney General, and Marie C. Pawol, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

Defendant, John H. Reed, appeals from the order of the district court for Douglas County denying his postconviction motion to vacate sentence. We dismiss the appeal.

Defendant filed his petition for postconviction relief on September 12, 1986. On September 16 the district court entered its order denying the relief requested. Defendant filed his notice of intent to appeal on October 22, 1986, some 36 days after the entry of the court's order.

Neb. Rev. Stat. § 25-1912(1) (Reissue 1985) requires that proceedings to obtain a reversal, vacation, or modification of final orders made by the district court shall be by filing in the office of the clerk of the district court within 1 month after the rendition of such final order, or within 1 month from the overruling of a motion for a new trial, a notice of intention to prosecute such appeal. Defendant filed his notice of intent to appeal more than 1 month after the entry of the order denying the relief sought in his petition for postconviction relief.

We have held that it is the settled law of this State that where a notice of appeal was not filed within 1 month, as required by § 25-1912(1), this court obtains no jurisdiction, and the appeal must be dismissed. *State v. Harrington*, 214 Neb. 696, 335 N.W.2d 316 (1983). Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. MARK S. MILLER, APPELLANT.

412 N.W.2d 849

Filed September 25, 1987. No. 86-1042.

1. **Constitutional Law: Jury Trials.** There is a constitutional right to a jury trial for offenses providing for a sentence of incarceration of more than 6 months.
2. **Jury Trials.** A demand for a jury trial by a defendant is necessary to invoke the statutory right to a jury trial.
3. **Circumstantial Evidence: Drunk Driving.** Circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of Neb. Rev. Stat. § 39-699.07 (Reissue 1984).
4. **Sentences: Appeal and Error.** Absent an abuse of discretion, this court will not reduce a sentence imposed by a trial court if the sentence is within statutory limits.

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

George A. Sutera of Sutera & Sutera, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

After a trial to the county court for Sarpy County sitting without a jury, defendant, Mark S. Miller, was found guilty of operating or being in actual physical control of a motor vehicle in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). After an enhancement hearing at which the State proved that defendant had twice before been convicted of the same charge and had had counsel during each such conviction, defendant was sentenced to 91 days in the Sarpy County jail and ordered to pay a fine of $500. The court also suspended his driver's license for 15 years. Defendant appealed to the Sarpy County District Court, where his sentence was affirmed. Defendant has appealed to this court, assigning as error that the trial court erred (1) in not advising defendant that he had a right to a jury trial, since the record does not show that defendant waived that right; (2) in finding defendant guilty, when the evidence was insufficient to prove his guilt; (3) in permitting the State, at trial, to inquire into defendant's felony and misdemeanor record; and (4) in abusing its discretion in imposing too severe a sentence. We affirm.

The record shows that on April 9, 1986, Nancy Smith was driving on a rural road from Springfield, Nebraska, to her home in Papillion, Nebraska. After she reached the crest of a hill, she observed the defendant's truck stopped sideways in the road, blocking the traffic. Unable to stop her car in time, she struck the defendant's vehicle. After the impact, her own vehicle was nosed under the defendant's truck. She sustained no serious injuries. She called out to see if anyone had been injured. In response, the defendant climbed out of his truck. Smith testified that the defendant was the sole occupant of the vehicle. After observing that the defendant had a "glassy look" in his eyes, Smith left to summon the police. She then returned to the scene of the accident.

Larry Fasnacht, deputy with the Sarpy County Sheriff's Department, was dispatched to investigate the accident. When he arrived at the scene of the accident, a rescue squad had already arrived and was administering aid to the defendant.

Upon questioning by Deputy Fasnacht, the defendant contended that he had been a passenger in the vehicle at the time of the accident and that the driver of the vehicle had fled the scene immediately after the accident. The defendant, however, gave conflicting accounts as to the identity of the driver. A 15- to 20-minute search for the driver had been conducted by the rescue squad. Although one squad member reported that he had seen "something that was about 6 foot and it was gray" in a nearby field, no other person was found.

The defendant was subsequently placed under arrest for driving while under the influence of alcohol and transported to Sarpy County jail. An Intoxilyzer test was administered, which revealed that the defendant's blood alcohol content was .236 percent.

The defendant assigns as error the county court's failure to advise him that he had a right to a jury trial, when the record does not reveal that the defendant waived this right. Defendant contends that the consequences of a third-offense conviction for driving while under the influence entitle him to a constitutionally protected right to a jury trial. There is a constitutional right to a jury trial for a serious offense, which is an offense providing for a sentence of incarceration of more than 6 months. *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987). Although the right to a jury trial may be waived, the waiver must be express and intelligent, and cannot be presumed from a silent record. *State v. Bishop, supra; State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985). Section 39-669.07(3) provides that a person convicted of third-offense driving while under the influence is guilty of a Class W misdemeanor. The maximum punishment for a Class W misdemeanor is 6 months' imprisonment and a $500 fine. This assignment of error is without merit. The charge is not a serious offense for which there is a constitutionally protected right to a jury trial.

The defendant, however, had a statutory right to a jury trial, pursuant to Neb. Rev. Stat. § 24-536 (Reissue 1985). That section provides that a jury trial in county court may be demanded by either party in any case except certain traffic

infractions and criminal cases involving city or village ordinances. A demand, however, is required to invoke this statutory right. *State v. Lafler*, 224 Neb. 613, 399 N.W.2d 808 (1987); *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). Unless a timely request is made, this right is waived. *State v. Lafler, supra*. The record fails to reflect that a demand for a jury trial was ever made. Thus, the defendant waived his statutory right to a jury trial, since it was the defendant's duty to make such a request if he desired such a trial.

Defendant also assigns as error the county court's finding that the defendant was in actual physical control of his vehicle, pursuant to § 39-669.07. The evidence in this case is largely circumstantial. We have held that circumstantial evidence may be used to support a conviction where the evidence as a whole establishes guilt beyond a reasonable doubt. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987); *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986). This court has held that circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of § 39-669.07. *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986). In the *Baker* case, this court, in response to a similar contention, held that there was sufficient circumstantial evidence to establish guilt beyond a reasonable doubt. In *Baker, supra*, the evidence revealed that the defendant was the sole occupant of the vehicle and was asleep in his parked vehicle when discovered by the deputy sheriff. The deputy sheriff awakened the defendant and noted that the defendant had a strong smell of alcohol on his breath and his speech was slurred. The defendant alleged that he was not operating a motor vehicle because the vehicle was parked where he was found by the deputy sheriff, the defendant was asleep, and the motor was not running. This court held that there was sufficient circumstantial evidence to convict the defendant, pursuant to § 39-669.07.

In the instant case, while there was evidence to the contrary, there was sufficient evidence presented by the State from which the trial court could find that the defendant was operating or was in physical control of a motor vehicle while under the influence of intoxicating liquor. The defendant was the sole occupant of the vehicle, and the vehicle was not moving. The defendant stated that he had no clear recollection of the events

leading up to the accident. From the evidence, the trial court could find that the guilt of the defendant had been established beyond a reasonable doubt.

Defendant also contends that the county court erred in permitting the State to inquire into the defendant's felony and misdemeanor record at trial. This argument is without merit. Neb. Rev. Stat. § 27-609 (Reissue 1985) provides that during cross-examination, for the purpose of attacking the credibility of a witness, evidence may be elicited that the witness has been convicted of a felony or of a misdemeanor involving dishonesty or false statement. We have held that when a defendant in a criminal case takes the stand on his own behalf, the defendant is subject to the same rules of cross-examination as any other witness. *State v. Pitts*, 212 Neb. 295, 322 N.W.2d 443 (1982).

In his final assignment of error, the defendant contends that the county court abused its discretion in imposing too severe a sentence. Absent an abuse of discretion, this court will not reduce the sentence imposed by the trial court if the sentence is within the statutory limits. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986); *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986); *State v. Fix*, 219 Neb. 674, 365 N.W.2d 471 (1985). The presentence report revealed that the defendant had been arrested 10 times for driving while under the influence, with 5 of those arrests resulting in convictions. At the enhancement hearing, the State proved that the defendant had two prior convictions of the same offense. The crime of third-offense driving while under the influence is a Class W misdemeanor, for which the maximum punishment is 6 months' imprisonment and a $500 fine. The minimum sentence is 3 months' imprisonment and a $500 fine. Furthermore, § 39-669.07(3) provides that, as part of the sentence, the driver's license of the third offender shall be revoked for a period of 15 years. The defendant was sentenced to 91 days in jail and a $500 fine, and his driver's license was suspended for a period of 15 years. The sentence imposed was clearly within the statutory limits. We hold that the county court did not abuse its discretion in imposing the sentence. The judgment and sentence of the lower court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. MATZ, APPELLANT.

412 N.W.2d 852

Filed September 25, 1987. No. 87-046.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
2. **Convictions: Circumstantial Evidence.** A person charged with a crime may be convicted on circumstantial evidence only.
3. **Burglary: Intent.** An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
4. _____: _____. A forcible and unauthorized nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal.
5. _____: _____. Burglary does not require an actual theft or asportation of property.

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

Avis R. Andrews, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

BOSLAUGH, J.

The defendant, James A. Matz, was convicted of two counts of attempted burglary and was sentenced to imprisonment for 20 months to 5 years on each count, the sentences to run concurrently. He has appealed and contends the evidence was insufficient to support the finding of guilty on each count.

The charges grew out of break-ins at Tidy Car and Victory Lake Marine, two businesses in Fremont, Nebraska, which share a common building. The record shows that when Vern Sukstorf, who operates Tidy Car, reported for work on the morning of July 29, 1986, he found splatters of blood on the inside floor, as well as two broken windows on the rear of the

building. Additionally, he noticed a trail of blood from both broken windows, leading to his front office. The trail of blood approached his desk but stopped 4 to 5 feet in front of the desk. Sukstorf found no contents missing from his store.

Ron Vlach, who operates Victory Lake Marine, found a broken window at the rear of his business. The window was part of a garage door and was located just above the lock assembly of the door. Vlach noticed a large amount of blood both on the outside of and the inside of the garage door, as well as on the locking mechanism. Vlach followed a trail of blood from the broken garage window about 100 feet to where another window was broken. Vlach found no contents missing from his building.

The trail of blood led through a parking lot to apartment No. 11 in an apartment complex. Tammy Patten, who lives in apartment No. 11, testified that sometime after midnight on July 29, 1986, the defendant came to her door, holding his hand and wearing a bloodstained shirt. The defendant was looking for "Jim," who lived in apartment No. 12. Matz left without incident.

Within a week of the incident, Patten identified the defendant in a photo lineup as the man looking for "Jim."

When the defendant was observed on August 6, 1986, following his arrest, he had a large laceration in the web of his left hand, between his thumb and the forefinger.

Steven Tellatin, a Fremont detective sergeant who assisted with the investigation of the break-ins, found a tire iron, screwdriver, potato chip sack, and glass fragments near the building, all stained with blood.

An expert witness testified that a comparison of blood samples found at the scene of the crime with samples obtained from the defendant disclosed that only .04 percent of the population had blood of the same type and with the same "genetic markers." This analysis excluded 99.96 percent of the population as suspects.

The defendant contends the evidence was not sufficient to establish that he intended to commit any felony or steal any property of value, as required by Neb. Rev. Stat. § 28-507 (Reissue 1985).

> [I]n determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.

State v. Jacobs, ante p. 184, 194, 410 N.W.2d 468, 475 (1987); *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987).

Although much of the evidence was circumstantial, a person charged with a crime may be convicted on circumstantial evidence only. *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979), citing *State v. Ohler*, 178 Neb. 596, 134 N.W.2d 265 (1965).

> It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

State v. Meadows, supra at 199, 277 N.W.2d at 708.

An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate. *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987); *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984). Nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). In the *Tomrdle* case at 583, 335 N.W.2d at 282, we cited *Hebb v. State*, 10 Md. App. 145, 268 A.2d 578 (1970): " 'The attempt by the appellants to enter a storehouse (which they knew carried a substantial inventory) in the nighttime . . . was sufficient to support a rational inference that they intended to steal everything of value that they could find and carry away.' "

In *Mirich v. State*, 593 P.2d 590, 593 (Wyo. 1979), the court said:

> The law is well settled and widespread that where one breaks into the property of another in the nighttime, an inference may be drawn that he did so with the intent to commit larceny. A reasonable mind recognizes that people do not usually break into and enter the building of another under the shroud of darkness with innocent intent and that the most usual intent is to steal. . . .
>
> . . . Defendant had been in the building and knew its contents. Knowledge of what a structure contains, coupled with an attempt to enter it, supports a rational inference of intent to steal whatever is of value within the building.

Burglary does not require an actual theft or asportation of property. *State v. Vaughn, supra; State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980).

In *State v. McNair*, 719 S.W.2d 113, 114 (Mo. App. 1986), the court held that "evidence that a person broke into a building which contains merchandise is sufficient for the trier of fact to find that the breaking was done with intent to steal."

In *People v. Sehr*, 150 Ill. App. 3d 118, 122, 501 N.E.2d 848, 851 (1986), the court cited *The People v. Johnson*, 28 Ill. 2d 441, 192 N.E.2d 864 (1963), for the proposition:

> "Intent must ordinarily be proved circumstantially, by inferences drawn from conduct appraised in its factual environment. We are of the opinion that in the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary. Like other inferences, this one is grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose."

The *Sehr* court also held, on its own facts:

> We find the fact that nothing was taken or even disturbed in the Jagiello residence has little redemptive value. The defendant was apparently only in the house for a short time before he was discovered. The basement contained rather large items such as sleeping bags, lawn furniture

> and so forth, and the first bedroom the defendant entered was a combination junkroom/weight-training room. It would appear that neither room contained the type of small valuable items which could be most easily carried away by a person afoot.

150 Ill. App. 3d at 123-24, 501 N.E.2d at 852.

The jury could find from the evidence of the State in this case that the defendant made forcible and unauthorized entries into the building during the nighttime hours of July 28 or early morning hours of July 29, 1986; the building contained items of value; the screwdriver and tire iron found near the premises were covered with his blood; and there was no evidence to explain his unauthorized presence on the premises. This evidence was sufficient to support a finding of guilty beyond a reasonable doubt on each count.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ERNEST H. ADDISON, RESPONDENT.

412 N.W.2d 855

Filed September 25, 1987. No. 87-201.

Original action. Judgment of suspension.

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

PER CURIAM.

This is an original disciplinary proceeding brought against Ernest H. Addison, a lawyer duly admitted and licensed to practice law in this state.

A formal charge against Addison was filed in this court on March 11, 1987, alleging his violation of Canon 1, DR 1-102(A)(1), (4), (5), and (6), and Canon 7, DR 7-102(A)(5), of

the Code of Professional Responsibility.

The referee appointed herein held a hearing on the matter, filed his report with findings of fact and conclusions of law, and has recommended that the court suspend the respondent from the practice of law for a period of 6 months.

It appears from the record that the charge in question arose out of an action filed in the district court for Douglas County, Nebraska, on behalf of plaintiff Joseph Medina. Medina had retained another attorney and respondent, Ernest Addison, to represent him in connection with injuries he sustained in an automobile accident that occurred in Omaha, Nebraska, on January 12, 1985. Medina was injured when a vehicle driven by Michael John Kozal collided with another vehicle driven by Susan Teresa Miyeno, which in turn struck Medina, a pedestrian at the time. As a result of the accident Medina was hospitalized at the Lutheran Medical Center in Omaha, Nebraska, and incurred expenses there totaling approximately $112,836.36. Kozal was insured by State Farm Automobile Insurance Company, with a policy limit of $100,000, and also by Sea Insurance Company, Ltd., with an umbrella liability policy having a limit of $1 million. Miyeno had a liability insurance policy with Allstate Insurance Company, having a limit of $50,000.

On November 5, 1985, respondent Addison visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. Addison became aware at this meeting that Winchester was under the false impression that State Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, Addison negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for $45,000 of the State Farm settlement of $100,000, and an additional $15,000 if and when Medina settled with Allstate, plus another $5,000 if the settlement proceeds from Allstate exceeded $40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained

by fraudulent misrepresentations made by respondent Addison.

In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).

Based upon the violations in this action and in light of the fact that respondent has previously been reprimanded by this court, *State ex rel. Nebraska State Bar Assn. v. Addison & Levy*, 198 Neb. 61, 251 N.W.2d 717 (1977), the referee recommended that respondent be suspended from the practice of law for a period of 6 months. Thereafter, the respondent filed a conditional admission with this court, acknowledging that his conduct constitutes a violation of DR 1-102(A)(1) and (4).

We believe that the referee was correct in his findings of fact and law and that the recommendation and consent thereto was proper. Accordingly, we enter a judgment of suspension for 6 months, said suspension to commence on December 1, 1987.

JUDGMENT OF SUSPENSION.

ROBERT F. CRAIG, TRUSTEE OF CASSIDY LAND & CATTLE COMPANY, INC., APPELLEE, V. LYNDA CASSIDY TAYLOR LOGEMANN, INDIVIDUALLY AND AS TRUSTEE OF THE MCCARTY RANCH TRUST, APPELLANT, WILLIAM LOGEMANN, INDIVIDUALLY AND DOING BUSINESS AS W.S. CATTLE COMPANY, ET AL., APPELLEES.

412 N.W.2d 857

Filed September 25, 1987. No. 87-451.

Constitutional Law: Courts: Jurisdiction. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.

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

William J. Rieb, for appellant.

David D. Begley of Kennedy, Holland, DeLacy & Svoboda, for appellee Craig.

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

WHITE, J.

This is an appeal from an order of the district court for Garfield County quieting title to a tract of land in Garfield County, Nebraska. The plaintiff below purchased the land at a foreclosure sale pursuant to proceedings conducted in the U.S. Bankruptcy Court for the District of Nebraska.

The factual situation is not complicated. Cassidy Land & Cattle Company, Inc., owned a 12,000-acre ranch, encumbered by a first mortgage in favor of Businessmen's Assurance Company. Severe financial difficulties arose in the operation of the ranch, resulting in large operating losses. Cassidy Land & Cattle Company conveyed the ranch to McCarty Ranch Trust and carried back a mortgage in excess of $2 million. Cassidy Land & Cattle Company was declared bankrupt by virtue of a petition filed in the bankruptcy court. Thereafter, the trustee filed an action to foreclose the mortgage in the U.S. District Court for the District of Nebraska. The action was referred to the bankruptcy court by the U.S. District Court.

At the foreclosure sale the bankruptcy trustee purchased the land. The sale was confirmed on August 19, 1986. At this point a number of documents had been filed in the office of the register of deeds in Garfield County sufficient, in the judgment of the trustee, to create a cloud on the trustee's title. The trial court sustained the trustee's motions for summary judgment, and the defendant Lynda Cassidy Taylor Logemann, individually and as trustee for McCarty Ranch Trust, appeals.

A number of issues are raised, but throughout this action only one question is presented: Does the bankruptcy court have jurisdiction to entertain an action for, and to foreclose, a real estate mortgage?

We first recognize that the U.S. Constitution and laws made pursuant to its authority are the supreme law of the land and that conflicting state laws cannot interfere with the operation of federal law. U.S. Const. art. VI.

The U.S. Constitution provides: "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8. The U.S. Bankruptcy Court and the U.S. District Court for the District of Nebraska have determined that the bankruptcy court had jurisdiction to entertain the foreclosure proceedings.

As this court said in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 495, 62 N.W. 899, 910 (1895), "It is a sufficient answer that in all cases of apparent conflict between the state and federal courts the latter are the exclusive judges of their jurisdiction over the subject of the action. (*Freeman v. Howe*, 24 How. [U.S.], 459.)"

The judgment of the district court is accordingly affirmed.

AFFIRMED.

ROBERT HROCH, APPELLANT, V. CITY OF OMAHA, APPELLEE.

413 N.W.2d 287

Filed October 2, 1987. No. 86-005.

1. **Administrative Law: Evidence: Appeal and Error.** In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. Competent evidence in such a case means evidence that tends to establish the fact in issue.
2. **Constitutional Law: Due Process: Notice.** The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

John W. Steele of Schumacher & Gilroy, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Allen L. Morrow, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

This was a proceeding in error brought by Robert Hroch to review the order of the city council of the City of Omaha, Nebraska, affirming the order of the housing division of the housing and community development department of the city declaring the building at 1906 Cuming Street to be a nuisance and directing the owner of the property, the plaintiff in error, Hroch, to cause the building to be torn down and removed.

The trial court found that the order should be affirmed. The plaintiff has appealed.

In *Goldsberry v. City of Omaha*, 181 Neb. 823, 151 N.W.2d 329 (1967), the authority of a city of the metropolitan class to remove or order the removal of a dangerous building which has become a nuisance because of its condition was recognized.

The plaintiff contends that the order of condemnation is not supported by the evidence, that the procedures followed by the city denied him due process of law, and that the city exceeded the scope of the authority vested in it by the Legislature.

The record shows that the plaintiff has owned the property since 1975. In 1978 or 1979 the building was damaged by fire and has been in a state of disrepair continuously since that time. At the hearing before the council the plaintiff stated that he had not repaired the building because he had insufficient funds to do so.

The reports of inspection show that the building is not secured and is frequented by transients. Approximately 20 percent of the roof is uncovered and open. All of the window glass is broken out, five floor joists are charred, the rear wall is cracked, the second floor roof is 100 percent fire damaged, and all plumbing fixtures have been removed. Transients who enter

the building for shelter build fires which constitute a hazard and danger to adjoining property.

In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. *First Nat. Bank & Trust Co. v. Ley*, 182 Neb. 164, 153 N.W.2d 743 (1967). Competent evidence in such a case means evidence that tends to establish the fact in issue. *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975).

The evidence which was before the council was sufficient to support its finding that the order of condemnation should be affirmed.

The plaintiff's primary contention that he was denied due process of law centers around his claim that he did not receive notice of the hearing before the director of the housing and community development department. The record does not show that a notice as required by the ordinances of the city was sent to the plaintiff. However, under the circumstances in this case, that defect does not affect the validity of the proceeding.

The ordinance provides that the property owner may appeal to the city council within 15 days. In this case the plaintiff perfected an appeal to the council, which hears "the testimony of the objectors and the director of the housing and community development department and other interested parties." Omaha Mun. Code, ch. 43, art. II, § 43-125 (1982).

> " '* * * The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.'. . ."

Webber v. City of Scottsbluff, 155 Neb. 48, 52, 50 N.W.2d 533, 537 (1951). Since the plaintiff had the right to a full evidentiary hearing before the council, no prejudice resulted from the failure to notify the plaintiff of the first hearing before the director. The plaintiff was not prevented from presenting anything to the council that could have been presented earlier to

the director.

By statute, cities are empowered to define, regulate, and suppress nuisances and remove unsafe buildings which are a public nuisance.

Neb. Rev. Stat. § 18-1720 (Reissue 1983) provides:

> All cities and villages in this state are hereby granted power and authority by ordinance to define, regulate, suppress and prevent nuisances, and to declare what shall constitute a nuisance, and to abate and remove the same. Every city and village is authorized to exercise such power and authority within its zoning jurisdiction.

Neb. Rev. Stat. § 18-1722 (Reissue 1983) provides:

> In case any owner of any building or structure shall fail, neglect or refuse to comply with notice by or on behalf of any city or village to repair, rehabilitate, or demolish and remove a building or structure which is an unsafe building or structure and a public nuisance, the city or village may proceed with the work specified in the notice to the property owner. A statement of the cost of such work shall be transmitted to the governing body, which is authorized to levy the cost as a special assessment against the land. Such special assessment shall be a lien on the real estate and shall be collected in the manner provided for special assessments.

Cities of the metropolitan class are granted additional powers. Neb. Rev. Stat. § 14-102 (Reissue 1983) provides:

> In addition to the powers granted in section 14-101, metropolitan cities, as therein defined, shall have power by ordinance:
>
> . . . .
>
> (32) To prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits; to provide for the removal of any buildings, or structures or additions thereto erected contrary to such regulations, to provide for the removal of dangerous buildings, and to provide that wooden buildings shall not be erected or placed or repaired in the fire limits; but such ordinance shall not be suspended or modified by resolution nor shall exceptions be made by ordinance or

resolution in favor of any person, firm, or corporation, or concerning any particular lot or building; to direct that all and any building within such fire limits, when the same shall have been damaged by fire, decay, or otherwise, to the extent of fifty per cent of the value of a similar new building above the foundation, shall be torn down or removed; and to prescribe the manner of ascertaining such damages and to assess the cost of removal of any building erected or existing contrary to such regulations or provisions, against the lot or real estate upon which such building or structure is located or shall be erected, or to collect such costs from the owner of any such building or structure and enforce such collection by civil action in any court of competent jurisdiction....

Neb. Rev. Stat. § 14-419 (Reissue 1983) provides:

> The city council, in cities of the metropolitan class, shall have the power by ordinance to regulate, in areas within three miles of the corporate limits, except as to construction on farms for farm purposes . . . (2) the removal and tearing down of buildings, dwellings, and other structures in such areas which constitute nuisances because of the dilapidated, unsafe, or rundown condition or conditions....

The city has enacted ordinances which implement the authority granted by statute.

Omaha Mun. Code, ch. 43, art. II, § 43-114 (1982) provides:

> Any building or structure found to be unsafe or unfit for occupancy or use, or any building or structure which is liable to fall or collapse from inherent structural weakness, or as the result of fire, decay or otherwise, and which the owner refuses to repair in accordance with the provisions of this division and the city's building code, or any structure located within the fire limits which has deteriorated from any cause to the extent of fifty (50) percent of the cost of a similar new building above the foundations, is hereby declared to be a nuisance. (Code 1959, § 37.08.040; Ord. No. 28752, 6-12-79)

Omaha Mun. Code, ch. 43, art. II, § 43-141 (1982) provides:

> Any and all buildings or structures which have any or

all of the following defects are hereby declared to be dangerous buildings:

. . . .

(i) All buildings and structures which because of their condition are unsafe, unsanitary or dangerous to the health, safety or general welfare of the people of the city.

Omaha Mun. Code, ch. 43, art. II, § 43-143 (1982) provides:

All dangerous buildings within the terms of this division are hereby declared to be nuisances and shall be repaired, vacated, or demolished as herein provided. (Code 1959, § 37.08.080; Ord. No. 28752, 6-12-79)

The evidence which has been previously summarized was sufficient to support the finding of the city council that the building in question was a nuisance and subject to condemnation and that the city did not exceed the authority vested in it by the Legislature.

The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION U-2.
CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE, V. JOHN D. AND PATTY R. ABRAHAMSON ET AL., APPELLANTS, EVERT ANDERSON ET AL., APPELLEES.

413 N.W.2d 290

Filed October 2, 1987. No. 86-119.

1. **Waters: Appeal and Error.** The proper standard of review for this court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., to determine if the judgment conforms to law, if it is supported by competent and relevant evidence, and if the DWR action is neither arbitrary, capricious, nor unreasonable.
2. **Constitutional Law: Statutes: Presumptions: Appeal and Error.** State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.

3. **Waters.** Ground water, as defined in Neb. Rev. Stat. § 46-657 (Reissue 1984), is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.
4. **Constitutional Law: Legislature.** Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.
5. **Statutes: Legislature: Intent: Appeal and Error.** In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
6. **Statutes: Legislature: Intent.** When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.

Appeal from the Nebraska Department of Water Resources. Affirmed.

Steven G. Seglin and Leroy W. Orton of Crosby, Guenzel, Davis, Kessner & Kuester, and Bruce A. Peterson of Anderson, Strasburger, Klein, Peterson and Swan, for appellee Central Nebraska Public Power and Irrigation District.

Larry L. Ruth and Rodney M. Confer of Knudsen, Berkheimer, Richardson & Endacott, for appellants.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee State of Nebraska.

Gene D. Watson and John C. McClure, for amicus curiae Nebraska Public Power District.

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

GRANT, J.

On November 2, 1984, the Central Nebraska Public Power and Irrigation District (hereinafter Tri-County) filed an application (Application U-2) with the Department of Water Resources (DWR), seeking recognition of incidental water storage in the three-county area of Gosper, Phelps, and Kearney Counties. The application alleged that a large mound of underground water had formed in this area as a result of seepage from Tri-County's 600-mile surface canal irrigation system. At that time Neb. Rev. Stat. § 46-226.01 (Reissue 1984)

provided as follows:

> Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation, and for recovery of such water, on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.

That section was amended by 1985 Neb. Laws, L.B. 488, effective April 27, 1985, and codified as § 46-226.01 (Cum. Supp. 1986), by deleting the words "and for recovery of such water." The remainder of the statute was not changed, nor were there any additions. The hearing on Application U-2 began on July 31, 1985.

In conformity with the requirements of § 46-226.01, Tri-County set out in Application U-2 that the application was "for a permit to modify application or appropriation Nos. 2355; 2374; 3476; 3620; 3823; 4656; 5278; 7716; 9673; 10280; 10281 and 10282." The first of these applications had been filed on January 13, 1934, giving that application a priority date as of the filing, and the last three were filed with a priority date of January 20, 1964. All the applications which were to be amended by Application U-2 were for irrigation except No. 2374, which sought storage of water at Lake McConaughy in Keith County, Nebraska.

Application U-2 also sought service of additional lands not previously identified as being served by facilities included under any of Tri-County's 12 original appropriations. Application U-2 was objected to by numerous owners of lands overlying the water mound sought to be recognized as incidentally stored water. A hearing was held before the assistant director of DWR, who was the hearing officer for the proceedings. By a corrected order dated January 10, 1986, the director of DWR made findings and conclusions and approved Application U-2, in the following form:

> Application U-2 is APPROVED IN PART. Approval extends to all water appropriations listed above, except for

A-2374 which shall be limited to that portion of it identified in the records of the Department of Water Resources as A-2374R. Those water appropriations are hereby MODIFIED to include recognition of incidental ground water storage beneath the three-county area depicted on Map 6 [later corrected to Map 5] of Exhibit 3 (a metes and bounds description of the area perimeter is contained in Exhibit 12 and by reference is incorporated herein). Incidental ground water storage is from seepage and downward percolation of surface water diverted from the Platte River or from supplies previously impounded in Lake McConaughy and other Tri-County reservoirs. Other conditions made upon approval of Application U-2 are:

(1) This approval shall not alter the grant allowed each water appropriation nor shall the rate, quantity or time of surface water diversion for each be increased from that existing on the filing date of Application U-2. Neither shall this approval authorize structural modification of the facilities used to impound in surface reservoirs or to divert, carry or deliver water. The diversion rate for natural flow from the Platte River under water appropriations A-2355, A-10280 and A-10281 shall be governed by the provisions of §§ 46-231 and 46-240.01 which specify water duty limitations.

(2) The priority date for each water appropriation listed above shall not be changed.

(3) Water incidentally stored underground shall be withdrawn or otherwise be used for a beneficial purpose.

(4) Imposition of certain fees for mechanical extraction of ground water shall not be undertaken without prior approval from the Director as prescribed in § 46-2,100.

The order also stated that sufficient evidence was found to support the belief that Tri-County's irrigation project had resulted in the formation of the underground water mound sought to be recognized as incidental water storage, that DWR had consulted with the Nebraska Game and Parks Commission as required by Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1984), and that the project did not jeopardize endangered or

threatened species. The order further stated that the approval of Application U-2 would improve Nebraska's standing in the event of interstate disputes involving the Platte River and its tributaries and that the public interest would be served if the application was approved. The order specifically left the determination of the constitutionality of § 46-226.01 to this court. The objectors to the application timely appeal to this court.

The seven errors assigned by appellants may be consolidated into four: (1) whether DWR erred in approving Application U-2 without having first found that the water stored or to be stored will be used for irrigation purposes; (2) whether § 46-226.01 is unconstitutional, in that it permits the taking of storage under the overlying property owners' land without just compensation and is an unconstitutional delegation of legislative authority, and whether DWR's regulations are sufficient to properly advise the public of what information is required by DWR before an application for incidental storage will be granted; (3) whether DWR erred in recognizing the incidental water storage occurring before the effective date of § 46-226.01; and (4) whether DWR erred by not applying the interbasin transfer statutes, Neb. Rev. Stat. §§ 46-288 and 46-289 (Reissue 1984), in its consideration of Application U-2. For the reasons hereafter stated, the decision of DWR approving Application U-2 is affirmed.

The facts concerning Application U-2 are largely undisputed. The record shows that Tri-County holds 12 separate permits for irrigation and water storage. Its facilities are located in Keith, Lincoln, Dawson, Gosper, Phelps, and Kearney Counties in Nebraska, and include facilities of the district such as Lake McConaughy, Kingsley Dam, Kingsley Power Plant, Diversion Dam, Supply Canal, Jeffrey Reservoir and Power Plant, Johnson Reservoir, Johnson No. 1 Power Plant, Johnson No. 2 Power Plant, Canaday Steam Plant, and irrigated areas served from the Supply Canal, Lateral 365, Carl T. Curtis Dam and Pump Station, Elwood Reservoir, Lateral E67, and the Phelps County Canal. Its irrigation system consists largely of three separate feeder canals. Tri-County's earlier permits, set out above, authorize the service of irrigation

to approximately 138,000 acres of land in the area of Gosper, Phelps, and Kearney Counties. The overall length of the laterals and feeder canals constituting the basis for the irrigation service to those acres totals approximately 600 miles.

Hydrologists, qualified as expert witnesses testifying for Tri-County, established the level of the ground water underlying the three-county area in the predevelopment period (using data from between 1931 and 1952) before Tri-County began its irrigation services in 1941. The level of the ground water in 1983 was also established. The difference between the two levels was determined to be water incidentally stored underground as a result of Tri-County's irrigation operation and the seepage therefrom. The perimeters of the underground storage area were also established by expert witnesses, using data from wells drilled in the area between 1941 and 1983. The quantity of such incidentally stored water was determined to be between 6.5 million and 7 million acre-feet of water, in natural underground storage, beneath approximately 684,000 acres of land located in the three-county area.

This amount of land includes the 138,000 acres already identified as being irrigated in Tri-County's 12 existing water appropriations. In addition to this land, the water mound lies beneath approximately 546,000 acres of land which were not being served by any of Tri-County's existing appropriations. In this area, 257,300 acres are currently being irrigated by well, and 288,700 acres are not being irrigated in any manner.

The proper standard of review for this court to follow in cases involving appeals from DWR under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., to determine if the judgment conforms to law, if it is supported by competent and relevant evidence, and if the DWR action is neither arbitrary, capricious, nor unreasonable. *In re Application A-15738, ante* p. 146, 410 N.W.2d 101 (1987).

The appellants' first assignment of error contends that

> [t]he Director erred by approving the service of additional amounts of land or different lands not identified to be served under the 12 original applications without first finding that the water stored or to be stored underground

> will be used for irrigation purposes, and that action was arbitrary and capricious.

The appellants rely on a strict construction of Neb. Rev. Stat. § 46-226.02(1)(b) (Cum. Supp. 1986), which provides that the director of DWR may approve the service of additional amounts of land not already identified as being served by an existing appropriation "[i]f the water stored or to be stored underground will be used for irrigation purposes." Appellants' position reads into the statute a condition that it must be shown the water will be used for irrigation of each acre of land overlying the storage area before the application can be approved.

Appellants' position seems to imply that in order to comply with § 46-226.02(1)(b), the water incidentally stored must be used immediately for irrigation on the land under which it is stored. Such a concept is at odds with the basic meaning of "storage," which has been defined to mean "a space for storing." To store something is "to stock or furnish against a future time" or "to collect as a reserved supply." Webster's Third New International Dictionary, Unabridged 2252 (1981). We hold that in § 46-226.02(1)(b), the phrase "will be used for irrigation purposes" is to be construed as water being available for irrigation uses after the storage.

In connection with this contention, the director's corrected order stated:

> (13) In disputing the meaning of "service," the parties centered their attention upon the intent of § 46-226.02 (1)(b). Objectors advocate a narrow definition. They contend that service is accomplished when water is provided directly to irrigated fields. Tri-County argues for a less restraining interpretation. It contends that service has already been rendered. Recharge of the ground water reservoir underlying both projects lands and others constitutes the service.
>
> In turning to the language adopted by the legislative body and to legislative history for guidance, Tri-County's assertions are deemed better. As a precondition to approving Application U-2 (or other applications like it), the Legislature did not indicate or even imply that an

applicant must first provide wells, pumps, pipelines, energy needs and any other ingredients necessary to extract recharged ground water. Therefore, recharge of the ground water reservoir which supports present, and will support additional future uses, constitutes Tri-County's service.

Lands, including those authorized by the water appropriations listed above, which overlie the ground water reservoir recharged by the Tri-County project, are depicted on Map [4] of Exhibit 3. They are "squared off" for administrative convenience on Map [5] of Exhibit 3. A substantial portion of the total is now irrigated with ground water. Nothing in the record suggests that significant future uses will be for anything other than irrigation.

Thus, all the lands depicted are properly within the scope of Application U-2. They should be incorporated in the ultimate ruling made herein.

We agree with the director as to the meaning of "service" in § 46-226.02(1)(b), as used in this case. The service to be rendered in Application U-2, in this case, consists of the storage of water underground "for irrigation purposes."

Underlying the problem facing the director of DWR in determining this issue is the fact that this underground water storage is not held in neatly confined reservoirs or bins, but is available as nature presents the situation to humans trying to avail themselves of something furnished by nature—the underground strata making water storage possible. It is completely unrealistic to pretend the water which accumulates under Tri-County's laterals and canals will remain in storage precisely under the lands which Tri-County has been authorized to service with irrigation waters. The water, of necessity, will move into the entire natural storage field, following the laws of nature. The outline of that storage field was testified to and established by expert testimony, and not seriously questioned by appellants. Realizing that, the fact that some of the storage field lies beneath land not irrigated should not require that the entire project be lost on that account alone.

Section 46-226.02(1)(d) is also applicable to Application U-2,

and must be considered. This section of the statute allows the director to approve an application when the application is for incidental underground water storage and the stored water apparently is being withdrawn or is otherwise being used for beneficial purposes. One of the purposes of Application U-2 has been stated as to seek recognition of incidental underground water storage as a beneficial use. The director of DWR found that "[i]n providing water for direct irrigation and for recharge, the Tri-County project is an economic and social benefit to the community. Public interest has been and is being well served." The incidentally stored water is being withdrawn for irrigation purposes for the 257,300 acres of overlying land which is irrigated. As to the acres of unirrigated land, the water there is available to be withdrawn for beneficial uses such as domestic, municipal, or irrigation, under the authorization of DWR. We agree with the determination of the director that the project authorized in the order granting Application U-2 is an economic benefit to the region. We hold that the director did not err, in the manner alleged in appellants' first assignment of error, in granting approval to Application U-2.

Appellants' second assignment of error contends that § 46-226.01 is unconstitutional in that permitting a taking of the storage under overlying property owners' land without just compensation is an unconstitutional delegation of legislative authority, and in that the director has not provided sufficient regulations for an application. We have held that state laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution. *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986); *State v. Mayhew Products Corp.*, 211 Neb. 300, 318 N.W.2d 280 (1982). Furthermore, unconstitutionality must be clearly established before this court will declare a statute void. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

Appellants first contend § 46-226.01 is unconstitutional because it allows for the taking of storage space beneath overlying property owners' land without just compensation, citing Neb. Const. art. I, § 21, which provides, "The property of no person shall be taken or damaged for public use without

just compensation therefor." Appellants urge that landowners have a constitutionally protected property right in the storage space beneath their property, derived from their right to use the water.

In this connection, the manner in which water is treated in the Nebraska Constitution and the statutes enacted thereunder becomes of critical importance. Neb. Const. art. XV, § 4, provides: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."

In *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966), we specifically recognized the relation of this section to underground water. At 799-800, 140 N.W.2d at 636-37, we stated:

> The Constitution of Nebraska provides that the necessity of water for domestic use and for irrigation purposes in the State of Nebraska is a natural want. Art. XV, § 4, Constitution. While this section of the Constitution has been related primarily to the diversion of water from rivers and streams, its relation to underground water is no different. Historically the state adopted the riparian right theory of the common law of England and subsequently impressed upon it the doctrine of appropriation. The rights of appropriators under the latter doctrine have been spelled out by statute and judicial interpretation while the rights of riparian landowners remain unsettled and undefined.
>
> Underground waters, whether they be percolating waters or underground streams, are a part of the waters referred to in the Constitution as a natural want. Such waters are as much a part of the hydrologic cycle as the flow of water in a stream or river. It is true that such waters are not concentrated as in a river nor do they move with the velocity of a river, but they do percolate through underground formations and have the same source and termination as surface water flowing in a river. Underground waters are a part of the source of water supply to a growing population and an expanding economy the same as the surface waters flowing in a live

> stream on the surface of the ground. Because of the ever-increasing demands for water control of underground waters as well as the flow of rivers and streams, it is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained. Without any declaration of public policy as to the use of underground waters other than the constitutional declaration that they are a natural want, we adhere to the rule that such waters must be reasonably used for a beneficial purpose without waste. It is axiomatic that waters which flow beyond the points of use to the sea are lost and constitute a form of waste, which is against public policy.

Statutes have been enacted concerning many phases of the problems arising from water, its scarcity or overabundance at times, the need of the state for water, and the public interest considerations that must govern the use of water.

The Nebraska Legislature has enacted the Nebraska Ground Water Management and Protection Act, Neb. Rev. Stat. §§ 46-656 to 46-674 (Reissue 1984). This act was first adopted in 1975, and at the time of the application and hearing in this case had last been amended as of July 10, 1984, and February 15, 1985. Section 46-657(2) states: "Ground water shall mean that water which occurs, moves, seeps, filters, or percolates through ground under the surface of the land."

That definition of ground water was further clarified in Neb. Rev. Stat. § 46-296(4) (Cum. Supp. 1986), which states: "Underground water storage shall mean the act of storing or recharging water in underground strata. Such water shall be known as water stored underground, but the term shall not include ground water, as defined in section 46-657, which occurs naturally."

This court has held that an overlying property owner has a protected right in the use of ground water, as defined in § 46-657, arising from his ownership of the surface above the ground water. *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985). In *Sorensen*, we held the right of an owner of overlying land to use ground water is an appurtenance constituting property protected by the

Constitution. That right to use water beneath one's land, however, is clearly not unfettered. Nebraska has developed a rule for ground water based on reasonable use and correlative rights. In *Sorensen* at 188, 376 N.W.2d at 546, we quoted from *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933), as follows:

> "[T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . ."

In their brief at 17, appellants state, "The right to use groundwater establishes the right to use underground storage for groundwater." The protected right of landowners is the right to the use of the ground water, and does not reach the ownership of the water itself. Nebraska's ground water is itself publicly owned. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). Ground water is owned by the public, and the only right held by an overlying landowner is in the use of the ground water. The right is recognized by statute. Section 46-656 provided in part, at the time of the hearing in this case, "Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the correlative rights of other landowners when the ground water supply is insufficient for all users." Appellants urge that the right to use the ground water gives rise to the exclusive right to use the storage space, that the storage space is theirs, and that "the recognition of incidental underground storage" constitutes an unconstitutional taking of their property. We disagree. We are here concerned with two general classifications of water existing beneath the ground: (1) ground water, as defined in § 46-657, which occurs naturally, and (2) water which has accumulated incidentally underground as a result of seepage from manmade facilities.

Section 46-226.01 provides:

> Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.

That legislative enactment does not purport to have the director of DWR authorize any taking of an interest in land, but only sets out a procedure for recognizing an appropriator's interest in water incidentally stored underground, if authorized.

There was no evidence before the director as to any harm resulting to appellants' lands from that recognition. Appellants have not shown that § 46-226.01 amounts to an unconstitutional taking without just compensation. A statute cannot deprive a person of property unless it prevents him from doing an act which he desires to do or diminishes the enjoyment or profit which he would otherwise derive from his property. 16A C.J.S. *Constitutional Law* § 506 (1984). Appellants in this case have presented no evidence which indicates that § 46-226.01 interferes with the use of their property. Absent such a showing, appellants have no standing to assert the unconstitutionality of the statute as taking their property. *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973); *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252 (1900).

Appellants' rights in the use of the "ground water" (within the meaning of § 46-657) under their lands are not affected. The calculation of the amount of that water is now more difficult, but clearly can be made. Indeed, as set out above, the calculation of the amount of water incidentally stored in this case was based on establishing the level of § 46-657 ground water before incidental storage began after the construction of appellee's facilities, which eventually resulted in the § 46-226.01 "underground water storage."

Section 46-226.01 is concerned with water for use and is constitutional in that it recognizes incidental underground water storage associated with a proper appropriation and, as

such, complies fully with the intent of Neb. Const. art. XV, § 4, and does not conflict with other sections of the Nebraska Constitution.

Appellants further argue that § 46-226.01 is an unconstitutional delegation of legislative authority and that it does not contain adequate legal standards to govern the director's review of an application. We find no merit in this claim. We have held that where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists. *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 186 N.W.2d 729 (1971). Section § 46-226.02 sets out specific conditions which must be met before the director may approve an application, where it provides, in part:

> (a) The rate, quantity, or time of surface water diversion shall not be increased from that approved for the original appropriation;
>
> (b) If the water stored or to be stored underground will be used for irrigation purposes, the director may approve the service of additional amounts of land or different lands not identified to be served with facilities included under the original appropriation, if the director determines that the change is in the public interest, and that any interference with the rights of senior appropriators as a result of such change is unavoidable and not material;
>
> (c) The priority date shall remain the same as that of the original appropriation; and
>
> (d) When the application is for recognition of incidental underground water storage, such stored water is being withdrawn or is otherwise being used for beneficial purposes.
>
> (2) For an application filed pursuant to section 46-226.01, the burden shall be on the applicant to prove that underground water storage has occurred.
>
> (3) The director may grant the application in a modified or reduced form, if required by the public interest, and may impose such other reasonable conditions as deemed

appropriate to protect the public interest.

(4) The director's order of approval shall specify:

(a) The source of the water stored or to be stored underground;

(b) The underground water storage method; and

(c) A description of the area served or to be served by the water stored underground.

In addition, Neb. Rev. Stat. § 46-209 (Reissue 1984) gives DWR jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes . . . ." The Legislature has recognized the expertise and experience needed to determine the difficult questions presented in the overall water situation in this state when it required, by Neb. Rev. Stat. § 46-701 (Reissue 1984), that the director of DWR be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work.

This court has recognized the difficulties inherent in requiring the Legislature to spell out each standard in complex fields in areas where expanding technology and complex theories daily change. In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 465, 283 N.W.2d 12, 24 (1979), we stated:

> The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. . . . The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases.

Similarly, in *Anderson v. Tiemann*, 182 Neb. 393, 401-02, 155 N.W.2d 322, 328 (1967), we stated: "Delegation of

legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision."

Section 46-226.01 does provide that after receiving an application, DWR "shall proceed in accordance with rules and regulations adopted and promulgated" by DWR. The fact that all the standards are not specifically listed in § 46-226.01 does not require a finding of unconstitutional delegation of authority. Standards which guide an administrative agency need not all be embodied in one statute, but may be found in others. The conditions found in § 46-226.02, when taken with the broad statutory authority granted to the DWR over the use and appropriation of water within the state (see § 46-209), provide for adequate standards governing the director's review of applications such as Application U-2. We have earlier discussed the burden on appellants to show a statute is unconstitutional, before this court will rule it invalid. In this argument, as before, appellants have failed to overcome the presumption of constitutionality afforded the legislative enactments. Section 46-226.01 is constitutional.

Insofar as appellants contend the director's regulations do not "contain adequate standards," we also determine that that contention is without merit. DWR regulations with regard to this application provided only, in addition to notice to be published, that "[e]ach application shall be accompanied by sufficient hydrologic information to identify the extent and scope of the underground storage and recovery." Neb. Admin. Code tit. 457, ch. 16, art. 001 (1984).

In this day of extraordinarily verbose administrative regulations, we determine it is not appropriate to condemn an administrative director in this case for saying too little. We determine that the DWR regulations are adequate to inform an applicant and possible objectors of the issues before the director. In addition to the statutory standards set out above, an applicant must supply "sufficient hydrologic information" before the application may be approved. Applicant's evidence must reach that standard. In this case, much evidence was presented on that issue. The objectors knew from reading the regulation above that they could defeat the application by

showing that the applicant did not supply sufficient information to permit the director to approve the application. Objectors presented their position by skilled, close cross-examination of applicant's experts and by presenting an expert witness of their own. The DWR regulations, when coupled with the statutory enactments, clearly outlined the legal field of battle and were not unconstitutional.

Appellants' third assignment of error contends that the director erred in recognizing incidental underground water storage occurring prior to the effective date of § 46-226.01. Appellants urge that the statute should be applied prospectively, and not retroactively. A retroactive application, appellants argue, would result in appellants' loss of the right to use the underground storage space beneath their land. The problem here is that the overlying property owners' protected rights are in the use of the water, not in the storage space. Their right to use the water is not being disturbed by the approval of Application U-2.

Appellants rely on *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960), to support their proposition that a legislative act will operate only prospectively, and not retroactively, unless the legislative intent and purpose that the statute operate retroactively is clearly disclosed. Appellants suggest a reading of § 46-226.01 does not disclose any reference to a retroactive application allowing for recognition of incidental underground storage occurring prior to August 26, 1983, the effective date of the statute. We disagree with appellants' position. We have held that in considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense. *Clinchard v. White*, 223 Neb. 139, 388 N.W.2d 477 (1986). While § 46-226.01 does not in and of itself indicate the legislative intention that it be applied retroactively, other sections of the act must be considered. Section 46-226.02 aids in determining the intent of the Legislature. When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different

provisions of the act are consistent and sensible. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987). Subsections 46-226.02(1)(b) and (4)(a) refer to the recognition of water "stored or to be stored." The plain meaning of that section shows the intent of the Legislature to allow an approval for an application seeking recognition of water stored prior to the effective date of § 46-226.01. Indeed, § 46-226.01 provides that only persons having appropriations can request that incidental storage rights be recognized. Of necessity, the statute contemplates recognizing already existing storage. In addition, Neb. Rev. Stat. § 46-295 (Cum. Supp. 1986) refers to water that "has been, is, and will be" incidentally stored in the underground strata. We hold, then, that when read collectively, it is clear that the intent of the Legislature was to apply the statutes concerning recognition of incidental underground water storage retroactively to include the recognition of incidentally stored water occurring prior to the effective date of those statutes.

Appellants' final assignment of error contends that the director erred in his consideration of Application U-2 by not applying the interbasin transfer statutes, §§ 46-288 and 46-289. Those statutes require that the director of DWR consider certain factors before granting or denying an interbasin transfer of water. Appellants argue that since water is flowing underground from the Platte River basin into the Republican and Little Blue River basins, the director should have applied the interbasin transfer statutes. Section 46-288(3) defines an interbasin transfer as "diversion of water in one river basin and the transportation of such water to another river basin for storage or utilization for a beneficial use." Appellants contend that whenever there is a transportation of water for a beneficial use to another basin, an application for approval of interbasin transfer is required. We agree with appellants' reading of §§ 46-288 and 46-289, in that an application for approval is required before an interbasin transfer takes place. We do not agree with appellants' contention, however, that approval was required in the case at bar. We have previously discussed the basic rule of statutory construction, in that the language of a statute will be given its plain or ordinary meaning. When the

words of the statute are unambiguous, no additional interpretation is necessary. *Midwest Messenger Assn. v. Spire*, 223 Neb. 748, 393 N.W.2d 438 (1986). Sections 46-288 and 46-289 are concerned with interbasin transfers. This term is clearly defined in § 46-288(3) as "the diversion of water in one river basin and the transportation of such water to another river basin for storage or utilization for a beneficial use." While Application U-2 appears to include an interbasin transfer, in that water is flowing from the Platte River basin into the Republican and Little Blue River basins, we agree with the director in his finding that movement of water through subsurface strata as has occurred in this case, resulting in the formulation of the underground mound, was not the sort of interbasin transfer defined in § 46-288. That section includes the terms "diversion" and "transportation." The plain meaning of § 46-288 is that the director must consider interbasin transfers of water if an affirmative act to transport from one basin to another has been shown. The interbasin transfer occurring in the case at bar is done naturally and will occur whether or not an application under the interbasin transfer statutes is approved. Tri-County has not diverted or transported water as defined in § 46-288(3). No purposeful act is the cause of the flow of water from one basin to another. We hold, then, that the director did not err in not applying the interbasin transfer statutes before giving his approval to Application U-2.

We determine that the director has not erred as alleged by appellants. The order of the director of DWR approving Application U-2 is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, v. GARY A. BOCIAN, APPELLANT.

413 N.W.2d 893

Filed October 9, 1987. No. 86-793.

1. **Constitutional Law: Entrapment.** The entrapment defense is not mandated by either the state or federal Constitution.
2. **Jury Instructions: Entrapment: Proof.** NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
3. **Criminal Law: Sentences.** The punishment for a criminal act should in all circumstances be commensurate with the offense.

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

James Martin Davis, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

The appellant, Gary A. Bocian, was found guilty by the verdict of a jury of each count of a five-count information. A sixth count was dismissed by the trial court. The charges arose out of two separate purchases of LSD and marijuana on January 31, 1986, and a later seizure after search of a quantity of LSD and marijuana. Both of the controlled substances were sold at each sale. Bocian was sentenced to a term of from 4 to 8 years on each count, to be served concurrently. He appeals.

Three errors are assigned: (1) The trial court erred in giving verbatim NJI 14.34 (entrapment) and thus failing to instruct on its own motion that it was the burden of the State to prove beyond a reasonable doubt that the defendant was predisposed to commit the offenses charged; (2) the trial court erred in submitting to the jury multiple counts of the same offense which were all based on the same act or transaction; and (3) the trial court erred in imposing excessive sentences.

The evidence discloses that a state patrolman, along with one Jack Cary, a cooperating individual (Cary had been previously

arrested for the unlawful sale of methamphetamine), purchased one-half ounce of LSD and two baggies of marijuana from Bocian on January 31, 1986, at approximately 11:30 a.m., and at 8 p.m. purchased another one-half ounce of LSD and two baggies of marijuana. After the second sale Bocian was arrested. A search warrant was secured, and, as a result of the search, two additional plastic bags of LSD and three bags of marijuana were found on his person and a quantity of LSD was found at his residence. Bocian admitted the sales, but contended at trial that he was improperly induced to commit the offenses.

We will deal with the assigned errors in the order argued by the appellant.

The instruction given by the trial court was a verbatim recitation of the pertinent parts of NJI 14.34, and reads as follows:

> The defendant contends that he was improperly induced to commit the unlawful conduct with which he is charged.
>
> If a law enforcement officer induced the defendant to commit an unlawful act, and the defendant would not have committed the act but for the inducement, then the defendant is not criminally responsible for that act.
>
> On the other hand, if a law enforcement officer did not induce the defendant's conduct, because the defendant was predisposed or ready to commit the act and was merely afforded an opportunity by the law enforcement officer to do so, then the defendant may be found guilty, provided that the State has proved all the essential elements of the crime beyond a reasonable doubt.
>
> Inducement may take different forms, such as persuasion, fraudulent representations, threats, or other coercive tactics, or holding out the promise or hope of reward. However, law enforcement officers are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or

ready to commit it.

The State must prove beyond a reasonable doubt that the defendant was not improperly induced to commit any unlawful conduct. If you have a reasonable doubt whether or not the defendant was improperly induced to commit the offense, you must find the defendant not guilty.

The appellant cites *United States v. Jannotti*, 729 F.2d 213 (1984). In that case undercover Federal Bureau of Investigation officers sought out various members of the city council of the city of Philadelphia, requested political assistance, and subsequently paid money to the council members. The defendants were tried and convicted of violations of the Hobbs Act, 18 U.S.C. § 1951(a) (1982) (conspiracy to interfere with interstate commerce) and of the RICO Act, 18 U.S.C. § 1962(d) (1982) (conspiracy to conduct an enterprise through racketeering activities). The court in its instructions on the issue of entrapment required of the defendants to first introduce evidence of inducement, and only then instructed the jury that "the government [had] the burden of proving predisposition beyond a reasonable doubt." 729 F.2d at 225. The first part of the instruction was disapproved, suggesting that the appropriate instruction was that the burden was on the government to prove (1) no improper inducement existed and (2) prior disposition to commit the offense.

We observe first that the entrapment defense "is not of a constitutional dimension." *United States v. Russell*, 411 U.S. 423, 433, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973). "This Court first recognized and applied the entrapment defense in *Sorrells v. United States*, 287 U.S. 435 (1932)." 411 U.S. at 428. The *Russell* majority observed at 428 n.5 that "[t]he first case to recognize and sustain a claim of entrapment by government officers was apparently *Woo Wai v. United States*, 223 F. 412 (CA9 1915)," while the first time, apparently, that this court recognized the defense was *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967). Quoting *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 2d 413 (1932), this court approved the following language of Chief Justice Hughes:

"The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to

> reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

181 Neb. at 355-56, 148 N.W.2d at 326-27.

The court has specifically approved the giving of NJI 14.34 in *State v. Lampone*, 205 Neb. 325, 287 N.W.2d 442 (1980), and in *State v. Gurule*, 194 Neb. 618, 621-22, 234 N.W.2d 603, 606-07 (1975), where we said:

> The Nebraska Jury Instruction is phrased in terms of "improper" inducement. The representations made by an undercover agent are almost always false in some particulars and, to some extent, may constitute an inducement to commit the crime. It is improper inducement that gives rise to the defense of entrapment. Overpersuasion, undue pressure, or coercion may constitute improper inducement and entrapment. State v. Ransburg, *supra*. The important consideration in determining whether entrapment occurred is the predisposition or readiness on the part of the defendant to commit the crime. United States v. Russell, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366. Reluctance or unwillingness on the part of the defendant may indicate an absence of predisposition or readiness to commit the offense. These matters are all covered in the Nebraska Jury Instruction....

Aside from the obvious conclusion that no constitutional provision, state or federal, mandates the requested instruction, the instruction in fact places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced. Bocian's contention is artificial, and the alleged error is not meritorious.

The second assignment of error relates to the five counts of

the information. Counts I and II charged Bocian with delivery of LSD on January 31, 1986. Counts III and IV charged delivery of marijuana on the same date, and, finally, count V charged possession of LSD with intent to deliver.

It is true the counts do not allege which of the two incidents of sale of LSD and marijuana to the patrolman and Cary is the subject of the charge, nor does the fifth count describe which of the three separate incidents of possession of LSD is relied on to support this count. No attack is made on the sufficiency of the information. It is evident that the essential elements of the separate offenses are charged. The record does not disclose any motions addressed to the trial judge requesting a more specific statement of the charges.

We were faced with this very situation in *State v. Abraham*, 189 Neb. 728, 730, 205 N.W.2d 342, 344 (1973), wherein we said:

> Since the information here, although phrased in general language, is sufficient to state an offense, the defendants' challenge really goes only to the requisite certainty and particularity of the information for the preparation of their defense. It is not such a challenge as can be brought by way of motion in arrest of judgment. Instead, a motion to quash is the proper method of attack. § 29-1808, R.R.S. 1943; Matters v. State, 120 Neb. 404, 232 N.W. 781. The defendants failed to avail themselves of this procedure and pleaded not guilty. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. § 29-1812, R.R.S. 1943; State v. Fiegl, 184 Neb. 704, 171 N.W.2d 643; Nelson v. State, 167 Neb. 575, 94 N.W.2d 1; Green v. State, 116 Neb. 635, 218 N.W. 432.

The record discloses that at each sale a separate price was specified and negotiated for each quantity of controlled substance. The argument suggests that the sales and possession were part of one transaction, i.e., the same continuing act, and thus the appellant is subject to multiple prosecutions for the same act, violating the double jeopardy provisions of the U.S. and State Constitutions. In the first place, it is well established that the same act may constitute more than one offense, and the

prosecution for the two separate crimes is not barred, e.g., robbery and use of a firearm to commit a felony; second, the delivery of LSD and the delivery of marijuana are not lesser-included offenses of one another for a very obvious reason: each controlled substance is prohibited.

It is true that count V is a lesser-included offense of counts I and II, and this fact would be fatal to count V except that count V is based on an entirely separate possession (as disclosed by the search warrant) from the previous sales. Separately structured sales of contraband can sustain separate prosecutions for the prohibited sale. *United States v. Weatherd*, 699 F.2d 959 (8th Cir. 1983) (controlled substances). See, also, *State v. Pope*, 192 Neb. 755, 224 N.W.2d 521 (1974). The assigned error is meritless.

Finally, Bocian argues that the sentences imposed are disproportionate to the offenses, and thus violate Neb. Const. art. I, § 15. We said in *State v. Foutch*, 196 Neb. 644, 646, 244 N.W.2d 291, 292 (1976), that "[t]he punishment for a criminal act should in all circumstances be commensurate with the offense."

Bocian stands convicted of five Class III felonies. The penalty range for a felony of that class is imprisonment from 1 to 20 years and/or a fine of not more than $25,000. We have no hesitancy concluding that the penalty of five 4- to 8-year concurrent sentences is not disproportionate to the delivery, or possession with intent to sell, of controlled substances. The judgment and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER H. JOHNSON, APPELLANT.

413 N.W.2d 897

Filed October 9, 1987. No. 86-997.

1. **Rules of Evidence: Witnesses: Prior Convictions.** In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by

establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.

2. **Motions for Mistrial.** In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded for a new trial.

Thomas L. Spinar, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a trial by jury, the defendant was convicted of the felony offense of issuing an insufficient-fund check. He appeals to this court, claiming as error the failure of the trial court to declare a mistrial based on misconduct of the prosecuting attorney. We reverse and remand for a new trial.

The defendant, on January 18, 1986, issued a check for $15,534 to Jack Keef Motors to pay for a motor vehicle which he had purchased. The defendant had insufficient funds in his checking account to pay the check. He failed to make good on the check after being contacted by both the auto dealership and the county attorney.

Defendant's defense was that he issued a check which he claimed the dealership had agreed to accept and hold. Following his failure to pay the check, the dealership repossessed the vehicle and held it for a period of 30 days before otherwise disposing of it.

The dealership denied that it had been asked by the defendant to hold the check for a definite period of time. Thus, the critical issue for the jury to determine was the credibility of the defendant.

The defendant's claim of error relates to certain questions propounded to the defendant by the prosecutor. First of all, the

prosecutor asked these questions:

Q. Have you ever sold securities?

A. No.

Q. Ever sold unregistered securities?

MR. SPINAR: Objection. This is irrelevant.

THE COURT: I am not sure about the relevance. I'd have to be advised on the matter. Approach the bench.

MR. CONNER [Prosecutor]: Well, I will withdraw the question.

Q. (By Mr. Conner) Where were you employed during the year of 1985?

MR. SPINAR: Objection. I don't see that that is relevant.

THE COURT: He may answer.

THE WITNESS: The year of 1985, I wasn't employed.

Q. (By Mr. Conner) You weren't employed?

A. No.

Q. Why?

MR. SPINAR: Objection, Your Honor. I don't think this is relevant.

Objection. Beyond the scope of direct examination.

THE COURT: Approach the bench.

. . . .

Q. (By Mr. Conner) Were you in prison in the months of January to June of 1985[?]

MR. SPINAR: Objection, Your Honor.

THE COURT: Sustained.

MR. SPINAR: Your Honor, I move for a mistrial on the grounds that counsel has deliberately sought to inflame the jury. It is prejudicial testimony.

. . . .

(Discussion off-the-record.)

In a later discussion in the absence of the jury, the motion for mistrial was overruled, but the court stated that the question relating to defendant's having been in prison was an improper question. However, because, as the court reasoned, the county attorney could have asked the defendant if he had been convicted of a felony, and the court understood that such was the case, the court felt there was no prejudice. The court then

instructed the jury that such a question was improper and should be disregarded, which instruction was agreed to by the defendant's counsel.

It is quite apparent from the line of questioning employed by the prosecuting attorney that he was trying to get across to the jury that the defendant had been imprisoned for selling unregistered securities, which might be a similar type offense to writing an insufficient-fund check. However, his method utilized was wholly improper and is to be condemned.

The Nebraska Evidence Rules are quite specific. Neb. Rev. Stat. § 27-609 (Reissue 1985) permits the offer of evidence of a witness' having committed a crime punishable by death or imprisonment of more than 1 year, or a crime which involved dishonesty or false statement regardless of the punishment, provided that not more than 10 years have elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date. Once having established the conviction, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof. *State v. Daugherty*, 215 Neb. 45, 337 N.W.2d 128 (1983).

In *State v. Archbold*, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984), this court stated as follows:

> In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury, *to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury*.

(Emphasis supplied.) See, also, *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

As previously stated, the credibility of the defendant as a witness was the critical issue in this case. The so-called "poison" having been injected into the case by the prosecutor, either deliberately or because of a lack of knowledge of the rules of evidence, it is problematical whether the defendant could have

received a fair trial.

It must be impressed upon the State that this court will not continually search for ways to extricate the prosecution from the results of its own misconduct by labeling such action "harmless error."

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

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS A. DANEHEY, RESPONDENT.

413 N.W.2d 635

Filed October 9, 1987. No. 87-827.

Original action. Judgment of disbarment.

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

PER CURIAM.

This is an original disciplinary proceeding submitted to this court upon the respondent's voluntary surrender of his license to practice law. Respondent, Thomas A. Danehey, voluntarily surrenders his license and consents to the entry of a disciplinary order against him.

Upon a careful review of the record before us, and based on the respondent's voluntary surrender of his license, his waiver of disciplinary proceedings, and his consent to the entry of an order of disbarment against him, we order that the respondent, Thomas A. Danehey, be, and hereby is, disbarred effective immediately.

JUDGMENT OF DISBARMENT.

GLENNA JEAN RITCHIE, APPELLANT, V. RAND CECIL RITCHIE, APPELLEE.

413 N.W.2d 635

Filed October 16, 1987. No. 85-872.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed as modified.

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

Thomas A. Wagoner, for appellee.

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

PER CURIAM.

Glenna Jean Ritchie appeals from the decree of the district court for Hall County, dissolving her marriage with Rand Cecil Ritchie, and claims that alimony decreed and attorney fees awarded are inadequate. We modify the award of alimony and affirm the decree as modified.

Glenna married Rand in 1971. While Rand was enrolled in a premedical program at the University of Nebraska-Lincoln, Glenna enrolled in a course of studies at that university. For approximately 1 year, while the Ritchies attended the university, their major source of income was student loans. After moving to Omaha so Rand could attend medical school, Glenna discontinued her studies to work full time to help support the couple. Although Glenna later resumed her studies, she never completed her college education, due partly to the Ritchies' frequent movements required by Rand's schooling and subsequent medical practice after graduation. While Rand was pursuing his degree, Glenna was the major source of support for the Ritchies, holding several different jobs, mostly at the minimum wage. Rand began his residency in psychiatry in 1976, which took the Ritchies to Portland, Oregon, back to Omaha, and then to Lincoln.

In 1979, Rand completed his residency requirements, and the Ritchies moved to Manhattan Beach, California, where Rand was employed by a medical group as a staff psychiatrist and

earned approximately $46,000 per year. Rand and Glenna moved to Grand Island, Nebraska, in 1980, to allow Rand to establish a private practice in psychiatry. Glenna worked in her husband's office as a receptionist and performed other office duties, but received no specific remuneration for such assistance to Rand in his practice. The Ritchies have no children. At time of trial, Glenna was 33 years of age; Rand was 34.

In 1984, Glenna filed her petition for dissolution of her marriage with Rand. The couple has lived without a budget, has dined out four times a week, and has taken trips to California and Colorado. In addition, Rand has taken several trips to Oregon, Hawaii, Colorado, and Kansas City. Their newly constructed home was completed in May of 1984. Since moving back to Nebraska, Rand has been the sole source of support for Glenna. After separation from Rand, Glenna depended upon temporary support payments from Rand, $60 per week which she earned as a part-time floral designer, and a small amount from other odd jobs, including interior decorating. Glenna expressed her desire to complete her college education for an art degree.

Glenna's monthly expenses are approximately $620. Although Glenna lives in the couple's new house, she does not make any house payments. Eventually, the house will be sold or deeded over to the bank which holds the mortgage on the premises. The outstanding debt on the house is $274,000, and the bank has offered to acquire the house and give Ritchies credit for $200,000, which, as far as the record reflects, may leave a substantial but unspecified deficiency.

Rand testified that he is again living in Manhattan Beach, California, where he is employed as a staff psychiatrist by the same medical group for which he had previously worked. Rand annually earns approximately $59,000 and has personal debts of about $50,000, including student loans, debts owed to members of his family, a loan for a new Jeep, and various credit card debts used for personal and moving expenses. Rand failed to pay temporary support payments to Glenna, and yet repaid part of a loan to his sister and gave a nurse $1,500 to embark on a humanitarian mission in connection with an earthquake in

Mexico.

In its dissolution decree, the district court quieted title to certain personal property in each party's name, including a 1982 Volvo awarded to Glenna and 1959 and 1984 Jeep automobiles awarded to Rand. Rand was ordered to pay the outstanding debts of the parties (which included the deficiency on the house) and to hold Glenna harmless concerning all debts of the parties. Further, Rand was ordered to pay Glenna alimony as follows:

> a. The sum of Six Hundred Dollars ($600.00) per month for a period of Twenty-four (24) months, commencing November 1, 1985, and ending October 1, 1987.
>
> b. The sum of Four Hundred Dollars ($400.00) a month for a period of Twenty-four (24) months, commencing November 1, 1987, and ending October 1, 1989.
>
> c. The sum of Two Hundred Dollars ($200.00) a month, commencing November 1, 1989, and ending October 1, 1990.

The decree also awarded Glenna $1,000 to apply to her attorney fees. Glenna appeals, claiming the alimony and attorney fees awarded are inadequate.

> In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987). See, also, *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987) (alimony award); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986) (alimony award).

"An appropriate award of alimony must turn on reasonableness and the circumstances of each case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984)." *Gale v. Gale, supra* at 805, 401 N.W.2d at 502. As reflected in

Neb. Rev. Stat. § 42-365 (Reissue 1984), factors affecting the amount of alimony include the duration of the marriage, history of contributions to the marriage by each party, interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment. In addition to the factors set out in § 42-365, the income and earning capacity of each party must also be considered. *Gale v. Gale, supra; Taylor v. Taylor, supra.* Section 42-365 also states in part: "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate."

With the foregoing in mind, we believe the trial court abused its discretion in the alimony awarded to Glenna. Our de novo review of the record reveals that the alimony awarded falls short of fulfilling the purpose and objectives of alimony as set forth in § 42-365. The parties were married 14 years. Glenna interrupted her education and career in order to help support Rand while he obtained his medical degree. Glenna later assisted Rand in establishing his practice in psychiatry and was substantially dependent upon him for support. As a consequence, Glenna's income, earning capacity, and job training are limited, and her employment record consists, for the most part, of jobs that paid minimum wages; for example, Glenna was earning approximately $60 per week at the time of trial from her part-time job as a floral designer. Glenna indicated, however, that she would like to return to school and earn her degree, thereby attempting to resume her career which had been interrupted by marriage. On the other hand, Rand is a psychiatrist with established employment from which he earns $59,000 per year. Although Rand has been ordered to pay the parties' outstanding debts, the record indicates that except for the deficiency expected upon disposition of their house, the debts incurred relate mostly to Rand's own personal expenses or to the advancement of his career.

From the entire record we conclude that the alimony awarded was inadequate and constitutes an abuse of discretion by the district court. Based on the record presented, the alimony award is inadequate to provide for Glenna's continued

maintenance and support, considering the respective economic circumstances of the parties and Glenna's desire to resume her education. Therefore, the district court's judgment and decree is modified, that is, Rand shall pay to Glenna the sum of $600 per month, as alimony, commencing November 1, 1985, with such monthly payments of alimony to continue until October 1, 1990.

Finally, appellant argues that the trial court erred in awarding her an insufficient amount for attorney fees. An award of attorney fees is a matter within the trial court's sound discretion, is reviewed de novo on the record, and will be affirmed on appeal in the absence of abuse of discretion. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987); *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984); *Ritchey v. Ritchey*, 208 Neb. 100, 302 N.W.2d 372 (1981). The award may depend on a variety of factors, including the nature of the case, the amount of property divided and alimony awarded, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Guggenmos v. Guggenmos, supra; Smith v. Smith, supra.* Considering the nature and circumstances of this case, the award of an attorney fee of $1,000 is not an abuse of discretion and is affirmed.

The decree of the district court is affirmed as modified.

Glenna is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

GRANT, J., not participating.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent on the issue of alimony. The record reflects respondent's earnings as a psychiatrist; however, his net income and available funds to pay the ordered alimony are speculative, since the amount and due date of some of the debts that he was ordered to pay are unknown, particularly the large prospective deficiency debt due the bank.

The ultimate test in allowing alimony is reasonableness as

determined by the facts in each case. *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987). The fixing of alimony rests in the sound discretion of the trial court, and in the absence of an abuse of discretion, it will not be disturbed on appeal. *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985). An abuse of discretion requires that the reasons or rulings of the trial judge be clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice. *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984).

The problem here is not an abuse of discretion in the amount allowed for alimony; rather, it is the absence of clear evidence as to the amount and due dates of the debts necessary for the trial court's consideration to make a reasonable award. The same problem prevents this court from making a considered alimony award.

Considering the evidence or lack of evidence presented to the trial court, it cannot be said that the trial judge abused his discretion in the amount of the alimony award. I would affirm.

CAPORALE, J., joins in this dissent.

THIRD PARTY SOFTWARE, INC., APPELLEE AND CROSS-APPELLANT, V. TESAR MEATS, INC., APPELLANT AND CROSS-APPELLEE.

414 N.W.2d 244

Filed October 16, 1987. No. 85-979.

1. **Judgments: Appeal and Error.** The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
2. **Trial: Damages: Appeal and Error.** Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.

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

David J. Lanphier of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Dean J. Jungers of Hascall, Jungers & Garvey, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit for damages in a contract termination case involving computer services that plaintiff, Third Party Software, Inc. (Software), had agreed to supply to defendant, Tesar Meats, Inc. (Tesar). Tesar appeals the dismissal of its counterclaim, and the $5,195.20 judgment in favor of Software. Software cross-appeals, claiming inadequate damages. A jury was waived. We affirm.

Tesar assigns four errors. First, its motion for a directed verdict at the close of plaintiff's case was denied. Tesar failed to address this error in its brief, and we do not discuss it. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). Second, the trial court failed to consider that Software did not mitigate its damages. Third, the trial court erred in assessing the damages, and the damages were excessive. Fourth, it was error to dismiss Tesar's counterclaim.

The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong. *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982); *Stauffer v. Wilson*, 182 Neb. 129, 153 N.W.2d 454 (1967).

There is little dispute in the evidence. The trial judge could find that Tesar is a processor of meats in Omaha, Nebraska, selling both retail and wholesale. Software was starting a new computer service business in Council Bluffs, Iowa, intending to provide accounting, business records, and other computer-related services to various customers, either by placing computers at the customer's business or by connecting the customer via telephone lines with a larger computer located in its Council Bluffs office. The latter arrangement was the subject of this lawsuit. Tesar was Software's first major service customer; the contract was described as a startup contract wherein Software did not contemplate making a profit; rather,

it expected to break even.

In 1982 and 1983, Tesar's operations showed dramatic unexplained losses which were suspected to be an inventory problem; particularly, the inability to trace raw products through the processing and delivery procedures. After some discussion between the parties, a written contract was executed by both parties on July 13, 1983, whereby Software was to design a special program for Tesar, including accounting, business records, inventory information, and other services to Tesar for a 3-year period at $505 per month rental. No beginning date was included in the contract; however, both parties assumed that it would be September 1, 1983. In fact, the monthly payments were to begin on September 1, 1983, unless Software could not perform due to equipment delays. Software began to acquire the necessary equipment. Credit arrangements were made to purchase a large-capacity model 9300 computer from NCR Corporation, which was ordered in August 1983 but not delivered to Software until late November 1983. This computer could support 14 terminals, of which 3 would be assigned to Tesar. About September 1, 1983, Software rented a small model 8271 NCR computer to serve the Tesar contract; however, Software did not then have the other needed complementary parts to install the computer equipment at Tesar. All of the parts were received on October 4, 1983, and they were taken directly to Tesar for installation, where John Tesar, president of the company, was found in an agitated state because he had just been told by his bank creditor that the Tesar note was being called because of its last unsatisfactory auditor's report. John Tesar said, "We're going out of business," "It's all over," "There's nothing we can do." Software ceased installation and removed most of its equipment that had been brought. Software hoped that Tesar could solve its credit problems and resume the contract; however, Software removed all of its equipment by January 1984, and this suit followed, wherein Software claimed $18,180 damages for all of the unpaid monthly installments. Tesar filed a counterclaim for $15,000, alleging failure to perform the contract. This counterclaim was dismissed.

Following termination of the contract on October 4, 1983,

Software returned all equipment and parts that its suppliers would accept, it terminated temporary rentals of equipment, and it made an unsuccessful effort to replace Tesar's assigned use of the NCR 9300.

The main issue here is the proper measure of damages. Generally, "[t]he measure of damages in a case of breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed." *May v. Marijo Corp.*, 207 Neb. 422, 424, 299 N.W.2d 433, 434 (1980).

Early in the evidence, the trial judge had a conference with counsel on the damages issue, saying,

> The only reason I wanted to know before going on with the testimony: it's my understanding this contract has not been completely performed by reason of unlawful termination. The measure of damages is not necessarily the contract price but is the value of services performed or the value of supplies furnished and the loss of anticipated profit. Is that your understanding of what the law is?

Counsel for Software did not disagree, and counsel for Tesar said, "[T]he contract was executory—or hadn't been fully performed and it was terminated, that the measure of damages was the out-of-pocket plus the profits that they could have received." It appears from the record that this theory of damages was followed during the rest of the trial, and Software did produce evidence showing $17,822.41 for out-of-pocket expenses.

"Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not." *Baum v. County of Scotts Bluff*, 169 Neb. 816, 827, 101 N.W.2d 455, 463 (1960); *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982).

After trial, the case was submitted on briefs, and a $5,195.20 judgment was entered against Tesar for these out-of-pocket costs and expenses:

2 months rental for computer	$2,190.60
2 months rental for software	200.00
Multiplexor expense	317.17

Modems	2,196.00
Plaintiff's cost for telephone jack	169.75
Installation of rented computer	121.68.

The second assigned error concerns the rule that Software had a duty to mitigate its damages. *Smith v. Erftmier, supra.* The record does not support Tesar's claim that the judge did not consider that issue. On the contrary, the judgment recites that the court, "having reviewed the evidence and trial briefs submitted herein finds for the plaintiff . . . ." Further, from the record the judge could find that Software had made a reasonable effort to mitigate its damages.

The third assigned error claims that there was error in the assessment of damages and that they were excessive. From the record and the circumstances here, the judge could find that the July 13, 1983, contract was binding upon both parties; that on October 4, 1983, Software was ready and able to perform the contract terms, which were still in force and binding upon both parties; that on October 4, 1983, Tesar terminated the contract by refusing permission to install computer equipment; that Software made a reasonable effort to mitigate its damages; that Software's claimed expenses were not business startup expenses but, rather, costs and expenses attributable to the July 13 contract incurred prior to termination; and that Software suffered reasonable out-of-pocket expenses and costs in that the rental of the computer and software was an effort to provide a temporary operational computer service to Tesar, and the sum of $2,190.60 was Tesar's share of the computer rental, the multiplexors and modems were required connecting equipment with the telephone transmission lines, and the two service charges of $169.75 and $121.68 were necessary in the installation process. There was no evidence that the judgment was excessive in that it was the result of passion, prejudice, mistake, or disregard of the evidence or applicable rules of law. *Wellman v. Birkel*, 220 Neb. 1, 367 N.W.2d 716 (1985). There was no error in the $5,195.20 judgment against Tesar, and it was not excessive.

For the same reasons, Tesar's counterclaim was properly dismissed.

In its cross-appeal, Software argues that the measure of

damages should be the same as in the breach of contract for personal service, "the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned," *Lee v. Ralston School Dist.*, 180 Neb. 784, 785-86, 145 N.W.2d 919, 921 (1966), and that it should recover all of the unpaid monthly installments, amounting to $18,180, even though its proof included a total of out-of-pocket expenses of $17,822.41. There is no merit to the cross-appeal.

AFFIRMED.

FIRST NATIONAL BANK IN ORD, APPELLEE, V. JOHN M. GREENE ET AL., APPELLANTS.

413 N.W.2d 899

Filed October 16, 1987. No. 85-983.

Uniform Commercial Code: Security Interests: Notice: Guaranty. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.

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

L.W. Kelly, Jr., of Kelly & Kelly, for appellants.

Robert E. Wheeler, for appellee.

William B. Brandt and Robert J. Hallstrom of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

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

GRANT, J.

Plaintiff-appellee, First National Bank in Ord (hereinafter Bank), brought this action in the district court for Valley

County, Nebraska, against defendants-appellants, John M. Greene and Lucille N. Greene, and others. The Bank sought to recover a deficiency judgment against these defendants under a guaranty contract. This is the second appearance of this matter in this court. The district court originally entered summary judgment in favor of the defendants. This court reversed that judgment and remanded the cause for further proceedings because fact questions existed as to the disposition of the collateral securing the original note. *First Nat. Bank v. Greene Bldg. & Supply*, 220 Neb. 205, 369 N.W.2d 59 (1985).

On remand, after trial to the court, judgment was entered against appellants on October 16, 1985, in the amount of $66,758.77 plus interest. On appeal, the appellants allege that the district court erred in finding that the Bank did not repossess the property, in finding that the sale of the property was conducted by the debtor, in finding that notice to the appellants of the sale was not necessary pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980), and in finding that the appellants had signed a valid and enforceable guaranty. For the reasons hereinafter set out, we affirm.

The evidence shows that on April 18, 1978, John and Lucille Greene executed an unlimited personal guaranty which unconditionally guaranteed payment to the Bank of all the debtor corporation's debts, whether then existent or later incurred. The other original defendants are not involved in this appeal. On March 22, 1979, the debtor executed a security agreement granting a security interest to the Bank in "All Machinery, Equipment (including automotive equipment) Furniture, fixtures, inventory, accounts rec. , contract rights, chattel paper, all tangible and intangible personal property, whether now owned or afteracquired, and all proceeds therefrom." On June 13, 1979, the debtor corporation gave the Bank an additional security interest in a truck-mounted crane. On January 30, 1981, an officer of the corporation executed note No. 60950 to the Bank in the amount of $113,087.30. This note was not paid off when due on April 30, 1981. As the company was unable to obtain alternative financing, a sale of the corporation's assets was ultimately held on June 1, 1981, resulting in a deficiency of $66,758.77. As we find that it was

not necessary to give notice of the sale to appellants under § 9-504(3), it is unnecessary to consider the other assignments of error.

It is well settled that a guarantor is a debtor within the meaning of Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) and is entitled to notice of the sale conducted by the creditor. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *Borg-Warner v. Watton*, 215 Neb. 318, 338 N.W.2d 612 (1983). This court has held, however, that where no security interest exists or is contemplated at the time the guaranty agreement is executed, the failure to give notice to the guarantor pursuant to § 9-504(3) is not a defense in an action against the guarantor. *First State Bank v. Peterson*, 205 Neb. 814, 290 N.W.2d 634 (1980). In *Peterson*, the guarantor signed an unconditional guaranty, similar to the type involved herein, guaranteeing the loans of a lumber company. The guaranty agreement was dated October 26, 1973. On October 31, 1973, the bank made a $12,000 loan to the lumber company. The bank subsequently advanced additional funds to the lumber company, resulting in a total indebtedness in excess of $60,000. The bank secured a portion of the later indebtedness by obtaining a security interest in the lumber company's inventory. As the loans were made in reliance on the guaranty agreement itself, we held that notice to the guarantor was not required. We held that where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.

The appellants argue that they are entitled to notice of the sale under *Borg-Warner v. Watton, supra*. In *Borg-Warner*, the inventory security agreement granted the creditor a lien on the debtor corporation's inventory before the guaranty agreement was executed. Additionally, the retail finance agreement provided that all contracts purchased by the debtor corporation were to be secured as a first lien upon the property. The facts of *Borg-Warner* indicated that the creditor did not contemplate making any unsecured loans to the debtor, and we held that the creditor was required to give the guarantor notice of the sale.

In the present case, however, the appellants signed an unconditional guaranty, guaranteeing the debts of Greene Building and Supply, Inc. The execution of the guaranty was a condition of credit extension from the Bank to the corporation. The guaranty agreement was executed in 1978, and the Bank did not obtain a security interest in the assets of the debtor corporation until 1979. There is no evidence that the parties contemplated that the debts guaranteed by John and Lucille Greene were secured debts. As in *Peterson*, the loans made by the Bank were made in reliance on the guaranty agreement itself.

Since the issue of notice is dispositive of this controversy, we need not consider the other assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

COLWELL, D.J., Retired, concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. GEORGE E. CARTER, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. VICTOR L. CARTER, APPELLANT.

413 N.W.2d 901

Filed October 16, 1987. Nos. 86-442, 86-445.

1. **Trial: Evidence: Pretrial Procedure: Appeal and Error.** After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
2. **Motions for Continuance: Appeal and Error.** This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court.
3. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt.
4. **Evidence: Hearsay: Witnesses.** A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial.
5. **Evidence: Hearsay: Witnesses: Appeal and Error.** It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be

upheld.

6. **Evidence: Appeal and Error.** If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
7. _____: _____. The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion.

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

William J. Elder of McCormack, Cooney, Mooney & Hillman, and Raymond J. Hasiak of Dowd, Fahey, Dinsmore & Hasiak, for appellants.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

The defendants, Victor L. Carter and George E. Carter, were charged in separate informations with first degree murder, with use of a firearm in the commission of a felony, and with being habitual criminals. In the trial court the cases were consolidated for trial. In this court they were consolidated for briefing and argument.

The jury returned verdicts of guilty, and the defendants were each sentenced to life imprisonment on the murder count and to a consecutive term of 10 years on the use of a firearm count.

On appeal the defendants contend that the trial court erred in overruling their motion to suppress identification testimony of Peggy Hatfield and Scott Reynolds, in failing to sustain their motion for a continuance, in failing to sustain their pleas in abatement, in permitting the State to introduce the preliminary hearing testimony of an absent witness, in that the trial was tainted with racial prejudice, in that numerous evidentiary rulings were erroneous, and in granting the State's motion in limine to suppress prior inconsistent evidence.

The record shows that the victim, Jeffrey R. Peterson, died as the result of being shot during the early morning hours of

October 9, 1985. A single .38-caliber bullet entered the left chest of the victim and penetrated both lungs and his heart.

The record further shows that between the hours of midnight and 1:30 a.m. on October 9, 1985, the deceased, Jeffrey Peterson, and his cousin, John Flynn, drove to the 19th and Lothrop Streets area in Omaha, Nebraska. They had been asked by a friend of theirs, Gerald Kincaid, to give a message to Janelle Anzalone to either call Kincaid or come to his house because Anzalone owed Kincaid money for pills she had purchased from him. Upon their arrival, Peterson and Flynn met two black males in a blue and white Cadillac parked in front of Anzalone's residence. Flynn inquired as to the whereabouts of Anzalone and was told by the person in the driver's seat that she was not around. During the conversation Flynn was threatened by someone in the Cadillac, and threats were made also against Kincaid or the Kincaid house. Later, Flynn was able to identify only one person in the Cadillac, that being Chester Carter, a brother of the defendants. Flynn could not positively identify Victor Carter as being present in the Cadillac and admitted that it was only his speculation that the individuals at 19th and Lothrop had anything to do with the later shooting.

After this attempt to contact Anzalone, Flynn and Peterson returned to Kincaid's residence at 39th and Young Streets and told Kincaid what had occurred. Peggy Hatfield, Scott Reynolds, and Ross Little were outside the Kincaid house, working on Flynn's car.

Just before 3 a.m. Hatfield, Reynolds, and Little decided to drive to a nearby convenience store for coffee and sandwiches. The three got into Hatfield's car, which was parked facing south on 39th Street. Before they pulled away from the curb, a car came up 39th Street, going north. Hatfield testified that the car contained two or three black males and that the car slowed down as it passed Kincaid's house. The car turned at the intersection of 39th and Young, backed up, and began to drive south on 39th Street. By this time Hatfield had also begun to drive south on 39th Street. The other car was now behind Hatfield and began honking its horn, so Hatfield pulled over to the curb. The car (later described by Reynolds as a blue/light

blue-gray Buick) pulled alongside Hatfield's car at about an arm's-length distance. The passenger in the car, whom Hatfield later identified as Victor Carter, pointed a gun toward Hatfield and asked if she knew Jerry Kincaid. She replied that she did not. Victor then said something to the effect of "[d]on't come messing around in our neighborhood or with our people." Hatfield again started to drive south on 39th Street. She looked in her rearview mirror and did not see the car following her. Hatfield drove to a phone booth on 30th Street, located 10 to 15 blocks away from the Kincaid residence. Reynolds made a phone call to the Kincaid residence and was told that Peterson had just been shot.

After Peterson and Flynn had returned from 19th and Lothrop, Kincaid received two or three unpleasant phone calls from Janelle Anzalone. During the second or third phone call, it was brought to Kincaid's attention that a blue car was coming around the corner. He looked out the window and said, "That's them," and then hung up on Anzalone. Flynn testified that Kincaid said, "They just went by" and that he (Flynn) understood Kincaid to mean the Carters. Flynn decided to go across the street to his grandmother's house, where he thought it would be safe, and indicated to Peterson to come with him.

As Peterson and Flynn walked out the front door, Flynn grabbed a baseball bat, and they began to walk through the front yard. When they were in the middle of the yard, the car came around the corner, sped up, and then slammed on its brakes. Flynn threw the bat toward the vehicle, but testified he did not know whether the bat hit the vehicle. Flynn saw muzzle flashes, heard a boom, and said, "Run, Jeff; they've got guns." Flynn ran back behind Kincaid's house, looked around the corner to see if anyone was coming, and then heard footsteps which he thought would be Peterson's. Instead, it was a friend of his named William Howard Thurman, saying that Peterson had been shot. Flynn never actually saw Peterson being shot, but did later identify the vehicle involved as a silver- or grayish-colored four-door Buick.

Later that morning, the Carter automobile was located in a motel parking lot near 39th and Dodge Streets. Flynn was brought to the parking lot and identified the Carter automobile

as being the same car involved in the shooting. Reynolds also identified the car as being the same one that pulled Hatfield's car to the side of the road. The vehicle was registered to Georgia Carter, the mother of the defendants.

Meanwhile, police officers were advised that the parties had left the building and were in an alley behind the motel. Officers Strong and Thuelen went to the alley behind the motel and arrested Victor Carter, Chester Carter, and Janelle Anzalone. George Carter was arrested by another officer in a bushy area around the corner from the motel. During his arrest, officers found a .38-caliber cartridge in George Carter's pocket, and 12 additional live .38 long rounds were found lying in the shrubbery.

That morning a lineup or "show up" consisting of Chester Carter, Victor Carter, and George Carter was conducted at the Central Police Station. Flynn identified Chester as one of the persons he saw in the blue and white Cadillac earlier that evening at 19th and Lothrop Streets. Reynolds identified Victor as the passenger in the front seat of the Buick that had pulled the Hatfield car over and also identified George as being a passenger in the back seat of that car. Reynolds later testified at trial that he was mistaken in his placement of George during the lineup and that George was actually the driver of the vehicle. Ross Little, also a passenger in the Hatfield car, identified Victor as the driver of the Buick and George as the passenger in the front seat. Hatfield identified Victor as the passenger waving a gun at her, but could not identify anyone else in the vehicle.

At the trial Kincaid testified that he had seen the shooting; that the blue car had stopped near the front of his house; that the passenger door flew open and a man jumped out, shooting a gun twice; and that then the driver jumped out and started shooting a gun four or five times. Kincaid identified the passenger as Victor and the driver as George.

The first assignment of error relates to the lineup identifications by Peggy Hatfield and Scott Reynolds. The defendants contend that Hatfield and Reynolds should not have been allowed to testify as to their previous identifications because the lineup was unduly suggestive and their testimony

was hearsay. No objections were made during trial to the testimony of either Hatfield or Reynolds. Therefore, the alleged error was not preserved for this court's review.

As stated recently in *State v. Pointer*, 224 Neb. 892, 895, 402 N.W.2d 268, 271 (1987), "[I]n a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal." This holding was followed in *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987), where we refused to consider error assigned to the admission of evidence concerning Intoxilyzer test results because no objection was made to the evidence at the trial.

The same rationale applies in this case. No objection was made to prosecution inquiries regarding the lineup.

> As dictated by the Nebraska Evidence Rules, error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context.

Roggenkamp, supra at 920, 402 N.W.2d at 687.

The second assignment of error concerns the trial court's refusal to grant the request for a continuance. This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court. *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987); *State v. Mecum*, 225 Neb. 293, 404 N.W.2d 431 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987).

Counsel for the defendants failed to comply with Neb. Rev. Stat. § 25-1148 (Reissue 1985), which provides that an application for continuance shall be by written motion and supported by affidavits setting forth the facts upon which the continuance is requested.

A failure to comply with § 25-1148 is relevant as to whether the trial court abused its discretion. In *Metschke v. Department of Motor Vehicles*, 186 Neb. 197, 200, 181 N.W.2d 843, 845 (1970), *overruled on other grounds Mackey v. Director of*

Department of Motor Vehicles, 194 Neb. 707, 235 N.W.2d 394 (1975), this court stated: "In the absence of a showing in conformance with section 25-1148, R.R.S. 1943, it is not error for the trial court to refuse to grant a continuance." In that case we found no abuse of discretion in denying the appellant's oral motion for a continuance (to secure additional witnesses) because there was no showing made as to what evidence would be procured by calling additional witnesses, no showing of materiality, and no showing of any other matters pertinent in support of the motion.

A similar finding was made in *Stastny v. Tachovsky*, 178 Neb. 109, 132 N.W.2d 317 (1964), holding there was no error in denying a motion for a continuance where an oral application was made the morning of the trial, no written application was made, and the parties seeking the continuance had sufficient time to prepare for trial. See, also, *Vlcek v. Sutton*, 201 Neb. 555, 270 N.W.2d 906 (1978).

In the present case, no written application was made, and no affidavits were filed to support a claim of prejudice if the continuance were not allowed. The defendants base their request on the fact that the prosecution witness Kincaid changed his previous statement and claimed to be an eyewitness to the shooting. The record shows that the defense counsel learned of the changed statement approximately 2 weeks before the start of the trial, they were given copies of the new statement, and they had full opportunity to cross-examine the witness at trial. These facts show there was no abuse of discretion in overruling the motion for a continuance.

In their third assignment of error, the defendants contend the trial court erred in overruling their pleas in abatement because the evidence adduced at the preliminary hearing was not sufficient to bind them over.

Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt. *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986).

At the trial, the State was allowed to introduce the testimony of Ross Little received at the preliminary hearing. The

defendants' fourth assignment of error is that the trial court erred in finding that Little was unavailable as a witness.

On March 28 or 29, 1986, Officer James C. Wilson of the Omaha Police Division was instructed to locate Little for the trial. Officer Wilson learned that Little was living in Oregon, contacted the local police in Oregon, and obtained the address and phone number of Little's father. Officer Wilson spoke with the father and left a message to have Little call him. One or two days later, Little returned the call and was told that he was needed as a witness. Little was told that his transportation to Omaha would be paid.

While arranging for an airline flight, Officer Wilson discovered an outstanding felony warrant for Little. Officer Wilson then called Little and told him about the warrant. Little was aware of this warrant, but was willing to return to Nebraska anyway.

Sometime later Officer Wilson told Little's father that his son would be arrested when he came back to Nebraska. Officer Wilson then contacted the local police in Oregon and requested that they arrest Little on a fugitive charge. As of April 4, 1986, the day Officer Wilson testified, Little had not been found.

Neb. Rev. Stat. § 27-804(1)(e) (Reissue 1985) provides that a witness is unavailable if "the proponent of his statement has been unable to procure his attendance by process or other reasonable means." A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial. *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984).

The issue here is whether the prosecution, through the efforts of Officer Wilson, made a good faith effort. Officer Wilson first tried to bring back Little voluntarily. When questioned as to why no attempt was made to immediately arrest Little, and instead giving him a chance to come back on his own, Officer Wilson testified, "My information is it would be much easier to get him back here willingly rather than having to extradite him. It's a long process."

It is within the sound discretion of the trial court whether unavailability has been shown. Absent a showing of an abuse of

discretion, the trial court's decision will be upheld. *State v. Wiley*, 223 Neb. 835, 394 N.W.2d 641 (1986); *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984).

In this case, the admission of Little's testimony from the preliminary hearing was at most harmless error. "If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal." *State v. Klingelhoefer*, 222 Neb. 219, 224, 382 N.W.2d 366, 370 (1986); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *overruled on other grounds State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

Little's testimony at the preliminary hearing was that he was a passenger in a car driven by Peggy Hatfield, that a blue car came up from behind and flashed its lights, and that Hatfield stopped and pulled over. One of the occupants of the car asked if they knew Jerry Kincaid, to which they responded they did not. Little's testimony differed from the testimony of the other witnesses only in that at the lineup he placed Victor as the driver and George as the passenger. The record shows that the testimony of Peggy Hatfield and Scott Reynolds established basically the same facts as the testimony of Little. Any error in the ruling regarding unavailability was at most harmless error.

The defendants' fifth assignment of error is that the trial was tainted with racial prejudice. The record does not support this contention.

We have examined the record concerning each of the evidentiary rulings complained of and find that they were not erroneous or not prejudicial. The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion. *State v. Ryan, ante* p. 59, 409 N.W.2d 579 (1987); *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

The final assignment of error is that the trial court erred in granting the State's motion in limine to suppress evidence of an incident a few months prior to the shooting, where John Flynn threatened a neighbor with a gun. The defendants contend the evidence should have been admitted to impeach Flynn's testimony that he did not own a gun. The trial court refused to

admit the evidence because it related to a collateral matter. We find no abuse of discretion.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD ALDRICH, APPELLANT.

413 N.W.2d 639

Filed October 16, 1987. No. 86-826.

Indictments and Informations. The district court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

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

Francis O'Brien, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Richard Aldrich, defendant, appeals his conviction of first degree sexual assault, Neb. Rev. Stat. § 28-319 (Reissue 1985), assigning one procedural error, that the court abused its discretion in allowing the State, at the conclusion of all evidence, to amend its information by deleting one word, "and," and substituting the word "or," making the charge read in the disjunctive. We affirm.

Section 28-319 provides:

> (1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the

> nature of his or her conduct, or (c) . . . .

The material parts of the information after amendment recited:

> Richard Aldrich, defendant . . . did subject another person to sexual penetration and did overcome the victim by force, threat of force, express or implied, coercion, or deception *or* knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his conduct, to-wit: sexual assault of [the victim], Schuyler, Nebraska, age 17 years, a violation of Section 28-319, of the Revised Statutes of the State of Nebraska . . . .

(Emphasis supplied to show amendment.)

Since Aldrich does not contend that there was a failure of proof, the facts are stated briefly. In September 1985, Aldrich was living in Schuyler, Nebraska, with the 17-year-old victim and her mother. The victim's tested IQ was about 68, and there was expert evidence placing her intelligence in the range of that of an 8- to 10-year-old child. The evidence clearly establishes the act of sexual penetration, and the jury could find that it was accomplished as charged in the information.

"[T]he District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced." *State v. Gascoigen*, 191 Neb. 15, 20, 213 N.W.2d 452, 455 (1973).

The facts here are similar to those in *State v. Davis*, 195 Neb. 361, 237 N.W.2d 885 (1976). Defendant's conviction there was affirmed upon an instruction submitted to the jury in the disjunctive, without any amendment of the operative information that charged him in the conjunctive.

The information upon its face in both forms was sufficient to charge a crime under § 28-319, since the crime is charged in the language of the statute and it informed defendant, with reasonable certainty, of the charges made against him. See *State v. McGee*, 221 Neb. 557, 378 N.W.2d 674 (1985). Further, the amendment did not charge either an additional or a different offense.

The amendment was no surprise to Aldrich, since the record shows that several days prior to trial he was aware of the technical defect here discussed. His failure to challenge the information before trial by a motion to quash, Neb. Rev. Stat. § 29-1808 (Reissue 1985), was a waiver of that technical defect. *State, ex rel. Gossett, v. O'Grady*, 137 Neb. 824, 291 N.W. 497 (1940); *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982).

No prejudice to defendant is shown, and the trial judge did not abuse his discretion in granting the amendment.

AFFIRMED.

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

413 N.W.2d 907

Filed October 16, 1987. No. 86-1049.

1. **Directed Verdict: Convictions.** A trial court is justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained.
2. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient 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 the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
3. **Homicide: Intent.** A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
4. _____: _____. The state of mind required for second degree murder may be inferred from the evidence of the criminal act.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and Lisa Martin-Price, for appellee.

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

BOSLAUGH, J.

The defendant, Ronald E. Williams, was charged with first degree murder and use of a firearm in the shooting death of Eric W. Holmes. Following a jury trial the defendant was found guilty of second degree murder and use of a firearm to commit a felony. He was sentenced to 20 years' imprisonment on the murder count and 3 years' (consecutive) imprisonment on the firearm charge.

On appeal the defendant's sole assignment of error is that the evidence was insufficient to sustain the conviction and that, therefore, the trial court erred in not sustaining his motions for a directed verdict and to dismiss the case. He argues that under the facts of this case it is clear as a matter of law that he was acting in self-defense and therefore the shooting was justified.

A trial court is justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained. *State v. Dwyer, ante* p. 340, 411 N.W.2d 341 (1987); *State v. Meints*, 225 Neb. 335, 405 N.W.2d 15 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987).

In determining whether the evidence is sufficient 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 the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction. *State v. Moore, ante* p. 347, 411 N.W.2d 345 (1987); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987).

Neb. Rev. Stat. § 28-304 (Reissue 1985) provides in part that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."

The state of mind required for second degree murder may be inferred from the evidence of the criminal act. *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983).

The record shows that on April 12, 1986, the victim, Eric Holmes, was living at Tim Agee's home at 4945 Manderson Street in Omaha, Nebraska. That evening a group of friends gathered at Agee's home for a get-together. Those at the party were Agee, Timothy Prince, Kelly Tibbs, Holmes, and Holmes' girlfriend, Michelle Tibbs. By around 11:30 p.m. everyone had left the house except for Holmes and Michelle.

Holmes and Michelle began to argue over possession of a blanket. Holmes told Michelle to get out and walk home, which she began to do. As she walked east up Manderson Street, she heard Holmes walking behind her. He caught up with her, and they again began to argue. Holmes grabbed her and tried to pull her back toward his house, but she pulled the other way. Holmes pushed her to the ground near a tree in front of the Roy Tipler home at 4828 Manderson Street and sat on top of her. Michelle began to cry and told Holmes to get off.

John Hudson and his mother, Linda Johnson, lived next door to Tipler. Hudson was hosting a birthday party for his girlfriend, Barbara Lawson, which the defendant, Ronald Williams, was attending. Hudson became aware of the altercation outside between Holmes and Michelle after several people complained to him. Hudson went outside and heard a woman gagging. He walked up the sidewalk to the tree and saw Holmes on top of Michelle. He told Holmes the police were coming and to get up and leave. Holmes did not get up, but remained on top of Michelle for approximately 3 more minutes. By this time other people had come outside to see what was happening. Holmes got off Michelle and stood up. Holmes and Michelle then walked east toward the Hudson home. By this time the defendant was also outside and heard Hudson and another man, Antonio Alexander, telling Holmes to leave. The defendant also heard Hudson's mother, Linda Johnson, tell Holmes to leave. Holmes replied to Johnson, "Fuck this shit, I'm not going anywhere, ain't nobody going to make me." Johnson told Holmes he had done enough already, to which he

replied that "he ain't done nothing yet."

The defendant then stepped in and told Holmes to leave. Holmes and the defendant began arguing back and forth. The defendant tried to go toward Holmes, but Hudson and Alexander restrained him. The defendant was then approximately 10 feet away from Holmes. The defendant appeared to calm down, so Hudson and Alexander let go of him. Holmes began walking west toward his house, but was walking backward so that he was still facing the defendant to the east.

They continued to exchange words, and when Holmes was approximately three to four houses away, Hudson and Alexander again had to restrain the defendant from going after Holmes. They were successful in restraining the defendant, so they again let go of him. Holmes, still walking backward, said, "Let him go. I got something for him." The defendant went toward Holmes again. Hudson tried to grab the defendant, but he broke away and ran up Manderson Street toward Holmes. At this point Holmes was in front of the home of Steven and Judy Gregory at 4848 Manderson, which was estimated to be around 100 yards from the tree in the Tipler yard where the Holmes-Michelle altercation took place.

The Gregorys had heard this altercation and had called 911 to report the disturbance. Judy Gregory testified that she and her husband were standing in the front doorway of their home watching Holmes and the defendant. She saw Holmes turn toward the defendant as the defendant came up from behind him. She saw Holmes put his hands up in the air and heard him say, "Man, I don't have anything." She then saw the defendant shoot Holmes. Holmes pulled up his shirt, looked at his chest, and said, "Man, you didn't have to shoot me." Holmes turned and ran west toward his house, while the defendant went east back toward the party. Judy Gregory testified that she never saw any kind of weapon in Holmes' possession. Steven Gregory also testified that he had seen Holmes with his hands in the air and that Holmes shouted, "I don't have anything" just before he was shot.

Others who were in front of the Hudson home gave a different version of the events in front of the Gregory home.

Bertha Jones testified that as the defendant approached Holmes, Holmes put his hand toward his jacket pocket and was bringing his hand back out when he was shot. Barbara Lawson testified Holmes did not put his hands in the air, but instead was bringing his hand toward his body when the defendant shot him. The defendant testified that Holmes had put his hand in his pocket and that he, the defendant, shot Holmes as Holmes was bringing his hand back out of his pocket. He also testified that he never saw a weapon on Holmes.

About 1:30 a.m. Timothy Prince went back to the Agee house and found Holmes lying on the couch with a bullet hole in his chest. The police were called, and Holmes was later pronounced dead.

Although the evidence was in conflict, it was sufficient to sustain a finding of guilty beyond a reasonable doubt. Taking the view of the evidence most favorable to the State, the evidence supports a finding by the jury that the defendant intentionally shot Eric Holmes. Two of the eyewitnesses to the shooting each testified that Holmes had his hands in the air and had stated, "I don't have anything" immediately prior to being shot. The defendant himself testified he never saw a weapon on the victim. This evidence was sufficient to support the conviction, and the judgment of the trial court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND TULLY, APPELLANT.

413 N.W.2d 910

Filed October 16, 1987. No. 86-1106.

1. **Pleas: Trial: Time.** In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
2. **Homicide: Lesser-Included Offenses: Proof.** Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater.

Therefore, evidence which proves first degree murder proves the existence of second degree murder.

3. **Criminal Law: Appeal and Error.** Error without prejudice does not provide a ground for the reversal of a criminal conviction.
4. **Mental Competency: Pleas: Trial.** A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
5. _____: _____: _____. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
6. _____: _____: _____. Mental retardation does not necessarily imply incompetence to plead or stand trial.
7. **Mental Competency: Pleas: Trial: Appeal and Error.** The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
8. **Postconviction: Proof.** One seeking postconviction relief bears the burden of establishing the basis for such relief.

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

John F. Sheaff and Roy A. Sheaff of Sheaff Law Offices, for appellant.

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

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

CAPORALE, J.

On February 9, 1962, defendant-appellant, Raymond Tully, pled guilty to second degree murder and was thereafter, on February 14, 1962, sentenced to life imprisonment. More than 24 years later, on June 5, 1986, he filed a motion for postconviction relief pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Following an evidentiary hearing, the motion was denied. In this appeal Tully urges that the district court erred in failing to overturn his conviction because (1) his plea was accepted without amendment to the information charging him with first degree murder, (2) his plea was not made knowingly, intelligently, and voluntarily, (3) he was not competent to plead, and (4) there was

no presentence investigation or other determination of his background prior to imposing sentence. We affirm.

The record reflects that the information charged Tully with first degree murder, alleging that he "feloniously, purposely, and of his deliberate and premeditated malice" killed his father. At the arraignment Tully's attorney advised the judge and prosecutor that his client was willing "to enter a plea of guilty to second degree murder." In response to a question by the judge, Tully said he understood. A series of questions between Tully and his attorney establishes that he and Tully had discussed the possibility of standing trial on the charge of first degree murder or of pleading guilty to a charge of second degree murder and that the attorney had explained the penalties for each offense to Tully. In response to the judge's inquiry Tully's attorney said he had no doubt Tully was then sane and was so at the time of the crime.

Psychiatric reports entered in evidence at that hearing establish that Tully told an examining psychiatrist that he had confessed killing his father to the authorities and that he had been having arguments with his father over a period of 2 years, hated him, and had purchased a rifle some 2 weeks prior to the shooting should his father make him "mad enough to use it." On the day of the shooting, Tully and his father, while working together all day, had argued over a number of things, including Tully's previously undisclosed membership in a flying club. During these arguments, the father had threatened to smash the club's plane. After they quit working, Tully had dinner with his parents, and later left to run errands. At the conclusion of his errands, Tully picked up the rifle, which he had hidden in an empty house, arrived back home at about "1:30 P.M. [sic]," cut the telephone wires, and shot his father in the head. Tully then "ditched" the rifle in a nearby vacant house. According to Tully, he was still angry, particularly over his father's threat to damage the plane, as Tully had always had an interest in flying, to the displeasure of his father. Tully, who was then 36 years old, later stated that at the time of the shooting he was so confused that he did not know the difference between right and wrong.

Tully had quit school when he was 16 years old and had finished the eighth grade. The examining psychiatrist

concluded Tully was mildly mentally retarded, having a measured intelligence quotient of 81. He had "many schizoid features" and partially "disassociated" while under stress. In this examiner's opinion it was "entirely possible" that Tully was not responsible for short periods of time while under stress and that there was "a reasonable doubt" as to whether Tully could "be classified as being sane at the time that he became involved with the shooting of his father."

Upon the prosecutor's statement that he had no objection, the judge accepted Tully's plea to second degree murder. The information was not amended at any time.

The prosecutor told the judge that Tully had no prior criminal record of consequence, the only thing being that Tully and another man once broke some windows at a pool hall. The judge deferred sentencing for 5 days, saying he wanted to visit with Tully in the presence of his attorney and the prosecutor. The record does not reflect what was said during that visit, if it took place.

When asked at the sentencing hearing whether Tully had anything to say as to "why sentence should not be pronounced," his attorney replied that "defendant has no statement to make."

We begin by noting that the merits of Tully's assignments of error are, in general, to be determined by the law as it existed when his plea was accepted. *State v. Bevins*, 187 Neb. 785, 194 N.W.2d 181 (1972).

Tully's first assignment of error rests upon the premise that the failure to amend the information constituted reversible error per se. Tully has failed to cite us to any authority in support of this premise; indeed, quite the contrary is true. In *Moore v. State*, 148 Neb. 747, 29 N.W.2d 366 (1947), an appeal from a conviction under Neb. Rev. Stat. § 28-402 (1943), we held that if the information charged murder in the first degree, a conviction of murder in the second degree could be sustained. Later, *Wolff v. State*, 172 Neb. 65, 108 N.W.2d 410 (1961), taught that a plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order, and its effect is to authorize the imposition of the sentence prescribed by law. Reading *Moore* and *Wolff* together, we learn that under

the law as it existed in 1962, a plea of guilty to second degree murder was properly entered in response to the information, which had charged first degree murder.

Tully next assigns as error the more general complaint that the trial court's failure to amend the information before accepting his guilty plea constituted a "failure to inform him of the nature and elements of the offense with which he was charged and . . . failure to assure that [his] guilty plea was voluntary." Brief for Appellant at 5. We will treat these two aspects of Tully's second assignment of error individually.

Tully's first contention has no merit under the law as it existed in 1962. The relevant homicide statutes in effect at the time were Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956), which read in relevant part as follows:

> 28-401. . . . Whoever shall purposely and of deliberate and premeditated malice . . . kill another . . . shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury.
>
> 28-402. . . . Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another . . . shall be deemed guilty of murder in the second degree; and upon conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life.

A comparison of the foregoing language reveals that, but for the fact that second degree murder does not require deliberation and premeditation as does first degree murder, the elements of the two crimes are identical. Tully does not claim that he did not know the elements of first degree murder. As *Moore v. State, supra*, points out, the previously cited statutes define degrees of the single crime of homicide. The unlawful killing constitutes the principal fact, and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence

of second degree murder. Thus, while it would certainly have been better procedure to have amended the complaint, it cannot be said that Tully suffered any prejudice by being permitted to plead guilty to a lesser degree of the crime charged in the information. This assignment of error is thus resolved by the rule that error without prejudice does not provide a ground for the reversal of a criminal conviction. *Svehla v. State*, 168 Neb. 553, 96 N.W.2d 649 (1959).

Tully next argues that the failure to amend the information renders his guilty plea involuntary, and therefore void, under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which holds that the waiver of federal constitutional rights cannot be presumed from a silent record; in order for a plea of guilty to stand, it must not only have been intelligently and voluntarily entered, but the record must affirmatively disclose it to have been such.

Tully acknowledges, however, that the principles enunciated in *Boykin* apply prospectively and not retroactively. *Brown v. Swenson*, 487 F.2d 1236 (8th Cir. 1973); *Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977). In *Brown*, the circuit court specifically held the *Boykin* requirements did not apply to a plea entered in 1964 and that the determinative question was whether under the totality of the circumstances the pre-*Boykin* plea was entered knowingly and voluntarily. See, also, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

This court announced the procedures to be used in accepting pleas of guilty in *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971). *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), extended the *Boykin-Turner* rule for prospective application to all offenses for which a defendant may be imprisoned, be they felonies, misdemeanors, or traffic infractions. The procedure for taking guilty pleas was clarified further in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and now requires that in order to support a finding that a plea of guilty has been freely, intelligently, voluntarily, and understandingly entered, the record must show that the court (1) informed the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege

against self-incrimination; and (2) examined the defendant to determine that he or she understood the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.

Thus, while the plea might not pass constitutional muster today, a matter we do not decide, the question is whether under the totality of the circumstances it can be said the plea was knowingly and voluntarily entered under the law as it existed in 1962. The record tells us Tully was represented by counsel, a factual basis for the plea existed, he had confessed to killing his father, he had been told the penalty for second degree murder as well as for the greater crime with which he was charged, and he himself told the judge he understood he was pleading guilty to the lesser offense. Tully had sufficient information to understand that by pleading guilty to second degree murder he removed the risk of being sentenced to death for the killing. Under those circumstances, we conclude that if Tully was competent to plead, the plea was a knowing and voluntary one.

This brings us to Tully's third assignment, wherein he urges there was error in failing to find he was not competent to enter a plea of guilty.

The present law is that a defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. The issue of competency is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court. Mental retardation does not necessarily imply incompetence to plead or stand trial. *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986). The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding. *State v. Davis*, 224 Neb. 771, 401 N.W.2d 165 (1987).

We have neither been referred to nor found any Nebraska law to suggest that the rules were otherwise when Tully entered his plea. We therefore apply the foregoing rules to the plea before us and conclude that the exchanges between Tully and

the judge in accepting his plea, coupled with the court's observation of Tully's exchanges with his attorney, are sufficient to support the trial court's implicit finding that Tully was competent to plead.

In his final assignment Tully claims the trial court erred in failing to order a presentence investigation or to otherwise adequately inform itself about his background.

At the time of Tully's conviction Neb. Rev. Stat. § 29-2217 (Reissue 1956) provided:

> In all cases of criminal prosecution, whenever any person shall have been found guilty, by verdict of a jury, or by his plea of guilty duly entered in the cause, of any misdemeanor or any felony, *except murder, treason, or forcible rape*, it shall be the duty of the court in which such cause is pending to ascertain, if practicable, through the agency of a probation officer or otherwise, the age of the accused, whether the offense of which he is found guilty by such verdict is his first offense, the extent of the moral turpitude involved in the act committed by the accused, and such other facts and circumstances relating to the accused as he may desire to know.

(Emphasis supplied.) Clearly, this statute imposed no duty on the court to investigate prior to announcing sentence, as the crime to which Tully had pled guilty was specifically exempted from its embrace.

The level of Tully's education and intelligence and the fact that he had no past criminal record were known by the court. Tully does not tell us what additional information helpful to him any further investigation of his background would have revealed. This assignment is therefore controlled by the rule that one seeking postconviction relief bears the burden of establishing the basis for such relief. *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987). No such basis has been established.

There being no merit to Tully's assignments of error, the judgment of the district court denying postconviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS L. THOMTE, APPELLANT.

413 N.W.2d 916

Filed October 16, 1987. No. 87-052.

1. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
2. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
3. **Drunk Driving: Investigative Stops: Probable Cause.** A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
4. **Police Officers and Sheriffs: Drunk Driving: Witnesses.** A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
5. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

James E. Schaefer, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The appellant, Dennis L. Thomte, was charged with operating a motor vehicle while he was under the influence of alcohol or when he had ten-hundredths of 1 percent or more by

weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). Having been convicted of that charge in the county court for Douglas County, Thomte appealed his conviction to the district court for Douglas County, which affirmed the county court's judgment of conviction.

At approximately 11 p.m. on April 25, 1986, Sgt. Timothy Cavanaugh was driving his cruiser southbound in moderate traffic on Interstate 680 within Omaha, which highway has two marked lanes for southbound traffic. Cavanaugh, driving in the left lane, approached other southbound vehicles in the right lane. As Cavanaugh began to overtake a Cadillac, which was being followed by other vehicles, the Cadillac made a sharp weave from right to left within the right lane but did not cross into the left lane occupied by Cavanaugh's cruiser. Cavanaugh reduced his cruiser speed to approximately 45 miles per hour and pulled into the right lane, ahead of traffic which was still following the Cadillac. During his observation of the Cadillac as it traveled 16 blocks, or a little over 1 mile, on I-680, Cavanaugh saw the Cadillac again weave within the right lane of traffic and, as the Cadillac was about to exit from the Interstate, activated the cruiser's red rotating lights. The Cadillac pulled to the right shoulder of the road and stopped. Cavanaugh parked his cruiser directly behind the Cadillac and then approached the vehicle, where he found Thomte inside and alone. Illumination at that point was provided by Cavanaugh's flashlight and street lamps on the Interstate. When he arrived at the Cadillac, Cavanaugh asked for Thomte's driver's license and the vehicle registration. Thomte told the officer that he was tired, and the officer observed that Thomte's "speech was very slurred and thick-tongued, mumbled, if you will. And I noticed a moderate odor of alcohol" on Thomte's breath.

Cavanaugh asked Thomte to get out of the Cadillac and perform some field sobriety tests. When Thomte said he knew the alphabet, he attempted to recite the alphabet, but, according to Cavanaugh: "He got through the letter 'N', with no problems, and then he just jumbled the rest, so I couldn't

make out what letters he was saying. So I asked him to repeat. He got to the letter, 'H', and just stopped." Thomte was then asked to perform a balance test, where Thomte stood on his left leg and, while so standing, would attempt to swing his right leg forward and backward. Thomte lost his balance during three unsuccessful attempts at such balance test. In another field sobriety test, the finger-to-nose test, where the subject extends both arms and then attempts to touch his nose with the index finger of each hand, Thomte satisfactorily touched his nose with the index finger of his left hand but missed his nose in the attempt with his right hand. Because it started to rain, Thomte and Cavanaugh got into the cruiser, and Cavanaugh summoned another officer to administer an "Alco-Sensor" test. Shortly thereafter, an Officer Siebken arrived and administered the Alco-Sensor test. Cavanaugh placed Thomte under arrest and transported him in the cruiser to Central Police Station for the purpose of a breath test through an Intoxilyzer Model 4011AS, which was administered by a police department technician.

Cavanaugh testified that, during his 5½ years on the police force, he had observed the conduct of people who had consumed alcohol, had made several hundred arrests for drunk driving, and had made arrests for many offenses other than drunk driving committed by persons who had consumed alcohol. Also, Cavanaugh testified concerning Thomte's physical appearance when he encountered Thomte on the Interstate and Thomte's inability to perform most of the field sobriety tests. During further testimony, Cavanaugh related events at the police station after Thomte had been advised of his *Miranda* rights. As testified by Cavanaugh, Thomte said he had been drinking since 6 p.m. and had consumed three glasses of wine. Cavanaugh expressed his opinion that Thomte was under the influence of alcohol at the time the officer stopped the Thomte vehicle on the Interstate. On cross-examination, Cavanaugh testified that Thomte had stated that he was taking medication, Calan. The technician who had administered the Intoxilyzer test testified that the Intoxilyzer's digital readout was ".135."

Thomte testified that he had three or four glasses of wine but had ceased drinking any alcohol at least 1½ hours before he

was arrested by Cavanaugh. Thomte generally disagreed with Cavanaugh's description of events on the Interstate leading up to the arrest, and testified that Calan contains acetone. Thomte also testified that he was not under the influence of alcohol when stopped by Cavanaugh. In rebuttal, the State recalled the technician who administered the Intoxilyzer test, and the technician testified that any acetone would cause the Intoxilyzer to cancel the test being administered if acetone is present in the breath sample sufficient to affect the test. At the conclusion of the evidence, the court stated: "The Court finds the defendant guilty." On appeal to the district court, the county court's judgment was affirmed. Thomte now appeals to this court.

Thomte alleges that the trial court erred in (1) not finding that the investigatory stop occurred without probable cause; (2) not finding that the search and seizure was unreasonable and without probable cause; (3) not finding that there was insufficient evidence to find Thomte guilty beyond a reasonable doubt; (4) admitting the results of the preliminary breath test; and (5) accepting the results of the breath test without adjusting it so as to give Thomte the benefit of the margin of error.

Thomte first argues that the initial stop of his vehicle was without probable cause. However, Thomte's roadside detention is more accurately classified as a stop and search situation subject to the guidelines pronounced in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), where the U.S. Supreme Court said: "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio, supra* at 22. See, also, *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983); *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981). An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986); *State v. Ebberson, supra*.

> Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

State v. Ebberson, supra at 44-45, 305 N.W.2d at 907. Sergeant Cavanaugh testified he observed Thomte's vehicle twice weaving within its lane of traffic. We hold that a vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, § 39-669.07. Courts in other jurisdictions have reached the same conclusion regarding an officer's observation of a vehicle weaving within its own lane of traffic. See, *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986); *State v. Ellanson*, 293 Minn. 490, 198 N.W.2d 136 (1972); *State v. Dorendorf*, 359 N.W.2d 115 (N.D. 1984); *State v. Bailey*, 51 Or. App. 173, 624 P.2d 663 (1981). Sergeant Cavanaugh had " 'a particularized and objective basis for suspecting the person stopped of criminal activity.' " *State v. Daniels*, 220 Neb. 480, 482, 370 N.W.2d 179, 181 (1985). The initial stop of Thomte's car was justified, and, therefore, his first assignment of error is of no merit.

Thomte next argues that the field sobriety tests constituted a search and seizure and were conducted without probable cause. Sergeant Cavanaugh testified, however, that appellant's eyes were glazed, his speech was slurred, and Thomte had a moderate odor of alcohol about him. Cavanaugh's observations of Thomte were no different from any view of Thomte's general physical characteristics which are "in the

plain view of an officer who has a right to be in the position to have that view." *Harris v. United States*, 390 U.S. 234, 236, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968). See *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973). Relying on *People v. Carlson*, 677 P.2d 310 (Colo. 1984), Thomte argues that roadside sobriety testing constitutes a full search and seizure and therefore must be supported by probable cause. Other jurisdictions, however, have held that administering roadside sobriety tests is more analogous to a limited *Terry* stop than to a formal arrest and may be justified by an officer's reasonable suspicion, based on specific articulable facts, that the driver is intoxicated. See, *State v. Superior Court, supra; Oregon v. Niles*, 74 Or. App. 383, 703 P.2d 1030 (1985). Cf. *State v. Stevens*, 394 N.W.2d 388 (Iowa 1986) (cases cited therein). Under the circumstances, we need not decide whether roadside sobriety tests must be supported by probable cause, because even under the more stringent standard applied in *People v. Carlson, supra*, namely, that probable cause is required for field sobriety tests, probable cause existed in the present case. In *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986), this court held that an officer's observations of a motorist's bloodshot eyes, slurred speech, and breath with the odor of alcohol constituted probable cause for a valid warrantless arrest for drunk driving. Since we have decided that the initial stop of Thomte was based on reasonable suspicion, the officer's additional observations of Thomte constituted probable cause for believing that appellant was driving while under the influence of alcohol, and, therefore, the sobriety tests were reasonable under the circumstances. Thomte's second assignment of error is without merit.

In connection with his third assignment of error, namely, that there is insufficient evidence to support his conviction, Thomte argues that the trial court erred in permitting Sergeant Cavanaugh to express his opinion as to whether or not Thomte was intoxicated. Thomte objects on the grounds that Cavanaugh lacked sufficient foundation for his opinion and, further, that the officer's opinion is not supported by the evidence. Cavanaugh testified, however, that he had observed the conduct of people who had consumed alcohol and that in

his 5½ years as an officer he had made several hundred drunk driving arrests. His testimony was based on personal observations of Thomte. We have often held that a police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based. See, *State v. Warnke*, 221 Neb. 625, 380 N.W.2d 241 (1986); *State v. Daniels, supra; State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983). The opinion testimony of Sergeant Cavanaugh was properly received.

Thomte maintains there was insufficient evidence to support his conviction.

> "[I]n determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. . . ."

State v. Moore, ante p. 347, 352, 411 N.W.2d 345, 350 (1987).

"As used in § 39-669.07, the phrase 'under the influence of alcoholic liquor' means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner." *State v. Burling*, 224 Neb. 725, 728, 400 N.W.2d 872, 875 (1987). Sergeant Cavanaugh's testimony supplies ample evidence to support the finding that Thomte was driving his automobile while he was under the influence of alcoholic liquor.

We have previously held that, even discarding the Intoxilyzer breath test results, a police officer's opinion testimony, based on personal observations of the defendant, is sufficient to sustain a finding that the defendant operated a motor vehicle when the defendant was under the influence of alcohol. See, *State v. Burling, supra; State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977). That is also our conclusion in this case. Further,

> "[I]n a case tried to the court without a jury, there is a

> presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment."

State v. Moore, supra at 352-53, 411 N.W.2d at 350. Having decided Sergeant Cavanaugh's testimony is sufficient to sustain Thomte's conviction, we find it unnecessary to address Thomte's fourth and fifth assignments of error, relating to the admission of the breath test results as evidence.

The judgment of conviction is supported by sufficient evidence and is affirmed.

AFFIRMED.

WESLEY R. HEUSMAN, APPELLANT, V. HOLLY JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

414 N.W.2d 247

Filed October 23, 1987. No. 85-819.

1. **Implied Consent: Miranda Rights: Blood, Breath, and Urine Tests.** *Miranda* warnings are not required prior to an officer's request of a driver to submit to a chemical analysis under the Nebraska implied consent law.
2. **Implied Consent: Right to Counsel: Blood, Breath, and Urine Tests.** The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
3. **Constitutional Law: Implied Consent.** Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is not unconstitutionally vague or overbroad.
4. **Implied Consent: Licenses and Permits: Revocation: Proof: Appeal and Error.** In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
5. **Implied Consent: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.

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

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

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

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

WHITE, J.

This is an appeal from the order of the district court, affirming the order of the director of the Department of Motor Vehicles, revoking Wesley R. Heusman's motor vehicle operator's license under Nebraska's implied consent law.

In his brief to this court appellant asserts that *Miranda* warnings should have been read to him, that he had a right to counsel prior to deciding whether to submit to a chemical test, that the implied consent statutes are unconstitutional, that he should not have been required to bear the burden of proof, and that he was entitled to be advised of his right to have an independent test of his body fluids conducted by a physician of his choice.

We note first that counsel for appellant abandoned his brief at oral argument. It is therefore unclear whether any of the appellant's assignments of error were preserved. Without deciding this issue, we note further that each of the above questions has recently been examined and decided by this court in a manner inconsistent with the appellant's position.

In *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986), we reaffirmed our position that *Miranda* warnings are not required prior to a request to submit to a chemical analysis under the Nebraska implied consent law. We also reasserted holdings from prior cases that under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test.

Appellant's constitutional argument, that Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is both vague and overbroad because it does not expressly define "reasonable," was also raised and rejected in *Fulmer*.

In *Wietjes v. Jensen*, 221 Neb. 579, 379 N.W.2d 734 (1986), and, additionally, in *Mackey v. Director of Department of*

Motor Vehicles, 194 Neb. 707, 235 N.W.2d 394 (1975), we have held that the burden is on the appealing licensee to prove the invalidity of the revocation order.

Additionally, the appellant contends that the order of the district court should be reversed because no evidence was offered to indicate that an officer was present who was certified to operate the testing device. While this might present a defense to the criminal charge of driving while intoxicated, it does not constitute a justifiable, reasonable excuse for refusing to submit to the test.

Finally, in *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986), we reaffirmed our position that Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.

For these reasons, the appellant's contentions are without merit, and the order of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF SILVEY REFRIGERATED CARRIERS, INC. SILVEY REFRIGERATED CARRIERS, INC., APPELLANT, V. BEE LINE MOTOR FREIGHT, INC., ET AL., APPELLEES.

414 N.W.2d 248

Filed October 23, 1987. No. 85-928.

1. **Public Service Commission: Appeal and Error.** In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
2. **Motor Carriers.** In determining whether a carrier's operation in hauling goods between points in one state through another state is a subterfuge, courts should look to the reasonableness of the carrier's modus operandi, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority, and (3) the incidental or dominant character

of the intrastate traffic as a portion of the carrier's overall operation. No single factor is controlling as to the outcome.

3. _____. A logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and does not indicate subterfuge to avoid state regulation.
4. **Public Service Commission: Motor Carriers: Proof.** The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
5. _____: _____: _____. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
6. _____: _____: _____. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.

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

Marshall D. Becker and Robert M. Cimino, for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellees.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, C.J., Pro Tem.

Silvey Refrigerated Carriers, Inc., has appealed from the order of the Nebraska Public Service Commission which denied its application for authority to operate as a contract carrier in Nebraska intrastate commerce.

Silvey is currently authorized to operate in interstate commerce from its terminal in Council Bluffs, Iowa. Beginning in February 1985, and continuing for 2 to 3 months, Silvey began furnishing service to Packaging Corporation of America, located in Omaha. Silvey's operations consisted of leaving an empty trailer at Packaging Corporation's loading dock, returning later for the loaded trailer, and leaving another empty trailer for loading. Silvey would then take the loaded trailer to its Council Bluffs terminal overnight and deliver the load to its Nebraska destination the following day. Packaging Corporation stopped shipping with Silvey when it learned that Silvey had no intrastate authority.

On April 24, 1985, Silvey applied for intrastate authority to operate as a contract carrier. Protests were filed by Bee Line Motor Freight, Inc., and Brown Transfer Co. After a hearing on August 14, 1985, the commission entered its order denying Silvey's application.

The commission found that Silvey was fit, willing, and able to properly perform the service; that it had not shown its service was such that it would serve any distinct need of the shippers which was not already being served by common carriers; that the entry of Silvey into the field before obtaining intrastate authority was significantly detrimental to the protestants Bee Line and Brown; and that Silvey's preapplication routine of leaving truckloads overnight in Council Bluffs before delivery to their Nebraska destinations was a subterfuge to evade the Nebraska motor carriers act.

Silvey's numerous assignments of error can be consolidated into three.

Silvey contends that the finding by the commission that its operations prior to the filing of the application were a subterfuge is not supported by the evidence and was erroneous. It is Silvey's position that its business practice of picking up a loaded trailer in Omaha and taking the load to its Council Bluffs terminal, and then transporting the load to its Nebraska destination the next day, falls within its interstate authority, and therefore Silvey is not subject to the jurisdiction of the commission.

Silvey relies on the decision in *Maudlin, Oregon Public Utility Commissioner v. Southwest Delivery Co., Inc.*, 1985 Fed. Carr. Cas. (CCH) ¶ 37,198. In that case, the Oregon public utility commissioner sought to prevent Southwest's activities on the basis that it was involved in Oregon intrastate commerce without proper authority.

Southwest Delivery operated in interstate commerce from its terminal in Vancouver, Washington. As a part of its business, Southwest would handle shipments between Portland, Oregon (located just across the river from Vancouver), and other Oregon destinations. Appellate division 2 of the Interstate Commerce Commission held that Southwest Delivery Co.'s practice of picking up less-than-load (LTL) shipments in

Portland, Oregon, then taking them back to its Vancouver, Washington, headquarters for consolidation with other LTL shipments having prior interstate movement, and delivering the entire load to Oregon destinations, was interstate commerce and not a subterfuge.

The ICC noted that transportation of property by motor vehicle between points in the same state through another state is transportation in interstate commerce regardless of how small the distance traveled in the other state. The ICC also noted that a carrier may not use its interstate operating authority to evade legitimate state regulation of intrastate commerce. Such transportation through another state is beyond the carrier's interstate authority if done in bad faith or as a subterfuge to evade intrastate regulation.

To determine whether bad faith or subterfuge was involved, the ICC looked to the test set out in *Pennsylvania P.U.C. v. Arrow Carrier Corp.*, 113 M.C.C. 213 (1971). The test provides that the ICC and the courts should look to the reasonableness of the carrier's modus operandi, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's overall operation. The *Arrow* decision also stated that no single factor is controlling as to the outcome.

As to the first issue, of circuity, the ICC found circuity occurred by picking up traffic within the Portland commercial zone, moving it north to the Vancouver terminal, and then moving it southward again to Oregon destinations. However, the ICC concluded that because the Portland-to-Vancouver hauls were within the boundaries of the Portland commercial zone, any circuity was merely an ordinary and routine facet of the business of transporting LTL shipments.

> The commercial zone defines the territory which is "adjacent to, and commercially a part of" a municipality; the commercial zone exemption of 49 U. S. C. 10526(b)(1), and the territorially coextensive terminal area

> exemptions of 49 U. S. C. 10523 and implied operating authority under 49 CFR 1041.20, which allowes [sic] carriers to serve points beyond the legal boundaries of specifically authorized municipalities, all exist to enable carriers to serve, in a simple and convenient matter, industries which may be located in suburban areas. Likewise, they permit carriers to establish operating terminals in suburban areas, as they may find to be expedient and convenient.

1985 Fed. Carr. Cas. at ¶ 37,198.03.

The facts in this case are similar to those in *Southwest*. Silvey's main terminal is located just across the river from its Omaha clients, and thus could be considered to be within the Omaha commercial zone.

The second prong of the test involves operational justification for movement outside the state. The ICC in *Maudlin, Oregon Public Utility Commissioner v. Southwest Delivery Co., Inc.*, 1985 Fed. Carr. Cas. (CCH) ¶ 37,198, stated that it has repeatedly recognized that operations through an operating terminal are a reasonable manner of transporting LTL traffic, even when they involve moving single-state traffic through an out-of-state terminal. The opinion cites *Pennsylvania Public Utility Comm. v. Leonard Exp.*, 107 M.C.C. 451 (1968), for the "fundamental statement of the relevant legal principal [sic] that a logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and counterindicatory of subterfuge to avoid State regulation." 1985 Fed. Carr. Cas. at ¶ 37,198.03. Therefore, Southwest's consolidation at the Vancouver terminal was a reasonable, normal, and logical manner of handling LTL traffic.

In this case, the issue is whether taking truckload shipments from Omaha to Silvey's Council Bluffs terminal for purposes of storage and a change of drivers is a sufficient operational justification so as not to be a subterfuge. Even if intrastate authority is granted, Silvey will continue to use its local "shag" drivers to pick up the traffic, rather than its over-the-road drivers. It has never required its over-the-road drivers to pick up loads in a local area because that would require them to be away

from their families for a longer period of time. It uses its local shag force to be more efficient.

In addition, Silvey justifies the taking of truckloads to Council Bluffs for storage purposes. Bill O'Brien, director of traffic and transportation for the Richman Gordman stores, testified that Silvey often took a loaded trailer from the Omaha distribution center to the Council Bluffs terminal and stored the product for 4 to 6 days in the trailer. This storage need is due to congested dock space at the Richman Gordman distribution center.

The third prong of the test is whether the percentage of intrastate traffic is incidental or dominant when compared to overall operations at the same terminal.

In the *Southwest* case, 698 shipments traveled single state, while 28,403 were handled in interstate commerce during the same period. The ICC found the single-state traffic was clearly incidental to Southwest's overall operations. It also found of importance the fact that even if Southwest had to obtain intrastate authority, it would continue to operate through its Vancouver terminal. "We see no better indication of defendant's good faith in this case than the lack of any persuasive reason why it should be expected to change its manner of handling the challenged single-State traffic, even if it had intrastate authority to provide the service." 1985 Fed. Carr. Cas. at ¶ 37,198.03.

The record in this case supports a finding that Silvey's interstate traffic is far more dominant than the small amount of intrastate traffic that would be involved if the application were granted.

In *Maudlin, Oregon Public Utility Commissioner v. Southwest Delivery Co., Inc.,* 1986 Fed. Carr. Cas. (CCH) ¶ 37,249, based on new evidence, Maudlin petitioned for administrative review of the appellate division 2 finding that Southwest was not engaged in intrastate commerce. Maudlin argued that portions of Southwest's traffic from Portland through the Vancouver terminal and back to Oregon were truckload (rather than LTL) in nature and, therefore, did not require movement to the Vancouver terminal. Southwest argued that even though the loads did not need to be

consolidated, they nevertheless needed to go to Vancouver for rating, billing, weighing of the trailers, and tightening and checking of the chains and bindings that secured the loads. The ICC held that this information did not change the outcome of the three-part test discussed in the first case.

Again citing *Pennsylvania P.U.C. v. Arrow Carrier Corp.*, 113 M.C.C. 213 (1971), it held:

> For the type of traffic routing involved in this proceeding, a carrier's conduct has been found lawful when the routing is reasonably direct and is employed: (a) to permit the efficient processing of traffic through a principal terminal; *or* (b) to permit consolidation of interstate and intrastate traffic to facilitate a complete service for a consignor.

(Emphasis supplied.) 1986 Fed. Carr. Cas. at ¶ 37,249.03.

Thus, it is clear that consolidation is not the only legitimate justification for hauling single-state loads out of state. In this case, the needs for a change of drivers and for storage are necessary for an efficient processing of traffic through a principal terminal.

Maudlin also argued that Southwest's rates for Oregon traffic were 25 to 27 percent below the prevailing Oregon intrastate rates, and, therefore, appellate division 2 was incorrect in characterizing the rates as " 'remarkably moderate' discounts." 1986 Fed. Carr. Cas. at ¶ 37,249.02. The ICC rejected this argument and held that Southwest may legitimately price its interstate service under federal ratemaking guidelines and that such action does not constitute a bad faith circumvention of State requirements.

We conclude that the record does not support the finding by the commission that Silvey's operations were a subterfuge, and conclude that the order to that extent must be reversed. This, however, does not establish that the denial of the application was erroneous.

The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be

consistent with the public interest. *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 188 Neb. 584, 198 N.W.2d 195 (1972); *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968).

If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied. In *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra*, we held, "Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established." (Syllabus of the court.)

Silvey contends that the commission erred in finding that it had failed to show a distinct need for its services that was not already being met by existing common carriers. Silvey argues that it can provide needed and specialized service to Packaging Corporation due to the close proximity of both operations. Packaging Corporation requires quick response time from a carrier to pick up loaded trailers because of its restricted dock space. Silvey is located 3 minutes away from Packaging Corporation's docks. However, the record indicates that Packaging Corporation has been able to move the three to four loads a week previously handled by Silvey by utilizing other common carriers. Packaging Corporation stated that it was possible that Bee Line and Brown could perform the same services, but in a little longer time. Both protestants have truck terminals located in Omaha, and Bee Line's Omaha terminal is located within 15 minutes' response time from Packaging Corporation's docks.

Silvey also argues that it can provide a needed and specialized service in providing "pool shipments," in which shipments for different destinations are loaded onto one truck. Bill O'Brien of Richman Gordman stores testified that on interstate shipments by Silvey, the company is forced to unload Silvey's trailers in Omaha and reload shipments for other Nebraska destinations onto their private fleet, due to Silvey's lack of intrastate authority. However, the record shows that N&W Transfer, a Nebraska common carrier with both interstate and intrastate authority, has been providing its shipping services to Richman

Gordman since 1979. In addition, both Brown and Bee Line have interstate as well as intrastate authority. O'Brien testified that he had not requested the services of either company but would have no objection to using their services, if needed, and that past use of the services has been good.

Finally, Silvey points to its needed and specialized service of storing loaded trucks at its Council Bluffs terminal until Richman Gordman is ready for delivery. O'Brien testified that this is part of the specialized service that Silvey provided. The record does not show whether other carriers could or could not provide this service.

In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary. *In re Application of Renzenberger, Inc.*, 225 Neb. 30, 402 N.W.2d 294 (1987); *In re Application of Northwestern Bell Tel. Co.*, 223 Neb. 415, 390 N.W.2d 495 (1986).

From the record in this case, it cannot be said that the evidence does not support a finding that Silvey's services can be provided just as well by existing common carriers.

> " ' "Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it. . . ." ' "

In re Application of McCarty, 218 Neb. 637, 641, 358 N.W.2d 203, 206 (1984), quoting from *In re Application of ATS Mobile Telephone*, 213 Neb. 403, 330 N.W.2d 123 (1983).

Silvey next assigns as error the finding that its entry into Nebraska intrastate commerce would be significantly detrimental to the operations of Bee Line and Brown. Silvey argues that Bee Line and Brown operate predominantly as LTL carriers and that Silvey is not interested in providing LTL services. But, as the appellees point out, the scope of Silvey's application is not limited to truckload authority and, if granted,

would include LTL authority. In addition, the record indicates that Bee Line's revenue derived from service to Packaging Corporation declined by one-half when Silvey began providing its services. Thus, there is evidence to support the commission's finding that entry into the field by Silvey would be detrimental to Bee Line and Brown.

Since there is evidence to support the finding of the commission that the application should be denied, that part of the order must be affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

DALE K. MOSEMAN, APPELLANT, V. L & P INVESTMENT COMPANY ET AL., APPELLEES.

414 N.W.2d 254

Filed October 23, 1987. No. 85-942.

1. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
2. _____. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
3. **Licensee: Negligence.** The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.

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

Robert R. Moodie of Friedman Law Offices, for appellant.

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

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

PER CURIAM.

The plaintiff, Dale K. Moseman, commenced this action to recover damages for the injuries he sustained when he jumped from a window of a second-floor apartment in a building owned by the defendants. The trial court sustained the defendants' motion for summary judgment and dismissed the petition. The plaintiff has appealed.

The petition alleged that on December 23, 1980, the plaintiff was a social invitee in an apartment leased by Joyce Brooks from the defendants; that a life-threatening situation arose when the plaintiff was violently attacked by another individual; that the doors to the apartment were equipped with deadbolt locks that required the use of a key to unlock the doors of the apartment on the outside or the inside; that because the plaintiff was unable to unlock either door, he was forced to jump through a window in order to escape from his attacker; and that as a result, he was seriously injured.

The petition alleged the defendants were negligent in the following particulars:

> 1) Failing to exercise ordinary care to render the premises in a reasonably, safe condition and free from latent defects, i.e. installing and failing to replace a deadbolt lock which required the use of a key for operation from the inside, therefore, unreasonably hampering and preventing exit from the premises at a time of emergency.
>
> 2) Failing to comply with the provisions of the laws, ordinances and building codes quoted above, i.e. by installing and failing to replace a deadbolt lock which required the use of a key for operation from the inside, therefore, unreasonably hampering and preventing exit from the premises at a time of emergency.

"In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from

the evidence." *Chadd v. Midwest Franchise Corp., ante* p. 502, 505, 412 N.W.2d 453, 457 (1987); *In re Estate of Thompson,* 225 Neb. 643, 407 N.W.2d 738 (1987).

> Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.

Chadd, supra at 505, 412 N.W.2d at 456.

The plaintiff's first assignment of error alleged that the trial court erred in failing to find there was a material issue of fact as to whether the defendants had failed to keep and maintain the premises in a reasonably safe condition, free from latent defects.

As a social guest in the apartment, the plaintiff had the status of a "licensee" and thus was entitled to the following:

> "The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care."

Dukes v. Barkdoll, 211 Neb. 546, 548, 319 N.W.2d 432, 434 (1982), citing *Casey v. Addison*, 190 Neb. 634, 211 N.W.2d 410 (1973).

The record shows that the plaintiff knew of the lock situation at the apartment and at one time had his own key to come and go at will from the apartment. There is no evidence of willful or wanton negligence on the part of the defendants. There is nothing to support the plaintiff's allegation of the breach of a duty owed the plaintiff by the defendants.

It is unnecessary to consider the plaintiff's other assignments of error.

The judgment is affirmed.

AFFIRMED.

ROBERT E. JOHNSON, JR., APPELLANT, V. NM FARMS BARTLETT, INC., A NEBRASKA CORPORATION, APPELLEE. WHEELER III, A NEBRASKA GENERAL PARTNERSHIP, APPELLANT, V. NM FARMS BARTLETT, INC., A NEBRASKA CORPORATION, APPELLEE.

414 N.W.2d 256

Filed October 23, 1987. Nos. 85-963, 85-964.

1. **Equity: Appeal and Error.** In an appeal of an equity action, the Nebraska Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judges: Appeal and Error.** Where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, the Nebraska Supreme Court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof.
3. **Injunction.** The purpose of an injunction is preventive, protective, and prohibitory, and it will not issue against discontinued acts unless there are probable grounds to believe that there will be a resumption of the violations or activities.
4. **Judgments: Final Orders: Appeal and Error.** While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken.
5. **Waters: Liability: Damages.** A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
6. **Waters.** The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
7. _____. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence.
8. _____. Waters resulting from rainfall and melting snow are diffused waters

which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.

9. _____. The alteration of natural drainage is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present.

10. **Waters: Liability: Negligence: Proof.** The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.

11. **Waters: Liability: Damages: Negligence: Proof.** Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.

12. **Contracts: Statute of Frauds: Proof.** In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.

Appeal from the District Court for Wheeler County: RONALD D. OLBERDING, Judge. Appeal in No. 85-963 dismissed. Judgment in No. 85-964 affirmed.

Robert H. Berkshire and Richard N. Berkshire, for appellants.

Douglas Pauley of Conway, Connolly and Pauley, P.C., for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

These two cases were consolidated for trial and for argument in this court. In the first case filed in the district court, designated as case No. 85-964 in this court, appellant, Wheeler

III, a Nebraska general partnership, sued appellee, NM Farms Bartlett, Inc., a Nebraska corporation, claiming the latter discharged diffused surface waters upon Wheeler III's land, which is located immediately to the north of a portion of NM Farms' lands, and sought damages and an injunction preventing NM Farms from so doing. Later, appellant, Robert E. Johnson, Jr., one of the three Wheeler III partners and sole owner of land immediately to the north of that owned by Wheeler III, sued NM Farms, claiming that it discharged diffused surface waters onto his land as well. He too sought damages and injunctive relief. Johnson's action is designated as case No. 85-963 in this court. In case No. 85-964, the district court permanently enjoined NM Farms from discharging water onto the Wheeler III land, but found that Wheeler III was not entitled to damages. In case No. 85-963, the district court made no ruling on Johnson's request for a permanent injunction and found he was not entitled to damages, notwithstanding the fact that, according to all the parties, Johnson and NM Farms had stipulated that no evidence would be adduced on the damages issue pending determination as to whether NM Farms was liable to Johnson. In these appeals both Wheeler III and Johnson assign as operative errors the district court's (1) failure to award damages, (2) denial of their motions in limine seeking to exclude evidence concerning their desire to have NM Farms purchase their lands, and (3) finding that Wheeler III had granted NM Farms an oral easement to run water across its land. NM Farms has not appealed the injunction entered against it in favor of Wheeler III. For the reasons hereinafter discussed, we dismiss Johnson's appeal and affirm the district court's judgment in Wheeler III's action.

In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, we consider, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hughes v. Enterprise Irrigation Dist., ante* p. 230, 410 N.W.2d 494 (1987); *Platte Valley Fed. Sav. & Loan Assn. v. Gray, ante* p. 135, 409 N.W.2d 617 (1987);

Neb. Rev. Stat. § 25-1925 (Reissue 1985). Further, where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, this court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof. See, *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985). Since the record in this case does not tell us what the judge saw nor what findings he made as a result of his view, we give no weight to the fact that he viewed some of the lands involved.

The lands in question are located in this state's Sandhills. In this locale, water, where no natural watercourse exists, fills the lower areas, and then proceeds to the next lower area, and travels across the land to a natural watercourse. Moreover, even when not connected to a water channel, low areas sometimes fill with water because of underground seepage.

NM Farms owns a quarter section of land which abuts the southern boundary of the quarter section owned by Wheeler III. Wheeler III's land is lower in elevation than is NM Farms' quarter section, dropping 11 feet from south to north. Johnson owns the quarter section abutting the northern boundary of Wheeler III's land and even lower in elevation, dropping an additional 4 to 5 feet from south to north.

Between 1979 and 1982, NM Farms drained and leveled its quarter section by cutting down the hills and filling in the low areas, lakes, and ponds, so as to enable it to use a center pivot irrigation system. The water displaced by these operations ran north over the Wheeler III and Johnson lands, over land owned by Joe Kneivel, under an east-west county road, and over land owned by Gerald Titterington, to Beaver Creek, which bisected the Mignery Ranch north of the Wheeler III land.

In addition to the aforesaid quarter section, NM Farms owns lands which abut the western boundaries of the Wheeler III, Johnson, and Kneivel lands. These NM Farms lands are referred to throughout the remainder of this opinion as NM Farms' western lands. The land NM Farms owns to the south of

the Wheeler III land will be referred to as NM Farms' quarter section.

Wheeler III purchased its land in 1979, leveled it, installed a well and a center pivot irrigation system, and commenced farming operations in the spring of 1980 on what had previously been pastureland.

In 1979 or 1980, NM Farms built a dam in a drainageway leading to the Wheeler III land for the purpose of keeping "the water from running further into" NM Farms' quarter section and to "impound the water or to pump up to the pivot system."

The fall of 1982 and spring of 1983 brought abnormally high amounts of precipitation to the Sandhills area. The water table was high, and water drainage problems appeared on properties which had had none before. The high water table rendered some land unfarmable and unrentable, and such land consequently sat idle.

While Wheeler III farmed its land in 1983, NM Farms did not farm its quarter section "[b]ecause the water table was too high in the low areas to the extent it was shallow lakes." Instead, the property was placed in the federal Payment-in-Kind program.

Prior to 1983, there was no natural watercourse on the Wheeler III, Johnson, or Kneivel lands. Rain and irrigation water would spread out on the Wheeler III property, collect in its pockets and valleys to form ponds, and then evaporate or become absorbed into the ground and underground channels.

At some point, NM Farms repaired its dam "where it was . . . poorly constructed," but in the spring of 1983, the dam nonetheless broke. That event caused a large amount of water to flow onto the lower northern properties. The rush of water cut a channel through the Wheeler III, Johnson, and Kneivel lands, and then turned east before again flowing north toward the Mignery Ranch and into Beaver Creek.

Sometime before mid-June of 1983, Steve Koinzan, the farm manager for Wheeler III and Johnson, and their farm operator, Rick Schindler, met with John Bryant, NM Farms' manager. They attempted to reach some joint understanding or agreement to alleviate the water problems each of them was experiencing. Bryant proposed two alternative solutions. The

first alternative was to develop a system to drain the excess surface waters from the quarter section owned by NM Farms through the Wheeler III, Johnson, Kneivel, Titterington, and Mignery Ranch lands into Beaver Creek. This would be accomplished by connecting ditches to follow the path of least resistance on these lands. The second alternative was to construct a ditch through NM Farms' western lands and then discharge the waters into the creek.

After examining a survey of the properties, prepared by NM Farms, Koinzan told Bryant he liked the first alternative and would recommend its adoption to Wheeler III and Johnson, but that he himself had no authority to sign an easement for NM Farms to discharge water onto the Wheeler III and Johnson lands. Koinzan thought that the first alternative would benefit Wheeler III because it would drain the ponds on its land. Bryant later dropped off an easement agreement at Koinzan's office, and Koinzan forwarded it on. NM Farms then obtained an easement across the Mignery Ranch for $1, and across Titterington's property for $10,000. Wheeler III and Johnson eventually rejected the easement proposed to them, but nonetheless decided to participate in the first alternative by constructing a ditch which very closely followed the survey prepared by NM Farms. In addition, Wheeler III constructed some lateral ditches to help drain the ponds on its property.

During the first part of May 1984, Wheeler III was unable "to completely plant [its land], it was too wet and there was [sic] still a few potholes and the ground next to the ditches and the generally flat low laying [sic] areas we still lost part of that from dying out." There was "an extreme large amount of water flowing down through the ditchs [sic], live water, from the south at that time and it kept the property fairly wet where you couldn't get and get around with the machinery." The ditches caused several problems. The tractor stuck several times, and the center pivots kept getting stuck in the ditches as they went through. Nonetheless, neither Wheeler III nor Johnson made any complaint to anyone at NM Farms about a water problem during the 1984 crop-year.

During July, August, and September of 1984, NM Farms pumped water, which came from a watershed south of its

quarter section, into the ditch. The water then flowed toward Beaver Creek across the Wheeler III, Johnson, Kneivel, and Titterington lands. The Titterington land was planted to hay, and Titterington asked NM Farms to stop pumping so that he could put up his hay. NM Farms stopped pumping the water, and 2 days later the water stopped running across Titterington's land, so that he could harvest his hay.

Wheeler III's 1984 popcorn crop was caught in a September frost, and, consequently, the prospective purchaser rejected the corn because of frozen and immature kernels.

In late November of 1984, Johnson contacted Bryant and indicated he would like NM Farms to purchase his and Wheeler III's lands, or enter into some sort of a long-term cash lease agreement. Bryant indicated he did not believe NM Farms would be interested, but suggested that he contact Kenneth Morrison of the Morrison Quirk Grain Corporation. In response, Johnson said he "might have to reconsider [the] drainage agreement that [he] had" with NM Farms.

After this conversation, NM Farms decided to construct a different route for its water discharges, totally outside of the Wheeler III, Johnson, and Kneivel lands. This new drainage system was started in 1984 and completed in early 1985, at a cost of $50,000. It, in effect, implemented NM Farms' second alternative solution as proposed in 1983. In constructing the new ditch NM Farms filled in a swale on the south side of the ditch to prevent water from flowing back onto NM Farms' property, but NM Farms did nothing on the north side of the ditch to prevent water from flowing from the diversion ditch onto the Wheeler III land.

In 1985 Wheeler III attempted to lease its land, but none of the 18 prospective tenants were interested. Thus, the land was not farmed at all in 1985.

In May of 1985, water backed up and overran NM Farms' new ditch, which had filled with sand. As a consequence, water again rushed north toward Titterington's property. On May 9, 1985, Titterington built a small dike on Wheeler III's land to prevent further water flow.

Wheeler III adduced testimony that in 1983 it received $13,000 from Crop Advisory pursuant to the terms of a lease

under which Crop Advisory farmed Wheeler III's land. However, Crop Advisory did not follow up on its commitment to enter into a like lease for 1984. Wheeler III then entered into a lease with Crop Advisory to share costs and profits on a half-and-half basis. As a consequence, Wheeler III suffered a loss of $5,230.91. There was testimony that the fair rental value of Wheeler III's land for 1985 was $9,945, but it does not appear that Wheeler III had obtained any commitment from anyone to lease the land for 1985. In addition, Wheeler III adduced testimony that as a result of the water damage the value of its land was diminished by an amount ranging from $39,000 to $48,000, that it spent $11,700 in 1983 to dig ditches for the purpose of alleviating its water problems, and that additional expenditures of between $5,000 and $6,000 would be required to make its lands farmable.

On the other hand, NM Farms adduced testimony that while the value of Wheeler III's land dropped from $750 per acre in 1983 to its present value of $360 per acre, that decrease was due to general economic conditions and to the general decline in farmland values. It was this witness' opinion that Wheeler III's land had not been damaged to any extent from flooding and that if there were damage, it was not permanent. It was this witness' further opinion that the addition of the drainage ditches increased the value of Wheeler III's land.

We concern ourselves first with the Johnson case, for it is not yet ripe for appeal and therefore is not properly before us. In determining that Johnson was not entitled to damages, the district court resolved a matter not before it in view of the stipulation that no evidence concerning damages would be adduced until after resolution of whether NM Farms had any liability to Johnson. If the district court meant by its decision to rule that it did not award damages because it found NM Farms had no liability to Johnson, we cannot discern that intention from the mere fact that the court denied Johnson's prayer for a permanent injunction. Since the purpose of an injunction is preventive, protective, and prohibitory, and it will not issue against discontinued acts unless there are probable grounds to believe there will be a resumption of the violations or activities, *Stuthman v. Lippert*, 205 Neb. 302, 287 N.W.2d 80 (1980), such

a ruling could just as well flow from a conclusion that it was unlikely NM Farms would in the future discharge its diffused surface waters onto Wheeler III's land. In any event, as the following analysis of Wheeler III's action will demonstrate, a finding that NM Farms has no liability to Johnson would be erroneous.

While it may be appropriate under certain circumstances to bifurcate trials, this court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken. *McCook Equity Exch. v. Cooperative Serv. Co.*, 223 Neb. 197, 388 N.W.2d 811 (1986); Neb. Rev. Stat. § 25-1911 (Reissue 1985). Thus, we dismiss Johnson's appeal for lack of jurisdiction.

This brings us to Wheeler III's first assignment of error, the district court's failure to award it damages.

We conclude from the evidence that Wheeler III's damages, if any, and whatever the proper elements thereof may be, arose from four sources: (1) a raised water table; (2) the leveling and draining of NM Farms' quarter section; (3) NM Farms' September 1984 water pumping; and (4) the breaking of NM Farms' dam.

The water table rose as the result of unusual amounts of precipitation, an act of nature for which NM Farms has no liability. *Baum v. County of Scotts Bluff*, 172 Neb. 225, 109 N.W.2d 295 (1961).

The analysis of NM Farms' liability for such damages, if any, as may have resulted from the leveling and draining of its quarter section rests initially upon Neb. Rev. Stat. § 31-201 (Reissue 1984), which provides:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

In *Jameson v. Nelson*, 211 Neb. 259, 263-64, 318 N.W.2d 259, 262-63 (1982), this court set out the legal principles arising

from applications of the foregoing statute:

> The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature. *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence. *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950). While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor. *Nichol v. Yocum, supra*. It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow *in a state of nature. Delp v. Laier*, [205 Neb. 417, 288 N.W.2d 265 (1980)].

(Emphasis in original.) See, also, *Eunice Harrington Investments, Ltd. v. Wallace*, 207 Neb. 373, 299 N.W.2d 174 (1980).

This court has also held that alteration of natural drainage is acceptable where the interests of good husbandry are served,

circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present. *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985).

The evidence convinces us that the alterations which NM Farms made on its quarter section served the interests of good husbandry and were necessary, but that they were not undertaken in a reasonable, nonnegligent manner under all the circumstances present, and resulted in a concentrated discharge of diffused surface waters from its quarter section onto Wheeler III's land in other than depressions, draws, swales, or drainageways through which said waters were wont to flow in the natural condition of the lands involved. The evidence further convinces us that the waters so discharged were the proximate cause of some of Wheeler III's damages.

The waters pumped from NM Farms' western lands into the ditch are characterized by Wheeler III as diffused surface waters. Since the record does not contradict that characterization, the foregoing analysis relating to NM Farms' liability for leveling and draining its quarter section applies as well to this third source of excess water discharged upon Wheeler III's land.

This brings us to the fourth and last source, the waters discharged by the breakage of the dam. *Barnum v. Handschiegel*, 103 Neb. 594, 173 N.W. 593 (1919), presented a suit for damages suffered when a dam defendant had built across a natural stream broke. The structure had been erected " 'as an ice and fish reservoir and for irrigation' " and other uses. *Id.* at 595, 173 N.W. at 593. Rev. Stat. § 3444 (1913) then provided, as does present Neb. Rev. Stat. § 46-241 (Cum. Supp. 1986), that the owner of a "storage reservoir" shall be liable for damages resulting from, among other things, "the breaking of the embankment of such reservoir." Section 3444 further provided, as does present Neb. Rev. Stat. § 46-243 (Reissue 1984), that a "reservoir constructed for the purpose of holding water back and raising it in order that it may be applied to lands of a higher level . . . shall not be considered a storage reservoir . . . ." The *Barnum* court concluded that in view of the statutory language exempting a structure which held water for irrigation from the definition of "storage reservoir," the owner

of a nonstorage reservoir was liable, in the event of breakage, only if he or she had negligently constructed or maintained the structure. The *Barnum* court also held that in such a case the "burden of proof is upon the plaintiff; but, when he has established the breaking of a dam and resulting injury, he has made a *prima facie* case. The defendant must then show that the dam was not negligently constructed or maintained." *Id.* at 598, 173 N.W. at 594. Although the case before us does not involve the damming of a natural stream, we nonetheless deem the situation at hand to be analogous to that presented in *Barnum*, and we therefore apply to the present case the rules announced by the *Barnum* court.

We conclude from the evidence that NM Farms built its dam, at least in part, to hold water for irrigation and that under the circumstances its dam does not constitute a storage reservoir. However, we also determine that NM Farms failed to show its dam was not negligently constructed or maintained and that it is therefore liable for the damages Wheeler III sustained as a consequence of the breakage of the dam.

Nonetheless, notwithstanding the fact that NM Farms impermissibly discharged certain waters onto Wheeler III's quarter section, the district court's judgment is correct. This is so because where water from another source has been added to water from a source for which a defendant is liable, and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable. *Schmidt v. Chimney Rock Irrigation Dist.*, 209 Neb. 1, 305 N.W.2d 888 (1981); *McGill v. Card-Adams Co.*, 154 Neb. 332, 47 N.W.2d 912 (1951); *Seibold v. Whipple*, 143 Neb. 167, 9 N.W.2d 154 (1943). See, also, *Shadow Isle, Inc. v. Granada Feeding Co., ante* p. 325, 411 N.W.2d 331 (1987).

Since NM Farms is not liable for all of Wheeler III's damages, some of those damages having resulted from unusual amounts of precipitation, the failure to apportion the damages attributable to the impermissibly discharged waters precludes Wheeler III from recovering any of its damages.

The foregoing determination renders the remaining two assignments of error immaterial insofar as this case is concerned. However, as one of the remaining assignments becomes moot by resolution of the other, and that other assignment may bear on the resolution of Johnson's cause, we proceed to a consideration thereof.

We note the finding Johnson attributes to the district court, that "Wheeler III orally granted NM Farms an easement to run water onto and across Wheeler III property," does not appear in the record. Nonetheless, such a finding, if it exists, is not warranted by the evidence.

Neb. Rev. Stat. § 36-103 (Reissue 1984) provides:

> No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same.

Neb. Rev. Stat. § 36-106 (Reissue 1984) provides: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

In order to establish that an oral contract falls within the § 36-106 exception to the statute of frauds found in § 36-103, the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.

Even if the other requirements were met, questions with which we do not concern ourselves, we are not clearly, satisfactorily, and unequivocally convinced that the acts performed by NM Farms were solely referable to any oral agreement there may have been with Johnson. That determination renders unnecessary any consideration as to whether the district court should have admitted testimony of

Johnson's need to reconsider his agreement with NM Farms.

APPEAL IN NO. 85-963 DISMISSED.
JUDGMENT IN NO. 85-964 AFFIRMED.

IN RE ESTATE OF LOUIE H. VILLWOK, DECEASED. JANET ANDERSON ET AL., APPELLANTS, V. ROSE M. VILLWOK, APPELLEE.

413 N.W.2d 921

Filed October 23, 1987. No. 85-988.

1. **Wills: Pleadings.** Alleging that a will is not "subscribed and attested in accordance with Nebraska law" is sufficient pleading to raise an issue as to validity of testator's signature.
2. **Wills: Words and Phrases.** One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
3. **Wills.** Testamentary capacity is tested by the state of a testator's mind at the time the will is executed.
4. **Wills: Undue Influence: Proof.** The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
5. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and where the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded for further proceedings.

George E. Brugh, for appellants.

David T. Schroeder, for appellee.

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

GRANT, J.

Janet Anderson, Elaine Jane Wesely, and Marilyn Smith, who are objectors to the probate of the will of Louie H. Villwok, appeal from an order of the district court for Saunders County, sustaining a motion for summary judgment filed by appellee, Rose M. Villwok, proponent of the will, dismissing appellants' objections to probate of the will, and remanding the action to the county court for further probate proceedings. We reverse the order and remand the cause to the district court for further proceedings.

The record before us shows the following. Louie Villwok, age 64, died on November 12, 1984, while a resident of Cedar Bluffs, Nebraska. He left surviving him his wife, Rose Villwok, and the appellants, who are three daughters from a previous marriage between decedent and Elaine Villwok. That marriage ended in divorce in 1973. Rose Villwok's previous marriage ended in divorce in 1972. The decedent and the appellee were married on March 5, 1974. On November 17, 1977, decedent executed a will which provided that Rose Villwok would receive the entire estate in the event that she survived decedent. Had Rose Villwok predeceased decedent, the will provided that each of the testator's daughters from his previous marriage and each of the daughters of Rose Villwok from her previous marriage would receive a general bequest of money and a portion of the residue.

On November 28, 1984, in the county court for Saunders County, appellee filed an "Application for Informal Probate of Will and Informal Appointment of Personal Representative" of Louie Villwok's will. On December 24, 1984, appellants filed an objection to the probate of the will. On February 19, 1985, appellee filed a "Formal Petition for Complete Settlement after Informal Testate Proceeding." An inventory filed by the personal representative, Rose Villwok, indicates a total estate in the amount of $430,985. On April 1, 1985, appellants filed an objection to probate of the will and a "Notice of Transfer" of the matter to the district court pursuant to Neb. Rev. Stat. § 30-2429.01 (Reissue 1985). Appellants alleged that the will was not a valid will of the decedent for the following reasons: (1) that the will was not subscribed and attested in accordance

with Nebraska law; (2) that decedent lacked testamentary capacity at the time of the making of the will; and (3) that the will was a result of undue influence of Rose Villwok.

Appellee filed a motion for summary judgment. At the hearing on the motion for summary judgment, Rose Villwok offered eight exhibits, all of which were received into evidence without objection. Included were the deposition of appellee, the depositions of each appellant, and the affidavit of Marie Kobza, who witnessed decedent's signature to the will. Appellants offered in evidence an affidavit of Ernest Villwok and the affidavits of each of the three appellants. The trial court sustained objections to these four affidavits.

Appellants allege two assignments of error: (1) The district court erred in sustaining the appellee's objections to appellants' offer of the four affidavits, and (2) the court erred in granting the appellee's motion for summary judgment. We turn first to the four excluded affidavits.

In the affidavit of Ernest Villwok, brother of decedent, the affiant states that he "was very well acquainted with my brother and was familiar with his handwriting and signature" and that "it is my opinion that the purported signature of Louie H. Villwok is not that of my brother and that the signature shown on said document [the will] does not appear to be my brother's handwriting." If properly admitted into evidence, this affidavit would raise an issue of fact as to the validity of decedent's signature.

Appellee alleges that appellants have not raised as an issue the validity of the signature appearing on the will. This is not correct. In their objections, the appellants alleged that "the Will was not subscribed and attested in accordance with Nebraska law." This court held in *In re Estate of Renter*, 148 Neb. 776, 779, 29 N.W.2d 466, 468 (1947):

> Clearly, the act of signing is one of the elements constituting the execution of a will. When contestants presented the objection that the will was not executed in manner and form as required by law, they presented an objection which included the question of whether the signature on the instrument was that of the alleged testator.

Thus, by alleging that the will was not "subscribed and attested in accordance with Nebraska law," appellants' pleadings were sufficient to raise the issue of the signature's validity.

Once raised, sufficient evidence must be offered to create a question of fact as to that issue. Ernest Villwok's affidavit provides sufficient evidence to raise a question of fact as to the validity of the signature. We hold that the district court erred in sustaining appellee's objection to this affidavit.

In connection with summary judgments, Neb. Rev. Stat. § 25-1334 (Reissue 1985) requires that "[s]upporting and opposing affidavits [1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." Ernest Villwok, because of his stated familiarity with decedent's signature, may testify as to the validity of that signature. Neb. Rev. Stat. § 27-701 (Reissue 1985) provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Clearly, the affidavit of Ernest Villwok was based on his perception and would be helpful to determination of a fact in issue. His affidavit should have been received in evidence. When received, the affidavit raises a question of fact, and summary judgment is then not appropriate.

The district court was correct in excluding the three affidavits of appellants. Construing § 25-1334, this court stated that " ' "[u]nder this provision [Fed. R. Civ. P. 56(e)], therefore, statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments, and of statements which would be inadmissible in evidence * * *." ' " *Hanzlik v. Paustian*, 216 Neb. 575, 579-80, 344 N.W.2d 649, 652 (1984), citing *Eden v. Klaas*, 165 Neb. 323, 85 N.W.2d 643 (1957). The *Eden* court, quoting *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943), stated at 328, 85 N.W.2d at 646: " 'Hence we

have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. . . .' " Exclusion of those affidavits, however, does not determine the appeal, because the same allegations, in more detail, were set out in the deposition of each affiant. Those depositions were received in evidence at the summary judgment hearing.

In support of the second assignment of error appellants have alleged that decedent lacked testamentary capacity and that the will was the result of undue influence of Rose Villwok on the decedent.

Appellants first contend that as a result of decedent's frequent drinking and resulting intoxication, he lacked the requisite testamentary capacity to make his will. The record, however, reveals no evidence that decedent was intoxicated on the day and at the time the will was executed.

One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty. *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981); *Anderson v. Claussen*, 196 Neb. 787, 246 N.W.2d 586 (1976). Such capacity is tested by the state of a testator's mind at the time the will is executed. *In re Estate of Schoch, supra.*

With regard to the undue influence allegation, the record provides sufficient evidence to create a question of fact. The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence. *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986).

The question is not answered by the statement in appellee's brief at 13, "The burden of proof with respect to the issue of undue influence is on the Objectors or Contestants." That statement is correct, but is not dispositive on a motion for summary judgment, as in this case. On the summary judgment question, the initial question to be decided is whether there is an

issue of fact, and the court need not determine, at that time, the weight to be given to conflicting evidence.

This court has stated many times that undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inference from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence, and the opportunity afforded designing persons for the exercise of improper control. *In re Estate of Price, supra*. See *Andersen v. Andersen*, 177 Neb. 374, 128 N.W.2d 843 (1964). Furthermore, in a trial, a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from such established facts. The declarations of a testator are admissible to show his state of mind and consequent susceptibility to undue influence. *Cook v. Ketchmark*, 174 Neb. 222, 117 N.W.2d 375 (1962); *In re Estate of Bowman*, 143 Neb. 440, 9 N.W.2d 801 (1943). In this case circumstantial evidence exists on this issue, as set out in the depositions of the three appellants.

Due to the surreptitious nature of undue influence, evidence in support of such an allegation usually is circumstantial in nature. Such evidence shows a course of conduct over a period of time intended to influence the mind of the testator. The influence must, of course, be "undue." Undue influence sufficient to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator. *In re Estate of Price, supra*.

Appellants allege that Rose Villwok engaged, over a period of time, in exerting such influence. On consideration of a motion for summary judgment, the court does not determine that there was undue influence, but only determines that there was evidence sufficient to create a factual question as to its potential existence.

The depositions of appellants, received in evidence without objection, reveal sufficient evidence to raise a factual question as to the existence of undue influence. The deposition of Rose Villwok reveals that she and decedent had worked in decedent's restaurant since 1968. After she married decedent in 1974, the

relationship between her and decedent's children deteriorated. Rose Villwok testified that she was always present when decedent's children visited. With regard to decedent's assets, testimony shows that all major holdings, including the house, restaurant, stock, savings accounts, and a farm inherited by decedent, were owned by decedent prior to his marriage to Rose Villwok.

The deposition of each appellant daughter reveals that decedent drank heavily on a daily basis and was intoxicated much of the time. While Rose Villwok was at work, decedent visited his daughter Elaine Jane Wesely at her home. In addition, Elaine would visit him at a bar or at his home when Rose was not there. Decedent also visited his daughter Janet Anderson and was careful to arrive home before Rose Villwok returned from work. All three daughters indicated that Rose Villwok made a concerted effort both to be present when the daughters would visit and to keep them apart from their father by being inhospitable during visits and by regularly refusing dinner invitations from the daughters.

Each daughter also testified as to decedent's statements regarding disposition of his property. Elaine Jane Wesely stated that her father indicated to her that he did not want Rose or her children to have his property. Similarly, Janet Anderson testified that her father said, "I don't want Rose or her children to have anything." Marilyn Smith testified that the testator stated to her that " 'I should not be telling you this, but you girls get all the property, the steak house and all the money that was in the CDs and everything' . . . 'Rosie gets nothing except the house'. . . ."

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and where the moving party is entitled to judgment as a matter of law. *In re Estate of Thompson*, 225 Neb. 643, 407 N.W.2d 738 (1987), citing *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987). In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party

against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *In re Estate of Thompson, supra*, citing *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987). We hold that in this case factual questions exist as to undue influence and the validity of testator's signature. Summary judgment is therefore improper. We reverse the summary judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROGER L. LIBERTY, APPELLEE, V. LUANN M. LIBERTY, APPELLANT.

413 N.W.2d 926

Filed October 23, 1987. No. 86-613.

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

L.J. Sass, for appellant.

Steven R. Brott, for appellee.

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

PER CURIAM.

Plaintiff-appellee, Roger L. Liberty, filed his petition to dissolve the common-law marriage of the parties. The marriage was based on the fact that the parties had lived in Kansas for some time during the time they lived together from 1974 to July 26, 1985, the time of the filing of the petition. Respondent-appellant, Luann M. Liberty, also prayed for a dissolution. The trial court dissolved the marriage and granted physical custody of the parties' four minor children to plaintiff, while retaining legal custody in the court. Respondent has appealed, assigning as error the custody order.

We have reviewed the record de novo and find no abuse of the trial court's discretion in this custody order. We have held that child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal, the judgment of the trial court will be affirmed in the absence of an abuse of that discretion. *Ainsworth v. Ainsworth*, 224 Neb. 160, 396 N.W.2d 285 (1986). The judgment of the trial court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IN RE INTEREST OF J.K.B. AND C.R.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.R.B., APPELLANT.
414 N.W.2d 266

Filed October 23, 1987. No. 86-981.

1. **Parental Rights: Trial: Due Process.** A proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process.
2. **Parental Rights: Trial: Rules of Evidence: Judicial Notice.** At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
3. **Parental Rights: Trial: Rules of Evidence.** In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
4. **Appeal and Error.** Error without prejudice forms no basis for appellate relief.
5. **Parental Rights: Appeal and Error.** Proceedings to terminate parental rights are reviewed by the Nebraska Supreme Court de novo on the record.
6. **Appeal and Error.** On a review of a record de novo, the Nebraska Supreme Court ignores improperly admitted evidence.
7. **Parental Rights: Right to Counsel.** In a proceeding to terminate parental rights, an indigent parent does not have the right to be represented by counsel of his or her own choosing; neither is the mere distrust of, or dissatisfaction with, appointed counsel enough to secure the appointment of substitute counsel.
8. **Parental Rights.** Where there is a need for a rehabilitation plan, a parent has not substantially complied with a reasonable court-ordered rehabilitation plan, the

prognosis for rehabilitation is poor, and it is in the child's best interests that the parent's rights be terminated, such rights are to be terminated.

Appeal from the County Court for Clay County: JACK R. OTT, Judge. Affirmed.

Stephen A. Scherr of Whelan, Foote & Scherr, P.C., for appellant.

Ted S. Griess, Clay County Attorney, and Jay J. Sullivan, guardian ad litem, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Forty-one-year-old D.R.B. appeals from the judgment of the Clay County Court (sitting as a juvenile court) terminating his parental rights in and to his 9-year-old daughter, C.R.B., and 8-year-old son, J.K.B. The parental rights of the children's mother were also terminated, but she has not appealed. We are thus concerned only with the rights of the father, who argues the county court erred by (1) improperly receiving certain evidence, (2) failing to appoint counsel, and (3) concluding that the evidence clearly and convincingly establishes grounds for terminating his parental rights. We affirm.

This matter has been pending since July 13, 1982, when petitions were filed alleging the children were within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984), and thus within the jurisdiction of the juvenile court. Specifically, the petitions alleged that the parents neglected or refused to provide for the children's "proper or necessary subsistence, or other care necessary for the health, morals, or well-being." Section 43-247 then provided, as it does presently, that the juvenile court have

> exclusive original jurisdiction as to . . . (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence,

> education, or other care necessary for the health, morals, or well-being of such juvenile . . . .

The family had been called to the State's attention 2 days earlier, when it was alleged the father had broken the arm of one of the mother's other children. Although the father now denies having broken the child's arm, he nonetheless pled guilty to the criminal charge arising from the incident. Nearly 4 years later, the State filed a motion to terminate the father's parental rights, alleging that "reasonable efforts under the direction of the Court have failed to correct the conditions" leading to the determination that the children were within the purview of § 43-247(3)(a).

Neb. Rev. Stat. § 43-292 (Reissue 1984) provided at the relevant time, as it does now:

> The court may terminate all parental rights between the parents . . . and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that . . .
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

In connection with his first assignment of error, the father asserts the county court improperly admitted "into evidence in a termination proceeding all documents placed in the court file for adjudication, disposition and review proceedings."

The documents in question consist of a variety of reports from therapists, social workers, and sundry functionaries. The father objected on the ground, among others, that the reports constituted inadmissible hearsay. Since the reports would have no relevance were they offered for any purpose other than to prove the truth of the matters asserted in them, the reports were indeed hearsay. Neb. Rev. Stat. § 27-801 (Reissue 1985); *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). The record tells us that the father, through counsel, stipulated at one review hearing that certain reports could be admitted if the allegations against him were changed to allege neglect rather than abuse.

Leaving aside that, so far as we can tell, neglect is all that was ever alleged, the state of the record is such that we cannot determine with certainty what records the stipulation encompassed. Further, there is no verbatim record as to the circumstances under which the myriad other reports were received in the various hearings which preceded the termination proceeding; thus, we cannot determine whether the father had an opportunity to cross-examine the authors of the reports at the time they were received in evidence. While the rules of evidence do not apply at a dispositional hearing, Neb. Rev. Stat. § 43-283 (Reissue 1984), a proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), at which parents are entitled to cross-examine adverse witnesses, *In re Interest of R.A., ante* p. 160, 410 N.W.2d 110 (1987).

While a court must take judicial notice of its own records in the case under consideration, and has the right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined, *In re Interest of R.A., supra*, and *State v. Norwood*, 203 Neb. 201, 277 N.W.2d 709 (1979), a juvenile court may not, at a proceeding to terminate parental rights, take judicial notice of facts or opinions other than as provided in the rules of evidence. *Jorgensen v. Jorgensen*, 194 Neb. 271, 231 N.W.2d 360 (1975), an action to modify the custody provisions of a divorce decree, holds that due process requires that witnesses be subject to cross-examination. The *Jorgensen* court observed that ex parte statements are too unreliable to be considered in the investigation of controverted facts, and ruled that where an investigative report may form the basis for the conclusions or judgment entered, the trial court must submit the report to the parties and permit them to call the person making the report to testify. *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981), found letters written to the court by various welfare agencies and received in evidence without objection nonetheless failed to clearly and convincingly establish the need to

terminate parental rights. In the course of its opinion the *D.* court observed that the termination of parental rights is far too important a matter to be done by informal procedures, and encouraged the use of more formal court procedures. Something more than encouragement being needed, we now hold that in proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985), which excludes from the hearsay rule:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Thus, there is merit in the father's first assignment of error; however, merely determining that there was error in this regard does not, in and of itself, entitle the father to relief on his appeal, for error without prejudice forms no basis for appellate relief. See, *Poppe v. Petersen*, 221 Neb. 877, 381 N.W.2d 534 (1986); *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984). We review proceedings to terminate parental rights de novo on the record and ignore improperly admitted evidence. *In re Interest of R.A., supra.* Thus, whether the error was prejudicial depends upon whether there is evidence separate and apart from the improperly admitted reports which clearly and convincingly establishes grounds for termination of the

father's parental rights. This is a matter resolved later in this opinion by the analysis of the third and last assignment of error.

In the second assignment of error the father complains of the fact that after he discharged his appointed attorney, the court refused to appoint another.

The relevant sequence of events is that in November of 1985 the father, notwithstanding the court's warnings that these proceedings presented serious matters and that if present counsel were permitted to withdraw another might not be appointed, insisted that his appointed attorney was inadequate and wished to proceed without him. Appointed counsel was then permitted to withdraw. When the termination hearing began on July 29, 1986, the father, who had apparently been unsuccessful in his effort to retain private counsel, moved for the appointment of counsel because he was indigent. The court refused the request. Nonetheless, the previously appointed counsel appeared for and represented the father, without objection, throughout the termination hearing.

Neb. Rev. Stat. § 43-279.01 (Cum. Supp. 1986), which became effective September 6, 1985, requires that when the State alleges that a juvenile is within the purview of § 43-247(3)(a), or when termination of parental rights is sought under certain circumstances, including pursuant to the provisions of the juvenile code, and the parents appear without counsel, the court shall inform them of the right to counsel "of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer." This does not mean, however, that an indigent parent has the right to be represented by counsel of his or her own choosing or that the mere distrust of, or dissatisfaction with, appointed counsel is enough to secure the appointment of substitute counsel. Even a criminal defendant does not enjoy such rights. *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987).

Moreover, the record in this case shows the father was represented in an effective fashion during the termination proceedings by volunteer counsel who had represented him by appointment in the past and was familiar with the case. There is no merit to this assignment of error.

Lastly, the father urges, in connection with the third

assignment of error, that the evidence fails to clearly and convincingly establish, as the county court found, that reasonable efforts under the court's direction failed to correct the conditions leading the court to assert its jurisdiction in the first instance.

The properly admissible evidence establishes that the county court's various rehabilitation plans required that, among other things, the father maintain employment and suitable housing, attend parenting classes, and participate in a homemaking program.

The properly admitted evidence clearly and convincingly establishes that the father maintained only sporadic employment, failed to regularly attend various parent counseling sessions, refused to follow homemaking directions or other directions with which he disagreed, would not prepare monthly budgets, and maintained unstable living arrangements which were inadequate to receive the children (at one point he lived in his truck for a 3-day period).

Moreover, the admissible evidence shows the father, himself the product of an alcoholic and violent home, has a long history of alcohol abuse and of abusing his female companions and wives (he has had four marriages). He is in arrears on the child support he is obligated to pay for his other four children and has paid only minimal support for the children who are the subject of this action. He has an antisocial personality, dresses in female clothing in public, is hostile, and from time to time has threatened the social workers assigned to the case. Even the psychologist called as a witness on the father's behalf testified that the father's inability to control his temper when frustrated presented a threat of harm to the children. The admissible evidence further clearly and convincingly establishes that the children demonstrated negative behavior after visits with their father. Notwithstanding these problems, the father does not recognize he needs help.

We conclude from our review, having given weight to the fact that the county judge observed the witnesses and judged their credibility, that the evidence clearly and convincingly establishes that the rehabilitation plan ordered by the county court was a reasonable one, that the father has not substantially

complied with it, that the prognosis for rehabilitation is poor, and that it is in the children's best interests that the father's parental rights be terminated without further delay. Thus, grounds for terminating the father's parental rights exist under the provisions of § 43-292(6), as found by the county court. *In re Interest of T.C., ante* p. 116, 409 N.W.2d 607 (1986); *In re Interest of L.H.*, 225 Neb. 706, 407 N.W.2d 784 (1987).

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the judgment of the court but disagree with the statement that a juvenile court at a proceeding to terminate parental rights may not take judicial notice of facts or opinions other than as provided in the rules of evidence.

Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), was concerned with the standard of proof required in termination proceedings and the necessity that the proceedings satisfy the requirements of fundamental fairness.

The U.S. Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), stated:

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

See, also, *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978).

In *Santosky v. Kramer, supra*, the Court held that in a proceeding to terminate parental rights, the process due is determined by the balancing of three factors: the private interests affected by the proceeding; the risk of error created by the state's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. In balancing these interests, I believe that due process is satisfied by use of a standard less drastic than requiring the application of the rules of evidence to materials that the juvenile court may judicially notice. The juvenile court should be able to take judicial notice of reports and other

materials received at earlier hearings and relevant in reaching a decision as to the proper disposition of the case, provided that the author of such reports or materials is available and can be subpoenaed as a witness and made available for examination by either party or the court. This procedure should be sufficient to satisfy all constitutional confrontation and due process of law requirements, provided that the reports or materials are available to the interested parties sufficiently in advance of the termination hearing so as to allow the parties to compel the attendance of the persons who wrote or prepared the materials. See *People in Interest of A. M. D.*, 648 P.2d 625 (Colo. 1982).

Similarly, the court in *Matter of J.R.B.*, 715 P.2d 1170 (Alaska 1986), found that while *Santosky* held that a termination of parental rights interferes with a fundamental liberty interest of the parent, "the discretionary use of hearsay in the dispositive phase of such proceedings, subject to review for abuse of discretion, is consistent with fundamental fairness." 715 P.2d at 1174. (Citing *Stein v. New York*, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) "(hearsay evidence rule, with all its subtleties, anomalies, and ramifications, will not be read into the fourteenth amendment)." 715 P.2d at 1174.)

A termination of parental rights hearing is the culmination of months and sometimes years of juvenile court involvement with the parties. To restrict the court's access to its own records and materials of the prior proceedings is to require the court to rehear the evidence received at those prior hearings again. This, I believe, goes too far.

Within the guidelines of notice and opportunity for cross-examination that have been set forth above, the taking of judicial notice by the juvenile court of prior reports and materials should satisfy the fundamental fairness requirements of *Santosky*.

DENNIS GRAFF AND VELDA GRAFF, HUSBAND AND WIFE, APPELLEES, V. GARY D. BURNETT, APPELLANT.

414 N.W.2d 271

Filed October 23, 1987. No. 86-1037.

1. **Liens: Livestock: Foreclosure: Equity.** An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
2. **Liens: Livestock.** When the owner of livestock contracts with another to feed and care for the owner's livestock, Neb. Rev. Stat. § 54-201 (Reissue 1984) provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care.
3. **Debtors and Creditors: Tender: Proof.** One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
4. **Debtors and Creditors: Tender: Words and Phrases.** A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
5. _____: _____: _____. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
6. **Debtors and Creditors: Tender.** Although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract.

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

James L. Germer of Germer, Murray, Johnson & Germer, for appellant.

Daniel L. Werner of McKernan & Werner, for appellees.

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

SHANAHAN, J.

Dennis and Velda Graff commenced an action against Gary D. Burnett in the district court for Thayer County, seeking to foreclose an agister's lien, Neb. Rev. Stat. § 54-201 (Reissue 1984), and a stallion service lien, Neb. Rev. Stat. §§ 54-202 et seq. (Reissue 1984), occasioned by their oral agreements with

Burnett concerning his horses. Responding to Graffs' petition, Burnett filed an answer and then counterclaimed, alleging that Graffs wrongfully detained Burnett's horses after Burnett had tendered payment of the stud fee and feed bill for his mares. The district court awarded monetary judgments to Graffs and authorized foreclosure of the liens on the horses if Burnett defaulted in payment of the amounts awarded to Graffs. The district court found against Burnett on his counterclaim. We affirm.

Dennis and Velda Graff own a horse-breeding farm and also sell horses. In the past, Gary Burnett, as an owner and dealer of horses, has had his mares serviced by stallions at Graffs' farm. During a conversation with Dennis Graff, Burnett expressed an interest in purchasing one of Graffs' mares, She's Rocky One, which Burnett offered to purchase on condition that Graffs breed She's Rocky One to one of their stallions, Skip A Hi, and keep She's Rocky One in a stall and on grain during her stay at Graffs' farm. Graffs agreed to a sale price of $2,250 for She's Rocky One and a stud fee of $500 for Skip A Hi. Also, Dennis Graff and Burnett discussed breeding two of Burnett's mares, Miss Tuff Cutter (also known as Tuffernhel) and Roan Spanish Miss, to Skip A Hi.

On July 6, 1984, Burnett brought his two mares, with a colt at the side of each, to Graffs' farm for breeding purposes. At that time Burnett and Dennis Graff orally agreed that Burnett's mares, Miss Tuff Cutter and Roan Spanish Miss, would be bred to Skip A Hi at a stud fee of $500 for each mare.

Pursuant to their oral agreements with Burnett, Graffs bred the three mares to their stallion. In mid-September 1984, Graffs notified Burnett that a veterinarian had verified the pregnancy of the mares. Burnett arrived at Graffs' place on October 16 to pick up his horses and, with Graffs, discussed payment for the services rendered at Graffs' farm. During that conversation, Graffs presented Burnett with the following itemized statement of charges for the horses:

She's Rocky One	For purchase	$2,250
	For care	118
	For stud services	500

Miss Tuff Cutter (Tuffernhel)	For care	187
	For stud services	500
Roan Spanish Miss	For care	187
	Total	$3,742.

Burnett took out his checkbook and declared that he wanted to pay part of the bill, namely, the stud fee for Miss Tuff Cutter and the charges for feed and care for the two mares (Miss Tuff Cutter and Roan Spanish Miss). However, Burnett declined to pay any of his account regarding She's Rocky One. Therefore, Burnett was prepared to write his check for $687, pick up his two mares (Miss Tuff Cutter and Roan Spanish Miss), and leave She's Rocky One at Graffs' farm until a future payment for the purchased mare. Graffs demanded payment of the entire account, and, when the parties failed to reach a settlement of the account for the horses, Burnett left and never paid any part of the bill submitted by Graffs.

On November 8, 1984, Graffs filed a "Notice of Lien" for services of a stallion and an "Affidavit for Agister's Lien" in the office of the Thayer County clerk, which documents pertained to the care, feed, and stud services provided to the mares Miss Tuff Cutter and Roan Spanish Miss, their accompanying colts, and She's Rocky One.

Section 54-201(2), pertaining to an agister's lien, provides in pertinent part:

> When any person . . . whose residence or principal place of business is located outside the State of Nebraska shall procure, contract with, or hire any other person . . . within the State of Nebraska to feed and take care of any kind of livestock, the person so procured, contracted with, or hired shall have a first, paramount, and prior lien upon such property for the feed and care bestowed by him or her upon the same for the contract price agreed upon, and in case no price has been agreed upon, then for the reasonable value of such feed and care. . . . Prior to removal of such livestock from his or her premises, the person . . . entitled to a lien shall file in the office of the county clerk, in the county in which such livestock may be fed and kept, an affidavit describing the livestock and

setting forth the amount justly due for the feeding and keeping of the same.

Section 54-202 specifies a party's rights to be paid for stud service by that party's stallion: "Every owner, lessee, agent or manager of any stallion . . . shall have a lien upon any mare and her colt . . . served by such stallion . . . for the full amount of the reasonable or agreed value or price of such service."

In their petition, Graffs asserted two causes of action—count I relating to the stud fee (Miss Tuff Cutter) and care for the two mares (Miss Tuff Cutter and Roan Spanish Miss) and count II relating to She's Rocky One (purchase price, stud fee, and care). Burnett, in his counterclaim, alleged that Graffs wrongfully retained possession of the horses Miss Tuff Cutter and Roan Spanish Miss.

Graffs admitted that Burnett had offered to pay $687 on October 16 as part payment of the bill submitted. Graffs' evidence regarding reasonable charges, which was undisputed, showed feed and care for the mares Miss Tuff Cutter and Roan Spanish Miss—pasture at $1.50 per day for 79 days and grain feeding at $3 per day for 23 days, all of which included care and feed until October 17, 1984, when the daily rate charged for care of all horses became $15 per day. Dennis Graff then testified concerning the oral agreements and events involving Burnett and the Graffs, as previously reflected in this opinion. Dennis Graff further testified that Burnett had never remonstrated regarding the purchase of She's Rocky One and that all previous transactions with Burnett, before those in question, had been on a cash basis, a medium of payment prevalent in the horse-breeding business. As developed during Dennis Graff's testimony, on account of a prior transaction, there was a credit for Burnett, thereby resulting in the sum of $687 due for the mares which Burnett had brought to Graffs' farm.

Burnett testified that he was willing to pay the stud fee and other charges for Miss Tuff Cutter and Roan Spanish Miss, but admitted that he could not pay the purchase price for She's Rocky One. Concerning the conversation at presentation of Graffs' statement or bill, Burnett further testified that he was unwilling to write an insufficient-fund check for the entire

amount of his account, or, as explained by Burnett: "I said I could give you [Graffs] a hot check and run home and stop payment and then you're going to have to come down and get this mare or you're going to have to give me some time to make it right." Burnett also testified that Graffs would not allow removal of his bred mares and their colts unless Burnett paid for the entire bill, including the purchase price for She's Rocky One. In further testimony, Burnett stated that he had paid Graffs by check in the past, and the parties intended payment by check regarding the particular transactions involved in this case, as evidenced in a conversation with Velda Graff, who informed Burnett that the mares had been bred and Graffs "would like for you to send us a check." Burnett emphasized his willingness to pay $687 by his check payable to Graffs.

The district court awarded Graffs judgment for $687 on count I and $2,868 on count II, for an aggregate judgment in the amount of $3,555 with prejudgment interest from October 17, 1984, and a daily fee of $15 for care and feed of Burnett's horses after October 17. The judgment also authorized foreclosure of Graffs' liens on Burnett's default in payment of the amounts awarded in the judgments. Also, the district court found against Burnett on his counterclaim.

In his appeal, Burnett does not question the district court's judgment concerning count II or foreclosure of a possessory lien under § 54-201 and the lien prescribed by § 54-202. Consequently, we review no aspect of the judgment rendered on count II or the method of foreclosing the stallion service lien in the present case. However, Burnett contends that the trial court erred in (1) determining that Burnett had failed to tender payment to the Graffs, (2) awarding the Graffs excessive damages and prejudgment interest, and (3) denying relief on Burnett's counterclaim.

An action for determination of the amount of a lien, pursuant to § 54-201 or § 54-202, and foreclosure of such lien is an equity action. See *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973).

> In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court,

> provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, Neb. Rev. Stat. § 25-1925 (Reissue 1985) . . . .

Hughes v. Enterprise Irrigation Dist., ante p. 230, 234, 410 N.W.2d 494, 497 (1987).

When the owner of livestock contracts with another to feed and care for the owner's livestock, § 54-201 provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care. See, *Kroll v. Ernst*, 34 Neb. 482, 51 N.W. 1032 (1892); *Gates v. Parrott*, 31 Neb. 581, 48 N.W. 387 (1891). Burnett does not question a disposition of the stallion service lien, authorized by § 54-202, as a possessory lien similar to the agister's lien under § 54-201. The undisputed evidence establishes that Graffs provided feed, care, and stud services to Burnett's mares. Graffs notified Burnett that the mares were pregnant, as verified by a veterinarian. Under the circumstances and theories advanced by the parties, Graffs were entitled to the benefit of a lien for feed and care, see, *Stickell v. Haggerty*, 158 Neb. 34, 62 N.W.2d 107 (1954), *Kroll v. Ernst, supra*, and *Gates v. Parrott, supra*, and to the benefit of a lien for the services by their stallion, Skip A Hi. See § 54-202.

The evidence presents a conflict concerning the method of payment contemplated by the parties. On the one hand, Graffs' evidence supports a finding that cash was the only acceptable form of payment, while Burnett's evidence supports a finding that the parties contemplated Burnett's check as an acceptable payment. We conclude, as a factual determination, that Graffs and Burnett intended that payment might be made by Burnett's check. Recognizing that Graffs otherwise properly perfected their liens, we must next determine whether Burnett's offer to pay by check for the mare care and stud services which were the subject of count I is a tender of payment which discharged or extinguished the liens asserted by Graffs and, consequently,

eliminated foreclosure as a remedy available to Graffs.

One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender. Cf. *Hanson v. Duffy*, 106 Ill. App. 3d 727, 435 N.E.2d 1373 (1982).

To determine whether a proper tender of payment has been made, we have stated that a tender is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made. See, *Mr. U Inc. v. Mobil Oil Corp.*, 197 Neb, 612, 249 N.W.2d 909 (1977); *Caha v. Nelson*, 195 Neb. 333, 237 N.W.2d 870 (1976). In *Mr. U Inc., supra*, we further concluded that a tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor. See, also, *Anson v. Grace*, 174 Neb. 258, 117 N.W.2d 529 (1962) (a sufficient tender requires a present and immediate ability to make the tender good). Similarly,

> "[a] mere offer to pay does not constitute a valid tender, the law requires that the tenderer have the money present and ready, and produce and actually offer it to the other party. Tender implies the physical act of offering the money or thing to be tendered, but this cannot rest in implication alone. The law requires an actual, present, physical offer; it is not satisfied by a mere spoken offer to pay, which, although indicative of present possession of the money and intention to produce it, is unaccompanied by any visible manifestation of intention to make the offer good."

Owens v. Idaho First Nat. Bank, 103 Idaho 465, 466-67, 649 P.2d 1221, 1222-23 (1982) (citing 74 Am. Jur. 2d *Tender* § 7 (1974)). Accordingly, although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract. See *United States v. Allen*, 699 F.2d 1117 (11th Cir. 1983).

While the record does not reflect that Burnett actually wrote his check for payment and then delivered or offered to deliver that check to the Graffs, existence of such check is not necessary for resolution of the basic issue involved in this case. An additional absence in the record is more important and crucial in Burnett's appeal, namely, the absence of any evidence that Burnett, when he offered to pay by check, had sufficient funds on deposit at the bank on which such check would have been drawn. Although Burnett acknowledged that he would have to "run home and stop payment" of a check given to pay for the entire account at Graffs' farm, Burnett offered no evidence that he had sufficient funds deposited in his checking account to cover the check he would have delivered to Graffs. As a consequence of such absent evidence, Burnett failed in his burden to show that he had the present ability of immediate performance, an element required for an effective tender, when the claimed tender was made. See, *Mr. U Inc. v. Mobil Oil Corp., supra; Caha v. Nelson, supra.* Without tender of payment, Burnett did not satisfy the obligation underlying the liens on the horses, and Graffs' liens subsisted for disposition by the district court. Burnett's first assignment of error has no merit.

Burnett's second assignment of error alleges that the district court awarded the Graffs excessive damages and prejudgment interest. Graffs were entitled to retain possession of Burnett's horses until their agister's lien was satisfied. *Kroll v. Ernst*, 34 Neb. 482, 51 N.W. 1032 (1892); *Gates v. Parrott*, 31 Neb. 581, 48 N.W. 387 (1891). A party entitled to the benefit of an agister's lien may recover the reasonable value of the feed and care which are the bases of such lien. See § 54-201(2). See, also, *Stickell v. Haggerty*, 158 Neb. 34, 62 N.W.2d 107 (1954). Burnett has never disputed the reasonableness of the charges for the horses' feed and care at Graffs', as well as stud fees for the horses. The district court's judgment for $687 is supported by the evidence, and Burnett's claim that the court awarded excessive damages is without merit.

Burnett further contends that the district court should not have awarded prejudgment interest. In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 131, 317 N.W.2d 900, 905 (1982),

we stated:

> Prejudgment interest is allowable only when the amount of the claim is liquidated. Neb. Rev. Stat. § 45-104 (Reissue 1978). Where a reasonable controversy exists as to the plaintiff's right to recover and as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

Burnett has not disputed the agreements involving the horses. At trial, Burnett did not take issue with the reasonableness of Graffs' charges for the services rendered. Additionally, on appeal, Graff concedes that "$500 was the agreed upon figure for stud fees" and "the fees for mare care and feed through October 16, 1984, were considered reasonable by the parties." Brief for Appellant at 8. Therefore, there was no controversy concerning Graffs' right to recover on their agreements with Burnett for mare care. By applied horsesense, the amount of such recovery is ascertained through the somewhat elementary process of multiplying the daily rate for care times the number of days on which the care was received, plus $500 for the stud fee, which produces the uncontroverted and liquidated sum of $687. There is no merit to Burnett's contention that prejudgment interest is not allowable under the circumstances.

In his final assignment of error, Burnett contends that the district court erred in denying his counterclaim for conversion and in failing to award him damages resulting from Graffs' wrongful detention of the horses. As we have previously stated, Graffs were entitled to retain possession of Burnett's horses until Graffs received a proper tender of payment. Because Burnett never tendered payment to Graffs, the district court correctly denied relief on Burnett's counterclaim.

The judgments of the district court are affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IN RE INTEREST OF C.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. G.W., APPELLANT.

414 N.W.2d 277

Filed October 23, 1987. No. 87-008.

1. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence.
2. **Constitutional Law: Appeal and Error.** A constitutional issue not raised in the lower court will not be considered for the first time on appeal.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Kelly S. Breen of Laughlin, Peterson & Lang, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Maria R. Leslie, for appellee.

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

WHITE, J.

The mother of C.W., a child, appeals from an order of termination of her parental rights. The child was first directed to the attention of the juvenile court of Douglas County, Nebraska, as the result of the investigation of the child's ingestion of Haldol, an antipsychotic medicine, in August of 1984. The mother failed to seek medical treatment for the child for a period in excess of 24 hours. The petition presented in the juvenile court in addition alleged that the mother was unable to provide a residence for the child, was sentenced to a term in the Douglas County Correctional Center, and was suffering from schizophrenia.

The court, after hearing, found the child to be one described by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984), i.e., "homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian." The child was placed in the custody of the Nebraska Department of Social Services. Following the disposition hearing on December 19, 1984, the child was placed in foster care and the mother ordered to comply with a plan of rehabilitation.

A motion was filed in July of 1986 requesting termination

after a determination that the child is one described in § 43-247(3)(a); that "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination," Neb. Rev. Stat. § 43-292(6) (Reissue 1984); and that the natural mother was unable to discharge parental responsibilities because of a mental illness or mental deficiency, and there were reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period of time, § 43-292(5).

After a termination hearing, the court found by clear and convincing evidence that the above-stated allegations were true and terminated the parental rights. The mother appeals and assigns as error that § 43-292(6) is unconstitutional and that there was insufficient evidence to find either a violation of the rehabilitation plan or that she was unable to discharge her parental responsibilities due to a mental illness.

This court has held repeatedly that an order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987). Appellant argues that a higher standard is imposed when the subject is children of American-Indian descent. Neb. Rev. Stat. §§ 43-1501 et seq. (Cum. Supp. 1986). The constitutional issue was not raised in the lower court and will not be considered for the first time on appeal. *R.D.N. v. T.N.*, 218 Neb. 830, 359 N.W.2d 777 (1984).

As to the remaining issue, the evidence is unfortunately conclusive that the mother suffers from an incurable mental illness, chronic undifferentiated schizophrenia, and that she was, at the time of the first hearing and the final hearing, mentally incapable of caring for herself or anyone else. The mother "even has some disease related inability to comply with treatment."

The mother was destined by virtue of the mental condition never to be able to comply with any order of rehabilitation. The situation was hopeless from inception. The purpose of the extended hearing, orders, conferences, and therapy escapes us. The court finally did what should have mercifully been ordered immediately.

This court, on its own motion, notes that § 43-292 contains a

provision which requires a court to appoint a guardian ad litem for an alleged incompetent parent when termination proceedings are sought under subsection (5) of the statute. Given the language of this provision, we note that such appointments are mandatory, even if subsection (5) is but one of the findings upon which the termination is sought.

In the case at bar, the record reveals that appellant's attorney apparently served as her guardian ad litem as well. While we do not believe that this situation was prejudicial to appellant in this case, we urge that these appointments be separated for purposes of § 43-292(5). This court recently discussed the differences between the duties and role of a guardian ad litem versus those of an attorney in *Orr v. Knowles*, 215 Neb. 49, 53, 337 N.W.2d 699, 702 (1983), as follows:

> The Code of Professional Responsibility establishes that an attorney must zealously represent the wishes of his or her client. See Canon 7. It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law. EC 7-7.

A guardian ad litem, on the other hand, has the duty to determine the best interests of his or her ward without necessary reference to the wishes of the ward. As in the *Knowles* case, we do not believe that the duties and responsibilities of a guardian ad litem are coextensive with those of an attorney for purposes of § 43-292(5). The alleged incompetent's best interests would be better served by a separate appointment of a guardian ad litem who could independently assess available alternatives and the best course for that individual.

We have reviewed the matter de novo and conclude that the order terminating parental rights is supported by clear and convincing evidence. The order terminating appellant's parental rights is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

I concur in the judgment of the court. I dissent from that part of the opinion which suggests that a guardian ad litem should

have been appointed for the appellant even though she was represented by other counsel in the proceeding.

The purpose of appointing a guardian ad litem to represent an incompetent or a minor is to ensure that the interests of such a party are protected. *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959).

It is the duty of a guardian ad litem to protect the rights of the party he represents, regardless of the party's willingness to give them away. *Workman v. Workman*, 174 Neb. 471, 118 N.W.2d 764 (1962).

Ordinarily, it is unnecessary to appoint separate counsel for a party who, because of a disability, is represented by a guardian ad litem. Similarly, where the party under disability is already represented by counsel, as in this case, it would seem unnecessary to appoint a separate guardian ad litem to carry on the defense.

Except in unusual situations, such as in *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983), it should not be necessary to appoint a guardian ad litem to represent a party who is also represented by separate counsel.

COLWELL, D.J., Retired, joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. NEAL P. MADSEN, APPELLANT.

414 N.W.2d 280

Filed October 23, 1987. No. 87-025.

Search and Seizure: Evidence: Waiver. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.

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

John P. Heitz of Cronin, Symonds & Heitz, for appellant.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

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

WHITE, J.

Appellant, Neal P. Madsen, was found guilty by a jury in Holt County of the offense of assault in the second degree (Neb. Rev. Stat. § 28-309 (Reissue 1985)), i.e., intentionally or knowingly causing bodily injury to another with a dangerous instrument. Assault in the second degree is a Class IV felony. The penalty prescribed for a Class IV felony (Neb. Rev. Stat. § 28-105 (Reissue 1985)) is "[m]aximum-five years imprisonment, or ten thousand dollars fine, or both. Minimum-none." The court sentenced him to an indeterminate term of from 1 1/2 to 5 years in the Nebraska penal complex. A motion for new trial was overruled, and this appeal followed.

Three errors are assigned: "1. That the District Court erred in admitting the knife into evidence as an exhibit. 2. That the verdict was not sustained by sufficient evidence. 3. That the sentence imposed by the District Court, although within the statutory limits, was an abuse of discretion." We affirm.

We begin by a brief recitation of the facts. Madsen and a friend drove to the farm of the victim, Lumir Ratkovec, at approximately 6 p.m. on March 30, 1986. Madsen, who had consumed 8 to 10 beers prior to the journey, intended to secure tools that he had left on the Ratkovec farm. A confrontation with Ratkovec occurred. Madsen struck Ratkovec in the left chest. Ratkovec apparently touched the area with his hand and observed that the hand was covered with blood. Madsen fled with his companion in the van owned by Madsen. Subsequently, the van was stopped at Atkinson, Nebraska, and Madsen was arrested.

The treating physician testified that Ratkovec was stabbed. A tool mark examiner testified that a cut on Ratkovec's shirt was caused by a sharp instrument, and a forensic serologist testified the blood on Ratkovec's shirt and undershirt matched Ratkovec's.

During the drive from Ratkovec's farm, Madsen stated to his companion, "I knifed the son-of-a-bitch, he was fucking with me." The companion also observed Madsen holding a knife, which Madsen placed in a tray between the front seats of the van.

After Madsen's arrest, the van was driven to the Holt County

sheriff's office. The van was later subjected to an "inventory search," and a small knife and several tools were seized.

We observe first that the defendant failed to move to suppress the knife prior to trial, pursuant to Neb. Rev. Stat. § 29-822 (Reissue 1985). We have previously held that objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial. *State v. Stowell*, 190 Neb. 615, 211 N.W.2d 130 (1973); § 29-822.

Objection was first made to the evidence at trial. Although an objection at trial is essential to our consideration of a claim that evidence was seized illegally, *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987), equally essential, at least in fourth amendment cases, is the pretrial motion to suppress, *State v. Stowell, supra*. The assigned error is without merit.

As to the second assignment of error, the evidence amply supports the conviction for second degree assault. Indeed, it is nearly conclusive. The assignment is without merit. See *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985). We pass to the last assigned error.

We have examined the sentencing proceedings and find the sentence is within the limits of the statute. The crime was violent and life threatening. We find no abuse of discretion.

AFFIRMED.

C. MICHAEL ANDERSON AND PETER HOCHSTEIN, APPELLANTS, V. FRANK O. GUNTER, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

414 N.W.2d 281

Filed October 23, 1987. No. 87-067.

Habeas Corpus: Prisoners. Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.

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

C. Michael Anderson, pro se.

Peter Hochstein, pro se.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellees.

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

PER CURIAM.

Appellants seek review of the district court's order sustaining the State's motion to quash their petition seeking a writ of habeas corpus, and dismissing their case. Although appellants specify eight different assignments of error, the only one pertinent to this proceeding is whether habeas corpus is an appropriate remedy under the circumstances of this case.

The appellants were convicted of first degree murder in the district court for Douglas County and were sentenced to death. Since that time, they have been incarcerated at the Nebraska Penal and Correctional Complex. The trial court's judgment was affirmed in *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

In their petition for a writ of habeas corpus the appellants allege that at some time after their sentences were imposed and they were remanded to the penal complex where the sentences were to be carried out, they were placed in administrative segregation or solitary confinement. This came about by reason of an administrative decision authorized by a change in the Nebraska Department of Correctional Services administrative rules and regulations. Such action, they claim, when added to their original sentences of death, constituted an ex post facto law contrary to the Constitution of the United States. They do not in any way allege that their sentences of death are void or that they are entitled to immediate release. At trial, appellant Anderson indicated that they were "[o]nly seeking an order remanding us back to Douglas County District Court for resentence but not to be released from our sentence to the

street."

Neb. Rev. Stat. § 83-4,114 (Reissue 1981), although providing certain limitations on the use of solitary confinement, expressly provides that such "provision shall not apply to segregation or isolation of persons for purposes of institutional control." Appellants allege that Nebraska Department of Correctional Services Administrative Rules and Regulations, ch. 4, rule 6(16) (1985), establishes that all inmates who are under the sentence of death will be kept in administrative segregation.

However, it is not necessary for us to address appellants' claim relating to solitary confinement. That was not a part of the original sentences of the district court and has no relationship to them. As we stated in *Mayfield v. Hartmann*, 221 Neb. 122, 123, 375 N.W.2d 146, 148 (1985):

> We believe that we need not address the many issues raised by [the petitioner], for the simple reason that even if all of the issues raised by [the petitioner] were valid, a matter we do not decide, he was still not entitled to relief in the form of habeas corpus.

In *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977), the petitioner attempted to raise the issue of his confinement in the adjustment center of the penal complex by means of a petition for habeas corpus. The district court denied his petition, stating that habeas corpus was not available to challenge conditions of confinement. In affirming that judgment, this court stated:

> The question is whether the writ of habeas corpus is a proper remedy for that purpose.
>
> This court has numerous times held that in the case of a prisoner held pursuant to a judgment of conviction, habeas corpus is available as a remedy only upon a showing that the judgment, sentence, and commitment are void. . . . Persons lawfully convicted of crime are excepted from the benefits of the statutory right to the writ. . . . *The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.*

(Emphasis supplied.) *Id.* at 856, 251 N.W.2d at 181. See, also,

Hrbek v. Shortridge, 223 Neb. 785, 394 N.W.2d 285 (1986).

The action of the district court in quashing appellants' petition and dismissing their case was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KENNETH RICHARD PAYNE, RESPONDENT.

414 N.W.2d 283

Filed October 23, 1987. No. 87-577.

Original action. Judgment of disbarment.

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

PER CURIAM.

On June 24, 1987, Counsel for Discipline of the Nebraska State Bar Association filed a motion for reciprocal discipline in this court, pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1986), and moved for this court to enter an order disbarring the respondent, Kenneth Richard Payne, from the practice of law in the State of Nebraska. Rule 21(A) states: "Upon receipt by the Court of appropriate notice that a member has been disbarred or suspended in another jurisdiction, the Court shall enter an order imposing the identical discipline . . . ."

The record indicates that on July 10, 1986, the respondent was disbarred by order of the Indiana Supreme Court. See *Matter of Payne*, 494 N.E.2d 1283 (Ind. 1986). The Indiana court held that possession and use of cocaine; purchasing and possessing marijuana, unspecified narcotics, and cocaine; failure to appear for a client at a hearing; and accepting cocaine as payment for legal services warrants disbarment. *Id.* Respondent has also been disbarred in Colorado. See *People v. Payne*, 738 P.2d 374 (Colo. 1987) (Colorado court held that reciprocal discipline should be imposed on attorney who has already been disbarred in another state).

On September 15, 1987, respondent was ordered to show cause on or before October 1, 1987, why the motion for reciprocal discipline should not be sustained. On October 2, 1987, Counsel for Discipline filed a motion for judgment on the pleadings after respondent failed to respond to this order.

After a careful review of the record, we find that there exists no issue of fact or law. Therefore, pursuant to rule 21(A), it is the order of this court that the respondent, Kenneth Richard Payne, be, and hereby is, disbarred from the practice of law, effective immediately.

JUDGMENT OF DISBARMENT.

GUS T. PALLAS, INDIVIDUALLY, GEORGE A. PALLAS, AND GUS T. PALLAS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES C. PALLAS, DECEASED, APPELLEES, V. LEON F. BLACK, APPELLANT.

414 N.W.2d 805

Filed October 30, 1987. No. 85-997.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance is an equitable matter triable de novo on appeal to this court.
2. **Equity: Appeal and Error.** In an appeal of an equity action, the Nebraska Supreme Court tries the factual issues presented de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where the credible evidence is in conflict on a material issue of fact, the Nebraska Supreme Court considers, and may give weight to, the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Appeal and Error.** The Nebraska Supreme Court is obligated to reach its own independent conclusions on questions of law.
4. **Statute of Frauds.** A memorandum otherwise adequate to satisfy the requirements of Neb. Rev. Stat. § 36-105 (Reissue 1984) need be signed only by the party to be charged.
5. _____. In order to satisfy the provisions of Neb. Rev. Stat. § 36-105 (Reissue 1984), a memorandum, in addition to being signed by the party to be charged or by his or her agent actually or apparently authorized to do so, must state with reasonable certainty, (1) each party to the contract either by his or her own name, or by such a description as will serve to identify him or her, or by the name or description of his or her agent, (2) the land, goods, or other subject matter to which the contract relates, and (3) the terms and conditions of all the promises

constituting the contract and by whom and to whom the promises are made.

6. **Specific Performance: Equity.** If one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party.
7. **Specific Performance: Real Estate: Vendor and Vendee.** Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
8. **Specific Performance: Proof.** A party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.
9. **Specific Performance.** The mere fact that the value of property which is the subject of a contract has increased or diminished since the contract was executed will not warrant a court in refusing to grant a decree of specific performance, absent circumstances indicating fraud or bad faith.

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

Warren S. Zweiback and Scott H. Rasmussen of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellant.

James T. Gleason of Swarr, May, Smith & Andersen, P.C., for appellees.

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

CAPORALE, J.

Defendant, Leon F. Black, appeals from a decree of specific performance entered in favor of the plaintiffs-appellees, Gus T. Pallas, individually, George A. Pallas, and Gus T. Pallas, personal representative of the estate of James C. Pallas, deceased, ordering the purchase by Black of certain improved real estate from plaintiffs, directing Black to pay plaintiffs $13,600 due pursuant to the agreement together with $842.23 for real estate taxes, and directing plaintiffs to convey "clear title" in and to the property to Black. Black's six assignments of error may be resolved by determining whether (1) there existed an enforceable contract for the purchase of the property by Black, (2) the plaintiffs evidenced an ability to convey marketable title thereto, and (3) specific performance is the appropriate remedy. We affirm.

The property, commonly known as 2727 Q Street, Omaha,

Douglas County, Nebraska, was acquired in equal shares by Thomas Pallas and his brother, James C. Pallas, on October 9, 1946. Thomas died in 1968, leaving his share to his widow, Fania Pallas. On September 21, 1968, Fania transferred her interest by quitclaim deed to her sons, the plaintiffs Gus and George, in equal shares. Subsequently, George either gave his share to Gus or appointed Gus as his representative in the management of the property. In any event, George testified he stood "ready" to execute a deed transferring whatever interest he might have to Black.

On September 9, 1977, James and his wife, Dorothy, executed a nondurable power of attorney appointing James' nephew Gus their attorney in fact for the purpose of handling and taking "care of our financial affairs, and to [sic] all matters pertaining thereto."

James was injured in a fall sometime in 1979, and thereafter resided in a nursing home until his death on April 11, 1982, at the age of 95. Gus and George visited their uncle at the home at least every other day. During some of these visits, James did not understand business questions his nephews tried to discuss, but at other times he did. James' last will and testament, dated March 10, 1977, devised all his property to his wife and named Gus as executor. The will further provided, however, that if Dorothy should die before James, his undivided one-half interest in the subject property was to be inherited by Gus and his wife, Rose. James' will was admitted to probate on May 20, 1982, and Gus was appointed as the personal representative of his uncle's estate. The probate proceeding, by failing to name Dorothy as one of James' heirs at the time of his death, establishes that Dorothy died before her husband and that, as a consequence, title to James' undivided one-half interest in the subject property vested in Gus and Rose.

The parties stipulated that at all times relevant to this litigation, George's wife, Finija, and Gus' wife stood ready, willing, and able, at the request of their respective husbands, to execute any documents reasonably required to effect the transfer of the property to Black. Gus testified that at all times relevant to this litigation, he has been ready, willing, and able to convey the property to Black, both on his own account and on

behalf of his Uncle James' estate.

In May 1975, the property was leased for a term of 18 months to Pancho's, Inc., a corporation controlled by Black and on behalf of which corporation Black signed the lease. Pancho's operated a tavern on the property, having purchased the business from its previous operators. Black testified that in this purchase he, acting as Pancho's, Inc., had acquired "all of the furniture, bar stools and, to the best of [his] knowledge, the back bar . . . everything that was in the building." The record indicates, however, that the bar and back bar were not in fact transferred to Black by Pancho's predecessors in title to the business.

On September 23, 1977, the property was again leased to Pancho's for a term of 1 year, with two 1-year extension options. Black again signed this lease on behalf of Pancho's. Pancho's exercised both of its extension options under this second lease, thereby extending the lease through October 31, 1980.

In the summer of 1980, Black initiated discussions with Gus about buying the real estate. Following those discussions, Black signed and sent the following letter to Gus:

> July 9, 1980
>
> . . . .
>
> Dear Gus,
>
> I hereby agree to pay $20,000.00 for the premises located at 2727 Q Street. The $20,000.00 will be paid as agreed upon with a down payment of $5,800.00. The balance with 11% interest will be paid in monthly payments over 4 years, no payment to be less than $300.00. Also, I will continue to make the monthly rent payments for the duration of the lease which expires October 31, 1980.
>
> A check for $5,800.00 is attached herewith. The final documents will be drawn up by my attorney for your review and approval along with the schedule of payments as soon as possible.

> It is my intention to begin removing various items from the building beginning this Friday and continuing until completed.
>
> Very truly yours,
>
> Leon F. Black

Gus testified that this letter expressed the terms of the agreement which had been reached between himself and Black. Accompanying the letter was a $5,800 check, drawn on Black's behalf, payable to Gus' order.

After July 9, 1980, the only key to the building was in Black's possession. The weekend following receipt of the letter of July 9, Gus visited the property and found a crew of laborers removing the "fancy, old-fashioned ceiling" and wall paneling from the property. At a later time, the bar and back bar were removed as well.

After July 9, 1980, plaintiffs made no effort to lease the property to anyone, viewing the property as belonging to Black. Black, however, did take steps to lease the property. On November 29, 1982, he, as "Black & Associates," executed a document captioned "Business Property Lease," purporting to lease the property for a term of 1 year and 11 months to Kathleen Alston Curtis, to be used by her to operate a tavern, for a rental of $150 per month, total rent being $3,450 over the term of the lease. Black testified that he entered into this lease as an accommodation to Gus, but admitted he never informed Gus of that fact. Plaintiffs continued to pay the real estate taxes as they came due through March 27, 1984, a total amount of $842.23.

On August 28, 1980, Black wrote and signed the following letter to Gus:

> Dear Gus,
>
> Enclosed herein is a check in the amount of $430.00 for 2 months rent, and also a check in the amount of $600.00, which is the minimum monthly payment we agreed to. This monthly payment for the land contract will be properly computed with a schedule of payments in the near future.

You should be hearing from Roy Breeling, our attorney, to obtain the information he needs to prepare these papers.

Sorry for the delay, but I've been super busy.

Very truly yours,

Leon F. Black

. . . .

cc: Roy Breeling

A Pancho's, Inc., check in the amount of $430 and a check drawn by Black on the same account as the $5,800 check accompanying the July 9, 1980, letter accompanied this letter.

In accordance with Breeling's request, Gus delivered to Breeling a copy of the power of attorney from James and the abstract of title to the property. A letter to Gus from Breeling dated November 11, 1980, acknowledged receipt of the abstract, and on April 13, 1981, Breeling advised Gus to treat the $5,800 and $600 checks as "earnest money deposits," but Breeling never produced a writing which, in Gus' opinion, accurately reflected the agreement he and Black had reached.

The building was permitted to deteriorate to the point that it was ultimately condemned as a nuisance and torn down by the city of Omaha sometime after 1982.

We begin by noting that an action for specific performance is an equitable matter triable de novo on appeal to this court. *III Lounge, Inc. v. Gaines*, 217 Neb. 466, 348 N.W.2d 903 (1984). As such, we try the factual issues presented de novo on the record and reach a conclusion independent of the findings of the trial court, provided that where the credible evidence is in conflict on a material issue of fact, we consider, and may give weight to, the fact the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Johnson v. NM Farms Bartlett, ante* p. 680, 414 N.W.2d 256 (1987); *Hughes v. Enterprise Irrigation Dist., ante* p. 230, 410 N.W.2d 494 (1987); *Platte Valley Fed. Sav. & Loan Assn. v. Gray, ante* p. 135, 409 N.W.2d 617 (1987); Neb. Rev. Stat. § 25-1925 (Reissue 1985). Of course, we are obligated to reach our own independent conclusions on the

questions of law presented. *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985); *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984); *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983).

In connection with the first issue, Black argues that there exists no sufficient written memorandum of the agreement to purchase the property such as to satisfy the requirements of Neb. Rev. Stat. § 36-105 (Reissue 1984). That statute provides in relevant part: "Every contract . . . for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the . . . sale is to be made."

Black's argument is based in part upon the premise that the foregoing statutory language means that the vendor must sign any document which purports to be a memorandum of an agreement to sell real estate. That premise, however, is erroneous.

More than a hundred years ago, in *Gartrell v. Stafford*, 12 Neb. 545, 11 N.W. 732 (1882), this court announced the rule that to authorize specific performance under a statute of frauds in all material respects identical to § 36-105, only the party to be charged need have signed the memorandum. In so holding, this court examined English precedent and concluded: "It is sufficient if the contract or memorandum thereof is signed by the party to be charged, that is, by the vendor . . . ." *Id.* at 553, 11 N.W. at 735. As in subsequent cases, the vendor in *Gartrell* was the person to be charged, and the *Gartrell* court's use of the word "vendor" was intended only to identify the party in the case before it as "the party to be charged." E.g., *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973); *Horn v. Stuckey*, 146 Neb. 625, 20 N.W.2d 692 (1945). In this case Black is the party to be charged, and, therefore, it is his signature which is required.

Black also asserts that his letter of July 9, 1980, cannot support an order of specific performance because it does not contain a sufficient statement of the terms of the agreement to serve as an adequate memorandum. This court stated the applicable rule in *Hansen v. Hill*, 215 Neb. 573, 578, 340 N.W.2d 8, 12 (1983):

> " 'A memorandum, in order to make enforceable a contract within the Statute [of Frauds], may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods or other subject-matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.' "

See, also, *David v. Tucker*, 196 Neb. 575, 244 N.W.2d 197 (1976). Black's letter of July 9, 1980, clearly satisfies these requirements.

Having concluded that the first issue must be resolved adversely to Black, we turn our attention to whether plaintiffs evidenced an ability to convey marketable title. While Black does not question the adequacy of the language of the power of attorney James executed to empower Gus to enter into an agreement to sell James' interest in the property, Black does urge that James was not competent to so authorize Gus. However, the question of James' competency at the time he executed the power of attorney becomes immaterial in view of his earlier testamentary disposition. While Black suggests no evidence of marketable title in plaintiffs was presented to him, the fact of the matter is that the record establishes plaintiffs provided Black's attorney with an abstract of title and that no defect in plaintiffs' title has been claimed.

Thus, we reach the third issue, whether specific performance is an appropriate remedy. We have said that if one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party. *Farmers Underwriters Assn. v. Eckel*, 185 Neb. 531, 177 N.W.2d 274 (1970). However, the fact that the remedy of specific performance is not available to one party to a contract is not sufficient reason for refusing specific performance to the other party. *Id.* Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract

of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations. *Perry v. Ritze*, 110 Neb. 286, 193 N.W. 758 (1923). Plaintiffs tendered performance of their contractual obligations by executing appropriate deeds conveying their respective interests to Black. Further, plaintiffs, at all times relevant to this litigation, remained ready, willing, and able to tender performance of their contractual obligations. The doctrine of mutuality will not prevent a court of equity from ordering specific performance under such circumstances. *Id.* See, also, *Reifschneider v. Nebraska Methodist Hospital*, 212 Neb. 91, 321 N.W.2d 445 (1982), which holds that a party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.

Finally, Black objects to the order of specific performance because the building has been torn down. Generally, the mere fact that the value of property which is the subject of a contract has increased or diminished since the contract was executed will not warrant a court in refusing to grant a decree of specific performance, absent circumstances indicating fraud or bad faith. *Sinclair Refining Co. v. Miller*, 106 F. Supp. 881 (D. Neb. 1952); *City of University Place v. Lincoln Gas & Electric Light Co.*, 109 Neb. 370, 191 N.W. 432 (1922). There is no showing in the record before this court that plaintiffs acted fraudulently or with bad faith.

We conclude from our review that the judgment of the district court should be, and hereby is, affirmed.

AFFIRMED.

ROSLYNN THOM, APPELLEE, V. LUTHERAN MEDICAL CENTER AND ALEXSIS, INC., APPELLANTS.

414 N.W.2d 810

Filed October 30, 1987. No. 87-126.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted.
3. _____: _____. Earning power is synonymous neither with wages nor with loss of physical function; nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted.
4. **Workers' Compensation.** While there is no numerical formula for determining one's earning power following an injury to the body as a whole, the percentage of body as a whole impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.
5. _____. Neb. Rev. Stat. § 48-162.01 (Cum. Supp. 1986) permits an award of vocational rehabilitation benefits when, as the result of a compensable injury, a worker is unable to perform work for which he or she has previous training or experience or when such rehabilitation will reduce the amount of earning power loss the worker would otherwise suffer.
6. **Workers' Compensation: Appeal and Error.** The compensation court's determination on rehearing of a worker's ability to return to work for which he or she is fitted by previous training or experience is a factual question which will not be disturbed on appeal to this court unless clearly wrong.
7. _____: _____. The compensation court's determination on rehearing that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael A. Fortune and Jerald L. Rauterkus of Erickson & Sederstrom, P.C., for appellants.

Scott M. Kirshenbaum of Brodkey Law Offices, for appellee.

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

CAPORALE, J.

The defendant employer, Lutheran Medical Center, at Omaha, and its insurer, Alexsis, Inc., appeal the Workers' Compensation Court award of benefits to the plaintiff-appellee employee, Roslynn Thom. The issues presented by the assignments of error argued by appellants are whether the evidence supports the compensation court's findings that Thom (1) suffered a loss of earning power and (2) is entitled to vocational rehabilitation services. We affirm.

The parties stipulated that on April 7, 1985, Thom, a registered nurse, suffered an injury to her back, while lifting a patient, in an accident arising out of and in the course of her employment as a staff nurse. After seeing an emergency room physician, Thom went to her family physician, who referred her to a neurosurgeon. In June 1985, she underwent the removal of two herniated disks. On January 31, 1986, the treating neurosurgeon released Thom to return to work, having stated she had a 7- to 10-percent disability of the body and would be limited in terms of lifting, bending, stooping, and sitting for prolonged periods of time. Thom later saw an orthopedist, who was of the opinion that she suffered a 20- to 25-percent disability of the body.

Thom testified that she continues to have back pain which radiates to her left leg and produces numbness.

Thom is a 36-year-old high school graduate who has been employed in the nursing field since 1977. She first became licensed as a practical nurse and later obtained an associate degree in nursing science. She had worked at Lutheran Medical Center since 1980 and at the time of the accident was earning $9.46 per hour, or $19,676.80 per year, as a staff nurse caring for patients. After being released by the treating neurosurgeon as having reached maximum improvement, Thom was unsuccessful in her efforts to find employment in which she could use her training and experience.

A vocational rehabilitation specialist provided placement assistance to Thom from December 1985 to February 1986, when the effort was terminated. During this period, the

specialist and Thom discussed the possibility that Thom return to school. Thom ultimately enrolled in a college in order to obtain a bachelor's degree in business with a focus on "accounting and computers," a program which will take 2 years of full-time study. The evidence is that the program of study Thom is pursuing leads to jobs with entry level salaries of between $18,000 and $24,000 per year.

After she finished working with Thom, the vocational rehabilitation specialist conducted a labor market survey, looking for jobs which existed in the Omaha area which could be performed within Thom's physical limitations and suitable for one with her training and experience. The specialist found several light and sedentary jobs to exist, such as supervising nurse, nursing home director, admissions director, and industrial nurse. The jobs paid up to $27,800 per year.

It was this witness' opinion that Thom was employable without further training, but she admitted that a degree would enhance Thom's employability and that the accident made her less employable than she had been. The vocational rehabilitation specialist also testified that, while in her judgment it was probable that Thom could have obtained the jobs she described, there were a variety of factors other than physical qualifications to be considered. The witness admitted that a person with a degree would be preferred over one without a degree and that at least one prospective employer had stated a predilection for hiring from within its organization. This specialist did not attempt to actually place Thom in a job.

The coordinator of a medical employment pool which makes most of its placements in temporary work testified that there were jobs which Thom could perform within her physical limitations, such as directing nurses in a home health care agency, taking care of premature babies, adjusting for insurance companies, and working in a doctor's office. These jobs would pay between $8.50 and $10 per hour, or up to $20,800 per year, assuming a 40-hour week. It was also this witness' opinion that Thom was employable without further education or training.

The employment coordinator for Lutheran Medical Center testified that Thom's application for employment with the

center as a utilization review coordinator was rejected because there were other better qualified applicants and that Thom's inquiry regarding employment as a staff nurse in the center's addictive diseases section was answered negatively because of her physical limitations. This witness testified that the health care industry is undergoing changes, but notwithstanding the fact that the center is reducing its nursing staff, there is "kind of a nursing crunch and we are having a hard time filling nursing positions right now, but they are staff nursing positions."

This case is resolved by the oft-repeated principle that the findings of fact made by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Nice v. IBP, inc., ante* p. 538, 412 N.W.2d 477 (1987); Neb. Rev. Stat. § 48-185 (Cum. Supp. 1986).

Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted. *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). Earning power is synonymous neither with wages, *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985), nor with loss of physical function, *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980). Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical formula for determining one's earning power following an injury to the body as a whole, *Aldrich v. ASARCO, Inc., supra*, the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power. E.g., *Smith v. University of Nebraska Medical Center*, 201 Neb. 730, 271 N.W.2d 852 (1978), *modified after reh'g on other grounds* 202 Neb. 493, 276 N.W.2d 86 (1979), upholding an award equivalent to a 10-percent loss of earning power based on medical opinions that the employee suffered a 10- to 40-percent

impairment of her body as a whole.

The range of expert medical opinions that Thom's physical limitations translated to a permanent partial disability of from 7 to 25 percent of the body as a whole, the fact that she has been unable to find employment, and the evidence that her employment prospects have been diminished as a result of the accident support the compensation court's finding that at present Thom suffers a 25-percent loss of earning power.

The next question is whether the evidence supports the award of vocational rehabilitation benefits.

The bases for awarding vocational rehabilitation are found in Neb. Rev. Stat. § 48-162.01 (Cum. Supp. 1986), which reads in relevant part as follows:

> (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 Nebraska Workers' Compensation 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 . . . 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 compensation 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 compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under [Neb. Rev. Stat. §§ 48-101 to 48-151 (Reissue 1984

& Cum. Supp. 1986)].

In *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980), this court held that those provisions read together permit an award of vocational rehabilitation benefits when, as the result of a compensable injury, a worker is unable to perform work for which he or she has previous training or experience or when such rehabilitation will reduce the amount of earning power loss the worker would otherwise suffer.

Just as we have held the determination of a worker's ability to return to work for which he or she is fitted by previous training or experience is a factual question which will not be disturbed on appeal to this court unless clearly wrong, *Nice v. IBP, inc., ante* p. 538, 412 N.W.2d 477 (1987), we hold the determination that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.

Lutheran Medical Center, in arguing that the evidence does not support the compensation court's finding, places heavy reliance upon *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986). This court affirmed the compensation court's denial of vocational rehabilitation in that case on the basis that the evidence supported the compensation court's finding that such would not serve the employee's best interests. The evidence in *Pollock* was that the employee did not have the background to undertake the course he wished to pursue, his future ability to meet the changing requirements of the industry he wished to enter was uncertain, and the availability of future employment was uncertain.

Such, however, is not the situation in this case. While the evidence is not overwhelming, it nonetheless permits inferences that the changing nature of the health care industry reduces employability for registered nurses who cannot function as staff nurses and who lack advanced training or education and that the rehabilitation services awarded would reduce the amount of earning power Thom would otherwise lose. The evidence thus supports the compensation court's specific finding that the vocational rehabilitation awarded will reduce the amount of earning power Thom would otherwise lose and

its implied finding that the rehabilitation is in Thom's best interests, to the extent that these findings cannot be said to be clearly wrong.

Since the effort at rehabilitation is aimed at reducing the earning power loss Thom presently suffers, the compensation court properly suspended payment of benefits for said present loss and awarded compensation for temporary total disability during the period of vocational rehabilitation. At the conclusion of the rehabilitative effort, the extent of Thom's loss of earning power will need to be reconsidered. § 48-162.01.

Pursuant to the provisions of Neb. Rev. Stat. § 48-125 (Cum. Supp. 1986), Thom is awarded the sum of $1,000 to apply toward the fee of her attorney for services rendered in this court.

AFFIRMED.

OMAHA MINING COMPANY, INC., DOING BUSINESS AS THE VIDEO STATION, ET AL., APPELLANTS, V. FIRST NATIONAL BANK OF BELLEVUE, APPELLEE.

415 N.W.2d 111

Filed November 6, 1987. No. 85-973.

1. **New Trial: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.
2. **New Trial: Liability: Damages: Verdicts: Appeal and Error.** When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
3. **Motions for New Trial: Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.

4. **Jury Instructions: Appeal and Error.** The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and reversed and remanded for a new trial.

Del Pelton of Pelton, Bertolini, Schroeder, Veith and O'Neal, for appellants.

John W. Wilke of Sodoro, Daly & Sodoro, for appellee.

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

COLWELL, D.J., Retired.

This is a suit to recover damages for interference with a business relationship. The jury returned an $85,000 verdict in favor of plaintiffs, Omaha Mining Company, Inc. (Mining), doing business as The Video Station, and David R. Head, its president, against defendant, First National Bank of Bellevue (Bank). Defendant's motion for a new trial was denied as to liability; however, it was granted on the issue of damages upon the court's finding that its damages instruction to the jury was incomplete. Plaintiffs' appeal assigns as error that the judge had no authority to set aside the award of damages where there was evidence to support it. Defendant does not cross-appeal.

The petition also stated a second cause of action, alleging defamation caused by defendant's filing a replevin suit against plaintiffs. This second cause was dismissed at the close of plaintiffs' evidence.

We affirm the trial court's ruling on the issue of damages. For other plain prejudicial errors appearing in the jury instructions later discussed, we reverse and remand for a new trial on all issues.

The testimony of three of the witnesses is before us. David Head and Michael L. Sullivan, attorney for Applause Video Corporation, testified for plaintiffs. Allan Lee Caplan testified for defendant.

Mining is a holding company owned by plaintiff Head; it sells and rents videotapes retail and sells tapes wholesale in

Bellevue, Nebraska. Mining owed the Bank $22,600 on three notes secured by a lien on Mining's inventory of tapes, furniture, and fixtures. Head cosigned these notes. Head also owed the Bank about $18,600 on personal notes. For about a year prior to June 1984, the customer relationship between Head and the Bank had been negative; the Bank had requested Head to obtain credit elsewhere. In June 1984, Head had a need for cash to protect a $2,500 real estate option and to pay a tape supplier a past-due account of $8,000. Head also wanted to sell all of The Video Station's assets, including 5,000 tapes, and then concentrate on Mining's wholesale business. He contacted Allan Caplan, the owner of Applause Video, which operated more than 15 retail videotape stores in the Omaha area. They discussed Applause's buying a large number of tapes, later agreed to be 1,223 tapes, which was a selected number that avoided certain notice provisions of the Nebraska bulk sales act. In late July 1984 Head met with Caplan and Sullivan at Head's office to further discuss the sale. Caplan made inquiry about getting a release of the lien on the tapes. Head called Denny Gilbert, an official at the Bank, explained the proposed sale of 1,223 tapes, and requested approval of the Bank to release its lien. It was at this point that plaintiffs' claims of interference began. Head reported to Caplan and Sullivan that Gilbert said that the Bank would not release its lien on the 1,223 tapes unless all sale proceeds were paid to the Bank and applied to all of Mining's and Head's loans, totaling about $41,000, although none were then due. Head then told Caplan that he could not sell the tapes because he needed the money for purposes other than to pay the Bank.

The negotiations continued, however, and a further effort was made by Caplan to secure the Bank's agreement to release the lien. At one point Head testified that a Bank official told him that he had to sell the tapes to Caplan and that if he did not, the Bank would call all of his notes and put him out of business. Head was later informed by his attorney that the Bank could not call notes before they were due. The two negotiators had also been discussing the possible sale of all Mining's retail store assets to Applause. Caplan's attorneys drafted two detailed contract proposals, the principal provisions of which are

summarized as follows: (1) the sale of 1,223 tapes for a consideration of $36,690 or $30 per tape and a noncompetition clause and (2) the sale of all assets, with the cash consideration space left blank and no values placed on any particular asset. On August 2, 1984, the parties met to discuss the contracts; neither was signed and no agreement on the terms was reached. Caplan later offered $27 a tape, but this offer was rejected by Head. That was the end of the negotiations. Defendant filed a replevin suit that was dismissed, and this suit followed. There was no clear evidence as to the cost value for the tapes other than that Mining carried them on its inventory as valued at $12.27 each. In November 1984, Applause bought 1,000 tapes from Mining's wholesale operation for $22.50 each, and in March 1985, it bought another 1,833 tapes for about $26 apiece.

> A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, 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.

Hegarty v. Campbell Soup Co., 214 Neb. 716, 720-21, 335 N.W.2d 758, 762 (1983).

> The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.

Id. at 720, 335 N.W.2d at 762.

> When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.

Id. at 726, 335 N.W.2d at 765.

At the instruction conference, counsel for both parties made no objection to the judge's proposed instructions that were later read and delivered to the jury, including the damages instruction, No. 7:

> If you find for the plaintiffs, then it is your duty to fix the amount of money which will fairly and reasonably

> compensate the plaintiffs for the damage proven by a preponderance of the evidence to have proximately resulted from the interference by the defendant.
>
> You are not permitted to allow any damages by way of punishment or sympathy. Your verdict must be based upon the evidence and not upon speculation, guess or conjecture.

This instruction conforms with the general rule that the plaintiff can recover such damages sustained as are the natural and proximate consequence of the interference. See 45 Am. Jur. 2d *Interference* § 58 (1969).

Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial. *McCready v. Al Eighmy Dodge*, 197 Neb. 684, 250 N.W.2d 640 (1977).

A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Vistron Corp. v. Scoular-Bishop Grain Co.*, 194 Neb. 696, 234 N.W.2d 906 (1975).

The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice. *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979).

Caplan took great pride in his business acumen to negotiate favorable business deals and said that the $27 figure was part of his negotiation plan. There is a close fact question whether defendant's alleged acts of interference either changed the price per tape factor or affected Caplan's negotiation strategy.

Plaintiffs claim that the negotiations between Head and Caplan for their respective businesses was a business relationship, having the elements of proof stated in *Mike Pratt & Sons, Inc. v. Metalcraft, Inc.*, 222 Neb. 333, 383 N.W.2d 758 (1986), which were included in the court's instruction No. 5. That relationship is better described in the Restatement (Second) of Torts § 766B (1979).

Intentional Interference with Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Comment:

a. . . . In order for the actor to be held liable, this Section requires that his interference be improper. The factors of importance in determining this issue are stated and explained in § 767 . . . .

The Restatement, *supra* at 20.

Factors in Determining Whether Interference is Improper

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

The Restatement, *supra*, § 767 at 26-27.

Under this record the rule for damages would include:

Damages

(1) One who is liable to another for interference with a

> contract or prospective contractual relation is liable for damages for
>
> (a) the pecuniary loss of the benefits of the contract or the prospective relation;
>
> (b) consequential losses for which the interference is a legal cause; and
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> . . . .
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> Comment:
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> . . . .
>
> *b.* . . . And when the defendant's interference is with prospective contractual relations, the plaintiff may recover for the loss of profits to be made out of the expected contracts.
>
> *c.* A major problem with damages of this sort is whether they can be proved with a reasonable degree of certainty.

The Restatement, *supra*, § 774A at 54-55.

In the case at bar, the issue of damages is narrowed by the allegations in paragraph X in plaintiffs' petition, "That the actions by Defendant caused a breakdown in the contractual relationship between Plaintiff[s] and Mr. Caplan, causing a *loss to Plaintiff[s] of the income that would have been derived from the sale of the video tapes and/or business to Mr. Caplan.*" (Emphasis supplied.)

An instruction that misstates the issues or defenses and has a tendency to mislead the jury is erroneous. *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967).

The trial judge's ruling that instruction No. 7 was incomplete was correct under the pleadings and the evidence for these reasons: (1) The issue of damages was limited by the pleadings to that loss of income caused by the tortious acts of defendant. (2) There was neither a definition nor guideline for the jury to follow in determining "loss of income." (3) The evidence purporting to support recoverable damages under the alternative contract proposal for the sale of all retail assets is all speculative, including the contract price for all of the assets being sold. At most, plaintiffs argue that about 5,000 tapes worth $30 each were in the inventory, which computes to $150,000 without assigning any values to other included assets.

The jury should have been instructed to disregard the proposed contract for the sale of all retail assets and all evidence supporting it.

There was no abuse of discretion by the trial judge in ordering a new trial on the issue of damages.

There is one other instruction error that relates to presenting defendant's affirmative defenses to the jury.

When the plaintiffs proved a prima facie case, it became incumbent upon the defendant to prove its alleged affirmative defenses of justification and privilege. 45 Am. Jur. 2d. *Interference* § 56 (1969). Those defenses and issues must be included in the jury instructions. *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979). Instruction No. 5 generally follows NJI 2.01 as a statement of plaintiffs' case, their burden of proof, and the effect of the jury findings. It did not provide like guidance for defendant's affirmative defenses, as suggested in NJI 2.02, and those affirmative defenses are not otherwise properly included in the instructions. It was not enough for instruction No. 3 to copy verbatim from defendant's answer its claims, defenses, and affirmative defenses. This instruction procedure has been criticized. *Nebraska State Bank v. Dudley*, 194 Neb. 1, 229 N.W.2d 559 (1975). The failure to clearly include an instruction to guide the jury concerning defendant's affirmative defenses was plain error, Neb. Rev. Stat. § 25-1911 (Reissue 1985), prejudicial to defendant, requiring reversal for a new trial on all issues.

AFFIRMED IN PART, AND REVERSED AND REMANDED FOR A NEW TRIAL.

LEE C. LARSON ET AL., APPELLANTS, V. CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, MIDLANDS DEVELOPMENT CO., A NEBRASKA GENERAL PARTNERSHIP, ET AL., INTERVENORS-APPELLEES.

415 N.W.2d 115

Filed November 6, 1987. No. 85-1000.

Mandamus. The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.

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

John C. Mitchell of Mitchell & Demerath, Richard E. Croker of Croker, Huck & McReynolds, and J. Patrick Green, for appellants.

Charles K. Bunger, Assistant Omaha City Attorney, for appellee.

Frank F. Pospishil and Harvey B. Cooper of Abrahams, Kaslow & Cassman, for intervenor-appellee Midlands Development Co.

Patrick W. Kennison of Kutak Rock & Campbell, for intervenor-appellee Mangimelli.

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

HASTINGS, C.J.

Plaintiff landowners appeal the judgment of the district court, which dismissed their petition for a writ of mandamus. By petitioning for such writ, the plaintiffs sought to compel the City of Omaha to revoke a development permit issued to intervenor Midlands Development Co. (Midlands), which allowed Midlands to remove dirt from the floodway and place it in the flood plain of Big Papillion Creek, thus changing the line of the floodway.

Although the trial court made certain findings of fact and law pertaining to the merits of plaintiffs' contention, it concluded that the demurrers of the defendant and the intervenors should have been sustained on the basis of the

plaintiffs' having an adequate remedy available by way of declaratory judgment action and by injunctive relief. We agree with the conclusion of the district court.

Generally, no construction is allowed in the floodway of a creek, but a plan submitted by the engineers of Midlands would increase the carrying capacity of the stream so as to allow for construction of a development project. Relying upon this plan, the City of Omaha granted the necessary permit under the provisions of the flood plain regulations of the Omaha zoning ordinance, Omaha Mun. Code, ch. 55, art. V, § 55-117 (1980).

At the time this present action was filed, two other actions were pending, one in this court and one in the district court for Douglas County, relating to these proceedings: *Wupper v. Shukert*, 220 Neb. xx (case No. 84-880, Sept. 12, 1985), and *Giger v. City of Omaha*, Douglas County District Court, docket 843, page 733. These actions sought declaratory and equitable relief. Similarly, a declaratory judgment action would be available to determine the constitutionality of the Omaha Municipal Code regarding the issuance of a permit without a prior hearing, which issue the plaintiffs sought to raise by this mandamus action.

"The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Neb. Rev. Stat. § 25-2157 (Reissue 1985). See, also, *Watts v. City of Omaha*, 184 Neb. 41, 165 N.W.2d 104 (1969).

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

AFFIRMED.

CAELI ASSOCIATES, INC., A NEBRASKA CORPORATION, APPELLANT, V. FIRESTONE TIRE & RUBBER COMPANY, AN OHIO CORPORATION, APPELLEE.

415 N.W.2d 116

Filed November 6, 1987. No. 86-033.

1. **Declaratory Judgments.** Ordinarily, an action for declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.

2. _____. The availability of another remedy is a factor bearing upon the exercise of a trial court's decision as to whether to entertain an action for declaratory relief.
3. _____. A declaratory judgment action is sui generis, and whether it is to be treated as one at law or in equity is to be determined by the nature of the dispute.
4. **Breach of Contract: Leases.** An action for breach of a lease presents an action at law.
5. **Appeal and Error.** In an action at law tried without a jury, it is not the role of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, it presumes that the trial judge resolved any controverted facts in favor of the successful party, and will consider the evidence and permissible inferences therefrom most favorably to that party.
6. _____. In an action at law tried without a jury, the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside on appeal to the Nebraska Supreme Court unless they are clearly wrong.
7. **Breach of Contract: Leases.** In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Frank Meares, for appellant.

Jon S. Reid of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

PER CURIAM.

Appellant landlord, Caeli Associates, Inc., a Nebraska corporation, brought an action pursuant to the provisions of Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), seeking a declaration that appellee tenant, Firestone Tire & Rubber Company, an Ohio corporation, had breached the terms of the lease under which it occupied property owned by Caeli, and should therefore vacate the premises. The trial judge, sitting without a jury, dismissed Caeli's petition, and this appeal followed. For the reasons discussed hereinafter, we affirm.

We begin by calling attention to the fact that, ordinarily, an action for declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law,

Zarybnicky v. County of Gage, 196 Neb. 210, 241 N.W.2d 834 (1976), and that the availability of another remedy is a factor bearing upon the exercise of a trial court's decision as to whether to entertain an action for declaratory relief, *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). It would seem that either a proceeding for forcible entry and detainer under the provisions of Neb. Rev. Stat. §§ 24-568 et seq. (Reissue 1985) or one for breach of contract is a remedy which is at least as serviceable as is this action for declaratory judgment. Thus, we question the propriety of the present action. However, as Firestone has not complained of the remedy sought by Caeli, we elect in this instance to review the issues presented by Caeli's assignments of error, which are that the trial judge erred in finding that Firestone did not breach the lease by (1) defeating the percentage rental provision, (2) rendering the demised building unsafe, (3) diminishing the value of the leasehold, and (4) making certain unauthorized alterations and engaging in other prohibited conduct, and that the district judge further erred by (5) finding that Caeli had waived the right to complain of certain alterations made by Firestone.

Before we can proceed further with our task, we must determine the scope of our review. A declaratory judgment action is sui generis, and whether it is to be treated as one at law or in equity is to be determined by the nature of the dispute. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987). The dispute before us concerns whether Firestone has forfeited its right to detain, that is, keep possession of, the demised premises by virtue of having violated certain lease provisions. Thus, the dispute takes on the character of an action for breach of the lease, a type of contract. As such, the present action is to be treated as one at law. *Washington Heights Co. v. Frazier, ante* p. 127, 409 N.W.2d 612 (1987); *Occidental S. & L. v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984).

The premises in question are located on the northeast corner of 60th Street and Ames Avenue in Omaha and are a part of what used to be a grocery store. Caeli leased the premises to Firestone for a term of 20 years beginning August 1, 1968, with

four 5-year extension options. The lease provides that Firestone would use the premises

> for the principal purpose of conducting a business for the sale and installation of tires, oil, and any and all home and automobile supplies and furnishings, toys, gardening and recreational goods, tire repairing, vulcanizing, and for general automotive service station, for a general retail business similar to that conducted on a national scale by other stores (which shall primarily engage in the business defined in this Section 6) of TENANT, and for such other uses as may be incidental thereto, including, without limitation, incidental wholesale sales, and for no other purpose or purposes.

Before Firestone took occupancy of the premises, Caeli, pursuant to agreement, made several improvements in order to house the Firestone business. The premises were expanded, and part of the former grocery store was remodeled into a showroom. Along with other modifications to the building, many electrical outlets and a platform were added to the retail sales area, and a wheel alignment pit was installed, along with a vent for an underground oil storage tank.

Caeli first urges that Firestone breached the lease by defeating the percentage rental provision of the lease. Section 7 of the lease provides for a base rental of $16,800 per year, or $1,400 per month. Section 8 of the lease provides for a contingent additional rental in the amount the sum of 3½ percent of Firestone's annual net retail sales plus 1 percent each of any annual net commercial and wholesale sales exceeds the total of the minimum guaranteed rental plus certain tax reimbursements made by Firestone. Caeli acknowledges by the terms of said section that Firestone "made no representation of any kind as to minimum or maximum annual volume of retail, commercial, and wholesale sales which [it] may or shall make [in] any lease year during the term of this lease."

Caeli asserts that Firestone misrepresented the profits it would realize, that Caeli relied upon those misrepresentations, and that, indeed, Firestone deliberately kept its sales low in order to prevent triggering the contingent percentage rental provisions of the lease. The first assignment of error fails not

only because Caeli did not plead a fraud action, but because there is no evidence that Firestone engaged in such a bizarre business practice as refusing to make sales simply because its landlord would share in the increased profits such sales would produce. While it is true that Firestone removed itself from the appliance business throughout the nation, it does not follow, and the record does not establish, that such action was taken to deliberately keep from paying Caeli any additional rent.

Caeli next claims the trial judge erred in failing to find Firestone breached the lease by rendering the building unsafe in violation of the requirements of section 17 of the lease. That section provides in part that Firestone "shall comply with all ordinances and regulations of government authorities relating to keeping the premises in an orderly condition and relating to the method of conducting [its] business thereon."

Firestone installed a wheel alignment computer by welding it to some joists. It also installed an engine analyzer by drilling holes through some of the joists. Caeli's expert witness concluded that as the result of those installations the entire roof assembly had been weakened to the point that it was in danger of collapse. On the other hand, Firestone's expert testified that although there could be a slight overstress of the roof structure when under a live load, the roof so stressed was still within the required safety range and that the installation of the units in question had not caused any structural damage to the building.

In an action at law tried without a jury, it is not the role of this court to resolve conflicts in or reweigh the evidence; rather, we presume that the trial judge resolved any controverted facts in favor of the successful party, and will consider the evidence and permissible inferences therefrom most favorably to that party. *Washington Heights Co. v. Frazier, ante* p. 127, 409 N.W.2d 612 (1987). Moreover, in such actions the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside on appeal to this court unless they are clearly wrong. *Washington Heights Co. v. Frazier, supra*. Thus, under the state of the evidence it cannot be said the trial judge was clearly wrong in finding that Firestone had not rendered the demised premises unsafe.

The third assignment of error rests on section 21 of the lease,

which provides in part that any alterations made to the premises by Firestone must not "diminish the value of the then existing improvements." Caeli's representative testified that without the Firestone lease the premises would have a value of $840,000; however, because Firestone produces limited income, the lease reduces the value of the demised premises to between $250,000 and $275,000. Caeli also claimed that Firestone's removal of the wheel alignment pit and replacing it with other, more modern equipment reduced the value of the premises. That evidence falls short of the proof required by the lease, as the reduction in value is tied, at least in part, to the income produced by the lease rather than to alterations made by Firestone. Additionally, another witness testified that the alterations made by Firestone had no effect on the value of the premises; that in fact, depending upon the subsequent use made of the premises, removal of the wheel alignment pit could increase the value of the premises. On that state of the record it cannot be said the trial judge was clearly wrong in finding that there had been no diminution in the value of the premises as a result of Firestone's conduct.

The fourth assignment of error urges the trial judge erred in failing to find that Firestone breached the lease by making certain unauthorized alterations and by engaging in other prohibited conduct.

The first claim again rests on section 21 of the lease, which empowers Firestone to, at its expense, make alterations to the interior of the building as, in Firestone's opinion, may be reasonably necessary or desirable, provided that it obtain Caeli's approval, which approval Caeli may not unreasonably withhold.

Caeli complains that Firestone, without Caeli's permission, replaced the underground oil storage tank located outside the building in such a way as to permit water to accumulate around the tank and seep onto and damage the footings, erected a partition which increased Firestone's warehouse space and decreased its retail sales area, and spent $9,200 in remodeling and repainting portions of the demised premises.

Caeli also asserts that Firestone erected and removed certain signs without Caeli's permission in violation of section 16 of the

lease, which provides that Firestone

> may erect such signs, with right of repairing and replacing when necessary, as shown on attached Exhibits. Said signs shall conform to city ordinances or the requirements of any other governmental authority having jurisdiction. [Firestone] may also erect such other signs as it may desire from time to time provided [Caeli's] prior written consent shall be first obtained, which consent shall not be unreasonably withheld.

Caeli claims that two signs were removed and one installed without permission and that damage was done to the roof in the process.

A witness called by Firestone testified that there were no cracks in the building, and, thus, the trial judge could find that the footings had not been damaged. While there was evidence that Caeli repaired the roof on more than one occasion upon Firestone's request, there is no direct evidence that the repairs were necessitated by the placement or removal of signs. Neither does the evidence provide any basis on which Caeli could reasonably have withheld its approval to the remodeling and repainting done by Firestone.

Caeli also complains that Firestone failed to pay a $461 charge for parking lot repair. The evidence does not establish that Firestone has any legal obligation to pay for the parking lot repair, notwithstanding the fact that it had voluntarily paid similar such charges in the past.

Once again, we cannot say the trial judge was clearly wrong in finding that Caeli's claims, even if considered proved, did not constitute material breaches of the lease.

Since the first four assignments of error are without merit, it necessarily follows that the fifth assignment is also meritless. In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract. See *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975). The lease in question contains no provision for a forfeiture under the circumstances proved.

The judgment of the district court is affirmed.

AFFIRMED.

WILLIAM R. ERNEST, APPELLANT, V. HOLLY JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, ET AL., APPELLEES.

415 N.W.2d 121

Filed November 6, 1987. No. 86-058.

Implied Consent: Licenses and Permits: Revocation: Jurisdiction: Time. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.

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

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

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

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

GRANT, J.

On June 7, 1985, plaintiff-appellant, William R. Ernest, filed a petition in the district court for Lancaster County, seeking the vacating of an order of the director of the Department of Motor Vehicles, rendered on May 23, 1985, suspending plaintiff's driver's license for 1 year. The director's order was based on plaintiff's failure to comply with the provisions of the "Nebraska Implied Consent Law," referred to by the director as "LB 1095, passed by the 82nd Session of the Nebraska Legislature," and codified in Neb. Rev. Stat. §§ 39-669.08, 39-669.09, and 39-669.14 to 39-669.18 (Reissue 1984) as of the date of this incident. Plaintiff's petition alleges that he appealed from the director's order "under the provisions of §60-420 and §84-917(2) R.R.S. (1943)." On the same day a $200 certified check was filed with the department "to be applied as costs for the appeal . . . pursuant to the provisions of R.R.S. §60-420." Service of summons on the petition was made on June 11, 1985.

On June 10, 1985, a document entitled "Demand for Production" was filed by plaintiff in the case. This filing set out: "Plaintiff hereby demands production of all depositions or exhibits introduced in the Agency Hearing on April 11, 1985."

The record next shows that on September 3, defendants filed a demurrer to plaintiff's petition, alleging that the district court lacked jurisdiction of the appeal because "no transcript of the proceedings before the Director of the Department of Motor Vehicles has been filed by the plaintiff as is required by Neb. Rev. Stat. §60-420 (Reissue 1984)."

On September 30, 1985, plaintiff filed in the case "a copy of the transcript of proceedings before the Director of the Department of Motor Vehicles as required by Neb. Rev. Stat. §60-420 (Reissue 1984)."

A hearing was held on defendants' demurrer on October 11, and on November 8, 1985, the demurrer was sustained. Plaintiff then retained present counsel, who filed a motion for new trial on November 18, 1985. This motion for new trial was overruled, and plaintiff timely appealed to this court.

Plaintiff alleges and argues that the district court erred (1) in holding that "the failure to file the transcript prior to answer day was jurisdictional" and (2) in "failing to find that the appellant was entitled to effective assistance of counsel, and due process of law as guaranteed by the United States Constitution and the Constitution of the State of Nebraska in his appeal from the order revoking his driving privileges."

With regard to the second assignment, we have held that an individual has no constitutional right to effective assistance of counsel in a civil proceeding. *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979). Proceedings under the implied consent laws are civil in nature. The second assignment of error is without merit.

With regard to the first assignment, plaintiff alleged in his petition that he appealed from the director's order of suspension "under the provisions of §60-420 and §84-917(2) R.R.S. 1943." Section 39-669.18 provides that in appeals from the director's order of revocation, the person "who feels himself aggrieved because of such revocation may appeal therefrom . . . in the manner prescribed in section 60-420." Neb. Rev. Stat.

§ 84-917(7) (Cum. Supp. 1984) provides: "The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal." Section 39-669.18 prescribes Neb. Rev. Stat. § 60-420 (Reissue 1984) as the method of appeal in this case. Our consideration is therefore limited to § 60-420.

Section 60-420 provides in part, in setting out the appeal procedure, as follows:

> The applicant, licensee, or appellant shall, within twenty days from the date of the final order complained of, execute a bond for costs to the State of Nebraska in the sum of two hundred dollars with sufficient surety to be approved by the Auditor of Public Accounts. The bond shall be filed in the office of the director. In lieu of the bond, the sum of two hundred dollars in cash, certified check, or money order may be deposited at the office of the director. It shall be the duty of the director, on payment or tender of the cost of preparing the transcript at the rate of ten cents per hundred words, to prepare a complete transcript of the proceedings relating to the refusal to issue or to reinstate any license or relating to the proceedings concerning the suspension, cancellation, or revocation of the license complained of. The applicant or licensee shall file a petition in such district court within thirty days from the date of filing of the director's final order in the matter and shall file the transcript before answer day which shall be the same as provided under the code of civil procedure in section 25-821.

Neb. Rev. Stat. § 25-821 (Reissue 1985) provides: "The answer . . . of the defendant shall be filed within thirty days after service of the summons . . . ."

The appeal procedure set out in § 60-420, in summary, provides: (1) a bond for costs must be filed in the office of the director within 20 days of the director's order; (2) a petition must be filed in the district court within 30 days of the director's order; and (3) the transcript of "the proceedings relating to the . . . revocation of the license" shall be filed before answer day, which is 30 days after the service of summons.

In *Black v. State*, 218 Neb. 572, 358 N.W.2d 181 (1984), and

Bammer v. Jensen, 222 Neb. 400, 384 N.W.2d 263 (1986), we held the filing of a bond in the form and manner set out in § 60-420 was necessary to give the district court, and this court, subject matter jurisdiction over such an appeal. Similarly, in *Miller v. Sullivan*, 194 Neb. 127, 230 N.W.2d 226 (1975), we held that the filing of a petition in the district court within 30 days of the director's order is jurisdictional.

We have not, however, previously addressed the effect of the requirement of § 60-420 that the transcript shall be filed within 30 days after the service of summons on the petition on appeal.

Appellant compares the procedure as to appeals set out in § 84-917 with the procedures in § 60-420. Section 84-917(4) provides: "Within fifteen days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it . . . ." Based on comparing the two statutes, appellant contends it is unfair to consider the requirements of the filing of the transcript under § 60-420 jurisdictional, when we held in *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), that the filing of the transcript in appeals under § 84-917 was not jurisdictional. In *Maurer, supra* at 161, 328 N.W.2d at 749, we held, "The preparation and filing of the transcript under the Administrative Procedures Act, as opposed to error proceedings, while critical to the ultimate disposition of the case, is not jurisdictional." That holding was specifically limited to appeals under the Administrative Procedures Act and the court specifically noted that under § 84-917(4) the 15-day period of time could be extended by the court "for good cause shown." *Maurer, supra* at 162, 328 N.W.2d at 749. The idea of a possible extension of a filing time militates against such a time's being jurisdictional. No such possible extension of the filing time is contained within § 60-420.

In *Maurer*, we noted that in error proceedings under Neb. Rev. Stat. § 25-1905 (Reissue 1985), the filing of the transcript by the plaintiff was required and jurisdictional as determined in *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973). In *School Dist. No. 39 v. Farber*, 215 Neb. 791, 793, 341 N.W.2d 320, 322 (1983), we said that in a

proceeding under § 25-1905, "The requirement that a transcript of the proceedings in the lower tribunal be filed with the petition is mandatory and jurisdictional."

Appellant states: "For reasons which are not clear, the Nebraska Legislature has created varied and numerous procedures for seeking judicial review of essentially non-judicial tribunals." Brief for Appellant at 4. While that may be so, the fact remains that § 60-420 provides clearly that a person who wishes to appeal an order of the Director of Motor Vehicles "shall [among other things] file the transcript before answer day which shall be the same as provided . . . in section 25-821." That answer day in this case was July 11, 1985—30 days after service of summons. The transcript was filed on September 30, 1985.

As set out above, this court has held that in an appeal pursuant to § 60-420 the requirements of the statute that an appellant *shall* file a bond for costs in the office of the director and *shall* file a petition within 30 days of the order are mandatory and jurisdictional. We can see no difference in holding that the statute's requirement that the appellant *shall* file the transcript before answer day is also jurisdictional. The requirements as to the times of filing the petition and the transcript are in the same sentence. The language is clear and unambiguous, and we see no reason to depart from our previous holdings that "shall" means that a mandatory action must be accomplished. *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982). We hold that the filing of the transcript of the proceeding relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in § 60-420, is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.

We note there is no question in this case of any failure on the part of the Department of Motor Vehicles to prepare the transcript. Section 60-420 provides: "It shall be the duty of the director, on payment or tender of the cost of preparing the transcript . . . to prepare a complete transcript . . . ." The record in this case does not show any payment or tender of costs.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., dissents.

IN RE INTEREST OF P.J.M., R.E.M., AND S.A.M., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.M., APPELLANT, AND L.M., APPELLEE.

415 N.W.2d 124

Filed November 6, 1987. Nos. 86-858, 86-859, 86-860.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court's review is de novo on the record.
2. **Parental Rights.** The order terminating parental rights must be supported by clear and convincing evidence and must also be in the best interests of the child.

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

C.E. Danley, for appellant.

Jerry L. Shelton, Deputy Gage County Attorney, and Dennis A. Winkle, guardian ad litem, for appellee State.

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

PER CURIAM.

On May 8, 1986, the Gage County Court, sitting as a juvenile court, entered an order terminating the parental rights of R.M. and L.M. as to their children P.J.M., R.E.M., and S.A.M. Both parents appealed to the district court for Gage County. The district court affirmed the termination order. The father, R.M., appealed to this court, asserting only that the decision was not founded upon clear and convincing evidence. We affirm.

On February 2, 1982, the State filed petitions alleging that P.J.M., R.E.M., and S.A.M. were in a situation which was injurious to the health of such children by virtue of unsanitary living conditions. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984). The adjudication hearing was had on the matter on February 23, 1982. The parents admitted that they had no place to live at that time and consented to the children's being placed in temporary custody with the Gage County department of public welfare.

On April 13, 1982, the court entered an order of temporary

disposition under the following terms and conditions:

(1) That the parents attend counseling at Blue Valley Mental Health Center, Beatrice, Nebraska. Said counseling to include but not necessarily be limited to the following topics:

a. Parenting skills
b. Discipline and guidance of children
c. Coping with stress
d. Marital strife
e. Finances
f. Adult supervision of children

(2) That [R.M.] seek and maintain suitable employment and make no change in employment without permission of the Gage County Division of Public Welfare.

(3) That the parents obtain adequate housing in cooperation with the Beatrice Housing Authority and maintain suitable housekeeping standards as approved by the Gage County Division of Public Welfare.

(4) That the parents work with the Gage County Home Extension Aide in improving nutrition and meal planning and food budgeting.

(5) That the parents maintain contact with the Gage County Division of Public Welfare and agree to visitation from personnel associated with said agency.

This order was continued several times, and on November 29, 1983, the order was continued and modified as follows:

(6) account for all income and expenses to the State Department of social services.

(7) [R.M.] shall enroll and regularly attend the Nebraska Division of Rehabulation [sic] Services Program (Voc Rehab) and succssfully [sic] complete the same.

On November 26, 1985, the State of Nebraska and the guardian ad litem for the children filed motions to terminate the parental rights of both parents. A hearing was held on these motions, after which the judge entered the termination order. The court made specific findings as to each of the seven above-mentioned directions and concluded that, pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984), reasonable efforts,

under the direction of the court, had failed to correct the conditions which originally necessitated the order. The court further found that it was in the best interests of the children that a final disposition terminating parental rights be made, since the parents had been unable, within a reasonable time, to rehabilitate themselves.

Our review of an order terminating parental rights is de novo on the record. *In re Interest of C.C., ante* p. 263, 411 N.W.2d 51 (1987). The order must be supported by clear and convincing evidence, and the court's primary consideration must be focused on the best interests of the child or children involved. *Id.*

The Nebraska Department of Social Services became involved with this situation in February of 1981 following a referral from the Beatrice Police Department which expressed concern about filthy home conditions and nutrition of the children in the home. During a visit to the home, a Child Protective Services worker with the department observed that the overall home conditions were very bad: the floors were dirty, so dirty that her shoes stuck to the floor in the kitchen; food was crusted on top of the stove and running down the side of the stove; and there was very little food in the refrigerator. The Child Protective Services worker continued to work with the mother and father for nearly a year, but the unsanitary conditions persisted. In January of 1982 a report was forwarded to the Gage County attorney's office, which led to the initial adjudication placing the children in foster care. When the children were placed into foster care in February, they were quite dirty and had head lice.

During the ensuing 4 years, the parents moved a number of times to different residences in the city of Beatrice. After each move, housekeeping standards would improve for a short period under the direction of social services workers, but, after a time, efforts to maintain sanitary conditions would fail.

Two children were born to the parents following the adjudication of P.J.M., R.E.M., and S.A.M. The parents were divorced in March of 1984, but were living together at the time of the termination hearing.

In April of 1985 the Nebraska Department of Social Services

contracted with a private agency, in a further attempt to reunify the family. A worker for this agency testified that from April through July she visited the mother two times a week and sometimes even more to help develop housekeeping, nutrition, and parenting skills. Despite these efforts, no appreciable progress was made with respect to housekeeping. The worker also testified as to the mother's inability to provide proper hygiene and nutrition care for her child then in the home. During her visits, the worker observed that the father never did anything to help with the maintenance of the home or care of the child.

From November of 1985 until the termination hearing the Department of Social Services again provided intensive counseling to the mother in the areas of nutrition, housekeeping, and child care practices. Once again these efforts proved fruitless. This worker testified that when the father was in the home, the mother was less willing to cooperate with her.

Despite repeated efforts on the part of social workers and repeated admonishments from the court, the parents were unwilling to attend counseling appointments at Blue Valley Mental Health on a regular basis. The mother testified that she "just got tired of [going]" to the counseling sessions, and added that she did not feel the counseling resulted in any progress. The father agreed with this testimony. Both parents testified that they were aware that the counseling was ordered by the court and attendance was a necessary step in getting their children back. There was also expert testimony from a psychologist that both parents had the intellectual capacity to understand and appreciate the court order.

At the time of the termination hearing the mother was unemployed, caring for the two children born since the court placed the first three children in foster care. The father has had occasional odd jobs, but has had no regular full-time employment since the adjudication. He also failed to complete the vocational rehabilitation program as ordered.

The father totally disregarded the court's order that he account for his income and expenses to the state Department of Social Services. His testimony regarding this issue reflects his

belligerent attitude with respect to the entire matter:

> Q- Okay. Now, at a later time the Court ordered you to report your earnings and make an accounting of your earnings to the Department of Social Services, Mrs. Church. Is that correct?
>
> A- Right.
>
> Q- Mrs. Church testified that you failed to do that. Is that correct?
>
> A- That's true.
>
> Q- What is the reason for that?
>
> A- Because the reason is I don't feel right that I have to show what I spend my money on and nobody else do, either.
>
> Q- You don't feel that showing an ability to budget and control your money would be important to show to the Court — in showing your fitness to have custody of your children back?
>
> A- I know what I spend my money on and I think it's my business what I spend my money on.
>
> Q- Okay. So in other words, you don't think the Court or the department has really any business sticking their nose into your finances. Is that right?
>
> A- Right.

It is evident from all of this that the father did little, if anything, to comply with the court order, and yet, it is he and he alone who is now appealing the termination order. The mother, who at least made some effort to rectify the situation, admitted at the termination hearing that she was then unable to care for the three children, given her present home situation with the other two children.

The three children have been in the same foster care home since the adjudication. When they were initially placed in foster care, they were behind in their developmental skills. Since then they have done quite well, but the youngest child, R.E.M., has had a severe speech problem which has required special attention on the part of the foster parents.

The juvenile court judge accurately summarized the situation:

> [A]fter four years of court-directed intervention including

> assistance from Social Services, counseling by mental health professionals, aid from the County Extension Service, and intensive in-house training by two separate private agencies, there is no realistic hope for returning the children to their parents within the foreseeable future. Put simply, the parents wish to maintain contact with their children, but are content to have them reared by the state.

Given the situation, the juvenile court's plan for parental rehabilitation was reasonable. The plan attempted to provide necessary instruction on housekeeping, nutrition, and care for the children, and also to provide at least the minimal amount of financial and emotional stability required to sustain a family unit.

We find clear and convincing evidence that R.M. failed to comply with this program as ordered and that the conditions leading to the adjudication have remained uncorrected. We have consistently held that when parents are unable or unwilling to rehabilitate themselves within a reasonable time, the best interests of the child or children require that parental rights be terminated without delay. *In re Interest of C.C., ante* p. 263, 411 N.W.2d 51 (1987); *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984). The 4 years that have expired since the original adjudication have been more than enough time for the parents to attempt rehabilitation. It is apparent that they have been unable to do so, and it is now in the best interests of the children for a final disposition of this case. We therefore affirm the district court's decision affirming the juvenile court's order terminating the parental rights of R.M. as to his children P.J.M., R.E.M., and S.A.M.

AFFIRMED.

IN RE INTEREST OF Z.R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. J.R.S., APPELLANT.

415 N.W.2d 128

Filed November 6, 1987. No. 87-057.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence and should only be issued as a last resort when no other alternative exists.
3. _____. The primary consideration in a termination proceeding is the best interests of the child. This standard means that the ultimate decision of the court, after sufficient evidence has been presented, must be rendered in the best interests of the child.
4. **Parental Rights: Appeal and Error.** An adjudication order is an appealable order. In the absence of an appeal, such an order may not be reviewed after the time for appeal has expired.
5. **Parental Rights.** A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. The past is an indication of the future.
6. _____. When a parent fails to rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay.
7. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
8. **Appeal and Error.** Consideration of an issue in this court is limited to errors assigned and discussed.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Leo J. Eskey, for appellant.

Dean Skokan, Dodge County Attorney, and Joe Stecher, for appellee.

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

BOSLAUGH, J.

J.R.S. has appealed from the order of the county court

terminating her parental rights to her son.

On October 22, 1982, a petition was filed alleging that the appellant's son, who was born September 19, 1980, was a child as defined in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982),

> whose parent, guardian or custodian neglects to provide proper or necessary subsistence, or other care necessary for the health, morals, or well-being of such juvenile or who is in a situation dangerous to life or limb or injurious to the health or morals of the juvenile.

At a detention hearing on October 26, 1982, the matter was continued to allow the appellant to enter inpatient treatment at the Hastings Regional Center. The care, custody, and control of the child remained with Dodge County social services for placement in the home of the appellant's mother. The court further ordered that the appellant, her mother, and the child were not to have contact with Deno McCracken, a friend of the appellant's.

On December 7, 1982, all parties involved agreed to a 5-month continuance. The State explained to the court that the juvenile petition had been filed because McCracken had been living with the appellant and that there was evidence that he had abused the child. McCracken at that time was incarcerated in the Dodge County jail, but was due to be released in 5 months. The continuance was allowed in order to determine whether any further problems would arise once McCracken was released.

On March 16, 1983, the court heard testimony from a social worker, who recommended that the child continue to live with his grandmother. The court agreed with this recommendation and also allowed the appellant to reside in the home with her son.

The hearing on the petition to declare the child to be a child within the meaning of § 43-247(3)(a) was held on April 6, 1983. The appellant testified that when her son was about 1 year old, McCracken had bitten him on the face, leaving a bruise. She testified that she, too, had bitten her son after he had bitten her. When questioned whether she thought it cruel to bite a 1-year-old child, she responded, "Not any crueler than him biting me." Testimony showed that both McCracken and the

appellant had a drinking problem, and the appellant testified that McCracken had beaten her while he was drunk. The appellant had recently served a 60-day jail sentence for violating the terms of her probation in a separate criminal matter. Under the terms of the probation order, she was to have no contact with McCracken, which she violated by sending letters to him in the Dodge County jail. The appellant testified that she would have no further contact with McCracken.

The child continued in the grandmother's care during the appellant's incarceration.

In the opinion of the grandmother, it was not in the child's best interest to have contact with McCracken. She became especially concerned for the child's well-being after seeing the appellant's black-and-blue face after she had been beaten by McCracken.

The court found by clear and convincing evidence that the child was a juvenile as described in § 43-247(3)(a), in that the appellant had neglected to provide proper care necessary for his health, morals, or well-being, and that at the time the petition was filed, he was in a situation injurious to his health and well-being. The court stated that it considered McCracken to be "a very violent person with some very dangerous characteristics." The court ordered the appellant not to have contact with McCracken, and allowed the child to remain in his grandmother's care. The court admonished the appellant that if she contacted McCracken, she had "better not even think about taking [her son], because you're placing him in a very dangerous situation." The appellant responded that she would not contact McCracken. Social services was directed to prepare a rehabilitation plan for the appellant.

An evaluation hearing was held on May 11, 1983. The court directed the appellant to comply with a rehabilitation plan, which required her to do the following:

1. Enroll in S.T.E.P. classes scheduled to begin in September 1983.
2. Attend a parent support group.
3. Participate in child development courses.
4. Facilitate the child's Head Start application.
5. Continue full-time parenting responsibility for the child,

and when working or attending class arrange for child care.

6. Attend programs on child abuse.

7. Obtain a GED.

8. Work with CETA and vocational rehabilitation in an attempt to further her education.

9. Find suitable employment.

10. Abstain from drug and alcohol usage and avoid associates by whom such usage is encouraged.

11. Develop a monthly budget.

The order also provided that the child remain in the custody of Dodge County social services for placement with the appellant, provided she continued to live at her parents' home.

A supplemental petition to terminate parental rights was filed on August 22, 1983. At a hearing held on October 5, 1983, the supplemental petition was read into the record.

The supplemental petition alleged that on or about August 3, 1983, the appellant had left her parents' residence, taking the child with her, in contravention of the May 11, 1983, order. At a later hearing the appellant admitted that she had taken her son to Omaha to live with Deno McCracken, which violated the April 6, 1983, order that had specifically provided that she have no contact with McCracken. The petition further alleged that under Neb. Rev. Stat. § 43-292(6) (Reissue 1984), grounds existed for termination of parental rights, due to the fact that the child had been found to be a juvenile within the meaning of § 43-247(3)(a) and that reasonable efforts under the direction of the court had failed to correct the conditions which led to that determination.

The appellant denied the allegations and asked that care of her son be returned to her mother. The court rejected that request and ordered that the child remain in foster care, with supervised visitation by the appellant.

On December 28, 1983, the State requested a continuance in order to give the appellant time to work on some short-term goals. Those goals included finding employment, signing up at the Nebraska Job Service, and getting on a waiting list for low-income housing. The trial court ordered that the appellant have unsupervised visitation and overnight visitation every other week.

The next hearing was held February 29, 1984, to determine the appellant's progress and to determine the child's best interests. The appellant testified that she had obtained part-time employment at a nursing home and wanted to work toward certification as a care staff member. She did not know how long it would take to become certified and said that she would not pursue the plan if a better paying job came along. Child Protective Services supervisor Connie DeBord testified that the appellant had been having overnight visitation every other week and a 2-hour visitation during the other week. She stated that there had been some problems with the visitations, in that the child was coming back to the foster home tired and worn out due to all the people and activity at the appellant's home, and that she needed to spend more time alone with the child.

At the conclusion of the hearing the court ordered that a family evaluation be conducted by Dr. Ann Taylor of Omaha to assess the strengths and weaknesses of the appellant's relationship with her son and that the appellant explore the possibility of entering the Child Saving Institute's single-parent program. A second rehabilitation plan incorporated in the court order provided that the appellant continue her employment, work toward certification as a care staff member, attend counseling with the child's therapist as recommended, establish an appropriate residence for herself and her son, abstain from drug and alcohol use, and have no contact with Deno McCracken.

The next hearing was on August 29, 1984. Child Protective Services supervisor Connie DeBord testified that none of the items on the rehabilitation plan adopted by the court at the previous hearing had been complied with and that no progress had been made. Overnight visitations were stopped when the appellant was arrested for DWI and possession of a controlled substance. However, those charges were dropped prior to the hearing. Overnight visits were also stopped because the child continued to come home very tired from his visits.

DeBord testified that the foster mother was concerned because after some of the visitations the child would masturbate and on one occasion had touched one of her sons on the

buttocks and anal area. This led to concerns about possible sexual abuse in the child's past, or during visitation.

The rehabilitation plan of February 29, 1984, required the appellant to continue employment and work toward certification as a care staff member. DeBord testified that the appellant had quit her job at the nursing home, then went to work at the Village Inn in March, but lost that job in April after she was arrested. She was not employed at the time of the hearing. The rehabilitation plan also required the appellant to visit with the child's therapist. DeBord testified that the appellant had made an appointment, but did not show up. The plan also called for the appellant to establish an appropriate residence for herself and the child. DeBord testified that the appellant had recently married, but the couple had not yet established their own residence. As to the child's progress, DeBord testified that he was doing very well in the foster home and had made good progress in the counseling sessions at the mental health clinic. The court continued the matter because it did not yet have the family assessment report from Dr. Taylor.

The next hearing was held on May 15, 1985, at which time the reports from Dr. Taylor had not yet been received.

The appellant testified that she had been employed for the past 9 months; that she had not used drugs or alcohol for the past 9 months; that she had rented a house in which she and her husband, R.S., lived; that she had not had contact with Deno McCracken; that she had not been to any counseling sessions since December; that she had not taken any parenting classes; and that she had not attended any programs on child abuse.

A protective services planning review report which was received indicated that the appellant continued to have supervised weekly visitations and that the child had bonded to his foster parents. Joyce Leedahl, who supervised the visits, reported that the child was always ready to return to his foster home and would remind Leedahl at the end of a visit that it was time for him to "go home" now.

The appellant requested additional visitation. The matter was continued in order to give the guardian ad litem time in which to make a recommendation as to whether an increase in visitation should be allowed. The court ordered that future

testing and evaluations should include R.S.

The next hearing was held on July 31, 1985. Child Protective Services caseworker Sharon Davis testified that the person who supervised the child's visits felt that the child was still afraid of R.S. Davis also testified that the appellant was still employed, but that she had missed two of the last four meetings with the child's therapist and that she had not become involved in the domestic abuse program. The appellant testified that she had stopped attending the required AA meetings, but that she was going to become involved in the domestic abuse programs and that she would begin attending a parenting class the following week.

The testimony indicated that R.S. had done little to facilitate any family progress.

The report from Dr. Taylor indicated that her evaluation of the child showed him to be very fearful of returning to his mother's home and that he seemed to have emerged from a background of emotional rejection. In her evaluation, Dr. Taylor indicated that R.S. believed it was not necessary for him to participate in the same rehabilitation steps as the appellant because no child was removed from him due to his parenting. R.S. did participate in an evaluation by the Pathfinder Alcohol-Drug Outpatient Clinic in Fremont, which concluded that R.S. was chemically dependent and at the crucial stage of alcoholism. The clinic recommended that, at a minimum, R.S. participate in its outpatient program, which R.S. refused to do. R.S. failed to undergo a psychological evaluation as previously ordered by the court, because he could not afford the test cost of $450. However, Davis testified that R.S. and the appellant had recently purchased a new console color television, cable installation, and new living room curtains and that "this amount would have added up to more than the evaluation itself." R.S. had also been ordered to attend AA meetings, which Davis testified he tried to do but could not find any that would fit into his work schedule.

Davis recommended that the child remain in his foster home with continued supervised visits. The guardian ad litem recommended that the court allow unsupervised daytime visits in the appellant's home or some public place on a trial basis. The

court agreed to unsupervised visitation on the condition that it be with the appellant only, and not with R.S. The court revised the rehabilitation plan to include a minimum of one AA meeting weekly, with a signed slip to verify attendance; participation in the domestic abuse program; and completion of a parenting class. In addition, both the appellant and R.S. were to abstain from alcohol and be subject to chemical testing at any time.

A supplemental petition to terminate parental rights was filed on June 13, 1986, and the hearing held on August 27, 1986. The testimony at the termination hearing will be discussed in conjunction with the appellant's assignments of error.

The first assignment is that the trial court erred in finding on April 6, 1983, that the child was a juvenile within the meaning of § 43-247(3)(a). The order finding that the child was a juvenile as described in the statute was an adjudication order, which was an appealable order. *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986); *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985). In order to appeal from that order, a notice of appeal had to be filed within 30 days from the rendition of the judgment. Neb. Rev. Stat. § 24-541.02 (Reissue 1985). In the absence of an appeal from the adjudication of April 6, 1983, the order may not be reviewed after expiration of the 30-day appeal period. *In re Interest of L.D. et al., supra; In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983). The time in which to appeal from the adjudication expired in 1983.

The second assignment of error is that the trial court erred in finding that a clear preponderance of the evidence showed that the child was physically abused by McCracken, the live-in boyfriend. It is not clear from the December 19, 1986, termination order whether the court was merely restating the reason for the April 6, 1983, adjudication (that McCracken had abused the child) or whether it was making a new finding with regard to the termination order. If the court was restating the reason for its April 6, 1983, adjudication that the child was a child within the meaning of § 43-247(3)(a), then the issue is not reviewable for the reasons stated in regard to the first

assignment of error. If the court was making a new finding that the child had been abused by McCracken, the assignment of error must still fail because the record shows by a clear preponderance of the evidence such abuse. The appellant testified at the April 6, 1983, hearing that when the child was about 1 year old, McCracken bit him on the face hard enough to leave a bruise. The grandmother testified that "it was a pretty good size bite."

In the third and sixth assignments the appellant argues the trial court erred in finding that the evidence showed an ongoing pattern in the mother's lifestyle and an inability to protect the child from physically assaultive males, even though R.S. had been sentenced to prison. The appellant also alleges error in the court's finding that the appellant continues to depend on abusive males. At the time of the original petition, the appellant was living with Deno McCracken, who abused both her and the child. She had contact and later took the child to live with McCracken after the court had specifically warned her of the danger in which she would be placing the child. She then became involved with and married R.S., who also abused her. She testified that the abuse occurred over "[l]ittle things like not paying the rent on time or not making enough for his lunch." R.S. was diagnosed as an alcoholic, yet refused to address his problem.

At the termination hearing Dr. Ann Taylor testified that the child had a lot of fears and concerns in regard to R.S. and that those fears continued to exist. That R.S. was incarcerated subsequent to the termination hearing on first degree assault charges for a period of 5 to 12 years only suggests that the appellant may no longer be involved with R.S.; it does not suggest that she will not become involved with yet another assaultive male.

The appellant's fourth and fifth assignments of error are that the court erred in finding that numerous rehabilitation plans were not complied with by the appellant and R.S., and erred in finding that no rehabilitation plan had been substantially complied with by the appellant.

Although there are conflicts in the evidence, the testimony given at the termination hearing gives a broad overview of the

appellant's involvement with the court. It is necessary to examine the requirements of each rehabilitation plan separately to determine the appellant's level of compliance.

First Rehabilitation Plan—dated May 10, 1983, and incorporated into the court order of May 11, 1983.

Parenting goals:

1. Enroll in S.T.E.P. classes scheduled to begin in September 1983. The appellant did not comply. She instead took the child from her mother's home and went to Omaha to live with Deno McCracken, in flagrant violation of the court order.

2. Attend a parent support group on Tuesday mornings. The appellant testified she went "to some of them." Caseworker Connie DeBord testified that the appellant did not attend this program from December 1983 through March 1985, while DeBord was her caseworker.

3. Participate in child development courses offered through the social services department of Memorial Hospital of Dodge County. DeBord testified that the appellant failed to comply with this requirement while DeBord was her caseworker. The appellant testified that she went to two or three of the sessions but did not get anything out of them.

4. Facilitate the child's Head Start application. The appellant complied with this requirement.

5. Continue full-time parenting responsibility for the child. The appellant testified she did this. However, it was during this time (before the child was placed in foster care) that the appellant took him from her mother's home to Omaha and moved in with McCracken.

6. Attend programs on child abuse. DeBord testified there were no such programs available in Dodge County at that time.

Vocational goals:

1. Obtain her GED. The court received into evidence a letter dated May 13, 1983, which stated that the appellant had completed her GED work and requested payment from the court. It would appear the appellant had completed her GED before the rehabilitation plan, dated May 10, 1983, required it.

2. Work with CETA and vocational rehabilitation in an attempt to further her education. The appellant testified that she went to CETA and filled out an application, but did not

follow up on it.

3. Find suitable employment which would allow her to provide for herself and the child without the assistance of ADC. The appellant obtained employment at a nursing home in January 1984.

Personal goals:

1. Abstain from drug and alcohol usage and avoid associates by whom such usage is encouraged. The appellant testified that during this time she continued to drink approximately once a month but that she did not use drugs. She admitted that she associated with people by whom such usage was encouraged.

2. Develop a monthly budget. The appellant testified she had done this with caseworker Bonnie Shuman.

Second Rehabilitation Plan—dated February 29, 1984, and incorporated into the court order of the same date.

1. Continue employment.

2. Work toward certification as a care staff member. The appellant quit her job at the nursing home shortly after the formulation of this rehabilitation plan, thus making requirement No. 2 no longer applicable. She began working as a waitress in March 1984, but held the job for only 2 weeks. She was fired after failing to show up for work due to an arrest on April 12, 1984, for DWI, resisting arrest, possession of marijuana, driving with an expired license, and refusing to submit to a chemical test. The appellant surrendered her license for 1 year, and all charges were dismissed. The appellant remained unemployed until September 1984, when she began working at Happy Inn.

3. Attend counseling with the child's therapist as recommended. Jeannie Barmettler was the child's first therapist. Caseworker Connie DeBord testified that the appellant failed to attend a therapy session in June 1984 and that it was not until after the court hearing in August 1984 that she began to attend some of the sessions. She did not attend any more sessions after December 1984. The child's next therapist was Sue Roesch. It is not clear from the record how many times the appellant met with Roesch. The appellant did testify that she quit seeing Roesch in the beginning of 1986 because "she wouldn't give me any feedback or anything" and "she wasn't

offering any kind of help back." The child was also under the care of child psychiatrist Dr. Ann Taylor. Dr. Taylor testified that she saw the appellant approximately twice. The appellant testified that she saw Dr. Taylor three or four times, but quit going because "we didn't get along."

4. Establish an appropriate residence for herself and the child. The appellant lived with her mother until August 1984, when she married R.S. DeBord testified that the general physical condition of the residences in which the appellant lived were acceptable and that the decline in visitation was not due to the residence itself, but due to other problems. Specifically, she testified that any home in which R.S. lived would not be an acceptable home for the child. Dr. Taylor testified that the child had a lot of concerns and fears in regard to R.S. and that those fears continued to exist. The child expressed a fear of returning to his mother's home.

5. Abstain from drug and alcohol usage. The appellant was arrested on April 12, 1984, for, among other things, DWI and possession of marijuana. The appellant testified that she did keep drinking until August 1984.

6. Have no contact with Deno McCracken. The appellant testified that she had had no contact with McCracken. DeBord testified that the appellant did have contact with McCracken during a visit in the park with the child. Several men in a car drove up, at which time the appellant took the child and went over to the car. After the visitation, the child said that McCracken had been in the car.

7. The appellant had agreed to provide nutritious meals, adequate rest time, clean clothing, and necessary medical care during extended visitations with the child. DeBord testified that problems arose in regard to the child's coming home tired and upset after his overnight visits to his mother's house. She reported that the child stated that on one occasion his mother had been gone the whole night and that his grandmother took care of him. There were also allegations made that the appellant and her mother had been taking baths with the child. The appellant denied taking a bath with her son, but admitted that her mother had done so. It was at this time that DeBord and the foster parents became concerned about some sexual acting-out

behavior that the child displayed at the foster home after returning from visitations. On one occasion the child began touching and playing with his foster brother's buttocks and placed his finger into the foster brother's anus. Because of this and the appellant's arrest for DWI, the overnight visitations were discontinued.

Third Rehabilitation Plan—dated June 24, 1985, and incorporated into the court order of July 31, 1985.

1. Continue employment. The appellant continued to work at the Happy Inn until September 1985, and then went to work at Hinky Dinky. She quit working at Hinky Dinky in March 1986, and went back to work at the Happy Inn. She was fired from the Happy Inn in August 1986, and as of the time of the termination hearing was not employed.

2. Attend counseling with the child's therapist as recommended. As previously discussed under the second rehabilitation plan, the appellant did not comply.

3. Continue to keep a residence appropriate for herself and the child. The appellant continued to live with R.S. The appellant testified she had continued to live with him even though, in the course of the past 2 years, social services, Dr. Taylor, and her own attorneys told her that R.S. was a large obstacle to her regaining custody of the child. In December 1985, the child told Dr. Taylor that his mother had hit him with a closed fist on the top of his head and had left bruises.

4. Abstain from drug and alcohol usage and submit to alcohol or drug testing if required by law enforcement or social services. In April 1986, social services requested a drug testing of the appellant after a family support worker visiting the home reported that she thought she had smelled marijuana and that the appellant appeared somewhat incoherent. The test results indicated the appellant had used marijuana. The appellant admitted that she had smoked marijuana as recently as August 4, 1986. At the time of the hearing the appellant was incarcerated in the Dodge County jail on charges of conspiracy and delivery of a controlled substance. R.S. was charged with the same offenses, plus an assault charge. Detective Sergeant Tellatin of the Fremont Police Department testified that on August 22, 1986 (5 days prior to the hearing), in a search of the

appellant's residence, marijuana was seized; two bongs, estimated to have been used within a fairly short period of time, and a small pipe were also found. He also testified that there was evidence that alcohol had been consumed in the house, as indicated by empty beer cans and an empty whiskey bottle. The appellant denied having consumed any alcohol since August 1984 and said that the empty cans and bottle belonged to someone else.

5. Regularly attend AA meetings. Sharon Davis, who became the appellant's caseworker in March 1985, stated the only evidence she had that the appellant was attending AA meetings was some attendance slips signed by appellant's friend Donna Hansen. She asked the appellant from then on to have the designated person that normally confirms attendance at AA meetings sign her attendance slips. Davis never received any attendance slips after that. The appellant testified that she tried to go on Sunday nights "if I didn't have laundry or something to do . . . ."

6. Become involved in a domestic abuse program. The appellant became involved in the S.O.S. (Systems of Support) program in late 1985, for a period of 2 1/2 to 3 months. She told Davis that the group had stopped meeting for a time and when they resumed she did not join the new group. The appellant testified that she was not involved in any domestic abuse program at the time of the termination hearing, but had signed up to begin one the following month.

7. Attend a parenting class. The appellant did attend the S.T.E.P. course and successfully completed it.

The record shows that over a period of 3 years the appellant has demonstrated her unwillingness to substantially comply with the requirements of her rehabilitation plans. As this court has stated:

> "As all too frequently occurs in cases such as the one before us, the enthusiasm or receptivity of a parent toward a rehabilitation program seems to intensify as the time for a dispositional hearing approaches. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation

> must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. In cases such as this the past is an indication of the future."

In re Interest of J. W., 224 Neb. 897, 903, 402 N.W.2d 671, 675 (1987), quoting from *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984).

The appellant's attendance at recent parenting and support groups is laudable, but it is too little, too late. She was ordered to begin those classes in September 1983. The above review of her compliance with the rehabilitation plans shows a definite and distinct unwillingness to comply with the plans, which were formulated for the purpose of changing the conditions in her home and life so as to allow her to regain custody of her son.

The sixth assignment of error is that the court erred in finding that the appellant has continued to abuse drugs.

The appellant has been arrested twice on alcohol- and drug-related charges since the trial court took jurisdiction of the case. Her first arrest was on April 12, 1984, for DWI, resisting arrest, possession of marijuana, driving with an expired license, and refusing to submit to a chemical test. While the exact connection between the two is not clear from the record, it appears that the charges were dismissed after the appellant surrendered her driver's license for 1 year. During April of 1986 she was required by social services to submit to a drug test after a caseworker smelled what she thought to be marijuana in the appellant's home. The test results indicated that the appellant had recently smoked marijuana.

In August 1986, she was arrested for conspiracy and delivery of a controlled substance. Evidence was received by the court subsequent to the termination hearing indicating that these charges had been dismissed. The appellant admitted that she had used marijuana as recently as August 4, 1986. The court did not err in finding that the appellant continued to abuse drugs.

The seventh and eighth assignments of error allege that the court erred in finding that conditions existed for the termination of parental rights as provided in § 43-292. The court found that under § 43-292 termination of parental rights would be in the best interests of the child, and following the

determination that the child was a juvenile within the meaning of § 43-247(3)(a), reasonable efforts, under the direction of the court, had failed to correct the conditions leading to that determination.

> "In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. . . ."

In re Interest of C.C., ante p. 263, 264, 411 N.W.2d 51, 53 (1987); *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987).

An order terminating parental rights must be supported by clear and convincing evidence and should only be issued as a last resort when no other alternative exists. However, the primary consideration in a termination proceeding is the best interests of the child. *In re Interest of K.L.N. and M.J.N., supra; In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986). This standard means that the ultimate decision of the court, after sufficient evidence has been presented, must be rendered in the best interests of the child. *In re Interest of M.B., R.P., and J.P., supra.*

Dr. Ann Taylor testified that the child is a very bright but anxious child who worries a lot, and because of this, stability is very important for him. When he is uncertain or unclear about things, he becomes extremely anxious and gets overwhelmed with his feelings, and cannot handle things until he knows clearly what will be happening to him. Because of this anxiety, a stable environment is very important to him. Dr. Taylor further testified that the child requires an environment that is structured, consistent, and predictable. His anxiety is in part due to his high level of intelligence, which was tested and showed an IQ of 136, putting him in the 99th percentile intellectually. Because of his intelligence, Dr. Taylor testified, "He's more aware of what is going to happen to him if things are not handled correctly . . . ."

Since she began seeing the child, Dr. Taylor has noted an

improvement in his verbalization of feelings, a better ability to express his anxieties, much improved motor skills, and an improvement in his overall functioning. She noted that as long as the child is in a stable environment where he feels safe, his school tasks are adequately attended to, and his needs are adequately met, he can become a very functional adult. Dr. Taylor testified that as to his need for stability, it would be in his best interests to terminate parental rights. The evidence supports a finding that termination of the appellant's parental rights is in the child's best interests.

The appellant also alleges error in the trial court's finding that, under § 43-292(6), reasonable efforts had failed to correct the conditions leading to the determination that the child was a juvenile within the meaning of § 43-247. At the time of the termination hearing, the appellant was unemployed, in jail, living with a man who beat her, showed no sign of discontinuing drug use over the 3 years, and showed little effort to cooperate with the child's therapists. When a parent fails to rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay. *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986). As this court has often stated, a child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of R.A., ante* p. 160, 410 N.W.2d 110 (1987); *In re Interest of K.L.N. and M.J.N., supra; In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984).

The evidence supporting the termination is clear and convincing, and the judgment should be affirmed.

The appellant's ninth assignment of error is that the lower court committed error throughout the proceedings in the reception of evidence, which deprived the appellant of a fair trial. Nowhere in appellant's brief is this issue discussed. Consideration of an issue in this court is limited to errors assigned and discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY J. HINTON, APPELLANT.

415 N.W.2d 138

Filed November 6, 1987. No. 87-123.

1. **Wiretaps: Appeal and Error.** The Nebraska Supreme Court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986).
2. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
3. **Wiretaps: Probable Cause.** An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant.
4. _____: _____. The test for issuance of a wiretap order under the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986), is whether the sworn information before the court is of sufficient apparent reliability to justify a finding that there is probable cause to believe that an offense cognizable under said statutes has been or is being committed.
5. **Wiretaps: Controlled Substances: Affidavits.** Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation.
6. **Wiretaps.** Substantial, not strict, compliance with the statutes governing interception of telephonic communications is required; that is, the interceptions must be conducted in such a manner as not to violate a party's substantive rights.
7. **Search and Seizure: Search Warrants.** In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.
8. _____: _____. A failure in the ministerial act of returning and filing a search warrant does not void the warrant.

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

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

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

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

CAPORALE, J.

Following a bench trial, defendant, Larry J. Hinton, was adjudged guilty of possessing cocaine, a controlled substance, with the intent to deliver same, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). The district court subsequently determined that the offense constituted a Class II felony under the provisions of § 28-416(2) and Neb. Rev. Stat. § 28-405 (Reissue 1985), and sentenced Hinton to imprisonment for a period of 10 to 15 years. Hinton appeals and assigns as errors the district court's failure to suppress the evidence obtained as the result of (1) attaching a pen register on his residence telephone, (2) intercepting his telephone communications, (3) searching a package found in his vehicle, and (4) searching his residence. We affirm.

FACTS

Based on information derived from a narcotics purchase made by an undercover police officer, and corroborating information received from a confidential source, officers of the Omaha Police Division, on September 20, 1985, filed a combined application and affidavit in the county court for Douglas County seeking a search warrant which would permit the installation of a pen register on the telephone serving Hinton's residence. A pen register is a device which prints the numbers dialed from the telephone line on which it is installed, and further reflects that incoming calls were received, but does not reveal the sources of the incoming calls. The requested warrant was issued as ordered by the county court on September 20, 1985, and a pen register installed on September 23, 1985. This pen register warrant was returned within 10 days of its issuance. The application did not seek to limit the time within which the pen register might be used, and the warrant imposed no such time limit.

The pen register recorded the telephone numbers called from Hinton's residence from the day it was installed until Hinton's arrest on March 21, 1986, a total of almost 6 months. No amended search warrant covering use of this pen register was requested or issued when Hinton changed his home telephone number on or about February 24, 1986; the register simply continued to operate on the new number.

On February 5, 1986, based in part upon information gathered from the pen register and in larger part upon extensive additional investigation, the Douglas County attorney filed a 37-page combined application and affidavit in the district court for Douglas County, seeking permission to intercept conversations conducted over Hinton's residence telephone which would reveal, according to paragraph 62 of the aforesaid document, the following information concerning the illegal distribution of controlled substances:

> A. The identity of individuals as yet unknown who are involved in these offenses and the extent of their involvement.
>
> B. The details of carrying out the offenses listed below:
>
> 1. The times when these illegal transactions will occur or have occurred.
>
> 2. The location of specific illegal narcotics.
>
> 3. The identity of the source or sources of supply of the illegal narcotics and the extent of the source(s) [sic] involvement.
>
> 4. The manner in which monies derived from the illegal narcotics transactions were utilized, concealed, "laundered", or otherwise disposed.
>
> 5. The arrangement and verification of meetings between individuals involved in the aforementioned offenses.

The district court, finding that "normal police investigative methods have been attempted and failed and reasonably appear [likely] to fail to succeed in the future," granted the application on February 19, 1986, and ordered

> intercept[ion of] the wire or oral communications of Larry Hinton . . . over [Hinton's then residence telephone number] . . . for a period of thirty (30) days from the date of the actual physical hook-up, and shall not automatically terminate when the described communications have first been obtained, but will terminate upon attainment of the authorized objectives as outlined in paragraph 62 of the application and affidavit.

The court further ordered "interim reports every ten (10) days from the date of the actual physical hook-up, setting forth the

number of calls intercepted . . . and the nature of the calls."

Hinton's telephone was tapped, pursuant to this order, on February 19, 1986. Conversations monitored on February 20 and 21, 1986, revealed, among other things, that Hinton intended to change his telephone number; consequently, the county attorney filed an amended combined application and affidavit with the district court. This document repeated the assertions of the first application and affidavit in that court, added assertions informing the district court of the pending change in Hinton's telephone number, and requested authorization to intercept conversations carried over the new number. The district court, again finding that "normal police investigative methods have been attempted and failed and reasonably appear [likely] to fail to succeed in the future," granted the relief sought in the amended application on February 24, 1986, and authorized the interception of conversations over Hinton's new telephone number for 25 days, again ordering the filing of interim reports every 10 days while the tap continued.

Conversations monitored pursuant to these two wiretap orders suggested that Hinton was using his telephone to arrange the shipment of substantial amounts of cocaine via a commercial package carrier from a New York address to the Omaha area, and was paying for the cocaine by shipping cash to New York via the same carrier. On March 3, 1986, the police officers monitoring the conversations overheard Hinton tell his suspected New York cocaine source that Hinton would ship out a quantity of money the following day. On this basis the officers, on March 4, 1986, requested a warrant to search a package Hinton had delivered to the carrier for shipment. An order of the county court granting this money shipment search warrant was issued on March 4. The package was searched pursuant to this warrant at the carrier's Omaha terminal on March 4 and found to contain $22,500. The package was then resealed and allowed to continue on to its destination in New York. The county court had ordered return of this money shipment search warrant within 10 days of issuance; however, it was not returned until May 30, 1986, more than 12 weeks after issuance.

Subsequently, another telephone call between Hinton and the suspected New York source was monitored by the police on March 14, 1986; this conversation also indicated that Hinton would be shipping a quantity of cash to the suspected source, via the carrier, in prepayment for a drug shipment. A search warrant for this second shipment of money was requested from the county court, and an order granting the request was issued on March 14, 1986. This second money shipment search warrant was executed the same day it was issued, and the package was searched at the carrier's Omaha terminal. It was found to contain $19,000. The package was then resealed and allowed to continue on to its destination in New York. The county court ordered return of the second money shipment search warrant within 10 days of issuance; however, it was not returned until May 30, 1986, 11 weeks after issuance.

On March 14, 1986, the monitored conversation revealed that Hinton's suspected New York source intended to personally deliver Hinton a supply of cocaine a few days later. However, on March 17 the police intercepted a telephone conversation in which Hinton's live-in girlfriend warned this suspected source to delay the trip. On the basis of this information and the results of surreptitious observation of Hinton, the county attorney, on March 20, 1986, requested from the district court an extension of the authorization to tap Hinton's new telephone number, and that the order of extension, should one issue, require "interim reports every ten (10) days from [March 20, 1986]."

The district court, finding that the objectives of the initial and amended applications and orders were yet to be fully met and that "normal police investigative methods have been attempted and failed, and reasonably appear [likely] to fail to succeed in the future," granted the extension on March 20, 1986, to continue the tap on Hinton's new telephone number for 30 days from the date of issuance, and ordered the county attorney to file interim reports every 10 days through that period.

On March 20, 1986, officers monitoring the telephone overheard a conversation between Hinton and his suspected source to the effect that three packages had been shipped to

Hinton via the carrier and should arrive shortly. The following day, March 21, 1986, the police verified that a package addressed to Hinton from one of the New York addresses used by the suspected source had arrived at the carrier's Omaha terminal. At approximately 9:30 that morning, officers monitoring Hinton's telephone conversations overheard him call the carrier's Omaha terminal, verify the arrival of the package, and inquire if one John Gallion, a known Hinton confederate, might pick up the package on Hinton's behalf; the carrier's officials assured Hinton this would be acceptable.

Shortly thereafter, the police and agents of the Federal Bureau of Investigation saw Hinton and Gallion leave Hinton's apartment, enter Gallion's automobile, and drive to the carrier's terminal. The officers then observed Gallion enter the carrier's terminal while Hinton remained in the automobile. Gallion returned to the automobile 2 to 3 minutes later, carrying a package measuring approximately 18 inches by 12 inches by 3 inches. Hinton and Gallion then drove off. Although they had no arrest warrant, the police and FBI agents followed and placed both Hinton and Gallion under arrest.

At this time a police officer "reached in . . . through the open driver's door and took the package from between the front seats." The officer carried the package to the Omaha Police Division Central Station, keeping it in his possession until a combined application and affidavit for a search warrant and the warrant were prepared, issued, and executed, all of which occurred during the day of Hinton's arrest. The county court ordered return of this automobile package search warrant within 10 days of its issuance; the warrant was instead returned to the county court on May 29, 1986, nearly 10 weeks after issuance. Field tests indicated that the package contained narcotic substances. Subsequent laboratory analysis determined the package contained 2 1/4 pounds of 99-percent-pure cocaine.

On the day of Hinton's arrest the police also filed a combined application and affidavit with the county court for a warrant to search Hinton's residence. This document recited information gleaned from the pen register, wiretaps, searches of the two packages of money Hinton had shipped to New York, the

surreptitious observation of Hinton, and confidential informants, all tending to support the affiant's stated belief that if a no-knock search of Hinton's residence was conducted, evidence of illegal drug transactions would be found. This application was granted by the county court on the day sought, and the warrant was issued and executed on that same day. The search conducted pursuant to this residence search warrant produced several dozen items of drug paraphernalia contaminated with a white powder residue suspected to have been cocaine. The results of the laboratory tests conducted on the residue are not reflected by the record. The county court ordered return of this residence search warrant within 10 days of its issuance; however, in typically slipshod fashion, this warrant was not returned until May 29, 1986, almost 10 weeks after its issuance.

On March 26, 1986, the district court, finding that the objectives of the wiretaps had been met and that the police had stopped intercepting telephone conversations as of 9:54 p.m. on March 21, 1986, ordered the existing wiretap terminated. Five months later, on August 20, 1986, the county attorney officially notified Hinton by letter of the placement of the taps. The letter was dated August 20 and postmarked August 22.

The prosecution failed to submit interim reports of the intercepted telephone conversations every 10 days, as had been ordered by the district court; in one instance an interim report apparently was submitted several days late, and a final interim report covering the period March 17, 1986, through the last intercepted call on March 21 was never filed. The record does contain three interim reports; one dated February 28, 1986 (covering the period February 19 through 24, 1986), one dated March 7, 1986 (covering the period February 24 through March 5, 1986), and one dated March 21, 1986 (covering the period March 6 through 16, 1986), respectively.

ANALYSIS

Intercepted Communications Statutes

We begin our analysis of the law applied to Hinton's assignments of error by reviewing the relevant provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp.

1986). In general, the statutes make it unlawful to, among other things, deliberately intercept or attempt to intercept, through any means, including through the use of any "electronic, mechanical, or other device," any wire or oral communications, unless the interceptor has previously obtained a court order permitting the interception or is a party to the communication, or one of the parties to the communication has previously consented to the interception. § 86-702 (Reissue 1981). The act permits prosecutors to apply to the district courts for authority to intercept wire or oral communications when such interception "may provide or has provided evidence" of, among other things, "dealing in narcotic or other dangerous drugs." § 86-703 (Reissue 1981).

Section 86-701(4) (Cum. Supp. 1986) defines electronic, mechanical, or other device as:

> any device or apparatus which can be used to intercept a wire or oral communication other than (a) any telephone or telegraph instrument, equipment, or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his or her duties; or (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal.

Other relevant definitions found in § 86-701 are:

> (1) Wire communication shall mean any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of communications;
>
> (2) Oral communication shall mean any oral communication uttered by a person exhibiting an expectation that such communication is not subject to

interception under circumstances justifying such expectation;

(3) Intercept shall mean the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

These definitions are virtually identical to those found in title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. (1982). While this court has not treated these definition sections specifically, it has observed that § 86-705 (Reissue 1981), dealing with the requisites for obtaining authority to intercept wire or oral communications and with the contents of orders granting such authority, and 18 U.S.C. § 2518 " 'are, in all substantive ways and in wording, virtually identical. . . .' " *State v. DiMauro and Kessler*, 205 Neb. 275, 278, 287 N.W.2d 74, 76 (1980); *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977). Consequently, this court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes. *State v. DiMauro and Kessler, supra; State v. Kolosseus, supra.*

Pen Register

Recognizing that the U.S. Supreme Court has concluded that a search warrant is not required prior to installation of a pen register, *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977), and *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), Hinton tells us that the "[w]arrantless use of a pen register violates State Constitutions" and refers us to *People v. Sporleder*, 666 P.2d 135 (Colo. 1983), and *Com. v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783 (1984). Brief for Appellant at 3. However, Hinton does not tell us what specific language of the Nebraska Constitution he claims requires a search warrant before a pen register may be used. The general rule is that this court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). This court will not hunt through a constitution in an effort to find language which might arguably support a challenger's position, conceive and develop the arguments which specific and identified constitutional

provisions may suggest, and then sit in judgment of the validity of those arguments.

Accordingly, we do not concern ourselves with the validity of the pen register search warrant, should such a warrant have been required.

Interceptions

This then brings us to the second assignment of error, which claims that evidence of the intercepted telephone conversations should have been suppressed because the State lacked probable cause to tap Hinton's telephone, had not exhausted other investigative procedures, failed to make timely interim reports, and failed to provide a timely inventory of the interceptions.

Probable Cause

An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant. *United States v. Garcia,* 785 F.2d 214 (8th Cir. 1986), *cert. denied* 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342. The test for issuance of a wiretap warrant under 18 U.S.C. § 2518 is whether the sworn information before the court is of sufficient apparent reliability to justify a neutral judicial officer in finding that there is probable cause to believe that an offense has been or is being committed. *United States v. Abramson,* 553 F.2d 1164 (8th Cir. 1977), *cert. denied* 433 U.S. 911, 97 S. Ct. 2979, 53 L. Ed. 2d 1095. See, also, *United States v. Van Horn,* 579 F. Supp. 804 (D. Neb. 1984), *aff'd sub nom. United States v. Womochil,* 778 F.2d 1311 (8th Cir. 1985).

In the present case, the affidavit in support of the first wiretap application contained a 30-page factual recitation, derived through a 6-month investigation which employed confidential informants, surveillance of Hinton and his residence, controlled buys of narcotic substances by undercover officers, the use of the pen register, and examination of Hinton's telephone bills, all of which strongly indicated that Hinton was a significant supplier of cocaine to the Omaha area. Without reproducing that document in this opinion, the affidavit was sufficiently detailed and of sufficient apparent

reliability to warrant a finding by a neutral judge that there was probable cause to believe that an offense both had been and was being committed.

Other Investigative Procedures

Section 86-705(1) provides in part: "Each application shall include the following information: . . . (c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Hinton argues:

> It is clear from the evidence introduced at the suppression hearing on August 25, 1986, that investigatory procedures employed by the Omaha Police Department and Douglas County Sheriff's Department had succeeded and, therefore, a wiretap order was not needed. The State's witnesses testified that they had sufficient grounds for issuing a search warrant for the apartment of Larry J. Hinton . . . prior to [the] February 19, 1986, wiretap order being issued. Since other investigatory procedures were successful the State has failed to comply with Neb. Rev. Stat. 86-705(C) (Reissue 1981).

Brief for Appellant at 12. Hinton's argument assumes that his arrest was the sole objective of the investigation of which these wiretap warrants were a part. However, as paragraph 62 of the State's applications for wiretaps clearly indicates, such was not the case. While it appears the police knew the identity of one of Hinton's sources, the police wanted to also learn, among other things, whether there were other sources, the extent of the involvement by others, and the manner in which Hinton used, concealed, "laundered," or otherwise disposed of the moneys produced by the illegal narcotics transactions in which he was thought to be engaged.

The record does not suggest that the police knew the answers to those additional questions, all of which were legitimate aspects of the investigation, at the time of the wiretap applications. Indeed, that these facts had not been determined after 6 months of increasingly intensive investigation of Hinton's affairs strongly supports the conclusion that

intercepting Hinton's telephone conversations was an appropriate step to take. Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation. *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985); *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983); *State v. Holmes and Beardslee*, 208 Neb. 114, 302 N.W.2d 382 (1981); *United States v. Garcia,* 785 F.2d 214 (8th Cir. 1986), *cert. denied* 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342.

Untimely Interim Reports

Section 86-705(7) provides:

> Whenever an order authorizing interception is entered pursuant to sections 86-701 to 86-707, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

The State, for reasons not disclosed by the record, chose to ignore the orders that it file reports at 10-day intervals, advising the district court of the number and nature of the calls intercepted. As noted earlier, no report was filed for the last 10 days the wiretap existed, and the reports for the remaining 26 days were late. Nonetheless, neither does the record reveal nor does Hinton claim that he was actually prejudiced by the State's failure to strictly comply with the reporting requirements of the wiretap orders. This jurisdiction is committed to the rule that substantial, not strict, compliance with the statutes governing interception of telephonic communications is required; that is, the interceptions must be conducted in such a manner as not to violate a party's substantive rights. *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984); *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972). Moreover, as observed in *State v. Kohout*, 198 Neb. 90, 251 N.W.2d 723 (1977), since requiring interim reports is not mandated by statute and rests within the discretion of the judge issuing wiretap orders, waiver of the

requirement or determination of the consequences of failing to follow the order in that regard also rests within that judge's discretion.

Untimely Inventory

The fact that substantial and not strict compliance with the relevant statutes is required disposes as well of Hinton's complaint that he was not, within 90 days after the termination order as required by § 86-705(9), provided an inventory of the order, the authorized periods of interception, and the fact that conversations were intercepted. As noted earlier, for reasons not disclosed by the record, no effort was made to comply with this order until 5 months after the interceptions were stopped.

The record does reflect, however, that an information was filed against Hinton on April 2, 1986, 12 days after his arrest; that he was arraigned and entered a plea of not guilty on April 10, 1986, on which date the court ordered mutual and reciprocal discovery pursuant to Neb. Rev. Stat. § 29-1912 (Reissue 1985); and that on July 14, 1986, Hinton filed numerous detailed motions to suppress evidence. As pointed out by the Attorney General, Hinton obviously had actual notice of the existence, as well as the substance, of the wiretaps before the 90-day statutory notice period expired. Under the circumstances Hinton suffered no prejudice by the State's failure to have strictly complied with the requirements of § 86-705(9).

Searches

The remaining two assignments of error, the failure to suppress the evidence obtained as a result of the searches incident to the automobile package and residence warrants, are so interwoven that they are discussed together.

It must be noted at the outset that although these last two assignments of error address only the automobile package and residence warrants, Hinton's argument goes as well to the money shipment warrants of March 4 and 14, 1986.

Hinton first argues that there was no probable cause to issue any of those warrants. However, this argument is resolved adversely to Hinton by our earlier dispositions of his first two assignments of error; once it is determined that there was no infirmity in the use of the pen register or wiretaps, there was

more than sufficient probable cause to issue the warrants in question.

Hinton next contends that the evidence seized pursuant to all four of the warrants should be suppressed because they were not returned within 10 days after their respective dates. Again, however, we have said that in the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant and, further, that a failure in the ministerial act of returning and filing a search warrant does not void the warrant. *State v. McCown*, 189 Neb. 495, 203 N.W.2d 445 (1973).

DECISION

There being no merit to Hinton's assignments of error, the judgment of the district court is affirmed.

CAVEAT

The application in this case of the principle that in the absence of demonstrated prejudice to a criminal defendant's substantive rights, substantial compliance with certain provisions of the intercepted communications statutes will suffice should not be read as a condonation by this court of the prosecutor's apparent indifference to the letter of the law. While limited and carefully controlled eavesdropping by government is regrettably necessary at this stage in our history, the practice is nonetheless a particularly rebarbative intrusion into the privacy that members of a free society are entitled to expect. It must be remembered that interceptions of suspected criminal telephone conversations result as well in at least some minimal interception of innocent conversations. Thus, simple professional pride should dictate scrupulous observance of the steps designed to protect the privacy of the citizens of this sovereign state. Additionally, it is inevitable that repeated lackadaisical prosecutory efforts, whether related to intercepted communications, return of warrants, or other aspects of criminal investigations, will in some future case prejudice a defendant's substantive rights and thereby succeed in destroying an otherwise valid conviction.

AFFIRMED.

SHANAHAN, J., dissenting.

With good reason, there is detectable uneasiness and, perhaps, apocalyptic apprehension in the majority's opinion. Since *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984), in which this court adopted the doctrine of "substantial compliance" to validate a wiretap despite police departure from requirements specified in wiretap statutes, the State has prevailed in every appeal to this court on the issue of police noncompliance with the statutory requirements for a wiretap—a batting average of 1.000, which would be an outstanding feat in the major leagues but is hardly a commendable indication of obedience to laws protecting the privacy of Nebraska citizens.

INDEPENDENT DETERMINATION

The majority has circumvented the question whether a pen register, in the absence of authorization by a valid warrant, violates a citizen's protection available under the Nebraska Constitution. While a court should not be asked to "hunt through a constitution in an effort to find language which might arguably support a challenger's position," location of the particular constitutional provision applicable in this case does not require some tiresome trek through the Nebraska Constitution, from article I, § 1 (a person's inalienable rights and a government from the consent of the governed), to article XVII, § 9 (Nebraska Constitution enrolled and deposited in the Secretary of State's office). The federal cases mentioned by the majority, namely, *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977), and *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), involve a pen register in relation to the fourth amendment to the U.S. Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ," while the cited cases from state courts, *People v. Sporleder*, 666 P.2d 135 (Colo. 1983), and *Com. v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783 (1984), answered the pen register question in reference to respective state constitutions which provided protection against "unreasonable searches and

seizures." The constitutional quarry of the "hunt" in Hinton's case is found at Neb. Const. art. I, § 7: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause . . . ," which is the exact constitutional protection examined in the above-indicated cases, federal and state. Therefore, as the result of Hinton's unquestionable reference to Neb. Const. art. I, § 7, this court should have resolved the issue about the pen register which produced information effective in Hinton's conviction.

Without question, a state may impose higher standards governing police practices on the basis of *state* law, and may guard individual rights, including the right to be free from unreasonable searches and seizures, more fervently than the U.S. Supreme Court does under the federal Constitution. *Mills v. Rogers*, 457 U.S. 291, 102 S. Ct. 2442, 73 L. Ed. 2d 16 (1982); *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986). "[T]he substantive rights provided by the Federal Constitution define only a minimum," a floor rather than a ceiling. *Mills v. Rogers, supra* at 300. "The present function of state constitutions is as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law." *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1367 (1982). Although opinions from federal courts, deciding questions involving the U.S. Constitution as well as other federal law analogously applicable to questions of state law, may provide appropriate models for resolution of issues arising under state law, a state court should not automatically defer to federal decisions, but should critically examine federal decisions, make an independent analysis of state law issues to be resolved, and determine solutions under appropriate state law. See Dix, *Exclusionary Rule Issues as Matters of State Law*, 11 Am. J. Crim. L. 109, 148 (1983).

PEN REGISTER

In *United States v. Caplan*, 255 F. Supp. 805, 807 (E.D. Mich. 1966), a pen register was characterized or described as

> a device attached to a given telephone line usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent and complete record of outgoing numbers called on the particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation.

In *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), a divided U.S. Supreme Court held that a pen register by a telephone company does not constitute a search, and the customer or subscriber assumed the risk of the company's disclosure to police, eliminating the expectation of privacy necessary for fourth amendment protection.

Criticizing the majority opinion in *Smith v. Maryland, supra*, LaFave makes the following observation:

> Under *Smith*, the police may without any cause whatsoever and for whatever purpose they choose uncover private relationships with impunity merely because the telephone company might under *some* circumstances for *certain limited purposes* make a record of such relationships for the company's *own* use. Indeed, it is enough for the majority in *Smith* that the telephone company has the capacity to make a record of such relationships, even though the company has had the good sense not to offend its subscribers by making or keeping those records for no reason.
>
> . . . .
>
> . . . [I]t makes no sense to say that the telephone subscriber (any more than the tenant or hotel occupant) is fair game for unrestrained police scrutiny merely because he has surrendered some degree of his privacy for a limited purpose to those with whom he is doing business. As

> Professor Amsterdam put it, "[t]he fact that our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in adding to those risks." [Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 406 (1974).]

1 W. LaFave, Search and Seizure § 2.7(b) at 507-08 (2d ed. 1987).

In *Com. v. Beauford*, 327 Pa. Super. 253, 475 A.2d 783, 791 (1984), the Pennsylvania Superior Court commented:

> If any law enforcement officer could, with or without probable cause or even reasonable suspicion, use a pen register on his own authority to record every number dialed by any citizen in Pennsylvania from a residential, business, or government phone, the pen register clearly could become a powerful weapon threatening invasion not only of the individual's intimate privacy, but also his political liberty, including his rights to associate, to express his views, and even to think in freedom.

Several state courts, construing their respective state constitutions, have concluded that a citizen has a right to be free from unreasonable search and seizure in the form of police installation or use of a pen register, obtained without a warrant issued on probable cause, to record telephone numbers dialed in privacy. See, *Com. v. Beauford, supra; People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982) (applied to toll billing records). In view of the vital role of telephonic communication in the private lives of Nebraska citizens, this court should have considered the constitutional question about police use of a pen register to obtain information otherwise beyond the control of the police, and should have required a warrant issued on probable cause as a condition precedent to acquisition of such pen register information.

WIRETAP

The notion that the standards imposed by *state* law may be more restrictive than federal standards, and may exceed federal constitutional mandates or minimums, also applies to

requirements for a wiretap authorized under state law. See, *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983); J. Carr, The Law of Electronic Surveillance, *Enactment and Constitutionality of Title III* (2d ed. 1987).

The case now before this court further illustrates how the "substantial compliance" doctrine has encouraged, and will continue to encourage, police noncompliance with wiretap statutes and court orders for electronic surveillance by law enforcement personnel. In Hinton's case, police routinely filed tardy interim reports or, worse yet, filed none at all, notwithstanding the court order for interim reports every 10 days after installation of the wiretap; persisted in the sloppy practice of late returns on search warrants; and filed the statutorily required wiretap inventory some 2 months after the 90-day period specified by statute. See Neb. Rev. Stat. § 86-705(9) (Reissue 1981).

The majority of this court feels that, inasmuch as interim progress reports on a wiretap are not required by the wiretap statute, failure to file progress reports, ordered by the court which authorized the wiretap, may be excused as a form of discretionary afterthought on the part of the authorizing court. Although § 86-705(7) provides that a court *may* require progress reports, that statute also contains a mandatory directive: "Such reports *shall be made* at such intervals as the judge may require." (Emphasis supplied.) If a court decides that progress reports are necessary to judicially determine whether a wiretap's objective has been achieved, thereby minimizing the intrusive nature of a wiretap, and then orders such progress reports from the police, rendition of progress reports is mandatory. Interim progress reports, when ordered by a court, and a wiretap inventory were intended by the Legislature to be substantial parts of the Nebraska wiretap law. In the wiretap statutes, as legislated requirements for a valid wiretap, nothing indicates a formula or factors by which one statutory component is accorded significance and value greater than any other part of the statutory scheme for wiretaps. On what basis and by what method a court may pick and choose among the several parts of the wiretap scheme to evaluate and characterize one part as more or less substantial than another

and, consequently, arrive at "substantial compliance" remains unexplained. See *United States v. Chavez*, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed. 2d 380 (1974) (Douglas, J., dissenting in part).

While this court's majority believes that presence or absence of actual prejudice to Hinton is a consideration in evaluating police failure to file interim progress reports, a paramount consideration is the judicial role in monitoring police conduct in a wiretap. As we expressed in *State v. Golter, supra*: "The bedrock of our wiretap law is stringent judicial monitoring of law enforcement agencies seeking to use and using electronic surveillance—an investigative technique highly intrusive upon the privacy of the citizenry." 216 Neb. at 41, 342 N.W.2d at 653. Continued condonation of prosecutory or police indifference to, or ignorance of, Nebraska wiretap statutes and court orders pertaining to wiretaps leaves little inducement for law enforcement to obey the law. The doctrine of substantial compliance with wiretap statutes makes obedience to the law neither a virtue nor a duty in law enforcement. More important, by the doctrine of substantial compliance, the judicial role as a neutral monitor of a wiretap is relinquished to law enforcement, and efficiency in law enforcement, unrestrained by constitutional safeguards for citizens, becomes an absolute end in itself. Requiring strict compliance with wiretap statutes, however, will allay the concern contained in the "caveat" found in the majority's opinion.

The present case demonstrates that the substantial compliance doctrine only lessens law enforcement's incentive to adhere to the requirements of wiretap statutes. Dissenting in *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 72 L. Ed. 944 (1928), Justice Brandeis warned:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

It remains to be seen what respect for law emerges from breach of law by those charged with enforcing laws.

Although the Nebraska wiretap statutes, as written, may be constitutional, the substantial compliance doctrine charts a course for inevitable collision with the constitutional protection against unreasonable search and seizure. While recognizing that police have departed from requirements imposed by the Nebraska wiretap statutes, this court's majority supplies no discernible demarcation to separate tolerable substantial compliance from a constabulary's contemptuous non-compliance condoned by the courts, and leaves one wondering when there is substantial compliance or not. Requiring the government's strict statutory compliance in wiretaps is but a small token to be paid for protection of privacy, lest nibbling at the wiretap statutes whets an appetite to devour constitutional safeguards against unreasonable search and seizure.

WHITE, J., joins in this dissent.

ANTHONY GRINDLE, APPELLEE, V. CHRISTY R. GRINDLE, APPELLANT.

415 N.W.2d 150

Filed November 6, 1987. No. 87-131.

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

Margene M. Timm, for appellant.

E. Michael Slattery of Case, Reinsch & Slattery, P.C., for appellee.

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

PER CURIAM.

This is an appeal from a decree of dissolution of marriage entered by the district court for Otoe County, Nebraska. The district court retained legal custody of the two children of the parties and placed physical custody of the children with the husband. The wife appeals and assigns as error the district

court's judgment on custody of the children.

> In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Gerber v. Gerber, 225 Neb. 611, 617-18, 407 N.W.2d 497, 502 (1987). This standard of review applies equally to child custody determinations. See, *Gerber v. Gerber, supra; Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987); *Staman v. Staman*, 225 Neb. 864, 408 N.W.2d 320 (1987); *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986); *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985).

The best interests of the children are the paramount consideration in determining who should have the care and custody of minor children on dissolution of a marriage. *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975).

A district court may maintain legal custody, while awarding physical custody to a parent or other party. See Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986). See, also, *Peterson v. Peterson, supra*.

A basis for a district court's retention of legal custody of children involved in proceedings for dissolution of marriage has been discussed in *Bartlett v. Bartlett, supra*, which is applicable in the present appeal. After our de novo review of the record, we find no abuse of discretion on the part of the district court. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN J. WARD, APPELLANT.

415 N.W.2d 151

Filed November 6, 1987. No. 87-511.

Homicide: Sentences. Under the provisions of Neb. Rev. Stat. §§ 28-105 and 28-304(2) (Reissue 1985), a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Sentence vacated, and cause remanded for resentencing.

Charles F. Fitzke, Scotts Bluff County Public Defender, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

PER CURIAM.

Defendant, Kevin J. Ward, was adjudged guilty of second degree murder and ordered to "serve an indeterminate sentence of thirteen to sixteen years" at the Nebraska Penal and Correctional Complex. He appeals and assigns that sentence as error, which the State has confessed by filing a motion to correct the same.

Neb. Rev. Stat. § 28-304(2) (Reissue 1985) defines murder in the second degree as a Class IB felony. The penalty authorized by Neb. Rev. Stat. § 28-105 (Reissue 1985) for such a felony is "Maximum-life imprisonment Minimum-ten years imprisonment." We have therefore held that a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years. *State v. Moss*, 219 Neb. 327, 363 N.W.2d 367 (1985); *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974).

As the sentence imposed upon the defendant is clearly invalid, defendant's assignment of error is sustained.

Accordingly, the sentence is vacated and the cause remanded to the district court for resentencing.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLANT, V. RAY H. WARREN, APPELLEE.

415 N.W.2d 152

Filed November 6, 1987. No. 87-800.

1. **Appeal and Error.** The language of a judicial opinion is to be read in the context of the facts under consideration and its meaning limited by those facts.
2. **Search Warrants: Evidence.** Absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant.

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

Ronald L. Staskiewicz, Douglas County Attorney, and Michael J. Haller, for appellant.

Mary K. Thielen of Taylor, Fabian, Thielen & Thielen, for appellee.

CAPORALE, J.

Defendant-appellee, Ray H. Warren, has been charged with the knowing or intentional possession of a controlled substance, cocaine, intending to deliver, distribute, or dispense same, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1986). The district court sustained his motion to suppress and exclude from use against him all evidence seized pursuant to a certain search warrant. The State has appealed to a single judge of this court pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1985), claiming that the district court erroneously invalidated the entire search because the warrant impermissibly purported to authorize the search of unnamed and undescribed persons, as well as the designated premises and

persons who were named and described. For the reasons discussed in this opinion, the ruling of the district court is reversed.

Upon the application and affidavit of Omaha Police Officer Kevin T. Donlan, the county court issued a warrant which authorized the search of

> 1804 Dodge Street, Apt. #506, Omaha, Douglas County, Nebraska, a beige brick multi-story, multi-unit apartment complex known as the Logan Apartments, AND/OR the person of Raymond Haywood, black male, light skin, 5'9", 150 lbs., approximately 22 years old, [a named and described female], John and/or Jane Doe.

In executing the warrant, Officer Donlan and other members of the Omaha Police Division found only Warren and the named and described female at the designated premises. The officers searched Warren, the named and described female, and the designated premises. Among the items found at and seized from the premises were several packages suspected to contain drugs and several items suspected to be drug paraphernalia. Nothing was seized from either Warren or the named and described female.

At the suppression hearing Officer Donlan testified that Warren weighed "190 to 200 some [pounds]" and that he had not himself ever seen the person he wished to search before preparing the application and affidavit for the warrant.

Warren's motion was based on our holding in *State v. Pecha*, 225 Neb. 673, 407 N.W.2d 760 (1987). The defendant therein, who was adjudged guilty of knowingly or intentionally possessing a controlled substance, successfully challenged his conviction on the ground that the evidence used to convict him was obtained from the search of his person pursuant to a warrant which named and described him only as John Doe. In reversing the conviction we ruled that the evidence should have been suppressed. In so holding, we noted that the affidavit on the basis of which the warrant was issued did not show probable cause to search defendant, and we characterized the warrant as "an invalid general" one. *Id.* at 681, 407 N.W.2d at 765.

The State recognizes that, under *Pecha*, the portion of the warrant in this case purporting to authorize the search of John

or Jane Doe was invalid as leaving too much to the discretion of the searchers in executing the warrant. It contends, however, that the remainder of the warrant identified the persons and premises to be searched with the requisite particularity and that such remainder should thus have been severed from the invalid portion and the search of the premises held to have been valid. Warren counters that, under *Pecha*, a warrant purporting to authorize the search of persons the police cannot identify with particularity in advance is a general warrant and invalid on its face in its entirety.

It must be noted that the language of a judicial opinion is to be read in the context of the facts under consideration and its meaning limited by those facts. See *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N.W. 1058 (1908). Thus read, *Pecha* stands only for the proposition that the search of a John Doe for which no probable cause existed is invalid. It does not stand for the proposition that an otherwise valid search must be suppressed merely because the warrant also purported to authorize the search of persons unknown to the police and identified only as John or Jane Doe. Indeed, in *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), the search warrant specifically described the property defendant was convicted of stealing but also stated defendant had other stolen property of unknown description. In affirming the conviction against a challenge the warrant was an invalid general one, we said that absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant. For a recent application of *State v. Pecha, supra*, and the principle of severability, see the single-judge opinion in *State v. Smith, ante* p. 419, 411 N.W.2d 641 (1987).

The present case is factually distinguishable from *Pecha* in at least one crucially important respect: evidence was seized not from Warren himself, but from various locations within the designated premises. Thus, even if Warren's claim that he was improperly searched because he is not the Raymond Haywood named nor the male described in the warrant is accepted as true, it avails him nothing. This is so because, as the foregoing

analysis demonstrates, the portion of the warrant which validly authorizes a search of and seizure from the premises may be severed from any invalid portions of the warrant. Consequently, the evidence seized from the designated premises may be used against Warren.

The ruling of the district court is erroneous and is hereby reversed.

REVERSED.

IN RE ESTATE OF LOYD WEST, DECEASED. THEO LEWIS WEST, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOYD WEST, DECEASED, APPELLANT, V. DONNA KARNES, TAX COMMISSIONER FOR THE STATE OF NEBRASKA, APPELLEE.

415 N.W.2d 769

Filed November 13, 1987. No. 85-822.

1. **Legislature: Taxation: Decedents' Estates.** Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
2. _____: _____: _____. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
3. _____: _____: _____. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an

unconstitutional delegation of legislative power.

4. **Constitutional Law: Standing.** For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
5. _____: _____. Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution.
6. **Actions.** The province of a court is to decide real controversies and to determine rights actually controverted, and the judicial power does not extend to the determination of abstract questions.
7. **Motions to Vacate: Fraud: Equity.** For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
8. _____: _____: _____. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
9. _____: _____: _____. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
10. **Motions to Vacate: Fraud: Proof.** Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
11. **Motions to Vacate: Fraud: Appeal and Error.** Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and

allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.

12. **Fraud: Words and Phrases.** *Collude* means to connive with another; conspire; or plot. *Collusion* is a secret agreement or secret cooperation for a fraudulent or deceitful purpose, such as a secret agreement between two or more persons to defraud a person of his rights, often by the forms of law.
13. **Motions to Vacate: Fraud.** As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, especially where the court was imposed upon thereby and the complaining party was prevented from having his interests fairly presented or fully considered by the court.
14. **Motions to Vacate: Fraud: Attorneys at Law.** Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
15. _____: _____: _____. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.

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

Paul E. Galter and, on brief, Frank Roubicek, for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

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

SHANAHAN, J.

On petition by the Tax Commissioner of the State of Nebraska, and pursuant to Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), the county court for Knox County set aside its inheritance tax order entered in the probate proceedings for the estate of Loyd West, deceased. Theo Lewis West, as personal representative of the estate, appealed to the district court, which affirmed the county court's judgment setting aside the inheritance tax order. We affirm the district court's judgment.

DETERMINATION OF DEATH TAXES

On September 7, 1980, Loyd West, a resident of Knox County, died testate and had devised his estate to his surviving

widow, Theo Lewis West, and his four children. After issuance of "Letters of Personal Representative" to Theo, on May 8, 1981, in the county court, Theo filed an inventory which reflected that Loyd's gross estate, located entirely within Nebraska, had a value of $2,319,355 at the date of Loyd's death. Frank Roubicek was the attorney representing Theo as personal representative, while John Thomas was the county attorney for Knox County.

Applicable Death Tax Statutes. The rate of inheritance tax for a transfer to an immediate relative, such as a widow or child, is 1 percent of the clear market value of property in excess of $10,000 taken by such recipient; provided, the succession interest of the surviving spouse is exempt from inheritance tax. See Neb. Rev. Stat. § 77-2004 (Reissue 1986). Deductions for determination of the inheritance tax are itemized in Neb. Rev. Stat. § 77-2018.04 (Reissue 1986).

An additional death tax, namely, the Nebraska or state estate tax, is imposed under Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), which states in appropriate part:

> [I]n addition to the inheritance taxes imposed by the laws of the State of Nebraska, there is levied and imposed an estate or excise tax upon the transfer of the estate of every resident decedent and upon the value of any interest in Nebraska real estate of a nonresident decedent. The amount of such tax shall be the amount by which the maximum credit allowance upon the tax imposed by the Federal Revenue Act imposing such tax shall exceed the aggregate amount of all estate, inheritance, legacy, or succession taxes paid to any state or territory or the District of Columbia, or any possession of the United States, in respect of any property subject to such tax.

To compute the amount due the United States for the federal estate tax, I.R.C. § 2011 (1982), as a part of the "Federal Revenue Act" mentioned in § 77-2101.01, allows credit for state death taxes paid up to a maximum credit specified in the federal statute. Therefore, the Nebraska estate tax is computed by reference to, or designed to "pick up," the difference between the maximum credit allowance under the Federal Revenue Act and the amount actually paid as the Nebraska

inheritance tax.

Among other Nebraska statutes pertinent to inheritance tax are Neb. Rev. Stat. § 77-2018.03 (Reissue 1986), which provides in part:

> [N]otice served upon the county attorney shall constitute notice to the county and the State of Nebraska. It shall be the duty of the county attorney to represent the county and the State of Nebraska in such matters as its attorney. In so representing the county and the State of Nebraska, the county attorney is authorized, in addition to such other powers as he normally may exercise as attorney for the county, to enter into and bind the county and the State of Nebraska by stipulation as to any facts which could be presented by evidence to either the inheritance tax appraiser or the county court, and to waive service of notices upon him to show cause or of the time and place of hearing, and to enter a voluntary appearance in such proceeding, in behalf of the county and the State of Nebraska,

and Neb. Rev. Stat. § 77-2022 (Reissue 1986): "When the value of the property has been fixed, as provided in [statutes requiring that property subject to inheritance tax be appraised at fair market value], the county judge shall determine and assess the tax to which the same is liable."

Inheritance Tax Worksheet. On behalf of the personal representative, Roubicek prepared an "inheritance tax worksheet," which was tendered to county attorney Thomas. That worksheet recited that Loyd West's gross estate had a value of $2,319,355 (the same value reflected in the personal representative's inventory filed with the court), the widow's succession interest was valued at $1,069,744, and the net value of the West estate, subject to Nebraska inheritance tax, was $1,249,611 (gross estate less widow's succession interest; no itemized deductions were claimed on the worksheet). In the worksheet's section entitled "NEBRASKA INHERITANCE TAX COMPUTATION," there was only the notation "As per material filed," which was inserted before the last line of the computation section—"Nebraska inheritance tax balance due . . . $48,375.00." Roubicek signed the worksheet on

May 7, 1981, the same day that Thomas, as Knox County attorney and pursuant to Neb. Rev. Stat. § 77-2018.01 (Reissue 1986), signed the worksheet and its incorporated certificate: "I have examined the foregoing worksheet and have no objections thereto for inheritance tax purposes only."

The inheritance tax worksheet was filed in the county court on May 8. Neither Roubicek nor Thomas filed any material to substantiate, or show the method of computing, the $48,375 figure stated in the worksheet as the inheritance tax due from devisees in the West estate. On June 2, the Knox County treasurer issued a receipt for payment of $48,375 as "Inheritance tax Loyd West Estate," and, also on June 2, an associate county judge of Knox County signed a "CERTIFICATE EVIDENCING PAYMENT OF COUNTY INHERITANCE TAX" of $48,375 regarding "the inheritance tax levied by this Court against the estate of Loyd West on the 2 day of June 1981." (The record does not contain the June 2 order indicated in the associate county judge's certificate.)

Form 706N, a Nebraska estate tax return, was signed by Roubicek on June 3 and, in reference to the West estate, recited that there was a taxable estate of $1,249,611, a credit of $48,375 was taken for state death taxes (which had been claimed on the federal estate tax return for the West estate), and inheritance tax was paid in the amount of $48,375, the same amount taken as a credit against the federal estate tax. Certification from Knox County, attached to the West estate's form 706N, verified payment of the inheritance tax stated in the state estate tax return. The 706N for the West estate then stated that the estate tax due the State of Nebraska was "$0." (For the West estate, there would be no state estate tax if the correct amount of inheritance tax paid was the same as the credit allowed against the federal estate tax. See § 77-2101.01.) Based on the information contained in the state estate tax return (706N), the Nebraska Department of Revenue, on June 10, issued its "Certificate Evidencing Payment of Nebraska Estate Tax," which stated: "Amount of Nebraska Estate Tax Paid NO TAX DUE."

As a result of a hearing held on June 16, County Judge James J. Duggan entered a "FORMAL ORDER FOR COMPLETE

SETTLEMENT AFTER INFORMAL TESTATE PROCEEDING," which recited the court's finding: "Inheritance tax has been determined, paid, and proper receipts filed. Inheritance tax is hereby approved as completed in this case." The certificate from the Nebraska Department of Revenue ("NO TAX DUE") was filed in the county court on June 19.

According to the "Estate Tax Closing letter," issued by the district director of the Internal Revenue Service on October 28, 1981, the tentative federal estate tax for the West estate was $448,140, but, after credits, including the $48,375 credit for state death taxes, the net federal estate tax on the West estate was $357,265.

PROCEEDINGS TO SET ASIDE TAX ORDER

Pleadings and Motion. Section 25-2001(4) empowers a district court and county court, see Neb. Rev. Stat. § 24-528 (Reissue 1985), to vacate its judgment or order after the term at which such judgment or order was made, if there has been "fraud practiced by the successful party in obtaining the judgment or order." On November 4, 1983, the Nebraska Tax Commissioner filed a petition to vacate the Knox County Court's inheritance tax order entered on June 16, 1981. The Tax Commissioner alleged that, if properly computed, the inheritance tax payable to Knox County "should not have been in excess of about $8,000.00," whereas the inheritance tax collected by Knox County was $48,375 as the result of the worksheet signed by Roubicek and Thomas. The Tax Commissioner claimed that the "Inheritance Tax Worksheet was fraudulently prepared and executed with the express purpose and intention of grossly overstating the inheritance tax due Knox County, in order to eliminate the estate tax due the State of Nebraska . . . ." The Tax Commissioner also alleged:

> That said fraud and collusion first became known to the State of Nebraska and its officers and employees in September, 1983, after another similar attempt to eliminate the state estate tax was brought to the attention of the Attorney General in August, 1983; the Department of Revenue of the State of Nebraska then initiated an investigation of estates in Knox County, Nebraska, to discover whether similar practices had occurred in the

> past; that that investigation led to the discovery of the fraud and collusion in this estate; that the Tax Commissioner could not, in the exercise of reasonable diligence, have discovered said fraud and collusion before she did.

Bearing in mind that the property valuations for the West estate are not disputed for the purposes of the present appeal but are accepted as reflected on the inheritance tax worksheet in question, the value of the West gross estate is $2,319,355. From that gross estate, there are deducted $357,265 (federal estate tax paid), $1,069,744 (widow's succession interest; exempt), and $40,000 ($10,000 exemption for each of the four West children), or $1,467,009 as the total for the deduction and exemptions, which results in $852,346 as the net value of the West estate subject to the Nebraska inheritance tax at the rate of 1 percent, or an inheritance tax of $8,523. When the inheritance tax is subtracted from $48,375 (the credit allowed to determine the federal estate tax on the West estate), the remainder, $39,852, is the apparent state estate tax due the State of Nebraska, based on the figures reported on the inheritance tax worksheet.

In their amended answer, the devisees of Loyd West generally denied the Tax Commissioner's allegations and, as an affirmative defense, raised the statute of limitations prescribed by Neb. Rev. Stat. § 25-2008 (Reissue 1985), which, except in cases of persons under certain disabilities, provides in part: "Proceedings to vacate or modify a judgment or order, for the causes mentioned in section 25-2001, subdivisions (4), (5) and (7), must be commenced within two years after the judgment was rendered or order made . . . ." After their answer, the West devisees filed a motion for summary judgment, asserting that the Nebraska estate tax, imposed under Neb. Rev. Stat. §§ 77-2101.01 et seq. (Reissue 1986), is unconstitutional. (The devisees' particular assertions of unconstitutionality are set forth and addressed later in this opinion.) The devisees also sought summary judgment, claiming that the 2-year statute of limitations found in § 25-2008 had run. The court overruled the motion for summary judgment.

Hearing on Motion to Vacate. County Judge James J. Duggan testified that he "look[ed] at" and "relied on the

inheritance tax worksheet" before he entered his order on June 16, 1981, approving the inheritance tax due on account of Loyd West's death. According to Judge Duggan, if the county attorney approves an inheritance tax worksheet, "I accept it [the worksheet]." If the county attorney does not approve the worksheet, a hearing would be held regarding the inheritance tax determination, although, after becoming a judge in 1977, Judge Duggan has never had to preside over a contested inheritance tax hearing.

Witnesses for the Nebraska Department of Revenue testified about the procedure followed when a Nebraska estate tax return, form 706N, is filed. Unless there is an extrinsic indication of some possible irregularity affecting an estate tax return, the department does not audit a 706N. Basically, then, the department's procedure consists of reference to federal estate tax tables to verify the amount of credit allowable as a result of the taxable estate reported on the federal estate tax return. After confirmation that the amount of the allowed federal estate tax credit claimed by an estate coincides with the amount of the credit shown on the 706N, the department then compares the inheritance tax paid, as reported in the 706N, with the certificate for inheritance tax payment, which has been issued by the collecting county and accompanies the 706N filed with the department. If the amount of the paid inheritance tax equals or exceeds the allowed credit used by the estate to determine its federal estate tax, the department issues its certificate that no Nebraska estate tax is due. However, if the amount of the credit claimed for the federal estate tax exceeds the Nebraska inheritance tax paid, the department issues its certificate reflecting payment of the Nebraska estate tax, if the correct payment of the state estate tax has accompanied the 706N, or issues a notice of the amount due on the Nebraska estate tax, if no payment or an insufficient payment has accompanied the 706N. The department is not supplied with information substantiating any computations for figures appearing on the 706N. The fact that the amount of the inheritance tax paid is equal to the federal credit for death taxes does not, by itself, indicate any irregularity concerning the 706N. Therefore, the department's standard procedure in

reviewing Nebraska estate tax returns does not include an audit or require an investigation or request for additional information concerning an estate. Such departmental procedure, as previously described, existed and was followed regarding the 706N filed by the West estate. Because no error or irregularity appeared on the face of the return filed for the West estate, the Department of Revenue issued its certificate that there was no Nebraska estate tax due from the West estate. Before August 1983, the department had no information about any irregularity involving the return filed for the West estate. However, in August 1983, as the result of information from external sources, the department commenced an investigation into several Nebraska estate tax returns for estates administered in Knox County, including the West estate.

At the hearing on the commissioner's petition, other evidence disclosed several instances where Roubicek had prepared inheritance tax worksheets containing an overstated inheritance tax and then sought approval of those worksheets through stipulations with county attorneys. A former county attorney of Antelope County, which is adjacent to Knox County, testified that he had disapproved a worksheet prepared by Roubicek because the inheritance tax was overstated in the worksheet. When the Antelope County attorney told Roubicek the reason for disapproval of the tendered worksheet, Roubicek responded that he "wondered what the Antelope County supervisors would think if they found out [the Antelope County attorney] was turning down $8,000 to the county," that is, rejection of the overstated inheritance tax. Regarding another estate which involved assets located in several counties, Roubicek wrote to the various county attorneys and stated:

> Now, the Federal death tax credit is $6,887.00. In otherwords [sic], a little more than the worksheet figures out and rather than send this extra money to the State of Nebraska on an estate tax, I propose that the extra credit be divided among the counties proportionately; which I have done. So, each of you fellows is getting a bit more. Tell me if you find this agreeable.
>
> I am enclosing a stipulation and waiver which, if satisfactory, please sign and return to me.

John Thomas, Knox County attorney when the West inheritance tax was determined, testified about his general procedure followed for stipulation to an inheritance tax worksheet, which included his consideration of property valuations, deductions, and the computation of the inheritance tax reflected in the tendered worksheet. After applying various "rules of thumb" to the inheritance tax worksheet for the West estate, Thomas accepted the worksheet prepared by Roubicek and "stipulated" that the inheritance tax was $48,375, inasmuch as Thomas had satisfied himself that Knox County "was entitled to something in the neighborhood of 48,000 maybe a little more, maybe a little less." Although he did not recant the figure reflected on the questioned worksheet for the amount of inheritance tax due Knox County, Thomas conceded that the stipulated values in the worksheet would not support the inheritance tax liability stated in that worksheet. Regarding another estate for which Roubicek was the personal representative's attorney, Thomas admitted that there was a stipulation between Roubicek and Thomas whereby the inheritance tax was intentionally overstated and, therefore, deliberately overpaid to Knox County to avoid payment of an estate tax to the State of Nebraska.

In his testimony, Roubicek offered lengthy explanations about some methods for valuation different from the methodology utilized for the West estate, that is, methods which might have produced property valuations greater than those entered on the worksheet approved by Thomas. According to Roubicek, those other methods of possible valuation might have increased the value of the West estate to somewhere near $10 million and, correspondingly, would have increased the West inheritance tax to $48,375, as asserted in the inheritance tax worksheet filed in the county court. Notwithstanding the other methods of possible valuation which might have resulted in the inheritance tax of $48,375, Roubicek admitted that, as stated in the worksheet, Thomas and he had stipulated to specific estate valuations for inheritance tax purposes as well as to the overstated amount of $48,375 as the inheritance tax due Knox County. As an explanation for the overstatement of inheritance tax due Knox County, Roubicek

testified: "I am faced with an inheritance tax proceeding in which my clients properly are required to disclose all their financial transactions perhaps for two or three years, which they are extremely desirous of avoiding . . . ."

County Court's Decision. The county court found that the inheritance tax order was procured through collusion of counsel and intentional fraud. Also, the court found that the 2-year statute of limitations (§ 25-2008) did not bar the Tax Commissioner's action, because the Tax Commissioner, in the exercise of reasonable diligence, could not have discovered the fraud within the 2 years after the fraudulently obtained inheritance tax order. As a result of those findings, the county court set aside the inheritance tax order entered on June 16, 1981, and ordered a redetermination of the inheritance tax liability concerning the death of Loyd West. On appeal by the personal representative, the district court affirmed the county court's judgment which set aside the inheritance tax order.

In the appeal to this court, the personal representative contends (1) Nebraska's estate tax law is unconstitutional; (2) the 2-year statute of limitations in § 25-2008 prevented the county court from setting aside the inheritance tax order; and (3) fraud, required to set aside a judgment pursuant to § 25-2001, has not been established.

CONSTITUTIONALITY OF NEBRASKA ESTATE TAX

Delegation of Legislative Power. Being and remaining liable until the state estate tax is paid, see § 77-2102, and in her initial attack on the constitutionality of the Nebraska estate tax, the personal representative of the West estate contends that the Nebraska Legislature, in adopting a state estate tax determinable in reference to the amount of federal estate tax liability, has delegated to the United States the power to raise state revenue by taxation. See, Neb. Const. art. VIII, § 1 ("The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct"); Neb. Const. art. III, § 1 ("[T]he legislative authority of the state shall be vested in a Legislature . . .").

With the possible exceptions of Nevada and South Dakota, the several states of the United States have adopted a system of

death tax statutes which, in substance and at a minimum, impose a state estate tax equal to the credit allowed for state death taxes in fixing the federal estate tax. See *Estate of Fasken*, 19 Cal. 3d 412, 563 P.2d 832, 138 Cal. Rptr. 276 (1977). The state estate tax has been characterized as a "pickup tax," or, as described in *Estate of Fasken, supra*,

> Each state according to the [*Treichler v. Wisconsin*, 338 U.S. 251, 70 S. Ct. 1, 94 L. Ed. 37 (1949)] formula may properly levy a pick-up tax which is calculated by first apportioning the federal state death tax credit according to the ratio of property which lies within its borders, and then reducing that apportioned credit by its inheritance tax. The balance of the apportioned credit constitutes the pick-up tax.

19 Cal. 3d at 428, 563 P.2d at 841-42, 138 Cal. Rptr. at 285-86.

In *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), this court considered the constitutionality of certain income tax statutes of Nebraska enacted pursuant to an amendatory constitutional provision, namely, Neb. Const. art. VIII, § 1B: "When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States." In *Anderson*, taxpayers, challenging the constitutionality of the income tax law as an unlawful delegation of legislative power contrary to the Nebraska Constitution, pointed to the specific language in the income tax law:

> "Any term used in [the state income tax law] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United States relating to federal income taxes, and the rules and regulations issued under such laws, *as the same may be or become effective, at any time or from time to time, for the taxable year*."

(Emphasis in original.) 182 Neb. at 395, 155 N.W.2d at 325.

This court, in *Anderson v. Tiemann, supra*, held that

Nebraska statutes imposing income taxation by reference to future income tax laws of the United States were constitutional and not an unlawful delegation of legislative power to the United States, and stated:

> It is conceded that the Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N.W.2d 227.

182 Neb. at 396, 155 N.W.2d at 325.

> The constitutional amendment with which we are dealing does not require, but only authorizes, the Legislature to base a state income tax law upon the laws of the United States. In connection with a state income tax law, we think it permits the Legislature to use all, part, or none of the laws of the United States as it may determine from time to time appropriate insofar as it may be lawful and practicable to do so. It does not preclude the Nebraska Legislature from repealing its own present enactment or adopting a completely different method of imposition of its income tax, and the Legislature retains the complete legislative power to make all such decisions. The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor constitute a violation of the requirements of a representative form of government.

182 Neb. at 399-400, 155 N.W.2d at 327.

Although *Anderson v. Tiemann, supra*, dealt with Nebraska statutes imposing an income tax and the present appeal deals with imposition of a state estate or excise tax, we believe that much of the rationale in *Anderson* applies to the delegation argument made by the personal representative of the West estate. Whether the Nebraska estate or excise tax, § 77-2101.01, is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature, such as the U.S. Congress. Although the Nebraska estate tax is correlative in operation with the federal estate tax

law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature. As stated in *Anderson v. Tiemann*, 182 Neb. 393, 396, 155 N.W.2d 322, 325 (1967): "[T]he Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States." Similar to the rationale employed in *Anderson v. Tiemann, supra*, we conclude that § 77-2101.01 specifies a tax which, although referable to federal law for computation of the amount payable to the State of Nebraska, remains subject to the power of the Nebraska Legislature, which determines whether such tax exists or will continue to exist.

Courts of other jurisdictions have reached a conclusion similar to ours, when those courts were called upon to consider a delegation argument against a state tax statute which, in defining terms or computing the amount of state tax, refers to federal statutes or regulations. For example, in *City Natl. Bk. v. Iowa State Tax Comm.*, 251 Iowa 603, 102 N.W.2d 381 (1960), the Iowa Supreme Court held that the phrase "taxable income," used in the Iowa income tax statute, which referred to the Internal Revenue Code of 1954 for the definition of "taxable income," was not an unconstitutional delegation of state power to tax, and expressed:

> [I]t is quite apparent that the only purpose in the reference to the federal statutes is for a definition of "adjusted gross income" and to broaden the definition of "gross income" in our prior law to include such income as that on capital gains under the federal definition. No attempt is made to make the construction or interpretation of such definitions by federal authorities the law in Iowa, and they are not given power to determine or fix the Iowa tax. In other words, the reference is not for the purpose of "fixing such tax" . . . .

251 Iowa at 617, 102 N.W.2d at 389. See, also, *First Federal Savings & Loan Assn. v. Connelly*, 142 Conn. 483, 493, 115

A.2d 455, 459 (1955) (defining "net earning" by reference to federal income tax law was not an unconstitutional delegation of power to tax; "This is not a delegation of legislative power but an incorporation by reference of the federal law into the state law"); *Parker Affiliated Cos., Inc. v. Department of Revenue*, 382 Mass. 256, 266, 415 N.E.2d 825, 831 (1981) (incorporation of federal tax law into state statute on income taxation was not an unconstitutional delegation of power to tax; " '[Federal] action may influence the amount of the tax payable, but the taxing power has not been delegated to [the Federal government]' ").

Therefore, we hold that, while § 77-2101.01 sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.

Separation of Powers. Next, in questioning the constitutionality of the Nebraska estate tax, the personal representative of West's estate proposes that, inherent in the procedure for determination of Nebraska death taxes, there is a conflict of interest statutorily demanded of a county attorney, namely, the county attorney must represent both the county and the State of Nebraska concerning matters immediately affecting the inheritance tax and ultimately bearing upon the Nebraska estate tax. See § 77-2018.03 ("In all matters involving the determination of inheritance tax . . . [i]t shall be the duty of the county attorney to represent the county and the State of Nebraska in such matters as its attorney"). See, also, *State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, 84

N.W.2d 136 (1957) (county attorney has the duty to represent the county and the state in inheritance tax matters). Such double duty required of the county attorney, the personal representative argues, constitutes legislative direction of a lawyer's conduct and, therefore, intrudes into the province of the Supreme Court of Nebraska, which is responsible for supervision of a lawyer's professional conduct.

The personal representative does not suggest in what manner death taxes were increased, or would be increased, or how any taxpayer's liability for death taxes was, or would be, enhanced or otherwise adversely affected by the dual duty of the county attorney in representation of both the state and county regarding matters pertinent to death taxes payable under Nebraska law.

For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. See *State v. Irwin*, 208 Neb. 123, 302 N.W.2d 386 (1981). See, also, *State v. Michalski*, 221 Neb. 380, 393, 377 N.W.2d 510, 519 (1985) ("To be in a position to challenge the constitutionality of a statute, a party must be adversely affected by the provisions at issue").

Whatever may be the onus imposed on a county attorney as a result of the statutory duty to represent both the state and county in matters affecting death tax liability, the personal representative of West's estate has failed to demonstrate that the county attorney's dual duty has caused, or will cause, any legally recognizable prejudice or injury pertaining to the estate's potential liability for the Nebraska estate tax. Without an adverse effect regarding the West estate's potential liability for the Nebraska estate tax, the personal representative of the West estate does not qualify as one with standing to contest the constitutionality of § 77-2101.01.

Apportionment Contention. In her brief, the personal representative states:

> The third area of unconstitutionality does not apply on the particular facts of this case, which is to say in this

> particiular [sic] case, there was not apportionment between the states. . . .
>
> To show how the Nebraska state proration and apportionment between the states rule would, or could be, assume these facts for our hypothetical situation . . . .

Brief for Appellant at 20. The personal representative then sets out a hypothetical case involving an estate containing real estate in Nebraska and Colorado and a problematic conflict between the states concerning their respective state estate taxes and the federal credit allowable for state death taxes. However, the West estate does not contain any property located outside the State of Nebraska and taxable under the death tax statute(s) of another state. In the West estate, all the federal estate tax, as well as the credit for state death taxes, is based on property entirely situated in and taxable by Nebraska. The personal representative of West's estate admits that the basis for alleged unconstitutionality is purely hypothetical.

Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution. See *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980). See, also, *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973). " 'The province of a court is to decide real controversies and to determine rights actually controverted, and "The judicial power does not extend to the determination of abstract questions." ' " *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 36, 388 N.W.2d 93, 99 (1986) (citing and quoting from *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F.2d 57 (8th Cir. 1950)).

Any problem arising out of interstate apportionment of the federal credit for state death taxes, if that were the consequence of § 77-2101.01, is not a justiciable controversy in the present proceedings, but is purely a conjectural question and, as such, need not be answered.

STATUTE OF LIMITATIONS

The personal representative claims that the 2-year limitation of actions, prescribed by § 25-2008, prevents setting aside the county court order on inheritance tax—a remedy or relief authorized by § 25-2001(4) on account of fraud in obtaining a judgment or order, because the petition to vacate was filed in November 1983, more than 2 years after the inheritance tax order was entered in June 1981. The Tax Commissioner counters that the 2-year limitation of § 25-2008 does not apply when the fraud which produces the judgment or order to be set aside is not discovered within the 2 years immediately after the judgment or order sought to be vacated.

Construing § 25-2008 (statute of limitations) in conjunction with § 25-2001(4) (fraud as a basis for setting aside a judgment), this court, in *Katz v. Swanson*, 147 Neb. 791, 24 N.W.2d 923 (1946), adopted the equitable doctrine of fraud-discovery as an exception to the strict application of the 2-year limitation prescribed by § 25-2008, when the fraud has not been discovered, or in the exercise of reasonable diligence could not have been discovered, during the 2 years immediately following the fraudulently obtained judgment. In *Katz*, this court stated:

> "The only exception to the statutory limitation of two years is where the fraud was not discovered within that period. This court has set out the rule in the following apt language: 'Equity will afford relief against a judgement procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.' [Citation omitted.] . . . 'Where such a petition fails to set forth that the facts were not discovered within two years of the trial, and fails to show any reason for extending the two years allowed by statute for setting aside judgments for fraud, equity is powerless to relieve.' [Citation omitted.]"

147 Neb. at 796, 24 N.W.2d at 926-27.

The Tax Commissioner's petition to vacate contained the

allegation that the fraud which produced the inheritance tax order was not discovered, and was not discoverable, in the exercise of the Tax Commissioner's due diligence within the 2 years after such order on inheritance tax. In substance, a 706N is virtually self-validating without extrinsic corroboration, except for the county certificate evidencing payment of the inheritance tax. Evidence demonstrates that, in its review of Nebraska estate tax returns, including the estate tax return for the West estate, the Nebraska Department of Revenue is not supplied with any particular data or computations underlying the figures entered on the estate tax return. In the 706N for the West estate, the reported amount of paid inheritance tax was corroborated by a certificate issued from Knox County as the collecting county. There was nothing inherent in the other limited information or unexplained figures appearing on the face of the West estate's 706N which would indicate irregularity or illegality infecting the process used in arriving at the monetary figures reported in the estate tax return. Until word reached the Department of Revenue concerning possible irregularity in the returns filed by several estates administered in Knox County, there was no indication to the department or departmental suspicion that there might be something awry in the 706N filed by the West estate. The evidence supports the county court's conclusion that the Nebraska Tax Commissioner (Department of Revenue) did not discover, and in the exercise of reasonable diligence could not have discovered, the overstated and misrepresented amount of the inheritance tax due Knox County, as reflected on the inheritance tax worksheet, which, by stipulation of counsel, was submitted to the county court for inheritance tax purposes. There is no error in the county court's applying the equitable doctrine of fraud-discovery to exonerate the 2-year limitation prescribed by § 25-2008 and thereby proceeding to decide whether relief should be granted as authorized in § 25-2001(4).

VACATING A JUDGMENT OR ORDER

Nature of Remedy. As we have already determined in this appeal, the county court properly allowed the Tax Commissioner to proceed under the fraud-discovery exception to the 2-year limitation prescribed by § 25-2008, because the

Tax Commissioner could not have discovered the alleged fraud within the statutorily dictated limitation of time. However, as authorized under § 25-2001(4), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms. See 46 Am. Jur. 2d *Judgments* § 684 (1969). See, also, *Miles v. Layton*, 38 Del. 411, 193 A. 567 (1937); *Keane v. Allen*, 69 Idaho 53, 202 P.2d 411 (1949); *Rossten v. Wolf*, 14 Ill. App. 2d 322, 144 N.E.2d 757 (1957). This court has repeatedly recognized that a court's jurisdiction based on § 25-2001 is concurrent with a court's independent equity jurisdiction. See, *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983); *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952); *Shinn v. Shinn*, 148 Neb. 832, 29 N.W.2d 629 (1947); *In re Estate of Jensen*, 135 Neb. 602, 283 N.W. 196 (1939); *Pavlik v. Burns*, 134 Neb. 175, 278 N.W. 149 (1938). Also, we are reminded that, in *Katz v. Swanson*, 147 Neb. 791, 24 N.W.2d 923 (1946), a case previously mentioned in this opinion concerning the statute of limitations, this court adopted a discovery rule for cases involving a fraudulently obtained judgment, notwithstanding the time limitation prescribed by § 25-2008, thereby recognizing applicability of an equitable doctrine in relation to a statutory action for vacation of a judgment. Thus, equitable consideration in the setting of statutorily authorized relief is not a novelty in Nebraska jurisprudence. If, as expressed by Selden, the standard for measure of equitable conscience is the "Chancellor's foot," fraud is indeed a bunion.

Burden of Proof. Under § 25-2001(4), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to

secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question. See, *County of Lincoln v. Provident Loan & Investment Co.*, 147 Neb. 169, 22 N.W.2d 609 (1946); *Pinches v. Village of Dickens*, 131 Neb. 573, 268 N.W. 645 (1936); *Kielian v. Kent & Burke Co.*, 131 Neb. 308, 268 N.W. 79 (1936).

Standard of Review. In reviewing a trial court's action in vacating or refusing to vacate a default judgment, see *Bigler v. Baker*, 40 Neb. 325, 58 N.W. 1026 (1894), or action in setting aside or refusing to set aside a judgment obtained through a trial, see *State v. Cottingham, ante* p. 270, 410 N.W.2d 498 (1987), the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion. By analogy, a trial court's disposition of a request to vacate a judgment or order allegedly obtained by fraud and entered at a previous term of court should be evaluated by the same standard applicable to requests involving a default judgment or judgment obtained through a trial. Therefore, we hold that under § 25-2001(4), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.

FRAUD AND COLLUSION

In her third assignment of error, the personal representative contends that the county court erred in determining that the Tax Commissioner had proved fraud to justify vacating the inheritance tax order, as authorized by § 25-2001(4). In the petition to set aside the inheritance tax order, the Nebraska Tax Commissioner alleged that there was actual or intentional fraud and collusion which produced the inheritance tax order and eliminated the potential Nebraska estate tax. The personal representative contends that, to prevail in the action to set aside the inheritance tax order, the Tax Commissioner must present proof suitable to sustain a cause of action for fraud (misrepresentation of a material fact). As we expressed in

Alliance Nat. Bank v. State Surety Co., 223 Neb. 403, 407-08, 390 N.W.2d 487, 491 (1986):

> To recover on a claim for fraud, [a plaintiff] must show (1) that a representation was made; (2) that the representation was false; (3) that, when made, the representation was known to be false, or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.

The personal representative asks, "What business man wants to expose his books to public scrutiny if he can avoid it?" Brief for Appellant at 25. Later, the personal representative points out that "[t]here are three parties to the Inheritance Tax Determination. They are the county, the State of Nebraska, and the estate," and then asks another rhetorical question: "Did the State rely upon the representations made by the estate's attorney?" Brief for Appellant at 30. The State did not rely on the overstated and misrepresented amount of inheritance tax reflected on the inheritance tax worksheet, but such absence of reliance does not prevent vacating the inheritance tax order.

Collude means to "connive with another : conspire, plot." *Collusion* is a "secret agreement : secret cooperation for a fraudulent or deceitful purpose . . . as . . . a secret agreement between two or more persons to defraud a person of his rights often by the forms of law." Webster's Third New International Dictionary, Unabridged 446 (1981). See, also, *Tomiyasu v. Golden*, 81 Nev. 140, 400 P.2d 415 (1965); *Clinton Coop. F. E. Assn. v. Farmers U. G. T. Assn.*, 223 Minn. 253, 26 N.W.2d 117 (1947); *Colegrove v. John Hancock Mut. Life Ins. Co.*, 153 S.W.2d 750 (Mo. App. 1941). As the U.S. Supreme Court stated in *Dickerman v. Northern Trust Company*, 176 U.S. 181, 190, 20 S. Ct. 311, 44 L. Ed. 423 (1900):

> Collusion is defined by Bouvier as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law," and in similar terms by other legal dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the

accomplishment of an unlawful purpose . . . .

As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, "especially where the court was imposed upon thereby and the complaining party was prevented from having his interest fairly presented or fully considered by the court." 46 Am. Jur. 2d *Judgments* § 16 at 323 (1969). See, also, *Harjo v. Johnston*, 187 Okla. 561, 104 P.2d 985 (1940); *Abernathy v. Huston*, 166 Okla. 184, 26 P.2d 939 (1933); *Ferguson v. Ferguson*, 98 S.W.2d 847 (Tex. Civ. App. 1936); 49 C.J.S. *Judgments* § 269 (1947). As expressed by the Iowa Supreme Court in *Scheel v. Superior Mfg. Co.*, 249 Iowa 873, 883, 89 N.W.2d 377, 383-84 (1958):

> "It has been said that all deceitful practices in depriving or endeavoring to deprive another of his known rights by means of some artful device or plan contrary to the plain rules of common honesty constitute fraud sufficient to warrant interference with a judgment by a court of equity. It matters little how the fraud is effected; a court looks to the effect, and asks if the result is a consequence of fraud."
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> . . .
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> . . . "* * * in the final analysis each case must be judged on its own facts in determining whether the circumstances amount to fraud so as to justify equitable relief against a judgment. Broadly speaking, if the result complained of is a consequence of fraud, the mode or manner in which the fraud was effected is immaterial."

See, also, 46 Am. Jur. 2d, *supra* at § 832.

In the present case, the State seeks to set aside a judgment procured through collusive misrepresentation by its attorney. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for a litigant and the adversary of the litigant. *Mercantile Comm. Bank v. Southwestern, etc., Corp.*, 93 Ind. App. 313, 169 N.E. 91 (1929); *Sturm v. School-District No. 70*, 45 Minn. 88, 47 N.W. 462 (1890). As noted in 46 Am. Jur. 2d, *supra* at § 827 at 984: "[E]quitable relief from a judgment exist[s] where an attorney fraudulently

pretended to represent a party but actually connived at his defeat, or, being regularly employed, corruptly sold out his client's interest."

Sir Walter Scott must have foreseen counsel's conduct in the present case, when he wrote:

> Oh, what a tangled web we weave,
> When first we practice to deceive!

While both Roubicek and Thomas offered various afterthoughts as methods for arriving at valuations different from, and greater than, the valuations actually used for inheritance tax purposes, the evidence, stripped of all verbal veneer, presents the crystallized fact that the attorneys, through their stipulated inheritance tax worksheet, jointly and deliberately overstated the amount of inheritance tax due Knox County, thereby carrying out their surreptitious agreement to eliminate the potential Nebraska estate tax on the West estate. The inheritance tax of $48,375, reflected on the worksheet, was absolutely impossible on the basis of the valuations reported in that document filed with the county court. Through the deceitful stipulation, each party interested in death tax liability relative to the West estate gained a very real advantage, except the State of Nebraska. For the West devisees, silence was acquired and nondisclosure assured, for, as acknowledged by the personal representative: "The heirs were anxious to avoid producing their books of account, and so on, in a county court inheritance tax hearing." Brief for Appellant at 24. For Knox County, there was the all-too-obvious exaggerated inheritance tax collected by the county. For the State of Nebraska, the attorneys' stipulation produced only injury—loss of the state estate tax. Roubicek and Thomas spawned the inheritance tax worksheet and its collusive misrepresentation, which was an integral and causative element in the production of an inheritance tax determination effectively eliminating payment of a Nebraska estate tax. Although it is true that the State of Nebraska did not rely on any factual misrepresentation by Roubicek and Thomas, it is also equally true that the State of Nebraska, through its attorney's connivance with the attorney for the personal representative, was prevented from having its interests fairly presented in the matter of the inheritance tax,

which ultimately became crucial in determining whether an estate tax was due the State of Nebraska. The inheritance tax worksheet was an intentionally fraudulent device to eliminate the Nebraska estate tax and was an artful scheme condemned by fundamental rules of honesty applicable to a lawyer representing the interests of a client. With respect to the interests of a client, a lawyer is expected to display dedicated protection, not deliberate damage. Consequently, we disagree with the personal representative, who suggests that the absence of the State's reliance on a factual misrepresentation, otherwise required to sustain a cause of action for civil fraud, precludes vacating a judgment which is the product of fraud and collusion by the county attorney, as the attorney for the State of Nebraska under § 77-2018.03. Therefore, we hold that if a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under § 25-2001(4) to the injured party. In that manner, we not only avoid relegating a party injured through collusion by that party's lawyer to another action outside the proceedings which produced the fraudulent judgment, that is, an action against the collusive lawyer, but we also avert time-consuming and expensive additional litigation to rectify the inequity caused by a lawyer's deceit toward the client.

The evidence presented to the county court supports, if not compels, the finding of fraud and collusion detrimental to the State of Nebraska.

> 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., 221 Neb. 678, 689, 380 N.W.2d 268, 276 (1986). Tested by a factual foundation and the plain rules of common honesty, the county court's judgment setting aside the inheritance tax order does not constitute an abuse of

discretion.

ERROR ASSIGNED BUT NOT ARGUED

In her final assignment of error the personal representative alleges that the county court erred in overruling the personal representative's motion for a mistrial, an error not discussed in the argument portion of the personal representative's brief. Therefore, we decline to consider this assignment of error, because "consideration of assignments of error is limited to those discussed in the brief." *State v. Evans*, 215 Neb. 433, 444, 338 N.W.2d 788, 795 (1983); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

We affirm the district court's judgment, which affirmed the the county court's judgment, vacating and setting aside the inheritance tax order entered in the estate of Loyd West, deceased.

AFFIRMED.

GLENN E. McCOMBS, APPELLANT, V. ELMER A. PRENOSIL, APPELLEE.
GLENN E. McCOMBS, APPELLANT, V. ELMER A. PRENOSIL ET AL., APPELLEES.

415 N.W.2d 453

Filed November 20, 1987. Nos. 85-721, 85-1014.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT and JEFFRE CHEUVRONT, Judges. Affirmed.

Barry L. Hemmerling of Jeffrey, Hahn & Hemmerling, P.C., for appellant.

Robert R. Gibson of Professional Legal Associates of Nebraska, P.C., for appellee Elmer Prenosil.

John D. Ragsdale, for appellee Woodmen Accident and Life Company.

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

PER CURIAM.

The appellant's brief in these cases contains no assignments of error. Neb. Rev. Stat. § 25-1919 (Reissue 1985) and the rules of this court, Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), require that each error assigned shall be separately stated in an appellant's brief. In the absence of an assignment of error, the judgment will be affirmed, unless the court notes plain error on the record. *Baggett v. City of Omaha*, 220 Neb. 805, 373 N.W.2d 391 (1985).

Since the records in these cases fail to disclose plain error, the judgments are affirmed.

AFFIRMED.

LUSCHEN BUILDING ASSOCIATION, A COPARTNERSHIP, APPELLEE, V. FLEMING COMPANIES, INC., A CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, ALFRED W. DOLEZAL ET AL., THIRD-PARTY DEFENDANTS, APPELLANTS.

415 N.W.2d 453

Filed November 20, 1987. No. 85-946.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt.
2. _____. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
3. **Contracts.** The construction of a contract, if needed, is a question of law for the court as well as a duty that rests upon the court, and there can be no ambiguity

unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.

4. _____. That two parties urge opposing interpretations of a contract does not necessarily indicate the document is ambiguous.
5. _____. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
6. **Contracts: Juries: Courts.** When the terms of the contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
7. **Contracts: Summary Judgment.** When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
8. **Evidence.** Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace or settle a controversy without respect to legal liability, is not admissible against the person making it.
9. **Summary Judgment.** In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
10. **Judgments: Appeal and Error.** Generally an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Reversed.

Stephen H. Nelsen and Shawn D. Renner of Cline, Williams, Wright, Johnson & Oldfather, for appellant Fleming Companies.

Stephen C. Hansen and Eugene G. Schumacher of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellants Dolezal et al.

Vance E. Leininger of Leininger, Grant, Rogers & Maul, for appellee.

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

WHITE, J.

This is an appeal from the district court for Platte County. Fleming Companies, Inc. (defendant and third-party plaintiff

below), Alfred W. Dolezal, Christine Dolezal, Joseph L. Gdowski, and Marcelline L. Gdowski (third-party defendants below) appeal from a summary judgment order and a judgment entered pursuant to that order. The appeals have been consolidated.

This appeal involves the interpretation of a lease, specifically a repair clause within a lease and a sublease. Luschen Building Association, appellee lessor, brought this action in the district court against Fleming, lessee, to compel it to repair or replace a parking lot on leased premises. Fleming then filed a third-party complaint against Dolezals and Gdowskis, sublessees, which alleged that if Fleming was held liable for said repairs, then the sublessees would be liable to Fleming for that work.

Luschen and Fleming entered into the original lease agreement on July 15, 1966. This lease was amended twice to extend the term and provide for increased rental rates. The repair clause remained as it had been set forth in the original lease. This clause, section 9, is at the heart of the dispute in this case and is set out in its entirety.

> 9. The Lessor shall maintain in good condition the structural parts of the building on the premises, including the exterior walls, roof, footings, and foundation, and shall perform any repairs made necessary by reason of such maintenance.
>
> The Lessee shall maintain in good condition the interior of the building on the premises including all doors both manually-operated and automatic, all glass including glass exposed to the exterior, and all heating, air conditioning, electrical, and plumbing fixtures, equipment, and services in said building or on the premises appurtenant thereto, and in addition shall provide all painting and decorating to the exterior of said building, and shall provide all maintenance and repair to the parking lot, parking lot lights, lighting, and striping.
>
> Should either the Lessor or the Lessee fail, for a reasonable period of time after notice by the other, to maintain the portions of the premises herein undertaken by each to be maintained, in good, and substantially their present condition, reasonable use, wear, and tear

excepted, the other party hereto having so given reasonable notice of the necessity for such maintenance, may proceed to provide such maintenance as reasonably required on behalf of the party so failing to provide the same; and if provided by the Lessee on behalf of the Lessor, the former may deduct the cost thereof from future installments of base rent as the same become due until reimbursed; and if provided by the Lessor on behalf of the Lessee, the cost thereof shall be paid by the Lessee to the Lessor simultaneously with the next monthly installment of base rent when the same falls due.

The sublease at issue in this case has a more complicated history. Fleming originally sublet the premises to parties not associated with this appeal on July 16, 1966. Those sublessees assigned the sublease to Dolezals and Gdowskis on March 26, 1968, to become effective April 7, 1968. The term was to expire July 15, 1976.

In June of 1972 Fleming and the sublessees, Dolezals and Gdowskis, executed a revised sublease which superseded and replaced the 1966 assigned sublease. The 1972 sublease agreement extended the initial term by allowing the agreement to automatically renew for 6 more years after July 15, 1976. There was also a rental rate increase for the additional 6-year term. The additional term was to expire July 15, 1982.

Finally, on October 22, 1981, Fleming and the sublessees executed the last sublease agreement for a term commencing July 16, 1982, and ending July 15, 1987. This sublease was in effect and controlling on October 7, 1982, the time when the correspondence began which led to the present appeal.

The relevant sublease provisions which are crucial to this appeal are set forth as follows:

1. The terms of the ORIGINAL LEASE hereinabove referred to are herein incorporated by reference with like force and effect as if the same had been fully set out, and SUBLESSEE acknowledges receipt of a true and correct copy of said ORIGINAL LEASE.

. . . .

9. SUBLESSEE shall perform the covenants and obligations of SUBLESSOR under the ORIGINAL

LEASE regarding maintenance and repair to the premises in strict accordance with the terms of Paragraph 9 of the ORIGINAL LEASE.

The ORIGINAL LESSOR shall maintain in good condition the structural parts of the building on the premises, including the exterior walls, roof, footings, and foundation, and shall perform any repairs made necessary by reason of such maintenance.

The SUBLESSEE shall maintain in good condition the interior of the building on the premises including all doors both manually-operated and automatic, all glass including glass exposed to the exterior, and all heating, air conditioning, electrical, and plumbing fixtures, equipment, and services in said building or on the premises appurtenant thereto, and in addition shall provide all painting and decorating to the exterior of said building, and shall provide all maintenance and repair to the parking lot, parking lot lights, lighting, and striping.

Should the SUBLESSEE fail, for a reasonable period of time after notice by the SUBLESSOR, to maintain the portions of the premises herein undertaken by SUBLESSEE to be maintained, in good, and substantially their present condition, reasonable use, wear, and tear excepted, the SUBLESSOR hereto having so given reasonable notice of the necessity for such maintenance, may proceed to provide such maintenance as reasonably required on behalf of the SUBLESSEE so failing to provide the same; and if provided by the SUBLESSOR on behalf of the ORIGINAL LESSOR, the former may add the cost thereof to future installments of base rent as the same become due until reimbursed.

Section 10 is set out only in pertinent part as follows:

10. SUBLESSEE covenants that it will pay the rent stipulated at the time and place specified; that it will use the premises solely for the purpose above specified; that it will, at its expense, keep the premises and improvements thereon, in the same good order and repair in which they now are or may hereafter be placed, except (1) usual wear and tear, (2) acts of God and unavoidable casualties, (3)

repairs of defects for which ORIGINAL LESSOR is responsible under the ORIGINAL LEASE, and (4) damages and loss for which SUBLESSOR and ORIGINAL LESSOR have waived recovery under said ORIGINAL LEASE.

The record reveals that on October 7, 1982, Luschen began corresponding with Fleming about the deteriorating condition of the parking lot on the leased premises. Fleming then passed these concerns along to the sublessees, Dolezals and Gdowskis, and directed them to make the repairs demanded by Luschen. Sometime prior to September 1983 some repairs were undertaken on the parking lot, consisting of asphalt caulk in the cracks of the concrete. This repair was unsatisfactory to Luschen.

Correspondence between the parties continued at least through late October 1983. Luschen filed suit against Fleming for enforcement of the lease on May 10, 1984. On October 1, 1985, after numerous motions were filed and steps were taken in pretrial proceedings, Luschen eventually filed a motion for summary judgment. A hearing on the motion was held on October 11, 1985, and evidence was adduced. On November 7, 1985, another hearing was held and orders of the court were handed down regarding the parties' liabilities. A partial summary judgment was entered in favor of Luschen and against Fleming. The order stated that Fleming was "responsible under the lease agreement for . . . necessary repairs to the parking lot" and that the only issue to be tried is the question of costs and specifications of such repairs.

The court then heard a stipulation from all the parties regarding the manner of the accomplishment of the repairs and time for completion. The stipulation specifically stated that defendant and third-party defendants reserved all rights to appeal the separate judgments against them regarding actual liability for those repairs.

Finally, the court then heard arguments and received evidence regarding the action between Fleming and sublessees, Dolezals and Gdowskis. That same day the court entered a judgment against the sublessees and in favor of Fleming, holding that sublessees had assumed all the obligations to repair

and maintain the parking lot. Therefore, the court held that sublessees were liable for the repairs which had been deemed the duty of Fleming in the prior summary judgment order.

Appellant Fleming assigns as error that the district court erred in granting summary judgment for Luschen because (1) the court misinterpreted the lease provisions as a matter of law; (2) material issues of fact remain; and (3) the court improperly drew inferences from the evidence in favor of Luschen.

Appellants Dolezals and Gdowskis assign as error that the district court erred in finding that no genuine issue of material fact existed between Fleming and Luschen and finding that no genuine issue of material fact existed between Fleming and sublessees.

We begin our analysis by addressing appellants Dolezals and Gdowskis' second assigned error. The language of the assigned error infers that the district court entered a summary judgment order against sublessees and in favor of Fleming. No motion for summary judgment was ever submitted by Fleming. The record reveals that Fleming and sublessees merely submitted the issue of sublessees' liability to the court at the November 7, 1985, hearing previously mentioned. The only evidence offered and admitted was the various lease and sublease agreements offered by Fleming.

In essence, the sublessees are arguing that the judgment rendered against them was erroneous because it was based on a separate erroneous summary judgment entered against Fleming. For the following reasons, we agree.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Chadd v. Midwest Franchise Corp., ante* p. 502, 412 N.W.2d 453 (1987). Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Id.* The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled. *Id.*

The district court found, apparently as a matter of law, that

Fleming was responsible under the original lease agreement for the necessary repairs to the parking lot. This finding by the court had to be based on one of two rationales. The court could have interpreted the lease as unambiguously imposing such repair liability on Fleming as a matter of law, according to the terms of the contract alone. On the other hand, Luschen submitted into evidence letters written to Fleming and replies therefrom and argued that this correspondence constituted admissions of liability on the part of Fleming. Each of these rationales will be addressed separately.

First, it is the law of Nebraska that the construction of a contract, if needed, is a question of law for the court as well as a duty that rests upon the court, and there can be no ambiguity unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties. *Meyers v. Frohm Holdings, Inc.*, 211 Neb. 329, 318 N.W.2d 716 (1982).

The lease language central to this controversy states that "[s]hould either the Lessor or the Lessee fail . . . to maintain the portions of the premises herein undertaken by each to be maintained, in good, and substantially their present condition, reasonable use, wear, and tear excepted . . . ." An interpretation of the "reasonable use, wear, and tear excepted" language is essential to the determination of this case. The parties to this action are in complete disagreement as to the intent of this language.

Luschen alleges that this language refers to the "permissible condition of the premises, not the cause of that condition." Brief for Appellee at 15. Appellee asserts that the language evinces an intent to require repairs and maintenance once the premises exhibited "unreasonable use, wear, and tear" and had "deteriorated to a point where it was no longer reasonable to expect to continue to use" it in that worn condition. *Id.* In other words, Luschen asserts the premises was not expected to be kept in new condition, but was expected to exhibit some reasonable wear and tear before repairs were needed.

Fleming asserts that this language was intended to except "conditions caused by 'reasonable wear and tear' from the

maintenance obligations imposed on Fleming." Brief for Appellant Fleming at 9-10. In other words, Fleming asserts that if the condition of the parking lot was caused by "reasonable use, wear, and tear," it was Luschen's obligation to repair it as needed.

Ambiguity is measured by an objective standard, not by the subjective contentions of adversaries in a courtroom. That two parties urge opposing interpretations does not necessarily indicate the document is ambiguous. *Burhoop v. Pegram*, 194 Neb. 606, 234 N.W.2d 828 (1975). However, a provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978).

In the case at bar the lease provision at section 9 seems to impose absolute liability on Fleming to maintain and repair the parking lot. However, this repair liability could be seen as limited by the "reasonable use, wear, and tear excepted" clause in the third paragraph of section 9, or by section 11, which contains a surrender clause which also excepts "usual wear and tear." Taken as a whole, the lease agreement is at best ambiguous. The extent to which the "reasonable use, wear, and tear" clause modifies either party's duties, if it does at all, is completely unclear from the face of the document. When the terms of the contract are in dispute and the real intention of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances. *First Nat. Bank v. Davis*, 123 Neb. 304, 242 N.W. 655 (1932). When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964). The summary judgment entered against Fleming by the district court was improper in that a genuine issue of material fact existed as to the true intent of the parties to the lease agreement.

As previously mentioned, the court below could have construed the written correspondence between the parties as an admission of liability from Fleming, as was argued below by

Luschen. A review of these letters reveals that this correspondence was a part of the negotiations, looking for a settlement of the dispute between Luschen, Fleming, and sublessees. " 'Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace, or settle a controversy without respect to legal liability, is not admissible against the person making it.' " *Bishop Cafeteria Co. v. Ford, supra* at 618, 129 N.W.2d at 593. If the district court inferred an admission of liability on the part of Fleming from this correspondence, it did so improperly. In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *Chadd v. Midwest Franchise Corp., ante* p. 502, 412 N.W.2d 453 (1987). 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. *Id.* Fleming was entitled to the benefit of any doubt as to the ultimate inferences to be drawn from the settlement negotiations.

The judgment entered by the court against sublessees was clearly dependent upon the summary judgment entered against Fleming. The court held that Fleming's obligations as to the parking lot had been assumed by the sublessees by virtue of the sublease agreements. It is generally held that an "order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it." 5B C.J.S. *Appeal and Error* § 1951 at 514 (1958). See, generally, 5 Am. Jur. 2d *Appeal and Error* § 956 (1962). For this reason the judgment against Dolezals and Gdowskis must be reversed, due to its dependence on an erroneous summary judgment, which is also reversed.

REVERSED.

BOSLAUGH, J., concurs in the result.

KEITH COUNTY BANK & TRUST COMPANY, A NEBRASKA BANKING CORPORATION, APPELLEE, V. WHEAT BELT PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.

415 N.W.2d 459

Filed November 20, 1987. No. 86-031.

1. **Nebraska Power Review Board: Electricity: Jurisdiction.** The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
2. **Mortgages: Foreclosure: Receivers: Debtors and Creditors.** A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
3. **Receivers: Debtors and Creditors.** Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Thomas M. Sonntag of John Peetz, P.C., for appellant.

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, O'Donnell, Merritt & Williams, P.C., for appellee.

Patrick W. Healey of Healey, Wieland, Kluender, Atwood & Jacobs, for amicus curiae Nebraska Rural Electric Association.

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

PER CURIAM.

Neal Batterman had become contractually obligated to pay for electricity provided by appellant, Wheat Belt Public Power District, a public corporation, to power irrigation wells during 1984 on lands in which Neal Batterman, Clarice Batterman, and Batterman & Sons, Ltd., a Nebraska corporation, had ownership interests. The Batterman interests were foreclosed upon, and appellee, Keith County Bank & Trust Company, a Nebraska banking corporation, was appointed foreclosure receiver to, among other things, preserve, protect, and manage the real estate, and to conserve and nurture it in a husbandlike manner. Wheat Belt thereafter informed the receiver that if the bills Neal Batterman had incurred before the receivership came

into existence were not paid, Wheat Belt would discontinue serving the receiver. The receiver responded by filing a declaratory judgment action against Wheat Belt, seeking, among other things, a declaration that the receiver was not obligated to pay Neal Batterman's bills and an injunction preventing Wheat Belt from disconnecting electricity to the wells. The district court granted a temporary injunction; Wheat Belt then counterclaimed, asking that the receiver be held liable for the bills Neal Batterman had incurred and that the temporary injunction be dissolved. Subsequently, the district court sustained the receiver's motion to dismiss its action, and the matter proceeded to trial on the merits of Wheat Belt's counterclaim. Thereafter, the district court dismissed the counterclaim and dissolved the temporary injunction. This appeal followed. Wheat Belt assigns as error the district court's (1) finding that it had subject matter jurisdiction, (2) granting of the temporary injunction, (3) finding that the receiver did not adopt Neal Batterman's contracts with Wheat Belt, and (4) dismissal of Wheat Belt's counterclaim. We affirm.

Wheat Belt first contends that subject matter jurisdiction of this dispute is lodged not in the district court but in the Nebraska Power Review Board. The contention rests on language in Neb. Rev. Stat. § 70-1017 (Reissue 1986), which declares that if "the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished . . . the matter shall be submitted to the board for hearing and determination." However, this court recently held, in *In re Complaint of Federal Land Bank of Omaha*, 223 Neb. 897, 395 N.W.2d 488 (1986), that the Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service; that the payment of another's delinquent charges is not a term of service contemplated by § 70-1017.

A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage. *Wells v. Farmers State Bank of Overton*, 124 Neb. 386, 246 N.W. 714

(1933). Having not perfected a lien on the real estate by reducing its claim to judgment, Wheat Belt seeks to make the receiver personally liable for Neal Batterman's delinquent debt. In other words, Wheat Belt endeavors to make the receiver, someone other than Neal Batterman, pay for electricity Wheat Belt provided in the past under contracts with Neal Batterman. Thus, the district court properly asserted subject matter jurisdiction.

The amicus curiae, Nebraska Rural Electric Association, invites us to consider Wheat Belt's second assignment of error, notwithstanding the fact it has been rendered moot by the dissolution of the temporary injunction. It is an invitation we decline, for the determination that the district court had jurisdiction over the subject matter of the dispute sufficiently addresses the suggested interest of the public in resolving whether a district court has the power to grant a temporary injunction in a dispute, jurisdiction of which is lodged in the Power Review Board.

The third assignment of error claims the district court erred in finding the receiver did not adopt Neal Batterman's contracts. Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership. See *Wells v. Farmers State Bank of Overton, supra*. Nevertheless, Wheat Belt presses the theory that in accepting the benefits of electric service, the receiver in this case adopted Neal Batterman's prior contracts with Wheat Belt and so came to stand in his shoes with respect to the delinquencies arising under those contracts. Wheat Belt first argues that as the receiver did not apply for service in its own right, it necessarily assumed the contracts executed by Neal Batterman. The fallacy in this position is that Wheat Belt had told the receiver electric service would not be provided unless Neal Batterman's past-due bills were paid. In the face of Wheat Belt's position, an application for service by the receiver would have been futile; instead, the receiver chose to challenge Wheat Belt's position in court. Wheat Belt's second argument, that since the receiver accepted the benefits of Neal Batterman's contracts, it must also accept the liabilities arising under those contracts, is equally spurious. The Neal Batterman contracts concerned

themselves with the service provided before the receivership came into existence; the receiver obtained no benefits under them whatsoever.

The resolution of the fourth and last assignment of error, that the district court erred in dismissing Wheat Belt's counterclaim, is controlled by the analyses of the first three assignments of error. Thus, the fourth assignment of error does not warrant separate discussion.

There being no merit to Wheat Belt's assignments of error, the decision of the district court is affirmed.

AFFIRMED.

STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLANT, V. ROBERT L. MEINS AND JANE M. MEINS, HUSBAND AND WIFE, ET AL., APPELLEES.

415 N.W.2d 462

Filed November 20, 1987. No. 86-288.

1. **Corporations: Mortgages: Foreclosure.** Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
2. **Demurrer: Pleadings: Judicial Notice.** On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
3. **Judicial Notice.** Courts take judicial notice of the public and general acts of Congress.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded for further proceedings.

James H. Dodson of Dodson and Dodson, and William H. Stowell, for appellant.

Rodney R. Smith of Smith & Boyd, for appellees Meins.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

Standard Federal Savings and Loan Association, plaintiff-appellant, filed its petition to foreclose a real estate mortgage on certain property in the town of Homer, Dakota County, Nebraska. Defendants-appellees Robert L. Meins and Jane M. Meins, the owners of the property, had given the mortgage to plaintiff's assignor.

In its petition, plaintiff set out that "Plaintiff is a Banking Association with its principal place of business in Gaithersburg, Maryland."

Defendants demurred to this petition, stating: "1. The Plaintiff has not legal capacity to sue in this matter; 2. There is a defect of parties, Plaintiff; 3. Plaintiff's petition does not state facts sufficient to constitute a cause of action . . . ."

This demurrer was sustained, and plaintiff was given 30 days "in which to amend its Petition." Plaintiff then filed an amended petition, in the same terms as its original petition but with two paragraphs added, as follows:

> 2. That the Plaintiff does not have a certificate of authority to transact business in the State of Nebraska.
>
> 3. That Plaintiff is not required to have a certificate of authority to foreclose its mortgage against the Defendants herein by virtue of Neb. Rev. Stat. Sections 21-20,105 (1), (7), (8) and (9) (Reissue of 1983).

Defendants again demurred, setting out the same three grounds set forth in their original demurrer and adding a fourth paragraph, that "the issues raised by this Demurrer are Res Adjudicata [sic], having been fully decided by this Court by its Journal Entry . . . ."

The court found that "the Demurrer of the Defendants should be sustained for the reasons set out therein," and sustained the demurrer. After plaintiff advised the court that it chose not to further plead, the court dismissed the amended petition. Plaintiff timely appealed to this court.

The four grounds stated in defendants' demurrer to the amended petition are set out above. Examination of the

transcript shows that if plaintiff's statement as to its status is sufficient, the petition does state facts sufficient to constitute a cause of action, and there is no defect in parties plaintiff.

The fourth ground stated by defendants, that is, that the issues in defendants' demurrer to the amended petition had been decided in the court's ruling on defendants' demurrer to the original petition and the earlier ruling was res judicata, is without merit. The sustaining of defendants' first demurrer was not a final order. Plaintiff amended its petition to put the issue of its capacity to sue in sharp focus, and the court, after sustaining the demurrer, dismissed the case. It is from this order of dismissal that this appeal is taken.

The only arguably valid ground on which defendants' demurrer was sustained is that "[t]he Plaintiff has not legal capacity to sue . . . ." Plaintiff attacks that ground in its assignment of error that the trial court "erred in concluding that Appellant was required to register as a foreign corporation in Nebraska in order to foreclose its mortgage." We determine the trial court was in error and reverse the dismissal of plaintiff's action.

Neb. Rev. Stat. § 21-20,105 (Reissue 1983) provides in pertinent part:

> [A] foreign corporation shall not be considered to be transacting business in this state, for the purpose of being required to secure a certificate of authority pursuant to this section, by reason of carrying on in this state any one or more of the following activities:
>
> (1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;
>
> . . . .
>
> (7) Creating, as a borrower or lender, or acquiring indebtedness, mortgages, or other security interests in real or personal property;
>
> (8) Securing, collecting, or servicing debts or enforcing any rights in property securing the same;
>
> (9) Transacting any business in interstate commerce . . . .

Since we are deciding this case on demurrer, we accept the well-pleaded facts in the petition as true. *Knoell v. Huff*, 224

Neb. 90, 395 N.W.2d 749 (1986). Examination of those pleadings shows that plaintiff is a federal savings and loan association, that the note and the mortgage in question were executed in Nebraska, that the mortgage originally provided that payments due thereunder were to be made at the original mortgagee's office in San Antonio, Texas, that the holder of the original mortgage assigned its rights under the mortgage to plaintiff by an assignment executed in the State of Texas, and that plaintiff is a banking association with its principal place of business in Gaithersburg, Maryland.

Without regard to plaintiff's contention that § 21-20,105(1), (7), or (9) applies to this situation and operates to remove any requirement that plaintiff had to secure a certificate of authority before foreclosing the mortgage in question, we note that § 21-20,105(8) provides that a foreign corporation need not secure such a certificate for the activity of "[s]ecuring, collecting, or servicing debts or *enforcing any rights in property securing the same*." (Emphasis supplied.)

In this case plaintiff is clearly trying to enforce a right it has in property which has been mortgaged to secure the debt assigned to plaintiff. We hold that where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, § 21-20,105(8) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in that activity.

If there be any question that plaintiff has not identified itself as a foreign corporation, we note that 12 U.S.C. § 1464(a) (1982) provides, in part, that the Federal Home Loan Bank Board is authorized "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations . . . ." The petition shows that plaintiff, Standard Federal Savings and Loan Association, is a foreign corporation within the meaning of § 21-2002(2).

On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice. 61A Am. Jur. 2d *Pleading* § 279 (1981); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 149 Neb.

507, 31 N.W.2d 477 (1948). Courts take judicial notice of the public and general acts of Congress. 29 Am. Jur. 2d *Evidence* § 32 (1967).

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. GARY LEE JACKSON, APPELLANT.

415 N.W.2d 465

Filed November 20, 1987. No. 86-978.

Postconviction. An evidentiary hearing on a postconviction motion is required upon an appropriate motion containing factual allegations which, if proved, constitute an infringement of a constitutional right.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Reversed and remanded for further proceedings.

Peter K. Blakeslee, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

GRANT, J.

Defendant appeals from the denial of his petition for postconviction relief in the district court for Lancaster County. On April 17, 1985, after defendant was found guilty in a jury trial of three counts of burglary, of three different Lincoln public schools, he was sentenced to an indeterminate term of 2- to-4 years' imprisonment on each of the three counts. The sentences were to be served consecutively.

In that case defendant appealed to this court. Defendant's counsel filed a motion to withdraw as counsel pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Defendant then filed a pro se motion opposing withdrawal. Defendant's motion in opposition consisted of complaints about defense counsel's failure to call other witnesses or to investigate facts which these witnesses would purportedly testify to, thereby denying defendant effective assistance of counsel. This court granted counsel's motion to withdraw, and defendant's convictions and sentences were affirmed in *State v. Jackson*, 221 Neb. xx (case No. 85-445, Jan. 14, 1985).

On August 7, 1986, defendant filed a pro se "Motion to Vacate and Set Aside Judgement and Sentence," pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1985). The motion was in 14 numbered paragraphs, alleging generally the ineffective assistance of trial counsel and setting out specifically allegations of such ineffective assistance. On September 22, 1986, defendant filed an amended motion to vacate, with the same general allegations of ineffective counsel, but setting out specific allegations of such ineffective assistance in 50 paragraphs. Defendant prayed for a hearing on his motion and for an order requiring the State to show cause why his conviction should not be set aside. The State opposed defendant's motion. After a hearing at which defendant was present and requested counsel, defendant's motion was denied by the trial court's order that the "files and records and exhibits received show that defendant is entitled to no relief and an evidentiary hearing is not required. Motions of defendant for vacation of sentence are overruled. Motion of defendant for appointment of counsel is overruled."

On November 14, 1986, the defendant timely appealed. On November 17, upon the district court's own motion, an attorney was appointed to represent defendant on appeal to this court.

Defendant's four assignments of error may be consolidated into two: (1) The trial court erred in not determining that defendant had been denied the effective assistance of counsel at his trial; and (2) the court erred in not granting an evidentiary hearing on defendant's motion for postconviction relief.

With regard to the alleged error in not granting a hearing on defendant's postconviction motion, we are governed by our general rule that an evidentiary hearing is not required if the motion and the files and records of the case show that the defendant is not entitled to relief. § 29-3001; *State v. Rivers, ante* p. 353, 411 N.W.2d 350 (1987). On the other hand, the statute requires a "prompt hearing" on an appropriate motion containing factual allegations which, if proved, constitute an infringement of a constitutional right. *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985). It is obvious that defendant has a constitutional right to effective counsel. As will be shown below, the trial court erred in denying an evidentiary hearing on defendant's motion, because the record does not show that defendant was not entitled to a hearing.

Defendant's issues which he contends support his claim of ineffective counsel are grouped into five in his brief: (1) that his trial counsel failed to challenge, on fourth amendment grounds, the seizure of certain evidence from defendant's vehicle; (2) that his trial counsel failed to challenge, on fifth amendment grounds, statements obtained from defendant by police officers; (3) that trial counsel failed to adequately prepare for trial in that he took no depositions of any witnesses, failed to discuss trial strategy with the defendant, and failed to contact and call to testify witnesses provided to defense counsel by defendant; (4) that trial counsel "failed to object to testimony of defendant's witness Randy Sabin when said witness revealed that the prosecutor had phoned Sabin and questioned him on the pretense that the prosecutor was defendant's attorney"; and (5) that trial counsel failed to object to the prosecutor's questions of defendant relating to his prior criminal record.

The general rules in considering appeals from the denial of postconviction relief are that a motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal, that a defendant seeking postconviction relief has the burden of establishing a basis for such relief, and that the findings of the district court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Rivers, supra; State v. Evans*, 224 Neb. 64,

395 N.W.2d 563 (1986); *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

With specific regard to the issue of relief sought on the basis of ineffective counsel, this court has adopted a two-part test: first, the attorney must perform at least as well as an attorney in the area with ordinary skill in criminal law; and, second, the attorney must conscientiously protect the defendant's interests. In addition, the defendant must show that in the absence of the attorney's error, there is a reasonable probability that the result would have been different. *State v. Rivers, supra; Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We reserve consideration of defendant's first claim. With regard to defendant's second claim concerning defendant's statement, the record shows that at the time of the police interview with defendant, he was not under arrest nor in custody; and the record also shows that the statement was not used in the prosecution's case in chief, but only in remote impeachment as to whether defendant had said he had "nothing against them [the schools]." Defendant's objection in this contention is without any merit.

With regard to defendant's third contention, that his counsel failed to properly investigate and adequately prepare for trial, the record shows that counsel ably represented defendant in a lengthy preliminary hearing, in which six prosecution witnesses testified and were thoroughly cross-examined. Before trial, defendant's counsel presented two motions in limine, which were both granted by the trial court. The police reports were examined by counsel and by defendant. During the trial, defendant's counsel vigorously cross-examined all the prosecution witnesses and presented four witnesses and the defendant as witnesses for the defense. With regard to the alleged failure to call other witnesses, examination of the record shows that the witnesses whom defendant has now identified as those who should have been called would probably not have been helpful to defendant and, in some cases, might well have further damaged his cause. Further, the decision to call, or not call, witnesses is a matter of trial strategy and within counsel's judgment. *State v. Evans, supra; State v. Lofquest*, 223 Neb.

87, 388 N.W.2d 115 (1986). Defendant's contention in this regard is without merit.

Defendant's fourth contention is that counsel did not object to the form of questions directed by the prosecutor to Randy Sabin, a witness called by defendant. On impeachment cross-examination this witness displayed confusion as to who had called him on the telephone before the trial. No prejudice could be deduced from this witness' confusion.

Defendant's fifth contention as to the ineffectiveness of his trial counsel raises the question of trial counsel's failure to object to the prosecutor's questions to defendant concerning defendant's past criminal record. The contention is without merit. The prosecutor merely established in five questions that defendant admitted he had been convicted of two felonies in the 10 years preceding the trial. Such questions were perfectly proper.

Defendant's first claim presents a different situation. It is settled law that, on postconviction appeals, this court generally does not consider issues that could have been raised on a direct appeal and that the burden is on a defendant seeking postconviction relief to allege facts which show he is entitled to such relief. In this case we are asked to consider the issue that defendant's counsel was ineffective in that he did not file a motion to suppress evidence vital to the State's case against defendant and did not object to the receipt of that evidence at trial on the basis it had been unconstitutionally seized from defendant. The resolution of that issue cannot be made until the facts of defendant's arrest, and subsequent search of his car, are known to this court. Review of a criminal case under our rule 3B does not determine such facts. For that question to be submitted to this court in a proceeding under rule 3B, defendant's counsel would have to attack his own performance and to allege and show that he had been ineffective.

If the allegations in a postconviction motion as to ineffective counsel can be disposed of by a consideration of the record—as is the case in the other four contentions in defendant's postconviction motion and brief in this case—there is no need for an evidentiary hearing. Consideration of the record before us does not give us an answer to defendant's first contention.

The facts concerning the defendant's arrest, as shown by the files and records, are almost completely unknown to this court. Defendant's amended postconviction petition, while not as artful as it might be, is sufficient to raise the issue of the lawfulness of his arrest. Defendant alleges an illegal search. The files and records of the case do not show that "defendant is entitled to no relief." If defendant can establish his allegations, he might be entitled to relief.

There may well be an explanation of the arrest in the files or records of the trial court which shows clearly that the arrest was proper and that counsel did not challenge the receipt of the seized items as a matter of strategy. The record before us, however, shows only that defendant was arrested at 40th and Van Dorn Streets in Lincoln, Nebraska. No arrest warrant or search warrant is mentioned. The State, in its brief at 4, states: "No pretrial motion was made to suppress this evidence [the items seized from defendant's car which were later identified as the same items taken from the schools]." No objection was made at the trial as to the receipt of those items, except on the basis of identification.

Defendant should be afforded an evidentiary hearing on the sole issue of the seizure of the knife and handcuffs from defendant's automobile at the time of his arrest. The cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting.

It is fundamental that an application for postconviction relief must allege facts which, if true, would entitle the prisoner to relief.

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

(Syllabus of the court.) *State v. Russ*, 193 Neb. 308, 226 N.W.2d 775 (1975).

The amended motion to vacate and set aside judgment and

sentence filed by the defendant is a 10-page "shotgun" type pleading. Paragraph 4 alleges that exhibits Nos. 22 (pocketknife) and 24 (handcuffs) were obtained "by way of an illegal search" by arresting officers. No fact is alleged which would explain why the defendant contends the search was illegal. More importantly, no fact is alleged which might be the basis for a contention that the arrest was illegal.

If a hearing is to be granted upon the basis of a pleading such as that filed in this case, then there is no longer a requirement that an application for postconviction relief plead *facts* as distinguished from conclusions.

CAPORALE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. JOHN GOLDEN, APPELLEE AND CROSS-APPELLANT.

415 N.W.2d 469

Filed November 20, 1987. No. 86-1019.

Pleas. Where a defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, his plea is not voluntary.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

George Rhodes, Custer County Attorney, for appellant.

Steven O. Stumpff of Stumpff Law Office, for appellee.

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

COLWELL, D.J., Retired.

Appellee, John Golden, was charged in two counts with assaulting an officer in the third degree, Neb. Rev. Stat. § 28-931(1) (Reissue 1985), a Class IV felony, and with using a firearm to commit a felony, Neb. Rev. Stat. § 28-1205(1) (Reissue 1985), a Class III felony. Golden entered pleas of guilty

to both charges, and he was sentenced to 3 years' probation subject to conditions including 90 days in jail.

The State appeals this sentence, pursuant to Neb. Rev. Stat. §§ 29-2320 to 29-2325 (Reissue 1985), assigning these errors: (1) The court erred in failing to impose two consecutive sentences upon the defendant, and (2) the sentence imposed was excessively lenient.

Golden cross-appeals, assigning as error that the trial court failed to advise him that, according to § 28-1205(3), the sentence for using a firearm to commit a felony must be served consecutively to any other sentence.

Briefly, the facts were that Golden, age 56 years, had a history of alcoholism accompanied by physical violence. In the late evening of June 25, 1986, Golden became intoxicated at his home in Broken Bow, Nebraska; he quarreled with his wife and struck her; and she summoned the police. Golden's recollection of later proceedings is vague. Then followed a full-scale scenario of a SWAT-team-type standoff and arrest of Golden, including his threatening the officers with a gun and statements such as "stay there or I'll drop you," "I've got a dead shot at you," and "I'm going to take one of you, I'm going to take you all." Golden was forcibly arrested, and two officers were bruised and scratched.

Golden was originally charged with seven felonies which, after a plea bargain including his agreement to enter guilty pleas, were reduced to the two felonies involved here.

We first consider Golden's cross-appeal, which is essentially that his guilty pleas were involuntary. At the November 13, 1986, arraignment, the judge conducted a lengthy and detailed explanation of Golden's constitutional rights that he would waive in the event of his guilty pleas to the two charges, as provided in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The lone exception was an error in the explanation of the maximum possible penalties that might be imposed, which was critical, since in the event of Golden's conviction of the crime of using a firearm to commit a felony, the provision in § 28-1205(3) that "sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed" is a mandate to a sentencing court to impose a consecutive

sentence. *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985).

Where a defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, his plea is not voluntary. See, *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983); *People v Woeltje*, 112 Mich. App. 699, 317 N.W.2d 230 (1982).

The judge explained that the penalty for third degree assault on an officer was "a maximum sentence of 5 years in prison or $10,000 fine or both and there is no minimum" and that using a firearm to commit a felony carries "a maximum sentence of 20 years in prison or $25,000 fine or both and there is a minimum of one year imprisonment." He further explained that he could impose the sentences "concurrently or consecutively." Golden was not informed that § 28-1205(3) mandated a consecutive sentence.

Since Golden was misinformed concerning the mandatory requirement of a consecutive sentence, § 28-1205(3), and the record does not otherwise affirmatively show that he understood that statutory requirement, and since the guilty pleas to the two related separate charges were the result of plea bargaining, we conclude that both pleas of guilty were involuntary and that both convictions should be set aside. This cause is remanded for further proceedings consistent with this opinion.

It is not intended that this disposition is a response to the unanswered question presented in *State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986).

It is not necessary to discuss appellant's assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DUANE P. O'NEILL, APPELLANT.

415 N.W.2d 470

Filed November 20, 1987. No. 86-1078.

Courts: Records: Appeal and Error. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.

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

Earl D. Ahlschwede of Ahlschwede, DeBacker & Truell, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

PER CURIAM.

The appellant, Duane P. O'Neill, was charged with the offense of operating a motor vehicle while under the influence of alcohol or when he had ten-hundredths of 1 percent of alcohol in his body fluid. Neb. Rev. Stat. § 39-669.07 (Reissue 1984). In the same count, the appellant was alleged to have twice previously been charged with and convicted of a violation of § 39-669.07.

On June 11, 1986, a Hall County Court jury found the appellant guilty of the principal offense. The court accepted the verdict and set a sentencing date for July 17, 1986, at 9:30 a.m. O'Neill appealed the county court's decision to the district court for Hall County. The district court affirmed, and O'Neill now appeals the decision of the district court affirming the decision of the county court.

We do not know what was before the district court, but the transcript here presented does not contain a copy of the sentencing judgment or sentencing proceedings, if any. In order for the district court to review, on appeal, the decision of the county court, it was necessary that there should be before the district court the judgment pronounced by the county court.

The appellant must present to this court a record of the judgment reviewed by the district court to enable this court to review its action. *Goldsmith v. Wix*, 43 Neb. 573, 61 N.W. 718 (1895). There being no county court judgment in the record here presented, the judgment of the district court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEO L. NEWSON, JR., APPELLANT.

415 N.W.2d 471

Filed November 20, 1987. No. 87-128.

Convictions: Appeal and Error. In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

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

Thomas M. Kenney, Douglas County Public Defender, and Cathy K. Bashner, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

CAPORALE, J.

Pursuant to the jury's verdicts, defendant, Leo L. Newson, Jr., was adjudged guilty of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1985) and of using a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). He appeals and assigns as his sole error the trial court's determination that the evidence is sufficient to sustain

the jury's verdicts. We affirm.

On the afternoon of June 26, 1986, Anton Poggenpohl and his wife, Deborah, were at their vacuum cleaner retail sales store at 6065 Ames Avenue in Omaha. While Mr. Poggenpohl was talking on the telephone, he noticed a man walk into the store at about 3:45 p.m. and look at some vacuum cleaners. While both of the Poggenpohls glanced at the man, neither of them paid much attention to him, thinking he was a customer on whom Mr. Poggenpohl would wait as soon as he finished his telephone conversation. When Mr. Poggenpohl approached the man, the latter demanded money and pointed an object draped with an orange-red dish towel, which he held in his right hand, at Mr. Poggenpohl's stomach. At first, Mr. Poggenpohl thought the matter was a joke, but changed his mind after he reached out, touched the towel, saw a barrel, and realized the object in the man's hand was a gun. Because there was no cash register, Mr. Poggenpohl gave the robber $75 to $100 from his wallet. The robber then turned and left through the front door of the store. Both Mr. Poggenpohl and his wife, who had been watching the 30- to 45-second confrontation from behind the counter, went out the front door to see where the robber had gone, but he was not in sight. Mrs. Poggenpohl then called the police.

Defendant is 6 feet 2 inches tall and weighs 175 pounds. According to the police report, Mrs. Poggenpohl said the robber was 5 feet 9 inches tall and weighed 160 pounds; however, Mrs. Poggenpohl testified she told the police the robber was over 6 feet tall and that the report was incorrect in the description attributed to her. Mr. Poggenpohl told police the robber was 5 feet 11 inches tall and weighed 160 pounds. However, at the preliminary hearing Mr. Poggenpohl testified that the robber weighed 190 pounds. According to Mr. Poggenpohl, the robber wore faded jeans, a T-shirt, and tennis shoes.

On June 30, 1986, Police Officer James Reuting showed the Poggenpohls 48 photographs, which they viewed independently of each other. Mrs. Poggenpohl said she was "pretty sure" the photograph of the defendant depicted the man who had robbed them. Mr. Poggenpohl identified the

defendant from the same photograph, saying he was "about ninety percent sure" and "[t]hat's the one that looked a lot like the guy that robbed us."

On July 15, 1986, at approximately 11 p.m., Police Officer John Skanes had occasion to stop a vehicle near Phil's Foodway store at 30th Street and Ames Avenue in Omaha. He asked the driver for his operator's license, but the driver, who identified himself as Danny Robinson, could not produce one. A second officer arrived later, recognized the driver as the defendant, and informed Skanes that a felony warrant had been issued for defendant's arrest.

On July 16, 1986, the Poggenpohls viewed a lineup independently of each other, and each identified defendant as the man who had robbed them. During the course of the trial, each of the Poggenpohls again identified defendant as the robber.

Defendant called three witnesses at trial. The first of these, Cheryl Jones, testified that she saw the defendant in the early morning of June 26, 1986, because he had spent the night at her home, at 4301 Boyd Street. According to Jones, the pair left her home sometime around 12 noon and went to a body shop. They then left the body shop for the home of defendant's sister, Neona Newson, arriving there at approximately 1:45 p.m. They left Ms. Newson's home at approximately 2 p.m. for Phil's Foodway so that defendant could purchase a birthday card for his mother. Defendant then dropped Jones off at her home at approximately 2:30 p.m. Jones also testified that defendant had cashed a $475 check he had received as a settlement for a car accident 2 days earlier and that defendant told her he had money from an unemployment check he had previously received. According to her, defendant was wearing a white shirt, white pants, and red, white, and black tennis shoes on that day.

Ms. Newson testified that Jones and the defendant had arrived at her home on June 26 at approximately 2 p.m. and left 10 to 15 minutes later for Phil's Foodway so that defendant could buy a birthday card for their mother.

Defendant's mother, Verna Louise Swan, testified that defendant arrived at her home on June 26, 1986, at

approximately 3:25 or 3:30 p.m. and brought her $20, enclosed in a birthday card, and a carton of cigarettes. Defendant then went to a local store and brought back beer, some of which he and his mother shared. According to Swan, defendant left her home at 4 p.m. or later. She remembered the date because it was 1 week after her birthday. Swan confirmed Jones' description of the clothing defendant was wearing on the day of the robbery.

Defendant testified that after he left Jones at her home at approximately 2:20 p.m., he picked up three individuals and purchased beer, arriving then at his mother's home at 3:15 or 3:30 p.m. He left his mother's home at 3:50 or 4 p.m., and the four went to a park at 20th and Pinkney Streets where they drank and socialized with other friends. The defendant also testified that the reason he had given Officer Skanes a false name when he was stopped on July 15, 1986, was because he had been convicted for driving while intoxicated and was at that time driving on a suspended license.

This case is controlled by the well-settled rule that in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Charron, post* p. 871, 415 N.W.2d 474 (1987); *State v. Moore, ante* p. 347, 411 N.W.2d 345 (1987); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987).

The testimony of the Poggenpohls more than adequately supports the jury's findings of guilt; the Poggenpohls separately and independently of each other identified defendant, both from photographs and from seeing him in a lineup, as the man who had robbed them. Each also identified him at trial. These identifications are not rendered unbelievable as a matter of law because of the discrepancies in the Poggenpohls' earlier descriptions.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH R. CHARRON, APPELLANT.

415 N.W.2d 474

Filed November 20, 1987. No. 87-175.

1. **Convictions: Appeal and Error.** In determining whether the evidence is sufficient 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 the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
2. **Sexual Assault.** In order for one to commit the offense of sexual assault in either the second or third degree, the victim must be subjected to actual sexual contact.
3. **Sexual Assault: Proof.** Third degree sexual assault does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of third degree sexual assault, sentenced to 90 days in jail, and fined $500. Upon appeal to the district court the judgment was affirmed. Upon appeal to this court the defendant contends the evidence was insufficient to support the conviction.

> In determining whether the evidence is sufficient 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 the explanations, or weigh the evidence. Such matters are for the trier of fact, and the conviction must be sustained if, taking the view of the evidence most favorable to the State, there is

sufficient evidence to support the conviction.

State v. Williams, ante p. 647, 648, 413 N.W.2d 907, 908 (1987); *State v. Duff, ante* p. 567, 412 N.W.2d 843 (1987); *State v. Moore, ante* p. 347, 411 N.W.2d 345 (1987); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987).

Sexual assault, third degree, is defined in Neb. Rev. Stat. § 28-320 (Reissue 1985):

> (1) Any person who subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in either the second degree or third degree.
>
> . . . .
>
> (3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

Sexual contact is defined in Neb. Rev. Stat. § 28-318 (Reissue 1985) as:

> (5) Sexual contact shall mean the intentional touching of the victim's sexual or intimate parts or *the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts.* Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. *Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.*

(Emphasis supplied.)

In order for one to commit the offense of sexual assault in either the second or third degree, the victim must be subjected to actual sexual contact. *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986).

The record shows that on June 4, 1986, at about 12 noon, the victim and her 2-year-old son were at the Sears store in the Crossroads shopping center in Omaha, Nebraska. The victim's car was parked on the store's west side, in front of the package

pickup portion of the store. While she was leaning into the back seat and placing her child in his carseat, the victim was grabbed from behind. She described the incident in the following manner: "He grabbed my rear end really hard forcibly with his hand and pushed and hurt, and especially with one finger." The victim testified that the touching was "on the outside of my clothing" and that the assailant's hand pushed on her vaginal area, causing pain.

Immediately following the incident, the victim turned around and saw the defendant walk across the parking lot. The victim testified that as the defendant walked away after the incident, his head was bouncing and he was laughing.

The victim followed the defendant until he reached his car, which was parked at the western end of the parking lot. The victim wrote down the license number of the defendant's car and reported the license number to the police, as well as descriptions of his person and his car. Later, the victim identified the defendant in a photographic lineup and at the trial.

The license number was traced to the defendant, and he was called to police headquarters concerning the June 4 incident. The defendant admitted that he had been in the parking lot of Children's Palace, a store located immediately to the west of the Sears parking lot, but denied having been in Sears' parking lot and denied any involvement in the incident described by the victim.

The defendant contends that the evidence failed to show that his conduct in touching the victim could be "reasonably construed as being for the purpose of sexual arousal or gratification of either party" as required by the statute.

The statute does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose. The act of the defendant in grabbing a woman from behind, pressing forcefully in the vaginal area, and then walking away, laughing and bobbing his head, were circumstances from which the trial court could find that the conduct of the defendant was for the purpose of his sexual arousal or gratification.

The evidence was sufficient to support the finding of guilty,

and the judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF COREY RICHTER, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. COREY RICHTER, APPELLANT.
415 N.W.2d 476

Filed November 20, 1987. No. 87-256.

1. **Criminal Law: Statutes.** While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
2. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
3. **Criminal Law: Words and Phrases.** "Preservation of the peace," as used in Neb. Rev. Stat. § 28-906(1) (Reissue 1985), means maintaining the tranquillity enjoyed by members of a community where good order reigns.
4. **Words and Phrases.** The word "physical" describes that which has material, substantive, and objective existence.

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

Charles F. Fitzke, Scotts Bluff County Public Defender, for appellant.

Douglas Warner, Deputy Scotts Bluff County Attorney, for appellee.

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

CAPORALE, J.

The county court sitting as a juvenile court found that the juvenile, Corey Richter, violated the provisions of Neb. Rev. Stat. § 28-906(1) (Reissue 1985) by obstructing peace officers, as a consequence of which the court had jurisdiction pursuant to the provisions of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 1986). The county court thereupon committed Richter to the

care and custody of the Department of Correctional Services for placement at the Youth Development Center-Kearney. Richter then appealed to the district court. That court affirmed the judgment of the county court, and Richter appealed to this court. His assignment of error questions the sufficiency of the evidence to support a finding that he obstructed the officers. We affirm.

Section 43-247(1) provides that the juvenile court shall have jurisdiction of any juvenile "who has committed an act . . . which would constitute . . . an infraction under the laws of this state . . . ." Section 28-906(1) provides that one

> commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he intentionally obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer . . . acting under color of his official authority.

Richter had been staying with his grandmother who, on October 20, 1986, asked the police to remove him from her home. Officers Mike Brunz and Douglas French, both in uniform, went to the grandmother's home in a marked police car to so do. As they approached the home, they could hear Richter arguing with and cursing and yelling at his mother. Officer French told Richter they were going to take him to a youth shelter for the evening. Richter ran away as the officers were escorting him to their automobile. Officer French then pursued Richter on foot, but lost sight of him. The officers found Richter approximately an hour later near his grandmother's home. Upon seeing the officers Richter started to flee again, but returned peacefully after his mother yelled for him to stop. No physical restraints were ever placed on Richter, nor did Richter ever resort to force.

Richter first argues he did not violate § 28-906(1) for the reason that the officers were engaged neither in enforcing the penal law nor in preserving the peace. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987);

State v. Lynch, 223 Neb. 849, 394 N.W.2d 651 (1986). Moreover, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). "Preservation of the peace," as used in § 28-906(1), means maintaining the tranquillity enjoyed by members of a community where good order reigns. See *State v. Sukovaty*, 178 Neb. 779, 135 N.W.2d 467 (1965). It can hardly be said that officers engaged in removing from the scene one who was arguing with and yelling and cursing at his mother were not engaged in preserving the peace, irrespective of what brought them to the scene in the first instance. Since obstructing an officer engaged in preserving the peace constitutes a violation of § 28-906(1), we need not consider whether the officers were at the same time enforcing the penal law.

Richter next argues that in order to establish a violation of § 28-906(1), the State must establish that he used, or threatened to use, some physical means to thwart the officers; that simply running away is not such an act and therefore does not violate the statute.

While cases from other jurisdictions can be found which hold that flight alone violates similar statutes, *State v. Jarvis*, ____ W. Va. ____, 310 S.E.2d 467 (1983), and *Tankersley v. State*, 155 Ga. App. 917, 273 S.E.2d 862 (1980), and which suggest to the contrary, *People v Landrie*, 124 Mich. App. 480, 335 N.W.2d 11 (1983), *disavowed on other grounds People v Wells*, 138 Mich. App. 450, 360 N.W.2d 219 (1984), they are not particularly helpful, for each statute employs different language. To the extent relevant to this case, § 28-906(1) prohibits the use or threat of "violence, force, physical interference, or obstacle" which intentionally "obstructs, impairs, or hinders" the preservation of the peace. Even if the word "physical" modifies "obstacle," as well as "interference," the act of running away was a "physical" obstacle in the sense that it was an act which had material, substantive, and objective existence. *Clemmons v. Insurance Co.*, 2 N.C. App. 479, 163 S.E.2d 425 (1968); Webster's Third New International Dictionary, Unabridged 1706 (1981). Since the physical obstacle interposed by the act of running away

obstructed, impaired, or hindered the officers' efforts to preserve the peace, Richter committed an infraction of a law of this state, and the juvenile court had jurisdiction over him.

AFFIRMED.

THE FEDERAL LAND BANK OF OMAHA, A CORPORATION, APPELLANT, V. MARLEN JOHNSON, APPELLEE.

415 N.W.2d 478

Filed November 20, 1987. No. 87-495.

1. **Judgments: Final Orders: Appeal and Error.** There can be no appeal to this court until there has been a judgment or final order in the court from which the appeal is taken.
2. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
3. **Judgments: Final Orders.** A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.

Appeal from the District Court for Dixon County: ROBERT E. OTTE, Judge. Appeal dismissed.

Gregory N. Lohr, for appellant.

Rodney R. Smith of Smith & Boyd, for appellee.

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

WHITE, J.

This is an appeal from the district court for Dixon County. The district court sustained the demurrers of defendant to plaintiff's November 21, 1986, petition and to the two amended petitions which followed.

The Federal Land Bank of Omaha's petitions alleged, in essence, that it had a security interest in crops grown on real estate owned by defendant Marlen Johnson's brother. The security interest allegedly arose pursuant to a real estate

mortgage held and recorded by The Federal Land Bank, which encumbered real estate owned by Johnson's brother and sister-in-law.

Appellant further alleged that Johnson was the assignee of his brother's interest in the above-mentioned crop and that Johnson harvested and disposed of at least part of the crop without the consent or knowledge of The Federal Land Bank. Appellant sought a judgment against Johnson for the value of its interest in the crop, since it had previously foreclosed on the real estate mortgage and the proceeds were insufficient to satisfy the debt. Appellant alleges that its security interest in the crop is superior to that of Johnson.

The district court sustained Johnson's demurrers for failure to state a cause of action in the original petition and two amended petitions. The last order of the lower court, entered on April 27, 1987, and filed May 1, reads, in part, as follows:

> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that Defendant's Demurrer to Plaintiff's Second Amended Petition should be and the same is hereby sustained.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff be and it hereby is allowed ten days in which to further amend its Petition and upon Plaintiff's failure to so amend, this matter shall be automatically dismissed at Plaintiff's cost.

The record before this court reveals no further order or judgment from the district court in this matter.

Appellant elected to prosecute an appeal from the April 27 order rather than to amend its petition. Appellant's actions are premature. It is fundamental that there can be no appeal to this court until there has been a judgment or final order in the court from which the appeal is taken. *McCook Equity Exch. v. Cooperative Serv. Co.*, 223 Neb. 197, 388 N.W.2d 811 (1986). A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987).

The April 27 order of the district court was not a "final determination of the rights of the parties" as contemplated by

Neb. Rev. Stat. § 25-1301 (Reissue 1985). The order was conditional in that *if* appellant had amended its petition, the case would have continued. As this court noted in *Lemburg v. Adams County, supra* at 292, 404 N.W.2d at 431, "a conditional judgment is wholly void because it does not 'perform in praesenti' and leaves to speculation and conjecture what its final effect may be." Quoting from *Wallace v. Hankins*, 541 S.W.2d 82 (Mo. App. 1976).

The April 27 conditional order of the district court was not a final judgment, and an appeal cannot be taken therefrom.

APPEAL DISMISSED.

ROBERT J. LUBY AND PATRICIA A. LUBY, APPELLANTS, V. CBS REAL ESTATE COMPANY ET AL., APPELLEES.

415 N.W.2d 480

Filed November 20, 1987. No. 87-807.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for further proceedings.

Debra R. Nickels of Welsh & Sibbernsen, for appellants.

Richard E. O'Toole of Walentine, O'Toole, McQuillan & Gordon, for appellees.

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

PER CURIAM.

The plaintiffs-appellants, Robert J. and Patricia A. Luby, allege they were damaged by the conduct of defendants-appellees, CBS Real Estate Company, Madeline Begley, and Jeannie Neff. The district court sustained the demurrer of the defendants on the basis that as real estate professionals they were entitled to the protection of the 2-year period of limitations applicable to professionals, embodied in Neb. Rev.

Stat. § 25-222 (Reissue 1985). *Tylle v. Zoucha, ante* p. 476, 412 N.W.2d 438 (1987), holds that real estate brokers are not professionals within the meaning of that statute. Accordingly, the judgment of the district court is hereby reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KAREN L. BARD, APPELLANT, V. COX CABLE OF OMAHA, INC., A NEBRASKA CORPORATION, AND CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEES.

416 N.W.2d 4

Filed November 25, 1987. No. 85-526.

1. **Demurrer.** In considering a demurrer, a court accepts as true all the facts pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Quo Warranto: Franchises.** Absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto.
3. **Public Utilities: Rates: Actions.** In order to judicially challenge a rate set by a legislative body, one must allege a special injury peculiar to himself or herself aside from and independent of that suffered by the nonsubscribing general public.
4. **Municipal Corporations: Rates: Actions.** Before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality.
5. _____: _____: _____. One is excused from making a demand upon a municipality to adjust a rate if such demand would be unavailing.
6. **Constitutional Law: Rates: Actions.** Courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law.
7. **Telecommunications: Rates: Actions.** The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), does not preclude state judicial review of basic and nonbasic community antenna television service rates charged prior to December 29, 1986.
8. **Demurrer: Pleadings: Actions.** Pleadings in ordinary actions are to be liberally construed; if with such a construction a petition states a cause of action, a demurrer is to be overruled.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

J. Patrick Green, Martin A. Cannon, and Larry W. Myers, for appellant.

Frank F. Pospishil and Harvey B. Cooper of Abrahams, Kaslow & Cassman, and Brent N. Rushforth and James M. McElfish, Jr., of Dow, Lohnes & Albertson, for appellee Cox Cable.

Herbert M. Fitle, Omaha City Attorney, and Timothy M. Kenny, for appellee City of Omaha.

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

PER CURIAM.

Plaintiff-appellant, Karen L. Bard, seeks an adjudication under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), that the community antenna television service franchise granted by the defendant-appellee City of Omaha to the defendant-appellee Cox Cable of Omaha, Inc., a Nebraska corporation, is void or, in the alternative, that the rates set by the city and charged by Cox Cable are excessive, and for other relief. The district court, after sustaining the separate demurrers of the city and of Cox Cable, dismissed Bard's amended petition. The five errors which Bard assigns to the district court's order of dismissal merge to challenge the district court's determinations that (1) she lacks the capacity to sue, (2) the court lacks subject matter jurisdiction, and (3) she has failed to state a cause of action. We reverse and remand for further proceedings.

This is the third suit concerning the Omaha-Cox Cable franchise to find its way to this court, the other two being *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982), and *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982). In this third suit Bard alleges that in March of 1980 Cox Cable and five other applicants, pursuant to invitation, submitted to the city their proposals for providing

community antenna television service to the city's residents. After holding public hearings, the city council adopted an ordinance granting a 15-year franchise to Cox Cable, pursuant to which the city's mayor signed a franchise agreement with Cox Cable in September of 1980.

In order to induce the city to award it the franchise, Cox Cable represented that it would include in its service a feature called "Interactive Data Exchange" (INDAX), which would allow users to bank, shop, check travel schedules, play games, and access various data sources. However, contrary to Cox Cable's statements and representations, INDAX did not then exist, Cox Cable knew it did not exist, and no such service presently operates anywhere. Each of the five city council members who voted for the franchise publicly stated that Cox Cable's representations regarding INDAX and the promise to deliver INDAX service were the factors which convinced him to vote in favor of awarding the franchise to Cox Cable. Even though Cox Cable's other services were not as high in quality as those proposed by the other companies, the promised INDAX service would have rendered Cox Cable's proposal superior in quality to the others and would have justified acceptance of the Cox Cable proposal, notwithstanding the fact its rates were in excess of those proposed by the other applicants.

The operative petition further alleges that (1) other than INDAX, the quality of services offered by the other applicants was equal to or better than that offered by Cox Cable; (2) the rates proposed by the other applicants were 5 to 20 percent lower than those charged by Cox Cable; (3) the services actually offered by Cox Cable are not as numerous, or as varied, as the services proposed by the other applicants; and (4) the rates approved by the city council under the franchise agreement are between 10 and 30 percent higher than rates charged by "other comparable CATV companies for comparable services in cities of comparable size elsewhere in the United States." The petition also asserts that Bard has subscribed to and paid for the services provided by Cox Cable since 1982. The petition concludes that the Cox Cable rates are excessive and unreasonable in violation of Neb. Rev. Stat. § 18-2201 (Reissue 1983), the due process clause of the 14th amendment to the U.S. Constitution, and

Neb. Const. art. I, §§ 1, 3, 16, 21, and 25.

Prior to filing this action, Bard, through her attorneys, on November 18, 1983, wrote the city a letter asking that public hearings be held to review Cox Cable's franchise and rates. The letter advised that if notice of such hearings was not received within 10 days, judicial relief would be sought. This letter referred to and incorporated a June 8, 1983, letter sent to the city by the same attorneys on behalf of another subscriber. That earlier letter also asked that the matter of Cox Cable's franchise and rates be put on the city council's agenda within 30 days. The city took no action in response to either letter.

Thus, Bard undertook to state two causes of action. The first seeks to void the franchise on the ground it was procured by fraud. The second seeks a judicial review of rates which are alleged to be arbitrary and unreasonable.

The city and Cox Cable each demurred pursuant to the provisions of Neb. Rev. Stat. § 25-806 (Reissue 1985), which provides that a defendant may demur to a petition when it appears from the face thereof that, among other things, (1) the plaintiff lacks legal capacity to sue, (2) the court lacks subject matter jurisdiction, or (3) the petition fails to state a cause of action. The five bases upon which each demurrer rests combine to assert the existence of each of the foregoing three statutory grounds, which parallel the findings made by the district court and correlate to the assignments of error presented by this appeal. Neither demurrer rests on the claim that several causes of action are improperly joined, also a statutory ground.

Because this case was decided by the district court on demurrers, we are required to accept as true all the facts pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but we do not accept as true the conclusions of the pleader. *Ambroz v. Cornhusker Square Ltd., post* p. 899, 416 N.W.2d 510 (1987); *Slusarski v. County of Platte, post* p. 889, 416 N.W.2d 213 (1987); *Knoell v. Huff,* 224 Neb. 90, 395 N.W.2d 749 (1986); *Midwest Messenger Assn. v. Spire,* 223 Neb. 748, 393 N.W.2d 438 (1986).

In connection with the first assignment of error, the finding that Bard lacks the capacity to sue, we concern ourselves first

with the prayer that the franchise be declared void.

The long-settled law of this jurisdiction is that, absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto. Neb. Rev. Stat. §§ 25-21,121 et seq. (Reissue 1985); *Clark v. Interstate Independent Telephone Co.*, 72 Neb. 883, 101 N.W. 977 (1904). No facts are pled from which it can be concluded that there has been an illegal expenditure of public funds or that taxes are affected. Thus, Bard lacks the legal capacity to maintain this action for the purpose of challenging the validity of the franchise.

As a subscriber to the franchise services, Bard has a special interest in the rates she pays and would benefit by a reduction of those rates. Thus, she alleges a special injury peculiar to herself aside from and independent of that suffered by the nonsubscribing general public. See, *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985); *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982).

We have also said that before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality. *Hall v. Cox Cable of Omaha, Inc., supra.* The rule is analogous to that employed in derivative actions by stockholders against private corporations. *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983); *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955). One might argue that the 10-day period specified in Bard's November 18, 1983, letter was unreasonably short, particularly in view of the circumstance that the period included two weekends and the Thanksgiving holiday. However, the fact the city made no response to a similar June 8, 1983, letter leads to the conclusion that the city would not have responded to Bard's letter no matter what time limit was set. Just as in a derivative action against a corporation a stockholder is excused from making a demand upon the corporation if such would be unavailing, *Anderson v. Clemens Mobile Homes, supra*, so, too, is one excused from making a

futile demand upon a municipality. *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 P. 826 (1899). Under the circumstances the 10-day demand upon the city was adequate.

We therefore conclude that Bard has the capacity to maintain this action insofar as it seeks a review of the rates she pays.

Consequently, with respect to the matter of rates, we reach the second assignment, that the district court erred in finding it lacked subject matter jurisdiction.

Section 18-2201 provides:

> The furnishing of community antenna television service is hereby declared to be a business affected with such a public interest that it must be regulated locally. All municipalities in Nebraska are hereby authorized and empowered, by ordinance, to regulate, to prohibit, and to consent to the construction, installation, operation, and maintenance within their corporate limits of all persons or entities furnishing community antenna television service. All municipalities, acting through the mayor and council or board of trustees, shall have power to require every individual or entity offering such service, subject to reasonable rules and regulations, to furnish any person applying therefor along the lines of its wires, cables or other conduits, with television and radio service. The mayor and council or board of trustees shall have power to prescribe reasonable quality standards for such service and shall regulate rate increases so as to provide reasonable and compensatory rents or rates for such service including installation charges. In the regulation of rate increases the procedure provided in section 18-2206 shall be used in any franchise granted or renewed after May 23, 1979. Such person or entity furnishing community antenna television service shall be required to carry all broadcast signals as prescribed by franchise and permitted to be carried by Federal Communications Commission regulations during the full period of the broadcast day of its stations.

Prior to its amendment in 1979, the pertinent language of § 18-2201 (Reissue 1977) provided that the "mayor and council or board of trustees shall have power to . . . regulate and fix

reasonable and compensatory rents or rates . . . ." 1969 Neb. Laws, ch. 119, § 1, p. 536-37. Thus, we agree with the district court's conclusion that any statutory authority it might have to review rates is limited only to the matter of rate increases. Since the suit is addressed to the rates as initially set rather than to an increase thereof, Bard has not stated a cause of action under the provisions of § 18-2201 (Reissue 1983).

Bard further alleges, however, that Cox Cable's rates violate the due process clause of the 14th amendment to the U.S. Constitution and several provisions of the Nebraska Constitution, including the due process clause contained in article I, § 3, thereof. The constitutional argument she makes limits itself to those due process clauses, and we, therefore, likewise limit our analysis to due process concerns.

Because the setting of rates for a regulated industry is a legislative act, the courts of this state lack the power to set rates. See *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N.W. 171 (1898). The courts do, however, have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law. See, *Reimer v. K N Energy, Inc.*, 223 Neb. 142, 388 N.W.2d 479 (1986); *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975); *Nebraska Telephone Co. v. State, supra; Capitol Cable, Inc. v. City of Topeka*, 209 Kan. 152, 495 P.2d 885 (1972); *Holton Creamery Co. v. Brown*, 137 Kan. 418, 20 P.2d 503 (1933); *Kiefer v. City of Idaho Falls*, 49 Idaho 458, 289 P. 81 (1930).

Thus, in the absence of overriding federal law, the district court possesses subject matter jurisdiction to determine whether Cox Cable's rates are so arbitrary and unreasonable as to be confiscatory.

The question at this point therefore becomes whether there exists any overriding federal law which divests the state courts of subject matter jurisdiction. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), provides, at § 543(c) (Supp. II 1984):

> In the case of any cable system for which a franchise has

been granted on or before the effective date of this subchapter [December 29, 1984], until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise—

(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

(2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service.

The relevant regulations promulgated under the act, specifically 47 C.F.R. § 76.33 (1986), provide in part:

(a) A franchising authority may regulate the rates of a cable system granted a franchise after December 29, 1984, and any cable system after December 29, 1986, subject to the following conditions:

(1) Only basic cable service as defined in § 76.5(pp) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. . . .

(3) A cable system once determined to be subject to effective competition shall not be subject to regulation for one year after any change in market conditions which would cause it to be determined not to be subject to effective competition.

(4) A cable system may automatically pass through to the basic service rate without franchising authority approval cost increases that are readily identifiable and entirely attributable to the provision of basic service. Rate increases of this type may be taken in addition to the automatic 5% annual rate increase to which the cable system may be entitled under the Title VI of the Communications Act.

(b) For franchises granted on or before December 29, 1984, a franchising authority may, until December 29, 1986, to the extent provided in the franchise agreement:

(1) Regulate the rates for the provision of basic cable service;

(2) Require the provision of any tier of service without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); and

(3) Regulate the rates for the initial installation or the rental of one set of the minimum equipment necessary to receive basic cable service.

(c) Any state or local law in existence on December 29, 1984, which limits or preempts regulation of rates for cable service by any franchising authority shall remain in effect until December 29, 1986, to the extent that it provides for such limitation or preemption.

(d) In establishing any rate for the provision of basic cable service by cable systems subject to paragraph (a) of this section, the franchising authority shall: (1) Give formal notice to the public; (2) provide an opportunity for interested parties to make their views known, at least through written submissions; and (3) make a formal statement (including summary explanation) when a decision on a rate matter is made.

(e) Any party may petition the Commission for relief of the provisions in this section in accordance with the provisions and procedures set forth in § 76.7 for petitions for special relief.

We conclude therefrom that the Cable Communications Policy Act of 1984 does not preclude state judicial review of the rates Cox Cable charged Bard from the date of filing of this action to December 29, 1986. What authority the city retains to regulate rates after that date, and thus for the courts of this state to review, cannot be determined at this stage of the proceedings.

Since Bard has the capacity to sue for the purposes of reviewing Cox Cable's rates, and the state district court, at the least, possesses subject matter jurisdiction to review the rates charged prior to December 29, 1986, we must address Bard's third and last assignment, that the district court erred in finding she failed to state a cause of action.

In making this determination we are guided by the principle

that pleadings in ordinary actions are to be liberally construed, and if with such a construction a petition states a cause of action, a demurrer is to be overruled. See, *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984); *Northport Irrigation District v. Farmers Irrigation District*, 125 Neb. 607, 251 N.W. 174 (1933).

The crucial allegations for the purpose of determining whether a cause of action has been stated are that Cox Cable promised to deliver services it does not and cannot deliver, and that its charges are as much as 30 percent higher than those otherwise available. These allegations support an inference that Cox Cable's subscribers are paying a rate which includes a charge for something that is not being delivered to them and that, to that extent, the rate is arbitrary and unreasonable such as to be confiscatory and therefore in violation of the due process clauses of the state and federal Constitutions. Thus, Bard has stated a cause of action for judicial review of the rate set by the city. Whether the evidence will prove her allegations is a different question, to be decided at another time.

For the reasons hereinabove stated, the district court's judgment of dismissal is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., and GRANT, J., not participating.

MARION SLUSARSKI AND CONRAD SLUSARSKI, APPELLANTS, V. COUNTY OF PLATTE, NEBRASKA, AND COUNTY OF MERRICK, NEBRASKA, APPELLEES.

416 N.W.2d 213

Filed November 25, 1987. No. 86-017.

1. **Demurrer: Pleadings.** Pleadings are to be liberally construed, and if so construed a petition states a cause of action, a demurrer thereto is to be overruled.
2. _____: _____. A demurrer which challenges the sufficiency of the allegations

is a general one.

3. _____: _____. In ruling on a general demurrer, a court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
4. **Waters.** Diffused surface waters which collect and concentrate in volume and velocity and flow into a natural depression, draw, swale, or other drainageway lose their character as diffused surface waters.
5. _____. A lower landowner may not obstruct waters which have collected and concentrated in volume and velocity from flowing through a natural depression, draw, swale, or other drainageway.
6. _____. The alteration of a natural drainageway for diffused surface waters is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances presented.
7. **Constitutional Law: Political Subdivisions Tort Claims Act: Eminent Domain: Damages: Actions.** When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
8. **Constitutional Law: Demurrer: Pleadings: Eminent Domain.** As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Reversed and remanded for further proceedings.

Raymond E. Baker of Law Offices of Raymond E. Baker, P.C., for appellants.

William T. Wright of Jacobsen, Orr, Nelson & Wright, P.C., for appellee County of Merrick, and Daniel D. Jewell of Jewell, Gatz & Collins, for appellee County of Platte.

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

CAPORALE, J.

Plaintiffs-appellants, Marion Slusarski and Conrad Slusarski, challenge the dismissal of their petition following the

sustainment of the separate demurrers of defendants-appellees, the Counties of Merrick and Platte. We reverse and remand for further proceedings.

The operative second amended petition asserts that Merrick and Platte Counties are "bodies politic," declares compliance with the relevant provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), as a condition precedent to bringing suit, and alleges that the Slusarskis are the lessees of a certain section of land in Merrick County which they farm and on which they had planted and cultivated certain crops. The petition further avers that the counties "jointly own and are responsible for a public road" abutting the east edge of the Slusarski leasehold, which road "acted as a dike" and prevented the flow of waters resulting from "rains, springs, or melting snows" across the leasehold, thereby flooding and damaging the Slusarskis' crops. Additionally, the petition states the aforesaid waters were not part of a watercourse or lake, and charges that but for the road said waters were "wont to flow in an easterly direction" across the Slusarski leasehold. The petition alleges the conduct of the two counties was "intentional," "unnecessary," and "unreasonable."

The counties take the position that the Slusarskis' operative petition fails to state a cause of action. In resolving this appeal we are bound by the rule that pleadings are to be liberally construed, and if so construed a petition states a cause of action, a demurrer thereto is to be overruled. See *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984). Moreover, a demurrer which challenges the sufficiency of the allegations is a general one, *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965), in ruling on which a court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. See, *Ambroz v. Cornhusker Square Ltd., post* p. 899, 416 N.W.2d 510 (1987); *Bard v. Cox Cable of Omaha, Inc., ante* p. 880, 416 N.W.2d 4 (1987); *Standard Federal Savings & Loan Assn. v. Meins, ante* p. 853, 415 N.W.2d 462 (1987); *Knoell v. Huff,* 224 Neb. 90, 395 N.W.2d 749 (1986).

In *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962), this court determined, on appeal following a trial on the merits, that an upper proprietor was entitled to a mandatory injunction compelling the lower proprietor to remove the earthen embankment the latter had erected along a boundary of his land, where waters collected and concentrated in volume and "flowed in a state of nature" through a depression or drainageway. *Id.* at 309, 113 N.W.2d at 201. In so holding, this court determined that the waters in question were not diffused surface waters and announced that

> diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply. The proper rule in such cases is generally stated in 56 Am. Jur., Waters, § 75, p. 562, as follows: "The great weight of authority, however, is to the effect that both under the civil-law rule as to surface waters and under the so-called 'common-law' or 'common enemy' rule, a natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. Thus, it has been held that it is the duty of a lower landowner who builds a structure across a natural drainway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein, and that this is a continuing duty."

Id. at 306, 113 N.W.2d at 200.

In *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985), the landowners claimed that a bridge built by the county obstructed the drainage of waters which collected on their lands, and sought to enjoin continuation of the obstruction and to have the former drainageway restored. In affirming the dismissal of the landowners' action after a trial on the merits, this court noted that the landowners had the burden of proving

that a drainageway existed before the county made its alteration, that the drainageway was formed and existed in a state of nature, and that the drainageway carried water from a higher to a lower estate. We concluded that since the landowners failed to prove the drainageway was a natural one, they had failed to meet their burden of proof.

More recently, in *Johnson v. NM Farms Bartlett, ante* p. 680, 414 N.W.2d 256 (1987), we said that the alteration of a natural drainageway for diffused surface waters is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances presented. Accord *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985). See, also, *Nickman v. Kirschner*, 202 Neb. 78, 273 N.W.2d 675 (1979); *Arthur v. Glover*, 82 Neb. 528, 118 N.W. 111 (1908).

The petition before us alleges the waters in question, but for the road, were "wont to flow in an easterly direction." The inference to be drawn from the words "wont to flow," giving them the liberal construction required, is that there existed a natural drainageway, that is, one occurring in a state of nature.

The petition informs us the waters in question arose from rains, springs, or melting snows; they thus began as diffused surface waters. *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980). Whether they retained their character as such is unknown, for the petition does not state whether at some point the waters collected and concentrated in volume and velocity. However that may be, the petition nonetheless states a cause of action in tort. If the waters retained their character as diffused surface waters, the counties were free, as lower proprietors, to dam them, provided the interests of good husbandry were served thereby, it was necessary to do so, and it was reasonable under all the circumstances presented. But the petition asserts the damming was not necessary and was done unreasonably. If the waters collected and concentrated in volume and velocity, they lost their character as diffused surface waters, and the counties were not privileged to obstruct their flow through the natural drainageway.

Moreover, the petition states a second cause of action. It

must be inferred from the facts alleged that the counties own and maintain the road for a public use. The plaintiffs in *Parriott v. Drainage Dist. No. 6, ante* p. 123, 410 N.W.2d 97 (1987), brought an action seeking damages as the result of flooding caused by the defendant drainage district's alleged negligence in failing to maintain a ditch in proper repair. In reversing the dismissal of the action following the sustainment of the defendant district's demurrer, we held that notwithstanding the fact that plaintiffs had failed to state a tort action in negligence against the district because they had failed to allege compliance with the Political Subdivisions Tort Claims Act, they had nonetheless stated an action for compensation under the provisions of the Nebraska Constitution. We observed that when a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation. We further said that as article I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language. Accord, *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985); *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977).

The judgment of the district court dismissing the petition is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

W & K FARMS, INC., APPELLANT, v. HI-LINE FARMS, INC., AND AARON R. WALTER, APPELLEES.

416 N.W.2d 10

Filed November 25, 1987. No. 86-068.

1. **Final Orders: Appeal and Error.** Generally, an order overruling a motion for additional time is not a final order from which an appeal may be taken.
2. _____: _____. An order which is not final ordinarily is not an appealable order.
3. **Judgments: Final Orders: Pleadings: Time.** An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
4. **Pleadings: Time.** As a general rule, the granting or withholding of permission to file a late pleading rests within the proper discretion of the trial court as a means of preventing delays and avoiding congestion of the trial docket.

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

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Richard L. Spittler, for appellees.

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

HASTINGS, C.J.

Plaintiff has appealed from an order of the district court, which denied its motion for 6 additional days to file a second amended petition. It assigns as error that (1) the trial court erred in finding an order entered by it on August 16, 1985, was a self-executing order; (2) the trial court erred by vacating on its own motion an earlier order entered directing the defendant to file a responsive pleading to plaintiff's second amended petition; and (3) the trial court erred by overruling plaintiff's motion to cure default by extending the time in which to file a second amended petition by 6 days.

This case is a procedural nightmare, brought about by the simple expediency of counsel's ignoring or failing to abide by the time restrictions ordered by the court. In addition, the transcript consists of two parts, making it extremely difficult to

follow the sequential filings and progression of this case in any logical order.

The plaintiff filed a petition on April 9, 1985, against the defendants, Hi-Line Farms, Inc., and Aaron R. Walter, as president, sole stockholder, and sole assignee of the corporation's assets. The petition sought collection of a promissory note.

An April 25, 1985, special appearance by Hi-Line was sustained for the reason that the corporation had been dissolved for nonpayment of taxes. The demurrer of Aaron Walter was filed on April 26. On May 17 the court sustained both the special appearance and the demurrer, and plaintiff was given 20 days to file an amended petition.

Some *32* days later, on June 18, an amended petition was filed by the plaintiff without having attempted to obtain special leave of the court until that date, and which was sought, apparently, in response to a motion for dismissal.

Defendant Walter then filed, on July 25, 1985, an extensive motion to strike certain portions of the amended petition, which was sustained by the court on August 16, by order filed on August 19, granting plaintiff "20 days to file its Second Amended Petition and upon its failure to do so, this matter shall stand dismissed." Plaintiff filed a second amended petition on September 11, again without special leave of the court, which was some *6* days after the deadline imposed by the court.

On October 23, "in control[ling] its own docket," the court opened the file to the last pleading—the second amended petition—and in its own motion directed Walter to file a responsive pleading within 20 days. Walter then filed, on November 12, within that court-directed timeframe, a special appearance, served on plaintiff on November 8, on the theory that the court's *self-executing* order of August 16, which required plaintiff to file its second amended petition within 20 days, had not been complied with, and therefore the action stood dismissed as of September 5.

On November 26 plaintiff filed a motion for the extension of the time to file its second amended petition "six days from Thursday, September 5, 1985 to Wednesday, September 11,

1985." It was supported by affidavit of counsel that although the order directing plaintiff to file a second amended petition was entered on August 16, counsel did not receive a copy of the order until August 19; that counsel calculated the 20 days' deadline from August 19, rather than August 16 (a discrepancy of 3 days, not 6 days); and that the pressures of other work and a heavy amount of dictation prevented the plaintiff's amended pleading from being "transcribed until September 9" and did not permit it to be "mailed for filing until September 10." As a matter of fact, it was not received by the clerk's office, located in the same city as the office of plaintiff's counsel, until September 11.

The matter becomes more confusing. On the trial docket, the judge's notes of December 13, 1985, vacated and set aside the court's order of October 23 directing defendant to file a responsive pleading; the special appearance (of Walter) filed November 12 was sustained; the motion (of plaintiff) filed November 26 for an order extending the time to file a second amended petition was overruled; the special appearance of Hi-Line Farms, Inc., filed December 11 (which does not appear in the transcript) was sustained because Hi-Line Farms previously had been dissolved; and the special appearance of defendant Walter to the petition filed November 26 (neither pleading appearing in the transcript) was overruled, and said defendant was given 20 days to plead to "said petition to vacate and set aside." Finally, on January 17, 1986, the judge's order (entered after the notice of appeal was filed) shows that the demurrer of the defendant Walter (not shown of record) was overruled, and he was given 20 days to answer, presumably the petition to vacate.

It is difficult to discern from just what the plaintiff is appealing. The notice of appeal mentions only the order overruling its motion for extension of time in which to file an amended pleading. Generally, such an order is not final because it does not dispose of the whole merits of the case and does leave something for the further consideration of the court. *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982). Considering only the notice of appeal, plaintiff's action in prosecuting this appeal is premature because there has been

no judgment or final order in the court from which an appeal may be taken. *Federal Land Bank of Omaha v. Johnson, ante* p. 877, 415 N.W.2d 478 (1987). Such a conclusion would leave us with no alternative but to dismiss the appeal as premature.

However, plaintiff insists in its argument that because the trial court determined that its order of August 16 granting plaintiff a time certain in which to file an amended pleading, failing which the action stood dismissed, was a self-executing order, it had no jurisdiction to grant further relief. Therefore, plaintiff argues, the effect of that finding was that as of September 5 plaintiff's action was dismissed. If September 5 was the effective date of a dismissal order, a notice of appeal filed on January 13, 1986, by the plaintiff would be substantially beyond the statutory limitation, and this court acquires no jurisdiction.

Finally, we address the question of whether, in fact, the trial court's order was self-executing so as to cause a dismissal of the proceedings. We have held as recently as *Federal Land Bank of Omaha v. Johnson, supra*, that an order such as this, allowing a plaintiff a certain amount of time in which to plead further and, failing that, the case is automatically dismissed, is a conditional judgment only. " '[A] conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.' " *Id.* at 879, 415 N.W.2d at 479-80.

The trial court could have denied plaintiff's motion for extension of time, which it did, and then order the action dismissed for failure to comply with the court's earlier order. That would have left no doubt in anyone's mind as to the finality of the order. We would then be called upon to determine whether, in dismissing the action rather than granting additional time to plead, the trial court acted within its proper discretion in imposing such a sanction so as to prevent undue delays and avoid congestion of the trial docket. *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978).

There being no final, appealable order, the appeal is dismissed.

APPEAL DISMISSED.

JOHN R. AMBROZ, APPELLANT, V. CORNHUSKER SQUARE LIMITED, A LIMITED PARTNERSHIP, APPELLEE.

416 N.W.2d 510

Filed November 25, 1987. No. 86-189.

1. **Demurrer: Pleadings.** A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
2. _____: _____. For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, and consider only the facts set forth in the petition.
3. **Polygraph Tests: Employer and Employee.** The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.
4. **Termination of Employment.** When employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee for whatever cause it chooses without incurring liability.

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

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

Kathleen A. Jaudzemis of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BOSLAUGH, J.

The question presented in this case is whether an employee, whose contract of employment is a hiring at will, has a cause of action against his employer who terminates the employment in violation of Neb. Rev. Stat. § 81-1932 (Reissue 1981) because the employee refused to submit to a polygraph examination.

The plaintiff, John R. Ambroz, was employed as a security guard by the defendant, Cornhusker Square Limited. The plaintiff's duties were to maintain building security at the Cornhusker Hotel in Lincoln, Nebraska, but did not involve public law enforcement.

The amended petition alleges that on May 7, 1985, the director of security of the defendant demanded that the plaintiff take a truth and deception (polygraph) examination by 4 p.m. that day or his employment would be terminated. The plaintiff refused to take the examination and as a result was wrongfully discharged by the defendant. The amended petition specifically alleges: "The only reason for termination of Plaintiff's employment was that Plaintiff declined to submit to a truth and deception examination as he was entitled to do under the Truth and Deception Examiners Act, Neb. Rev. Stat. §§81-1901 et seq. (Reissue 1981)." The amended petition prays for reinstatement to the position of security guard and for damages. According to the plaintiff's brief, his theory of the case is that it is a common-law tort action for wrongful discharge.

The defendant's general demurrer to the amended petition was sustained, and the petition was dismissed. The plaintiff has appealed.

A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *Overman v. Brown*, 220 Neb. 788, 372 N.W.2d 102 (1985), citing *Blanchard v. White*, 217 Neb. 877, 351 N.W.2d 707 (1984). For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986); *Abboud v. Lakeview, Inc.*, 223 Neb. 568, 391 N.W.2d 575 (1986); *Reimer v. K N Energy*, 223 Neb. 142, 388 N.W.2d 479 (1986); and *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986), and consider only the facts set forth in the petition, *Abboud, supra*.

The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981 & Cum. Supp. 1984), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.

Section 81-1932 (Reissue 1981) provides:

> No employer or prospective employer may require as a condition of employment or as a condition for continued

employment that a person submit to a truth and deception examination unless such employment involves public law enforcement. This shall not be construed to prohibit such employer from asking an employee or applicant to submit to a truth and deception examination if:

(1) No questions are asked during the truth and deception examination concerning the examinee's sexual practices, labor union, political or religious affiliations, or marital relationships;

(2) The examinee is given written and oral notice that the examination is voluntary and that the examinee may discontinue the examination at any time;

(3) The employer or prospective employer has the employee or applicant sign a form stating that the examination is being taken voluntarily;

(4) Questions that are asked prospective employees are job related;

(5) Prospective employees are not preselected for a truth and deception examination in a discriminatory manner;

(6) An employee is only requested to submit to a truth and deception examination if such examination concerns itself with a specific investigation;

(7) The results of a truth and deception examination are not the sole determinant in the termination of employment; and

(8) All questions that are asked during a truth and deception examination and the responses of the examinee are kept on file by the employer for a period of one year.

Section 81-1935 (Reissue 1981) provides:

Except as provided in section 81-1932, any person who violates the provisions of sections 81-1901 to 81-1936 or who falsely states or represents that he or she is or has been an examiner or intern shall be guilty of a Class II misdemeanor.

The amended petition alleges that the contract of employment was oral and for an hourly wage. It does not allege that the plaintiff was hired for a definite period of time. In *Jeffers v. Bishop Clarkson Memorial Hosp., supra*, we held

that "when employment is not for a definite term and *there are no contractual or statutory restrictions upon the right of discharge*, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability." (Emphasis in original.) 222 Neb. at 832, 387 N.W.2d at 695, citing *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985); *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982).

In somewhat related cases, we have recognized a constitutional restriction upon the discharge of governmental at-will employees. Although governmental at-will employees may be discharged for no reason at all, they may not be discharged on a basis that infringes upon constitutionally protected interests. *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986). See, also, *Devine v. Dept. of Public Institutions*, 211 Neb. 113, 317 N.W.2d 783 (1982); *Nebraska Dept. of Roads Emp. A. v. Department of Roads*, 364 F. Supp. 251 (D. Neb. 1973); *Patteson v. Johnson*, 721 F.2d 228 (8th Cir. 1983), *appeal after remand* 787 F.2d 1245 (8th Cir. 1986).

The plaintiff argues that in this case, there is a "statutory restriction" upon the defendant's right to discharge the plaintiff, which creates an exception to the at-will rule. In *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), we recognized that other jurisdictions have adopted public policy exceptions to the rule. We stated at 316, 299 N.W.2d at 151:

> We recognize, however, that the "employment at will" rule is not, in some jurisdictions, an absolute bar to a claim of wrongful discharge. In a number of jurisdictions, an exception to the "terminable at will" rule has been articulated in recent years. Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.

In *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 833, 387 N.W.2d 692, 695 (1986), we stated:

> Except in cases where an employee is deprived of constitutional or *statutory rights* or where contractual

> agreements guarantee that employees may not be fired without just cause, the law in this state continues to deny any implied covenant of good faith or fair dealing in employment termination. See, e.g., *Alford v. Life Savers, Inc.*, 210 Neb. 441, 315 N.W.2d 260 (1982); *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981).

(Emphasis supplied.)

Ambroz argues that he was discharged for *refusing* to participate in an activity which is protected under § 81-1932. The relevant portion of the statute provides: "No employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination unless such employment involves public law enforcement." We believe the statute is a pronouncement of public policy on the issue of wrongful discharge.

Although 1980 Neb. Laws, L.B. 485, was introduced "to provide procedures, standards, and rules for the licensing of persons who claim to be able to detect truth and/or deception through the use of mechanical instrumentation," Committee Statement, Miscellaneous Subjects Committee, 86th Leg., 2d Sess. (Mar. 29, 1979) (statement of Dave Newell, chairman), the introducer's statement of intent specifically stated, "The bill also regulates the use of truth and deception devices in employment situations. Any employer requiring an employee or applicant, as a condition of employment or continued employment, to take a truth and deception test shall be guilty of a Class II misdemeanor." Introducer's Statement of Intent, 86th Leg., 2d Sess. (Feb. 9, 1979) (statement of Dave Newell, chairman and principal introducer).

From the legislative history of § 81-1932, it is apparent that the Nebraska Legislature was promulgating public policy. The statute speaks for itself in language that is clear and unambiguous and specifically prohibits an employer's use of the polygraph to deny employment.

In *Strahl v. Miller*, 97 Neb. 820, 824, 151 N.W. 952, 953 (1915), we said:

> The law seems to be well settled that, when a statute

> commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute, and that such injury resulted proximately from such failure. The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide.

The decisions from other jurisdictions are not unanimous.

Where there is no statute on the matter, the cases generally hold that an employee at will has no cause of action for wrongful discharge because he refused to submit to a truth and deception examination. L. Larson & P. Borowsky, Unjust Dismissal § 7.05 (1987). But in cases involving a statute similar to § 81-1932, a number of courts have held that the statute creates an exception to the common-law rule and permits an employee who is discharged in violation of such a statute to recover damages from the employer.

In *Townsend v. L.W.M. Management, Inc.*, 64 Md. App. 55, 494 A.2d 239 (1985), a case involving a statute similar to § 81-1932, the court held that it would " 'recognize a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy,' " 64 Md. App. at 60, 494 N.W.2d at 242, and that "[t]he source of the 'clear mandate of public policy' may be found in legislative enactments . . . . In any case, the public policy found must be 'sufficiently clear to provide the basis for a tort or contract action for wrongful discharge.' [291 Md.] at 42, 432 A.2d 464." 64 Md. App. at 61, 494 A.2d at 242.

Molush v. Orkin Exterminating Co., Inc., 547 F. Supp. 54 (E.D. Pa. 1982), involved a similar factual situation. In the *Molush* case the court held at 56:

> A discharged employee may have a cause of action against his employer when the employer exercises his otherwise absolute right to terminate the employment relationship in

> a manner which contravenes or undermines an important public policy. . . . Such a public policy has been found by courts to be embodied in Pennsylvania's anti-polygraph statute. Courts have upheld tort actions for wrongful discharge of employees for their refusal to submit to polygraph examinations . . . and upheld actions for wrongful discharge based on the results of a polygraph examination allegedly required as a condition of continued employment . . . .

See, also, *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979); *Heller v. Dover Warehouse Market, Inc.*, 515 A.2d 178 (Del. Super. 1986); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (1985); Annot., 12 A.L.R.4th 544 (1982).

Unlike the plaintiff in *Collins v. Baker's Supermarkets*, 223 Neb. 365, 389 N.W.2d 774 (1986), the plaintiff in this case was discharged, not merely demoted.

This is a case involving a discharge in violation of a clear, statutorily mandated public policy. We believe that it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated. This case falls within that rule.

We conclude that the order of the district court sustaining the demurrer of the defendant was erroneous.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROGER D. TODD, APPELLANT.

416 N.W.2d 13

Filed November 25, 1987. No. 86-1086.

Trial: Evidence: Appeal and Error. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.

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

Thomas J. Garvey and Charles E. Dorwart, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

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

GRANT, J.

The defendant, Roger D. Todd, appeals from his convictions by a jury of burglary, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985), a Class III felony, and theft, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1983), a Class III felony, Neb. Rev. Stat. § 28-518(1) (Reissue 1985). The defendant appeals, assigning two errors: (1) that the district court erred in allowing the defendant to be cross-examined with respect to a misdemeanor conviction and (2) that the district court erred in overruling the defendant's motion for a new trial. For the reasons set out below, we affirm.

The record reveals that in the early morning hours of May 27, 1986, John Slettedahl heard the sound of a car engine running outside his open bedroom window. Looking out his window, Slettedahl observed a copper-colored pickup truck, with the engine running, parked on the corner of a street north of his home. He next observed two men emerge from an adjoining field and place a long white sofa in the back of the pickup truck. Slettedahl recognized one of the men loading the furniture into the truck as the defendant. He knew the defendant as a neighbor and as one who used the same babysitter used by Slettedahl. Slettedahl then went back to bed.

The same morning, after arising, he looked out his window

at the model home across the street and noted that he could not see the white couch which was normally visible through the window at the front of the model home. The back door of the model home was standing open, and the furniture was missing. Slettedahl then contacted the police.

After the police officers interviewed Slettedahl, a search for the missing furniture was conducted at the defendant's home the following day. The missing furniture was not found. The investigation revealed that the missing furniture in the model home had been leased and had a retail value in excess of $6,000. The defendant was arrested later that afternoon.

In an amended complaint the defendant was charged, in two counts, with burglary and theft, as set out above. Defendant pled not guilty, and the matter was set for trial on September 24, 1986.

On the second day of the trial, after the defense had started its case but before the defendant took the stand, an in-chambers meeting was held on the record. Some discussions in the meeting, however, were "held off the record." The judge and counsel for both parties were present, but the defendant was not. At the in-chambers meeting, the prosecutor indicated that he intended to use the defendant's prior shoplifting conviction in his rebuttal case "for the purpose of prior bad acts or for credibility." The defendant's police record revealed that he had been arrested on May 19, 1985, for shoplifting, after he was seen taking a bottle of cologne at a department store. The defendant had pled guilty to that offense. The use of the prior theft conviction was generally discussed, and the court stated, "My initial thought is that it's [the prior conviction] probably admissible, but I suppose that, you know, if the defendant wants, he's entitled to a limiting instruction at that time that it's being received not to — not as bearing on his credibility." Later, the court said, "But I think the State's probably entitled to produce the evidence of the prior. It's so close in time and it certainly involves an intent to deprive the owner of the property, petty larceny." Defendant's counsel responded, "That by itself, yeah." The prosecutor then stated that while he had said he intended to use the prior conviction during rebuttal, he meant to use it during his cross-examination of defendant. The

court then stated, "I think you can do it by cross-examination. . . . Again assuming that, you know, assuming his testimony is essentially that, I'm paraphrasing, 'But I'm a nice guy. I didn't do anything other than dump some grass clippings.' " Defendant's counsel indicated his disapproval of the prosecutor's change of trial tactics, but made no objection then, or at any other time during the in-chambers discussion, to the State's use of the fact of defendant's prior conviction.

The trial then resumed before the jury. Defendant testified in his case that while he might have been in the area the night of the burglary, he had not committed the burglary. Subsequently, during cross-examination, the defendant was asked if he had "ever been convicted of a theft . . . within the last 12 months . . . ." Defendant admitted to the shoplifting conviction. The State's attorney continued to cross-examine defendant as to the incident. Defendant's counsel made no objection to this line of questioning except for one objection to a question if the prior conviction was the same thing defendant was accused of in the trial. Defense counsel's objection to that particular question was sustained on the ground it called for a legal conclusion. Defendant's counsel went into the details of the prior conviction on his redirect. On September 25, 1986, the jury found the defendant guilty of the counts of both burglary and theft. Defendant timely filed a motion for a new trial. The motion was denied. Defendant was sentenced to 1 to 3 years in the Department of Correctional Services on each count, with the sentences to run concurrently.

We first consider the defendant's assignment of error that the district court erred in allowing the defendant to be cross-examined as to a prior misdemeanor conviction.

We need not consider, in the circumstances of this case, whether the prior conviction was admissible under either Neb. Rev. Stat. § 27-609(1)(b) or § 27-404(2) (Reissue 1985). The Nebraska Evidence Rules provide that error may not be predicated on a ruling which admits evidence unless a timely objection appears of record, stating the specific ground of objection, if a specific ground is not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)). It is well-settled by this court that if a party does not

make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence. *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). As we have said above, no objection was made to the testimony in question.

In his brief at 4, defendant contends that defense counsel (different than appellate counsel) "made his objection and argument at the time of the in-chambers discussion to the use of the prior conviction and said objection at that time is sufficient to permit Appellant to raise this issue on appeal . . . ." Our examination of the record shows the issue was discussed but that no general or specific objection was made to the use of the prior conviction.

The instant case is different procedurally from *State v. Williams*, 212 Neb. 860, 326 N.W.2d 678 (1982), cited by defendant. In that case, defendant moved for an order of the court directing that Williams' prior misdemeanor convictions could not be used in the trial by the State. Clearly, Williams objected to the testimony, and the court clearly ruled, " '[T]he State will be permitted to bring the misdemeanor convictions out . . . on cross examination.' " *Williams, supra* at 861-62, 326 N.W.2d at 679. In this case there was never an objection made, nor was there a prior ruling. The court said that if certain testimony were adduced, the prior conviction might be admissible. In the context of this case, defendant could not rely on the discussion in chambers, or on the court's statements as to how the evidence might be treated, to preserve the question on appeal.

In his second assignment of error, defendant contends that the court erred in overruling defendant's motion for a new trial. The granting of a motion for a new trial lies within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987); *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985). The trial court did not abuse its discretion in overruling the defendant's motion for a new trial.

The judgment and sentences of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANNE M. VESELY, APPELLANT.

415 N.W.2d 786

Filed November 25, 1987. No. 87-074.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

James R. Mowbray of Mowbray, Chapin & Walker, P.C., for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, and Patrick A. Campbell, for appellee.

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

PER CURIAM.

Defendant, age 17 years, was charged with and convicted of operating a motor vehicle while under the influence of alcoholic liquor or while having ten-hundredths of 1 percent or more by weight of alcohol in her body fluid (DWI). This appeal concerns only the denial of her county court pretrial motion to transfer her case to the jurisdiction of the juvenile court. Neb. Rev. Stat. § 43-261 (Cum. Supp. 1986). Defendant claims that the trial court abused its discretion in finding a sound basis for retaining jurisdiction.

We have reviewed the entire record and find no abuse of discretion on the part of either the trial court denying the motion or the district court, sitting as an appellate court, affirming the county court's decision.

AFFIRMED.

HEADNOTES

Contained in this Volume

Abandonment
Actions
Administrative Law
Affidavits
Annexation
Appeal and Error
Arrests
Assault
Attorney and Client
Attorney Fees
Attorneys at Law

Battery
Blood, Breath, and Urine Tests
Breach of Contract
Brokers
Burglary

Case Disapproved
Case Overruled
Child Support
Circumstantial Evidence
Constitutional Law
Contracts
Controlled Substances
Convictions
Corporations
Counties
Courts
Criminal Law

Damages
Debtors and Creditors
Decedents' Estates
Declaratory Judgments
Demurrer
Directed Verdict
Discrimination
Divorce
Drunk Driving
Due Process

Effectiveness of Counsel
Electricity
Eminent Domain
Employer and Employee
Employment Security Law
Entrapment
Equal Protection
Equity
Escape
Evidence
Expert Witnesses

Final Orders
Fire Protection Districts
Foreclosure
Foreign Judgments
Franchises
Fraud

Guaranty

Habeas Corpus
Health Care Providers
Hearsay
Homicide

Impeachment
Implied Consent
Indictments and Informations
Informed Consent
Initiative and Referendum
Injunction
Insurance
Intent
Investigative Stops
Invitor-Invitee

Joint Ventures
Judges

Judgments
Judicial Notice
Juries
Jurisdiction
Juror Qualifications
Jurors
Jury Instructions
Jury Trials
Juvenile Courts

Leases
Legislature
Lesser-Included Offenses
Liability
Libel and Slander
Licensee
Licenses and Permits
Liens
Limitations of Actions
Livestock

Malpractice
Mandamus
Medical Malpractice
Mental Competency
Minors
Miranda Rights
Modification of Decree
Mortgages
Motions for Continuance
Motions for Mistrial
Motions for New Trial
Motions to Dismiss
Motions to Vacate
Motor Carriers
Municipal Corporations

Names
Nebraska Power Review Board
Negligence
New Trial
Notice

Obscenity
Ordinances
Other Acts

Parental Rights
Parol Evidence
Parties
Paternity
Photographs
Physician and Patient
Plea in Abatement
Pleadings
Pleas
Police Officers and Sheriffs
Political Subdivisions Tort Claims Act
Polygraph Tests
Postconviction
Presumptions
Pretrial Procedure
Principal and Agent
Prior Convictions
Prisoners
Probable Cause
Products Liability
Proof
Property
Prosecuting Attorneys
Proximate Cause
Public Service Commission
Public Utilities

Quo Warranto

Rates
Real Estate
Receivers
Records
Rescission
Revocation
Right to Counsel
Robbery
Rules of Evidence

Search and Seizure
Search Warrants
Second Injury Fund
Security Interests
Sentences
Sexual Assault
Specific Performance
Standing
Statute of Frauds
Statutes
Summary Judgment

Taxation
Telecommunications
Tender
Termination of Employment
Testimony
Time
Tort-feasors
Torts
Trial
Trusts

Undue Influence
Uniform Commercial Code

Valuation
Vendor and Vendee
Venue
Verdicts

Waiver
Waters
Wills
Wiretaps
Witnesses
Words and Phrases
Workers' Compensation

INDEX

Abandonment

A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation.
In re Interest of R.A. 160

Actions

1. Whenever a person has possession of money to which in equity and good conscience another is entitled, a suit lies for money had and received. In such a case the law implies a promise by the former to pay such money to the latter.
Sesostris Temple Golden Dunes v. Schuman 7
2. Negligence is actionable only when it results in damages.
Bittner v. Miller 206
3. A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
Turner v. Welliver 275
4. Under a code system of pleading, such as that in Nebraska, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery.
Bergman v. Anderson 333
5. In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
Rahmig v. Mosley Machinery Co. 423
6. In a cause of action for products liability on account of a design defect, the test for a manufacturer's strict liability in tort is the user-contemplation test or consumer-contemplation test reflected in Restatement (Second) of Torts § 402 A (1965).
Rahmig v. Mosley Machinery Co. 423
7. The province of a court is to decide real controversies and to determine rights actually controverted, and the judicial power does not extend to the determination of abstract questions.
In re Estate of West 813

8. In order to judicially challenge a rate set by a legislative body, one must allege a special injury peculiar to himself or herself aside from and independent of that suffered by the nonsubscribing general public.
Bard v. Cox Cable of Omaha, Inc. 880
9. Before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality.
Bard v. Cox Cable of Omaha, Inc. 880
10. One is excused from making a demand upon a municipality to adjust a rate if such demand would be unavailing.
Bard v. Cox Cable of Omaha, Inc. 880
11. Courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law.
Bard v. Cox Cable of Omaha, Inc. 880
12. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), does not preclude state judicial review of basic and nonbasic community antenna television service rates charged prior to December 29, 1986.
Bard v. Cox Cable of Omaha, Inc. 880
13. Pleadings in ordinary actions are to be liberally construed; if with such a construction a petition states a cause of action, a demurrer is to be overruled.
Bard v. Cox Cable of Omaha, Inc. 880
14. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889

Administrative Law

1. The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
In re Application A-15738 146
2. Courts ordinarily refuse to take judicial notice of municipal

ordinances or internal operating rules of administrative agencies.
Zybach v. State 396
3. In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. Competent evidence in such a case means evidence that tends to establish the fact in issue.
Hroch v. City of Omaha 589

Affidavits

1. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial.
Rahmig v. Mosley Machinery Co. 423
2. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
Rahmig v. Mosley Machinery Co. 423
3. In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
State v. Duff 567
4. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
State v. Duff 567
5. Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation.
State v. Hinton 787

Annexation

If either a fire protection district organized under Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1984) or a municipality seeks a judicial adjustment of matters arising out of annexation by a municipality, proceedings under Neb. Rev. Stat. § 31-766 (Reissue 1984) must be commenced as soon as it becomes evident that an agreed adjustment cannot be reached.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50

Appeal and Error

1. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it.
   Bell v. Williams Care Center 1
2. A jury verdict may not be set aside unless 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.
   Bell v. Williams Care Center 1
3. Where a case has been tried on the theory that the Uniform Commercial Code is applicable, upon appeal it will be decided upon the same theory.
   Sesostris Temple Golden Dunes v. Schuman 7
4. It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
   Professional Recruiters v. Oliver 16
5. Appeals under the provisions of Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984) are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
   Tuma v. Omaha Public Power Dist. 19
6. The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
   State v. Nesbitt 32
   State v. Ryan 59
   Turner v. Welliver 275
   State v. Carter 636
7. When reviewing the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
   State v. Nesbitt 32
8. The decision to grant a motion for mistrial is squarely within the sound discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
   State v. Nesbitt 32
   State v. Jacobs 184
   State v. Alvarado 195
9. Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), which allows the county attorney to appeal any ruling or decision of the court made during the prosecution of a cause, does not permit review of issues upon which no ruling was made.
   State v. Jensen 40

10. In an appeal of a declaratory judgment in an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50

11. The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal.
State v. Ryan 59

12. All of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
State v. Ryan 59

13. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
State v. Ryan 59
State v. Schreck 172
State v. Miller 576

14. As a general rule, the right to appeal in a criminal case may only be exercised by a person aggrieved or injured by the judgment.
In re Claim of Rehm and Faesser 107

15. The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
In re Claim of Rehm and Faesser 107

16. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat. § 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
In re Claim of Rehm and Faesser 107

17. In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
In re Interest of T.C. 116
In re Interest of C.C. 263
In re Interest of J.K.B. and C.R.B. 701
In re Interest of P.J.M., R.E.M., and S.A.M. 764
In re Interest of Z.R. 770

18. Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
In re Interest of T.C. 116

19. The findings and conclusions of the trial court in an action at law tried without a jury will not be set aside unless they are clearly wrong.
Washington Heights Co. v. Frazier 127

20. In an action at law tried without a jury, it is not the province of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, the court presumes that the trial court resolved any controverted facts in favor of the successful party, and considers the evidence and all permissible inferences therefrom most favorably to that party.
Washington Heights Co. v. Frazier 127

21. The Nebraska Supreme Court has an obligation to reach independent conclusions on questions of law.
Washington Heights Co. v. Frazier 127
Pallas v. Black 728

22. In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

23. The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
In re Application A-15738 146
In re Application U-2 594

24. An order of termination of parental rights is reviewed de novo, and evidence erroneously admitted is not considered.
In re Interest of R.A. 160

25. Any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
State v. Schreck 172
State v. Jacobs 184
State v. Carter 636

26. It is not the province of this court on appeal of a conviction to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a guilty verdict returned by a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Schreck 172
State v. Jacobs 184

27. In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived.
State v. Schreck 172
State v. Moore 347
In re Interest of C.W. 719

28. A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985) is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
State v. Jacobs 184

29. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Jacobs 184

30. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
State v. Jacobs 184

31. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195

32. Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind 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.
Cain v. Cain 203

33. A request to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed.
Bittner v. Miller 206

34. An abuse of discretion exists when a ruling of the trial court is untenable such as to deprive a party of a substantial right and deny that party a just result.
Bittner v. Miller 206

35. The Nebraska Supreme Court will not disturb the ruling of the trial court on a motion to change venue in a civil action unless an abuse of discretion is shown.
Bittner v. Miller 206

36. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
Hughes v. Enterprise Irrigation Dist. 230
Johnson v. NM Farms Bartlett 680
Pallas v. Black 728

37. A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
Hughes v. Enterprise Irrigation Dist. 230

38. The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
State v. Cottingham 270

39. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270

40. In order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice.
State v. Cottingham 270

41. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.
State v. Cottingham 270

42. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275

43. A party cannot complain of error when, by his own action, he has acquiesced therein.
Shadow Isle, Inc. v. Granada Feeding Co. 325

44. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
Bergman v. Anderson 333

45. A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
State v. Dwyer 340

46. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
State v. Moore 347
State v. Parsons 543
State v. Williams 647
State v. Thomte 659
State v. Newson 867
State v. Charron 871

47. A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal.
State v. Rivers 353

48. A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
State v. Rivers 353

49. A generalized and vague assignment of error that does not advise the Nebraska Supreme Court of the issue submitted for decision will not be considered.
Meis v. Grammer 360

50. Consideration of an appeal to the Nebraska Supreme Court is limited to the errors assigned and discussed.
Meis v. Grammer 360
In re Interest of Z.R. 770
51. Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
Zybach v. State 396
52. In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
Rahmig v. Mosley Machinery Co. 423
53. Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony.
Rahmig v. Mosley Machinery Co. 423
54. A paternity action is an action at law, and, when a jury has been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
State ex rel. S.B. v. Dybdall 473
55. The credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence.
State ex rel. S.B. v. Dybdall 473
56. The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
Bay v. House 521
57. A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
Bay v. House 521
58. The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong.
Parker v. St. Elizabeth Comm. Health Ctr. 526
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737
59. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.
Parker v. St. Elizabeth Comm. Health Ctr. 526

60. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
Nice v. IBP, inc. 538

61. The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737

62. In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
State v. Duff 567

63. In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.
State v. Duff 567

64. Where a notice of appeal was not filed within 1 month from the entry of the final order appealed from, as required by Neb. Rev. Stat. § 25-1912(1) (Reissue 1985), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.
State v. Reed 575

65. In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
State v. Matz 581

66. In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. Competent evidence in such a case means evidence that tends to establish the fact in issue.
Hroch v. City of Omaha 589

67. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to

interpret it in a manner consistent with the Constitution.
In re Application U-2 594
68. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594
69. The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
Third Party Software v. Tesar Meats 628
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
70. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
Third Party Software v. Tesar Meats 628
71. After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636
72. This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court.
State v. Carter 636
73. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
State v. Carter 636
74. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Carter 636
75. Error without prejudice does not provide a ground for the reversal of a criminal conviction.
State v. Tully 651
76. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Tully 651
77. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666
78. In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to

determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
In re Application of Silvey Refrig. Carr. 668

79. Where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, the Nebraska Supreme Court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof.
Johnson v. NM Farms Bartlett 680

80. While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken.
Johnson v. NM Farms Bartlett 680
Federal Land Bank of Omaha v. Johnson 877
W & K Farms v. Hi-Line Farms 895

81. Error without prejudice forms no basis for appellate relief.
In re Interest of J.K.B. and C.R.B. 701

82. On a review of a record de novo, the Nebraska Supreme Court ignores improperly admitted evidence.
In re Interest of J.K.B. and C.R.B. 701

83. An action for specific performance is an equitable matter triable de novo on appeal to this court.
Pallas v. Black 728

84. The compensation court's determination on rehearing that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.
Thom v. Lutheran Medical Center 737

85. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.
Omaha Mining Co. v. First Nat. Bank 743

86. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

87. Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.
Omaha Mining Co. v. First Nat. Bank 743

88. The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice.
Omaha Mining Co. v. First Nat. Bank 743

89. In an action at law tried without a jury, it is not the role of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, it presumes that the trial judge resolved any controverted facts in favor of the successful party, and will consider the evidence and permissible inferences therefrom most favorably to that party.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

90. An adjudication order is an appealable order. In the absence of an appeal, such an order may not be reviewed after the time for appeal has expired.
In re Interest of Z.R. 770

91. The Nebraska Supreme Court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986).
State v. Hinton 787

92. The Nebraska Supreme Court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
State v. Hinton 787

93. The language of a judicial opinion is to be read in the context of the facts under consideration and its meaning limited by those facts.
State v. Warren 810

94. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.
In re Estate of West 813

95. Generally an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.
Luschen Bldg. Assn. v. Fleming Cos. 840

96. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.
State v. O'Neill 866

97. Generally, an order overruling a motion for additional time is not a final order from which an appeal may be taken.
W & K Farms v. Hi-Line Farms 895

98. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
State v. Todd 906

Arrests

The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Moore 347

Assault

1. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
2. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
3. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333

Attorney and Client

1. It is the rule that, ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void and insufficient until proved.
Koch v. Koch 305
2. As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
Stansbery v. Schroeder 492
3. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492

Attorneys at Law

1. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
   In re Estate of West 813
2. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.
   In re Estate of West 813

Attorney Fees

1. Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
   In re Claim of Rehm and Faesser 107
2. The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
   In re Claim of Rehm and Faesser 107
3. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat. § 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
   In re Claim of Rehm and Faesser 107

Battery

1. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
   Bergman v. Anderson 333
2. A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
   Bergman v. Anderson 333
3. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
   Bergman v. Anderson 333

Blood, Breath, and Urine Tests

1. *Miranda* warnings are not required prior to an officer's request of

a driver to submit to a chemical analysis under the Nebraska implied consent law.
Heusman v. Jensen 666
2. The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
Heusman v. Jensen 666
3. Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.
Heusman v. Jensen 666

Breach of Contract

1. A suit for the claimed breach of a contract presents an action at law.
Washington Heights Co. v. Frazier 127
2. Where a party's breach by nonperformance contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
Shadow Isle, Inc. v. Granada Feeding Co. 325
3. A party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.
Chadd v. Midwest Franchise Corp. 502
4. A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition.
Chadd v. Midwest Franchise Corp. 502
5. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future.
Chadd v. Midwest Franchise Corp. 502
6. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
Chadd v. Midwest Franchise Corp. 502
7. The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury.
Chadd v. Midwest Franchise Corp. 502
8. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
Chadd v. Midwest Franchise Corp. 502
9. An action for breach of a lease presents an action at law.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

10. In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

Brokers

For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
Tylle v. Zoucha 476

Burglary

1. An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
State v. Matz 581
2. A forcible and unauthorized nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal.
State v. Matz 581
3. Burglary does not require an actual theft or asportation of property.
State v. Matz 581

Case Disapproved

County of Boone v. Armstrong, 23 Neb. 764, 37 N.W. 626 (1888), is expressly disapproved.
In re Claim of Rehm and Faesser 107

Case Overruled

1. The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
In re Application A-15738 146
2. Insofar as *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable

alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.
Rahmig v. Mosley Machinery Co. 423

Child Support

1. Modification of child support is an issue entrusted to the sound discretion of the trial court.
Dobbins v. Dobbins 465
2. The paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children.
Dobbins v. Dobbins 465
3. Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.
Dobbins v. Dobbins 465
4. Evidence of the increased age of children alone will not furnish a satisfactory basis for modification of an award of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
Dobbins v. Dobbins 465
5. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, that rule includes only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order.
Dobbins v. Dobbins 465
6. Under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.
State of Iowa ex rel. Petersen v. Miner 551
7. In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.
State of Iowa ex rel. Petersen v. Miner 551

Circumstantial Evidence

1. Circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
State v. Nesbitt 32
2. One accused of a crime may be convicted on the basis of

circumstantial evidence if, viewed as a whole, the evidence establishes guilt beyond a reasonable doubt; the State is not required to disprove every hypothesis but that of guilt.
State v. Jacobs 184
3. Circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of Neb. Rev. Stat. § 39-699.07 (Reissue 1984).
State v. Miller 576
4. A person charged with a crime may be convicted on circumstantial evidence only.
State v. Matz 581

Constitutional Law

1. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
State v. Miller 576
2. When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.
Parriott v. Drainage Dist. No. 6 123
3. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest.
In re Application A-15738 146
4. The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right.
In re Application A-15738 146
5. In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived.
State v. Schreck 172
State v. Moore 347
In re Interest of C.W. 719
6. In order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
State v. Schreck 172
7. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
State v. Schreck 172
8. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by

common understanding and practice, the Constitution requires no more.
State v. Schreck 172
9. Statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
10. The party challenging the constitutionality of a statute has the burden to show it is unconstitutional.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
11. Courts must apply and must enforce the Constitution as it is written.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
12. Before construing a constitutional provision, it must be demonstrated that its meaning is not clear and that construction is necessary.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
13. If a constitutional provision is construed, its words and terms are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
14. The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
15. L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
16. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
Banner County v. State Bd. of Equal. 236
17. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
Banner County v. State Bd. of Equal. 236
18. The Constitution, as amended, must be read as a whole.
Banner County v. State Bd. of Equal. 236
19. The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power.
Banner County v. State Bd. of Equal. 236

20. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
Banner County v. State Bd. of Equal. 236
21. In determining the meaning of a constitutional provision, we must look to the plain and clear language contained therein.
Banner County v. State Bd. of Equal. 236
22. A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument.
Banner County v. State Bd. of Equal. 236
23. The effect of the 1984 amendment to Neb. Const. art. VIII, § 1, is to permit the valuation of agricultural and horticultural land by a different method. However, the result must be correlated with the value of all other land.
Banner County v. State Bd. of Equal. 236
24. Prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.
Meis v. Grammer 360
25. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights.
Meis v. Grammer 360
26. Running a prison is an inordinately difficult undertaking, requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.
Meis v. Grammer 360
27. In the absence of substantial evidence that prison officials have exaggerated their response to their concerns for internal security of the institution, courts should generally defer to their expert judgment.
Meis v. Grammer 360
28. Several factors are relevant in determining the reasonableness of prison regulations. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.
Meis v. Grammer 360
29. The guarantee of equal protection of the laws requires that the

state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions.
Meis v. Grammer 360

30. Fourth amendment rights are personal rights, which may not be vicariously asserted.
State v. Smith 419

31. The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

32. A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

33. Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

34. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.
Craig v. Logemann 587

35. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.
Hroch v. City of Omaha 589

36. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.
In re Application U-2 594

37. Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.
In re Application U-2 594

38. The entrapment defense is not mandated by either the state or federal Constitution.
State v. Bocian 613

39. Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is not unconstitutionally vague or overbroad.
Heusman v. Jensen 666

40. The Nebraska Supreme Court will not consider a constitutional challenge in the absence of a specification of the constitutional provision which is claimed to be violated.
State v. Hinton 787

41. For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
In re Estate of West 813

42. Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution.
In re Estate of West 813

43. Courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law.
Bard v. Cox Cable of Omaha, Inc. 880

44. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889

45. As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889

Contracts

1. Whenever a person has possession of money to which in equity and good conscience another is entitled, a suit lies for money had and received. In such a case the law implies a promise by the former to pay such money to the latter.
   Sesostris Temple Golden Dunes v. Schuman 7
2. The meaning of an unambiguous contract presents a question of law.
   Washington Heights Co. v. Frazier 127
3. If a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document.
   Washington Heights Co. v. Frazier 127
4. Parol evidence is admissible to explain vague language contained in a written contract.
   Washington Heights Co. v. Frazier 127
5. A contract provision is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
   Shadow Isle, Inc. v. Granada Feeding Co. 325
   Luschen Bldg. Assn. v. Fleming Cos. 840
6. A lease is to be construed as any other contract.
   Chadd v. Midwest Franchise Corp. 502
7. The proper construction of a written contract is generally a question of law to be determined by the courts.
   Chadd v. Midwest Franchise Corp. 502
8. An agreement which depends upon the wish, will, or pleasure of one of the parties is unenforceable. Mutuality of obligation is an essential element of every enforceable agreement.
   Chadd v. Midwest Franchise Corp. 502
9. Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant.
   Chadd v. Midwest Franchise Corp. 502
10. Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.
    Chadd v. Midwest Franchise Corp. 502
11. The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury.
    Chadd v. Midwest Franchise Corp. 502
12. The questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury.
    Chadd v. Midwest Franchise Corp. 502
13. Where, in a suit on a contract, the plaintiff's evidence establishes

acceptance of the offer, it is the burden of the offeree to establish that the offeree revoked the acceptance prior to communication of the acceptance to the offeror.
Stremmel v. Kinney 555

14. In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.
Johnson v. NM Farms Bartlett 680

15. The construction of a contract, if needed, is a question of law for the court as well as a duty that rests upon the court, and there can be no ambiguity unless and until an application of pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.
Luschen Bldg. Assn. v. Fleming Cos. 840

16. That two parties urge opposing interpretations of a contract does not necessarily indicate the document is ambiguous.
Luschen Bldg. Assn. v. Fleming Cos. 840

17. When the terms of the contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
Luschen Bldg. Assn. v. Fleming Cos. 840

18. When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
Luschen Bldg. Assn. v. Fleming Cos. 840

Controlled Substances

Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation.
State v. Hinton 787

Convictions

1. Circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
State v. Nesbitt 32
State v. Jacobs 184

2. When reviewing the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.
State v. Nesbitt 32
State v. Schreck 172
State v. Williams 647
State v. Thomte 659
State v. Newson 867
State v. Charron 871

3. In determining whether evidence is sufficient in a jury trial to sustain a conviction, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury.
State v. Jacobs 184

4. In a criminal trial, the trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained.
State v. Dwyer 340
State v. Williams 647

5. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
State v. Moore 347

6. In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
State v. Matz 581

7. A person charged with a crime may be convicted on circumstantial evidence only.
State v. Matz 581

Corporations

Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
Standard Federal Savings & Loan Assn. v. Meins 853

Counties

1. Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
In re Claim of Rehm and Faesser 107
2. The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
In re Claim of Rehm and Faesser 107
3. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat. § 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
In re Claim of Rehm and Faesser 107

Courts

1. Courts must apply and must enforce the Constitution as it is written.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
2. A trial court may vacate or modify its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court.
Frerichs v. Nebraska Harvestore Sys. 220
3. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.
Craig v. Logemann 587
4. When the terms of the contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
Luschen Bldg. Assn. v. Fleming Cos. 840

5. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.
State v. O'Neill 866

Criminal Law

1. Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), which allows the county attorney to appeal any ruling or decision of the court made during the prosecution of a cause, does not permit review of issues upon which no ruling was made.
State v. Jensen 40
2. The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).
State v. Jensen 40
3. Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "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. Masilko 45
4. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), the trial court must 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. Masilko 45
5. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
6. As a general rule, the right to appeal in a criminal case may only be exercised by a person aggrieved or injured by the judgment.
In re Claim of Rehm and Faesser 107
7. Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
In re Claim of Rehm and Faesser 107
8. The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
In re Claim of Rehm and Faesser 107
9. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat.

§ 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
In re Claim of Rehm and Faesser 107

10. Intent with which an act is committed 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. Schreck 172

11. In order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
State v. Schreck 172

12. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
State v. Schreck 172

13. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more.
State v. Schreck 172

14. To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty party.
State v. Jacobs 184

15. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270

16. Robbery of contraband may be subject to the penal sanction of Neb. Rev. Stat. § 28-324 (Reissue 1985).
State v. Dwyer 340

17. Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.
State v. Sorich 547

18. When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547

19. The punishment for a criminal act should in all circumstances be commensurate with the offense.
State v. Bocian 613

20. Error without prejudice does not provide a ground for the reversal

of a criminal conviction.
State v. Tully 651
21. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
22. An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
State v. Thomte 659
23. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
In re Interest of Richter 874
24. "Preservation of the peace," as used in Neb. Rev. Stat. § 28-906(1) (Reissue 1985), means maintaining the tranquillity enjoyed by members of a community where good order reigns.
In re Interest of Richter 874

Damages

1. The party seeking recovery has the burden of proving damages with as much certainty as the case permits.
Sesostris Temple Golden Dunes v. Schuman 7
Shadow Isle, Inc. v. Granada Feeding Co. 325
2. The evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness.
Sesostris Temple Golden Dunes v. Schuman 7
3. When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.
Parriott v. Drainage Dist. No. 6 123
4. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
5. Negligence is actionable only when it results in damages.
Bittner v. Miller 206
6. In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
International Mov. & Stor. v. City of Lincoln 213

7. Damages that are uncertain, conjectural, or speculative cannot be the basis of a recovery.
Shadow Isle, Inc. v. Granada Feeding Co. 325
8. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
Chadd v. Midwest Franchise Corp. 502
9. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
Third Party Software v. Tesar Meats 628
10. A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
Johnson v. NM Farms Bartlett 680
11. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680
12. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743
13. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889

Debtors and Creditors

1. One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
Graff v. Burnett 710
2. A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of

cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
Graff v. Burnett 710
3. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
Graff v. Burnett 710
4. Although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract.
Graff v. Burnett 710
5. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850
6. Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Decedents' Estates

1. Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
In re Estate of West 813
2. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
In re Estate of West 813
3. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical

matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.
In re Estate of West 813

Declaratory Judgments

1. In a declaratory judgment action involving the determination of issues of fact, such issues may be tried and determined as in other civil actions.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50
2. In an appeal of a declaratory judgment in an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50
3. Ordinarily, an action for declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
4. The availability of another remedy is a factor bearing upon the exercise of a trial court's decision as to whether to entertain an action for declaratory relief.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
5. A declaratory judgment action is sui generis, and whether it is to be treated as one at law or in equity is to be determined by the nature of the dispute.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

Demurrer

1. On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
Standard Federal Savings & Loan Assn. v. Meins 853
2. In considering a demurrer, a court accepts as true all the facts pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
Bard v. Cox Cable of Omaha, Inc. 880
Slusarski v. County of Platte 889
3. Pleadings in ordinary actions are to be liberally construed; if with such a construction a petition states a cause of action, a demurrer is to be overruled.
Bard v. Cox Cable of Omaha, Inc. 880
Slusarski v. County of Platte 889
4. A demurrer which challenges the sufficiency of the allegations is a general one.
Slusarski v. County of Platte 889

5. As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889
6. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Ambroz v. Cornhusker Square Ltd. 899
7. For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, and consider only the facts set forth in the petition.
Ambroz v. Cornhusker Square Ltd. 899

Directed Verdict

1. For purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.
Turner v. Welliver 275
2. In a criminal trial, the trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained.
State v. Dwyer 340
State v. Williams 647
3. In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.
Rahmig v. Mosley Machinery Co. 423
4. Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.
Rahmig v. Mosley Machinery Co. 423

5. If there is any evidence which will sustain a finding for the party against whom the motion for a directed verdict is made, the case may not be decided as a matter of law.
Jones v. Malloy 559

Discrimination

1. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
2. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
3. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195
4. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195

Divorce

Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind 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.
Cain v. Cain 203

Drunk Driving

1. For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.
State v. Slezak 404
2. Circumstantial evidence may be used to establish physical control of a motor vehicle within the meaning of Neb. Rev. Stat. § 39-699.07 (Reissue 1984).
State v. Miller 576
3. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for

investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
State v. Thomte 659

4. A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
State v. Thomte 659

Due Process

1. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.
Hroch v. City of Omaha 589

2. A proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process.
In re Interest of J.K.B. and C.R.B. 701

Effectiveness of Counsel

This court has adopted a two-part test to determine whether a defendant received effective counsel: first, the attorney must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. Additionally, the defendant must show that there is a reasonable probability that but for the attorney's error the result of the case would have been different.
State v. Rivers 353

Electricity

1. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
Tiede v. Loup Power Dist. 295

2. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and

prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
Tiede v. Loup Power Dist. 295
3. Power companies are not insurers and are not liable for damages in the absence of negligence.
Tiede v. Loup Power Dist. 295
4. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
Tiede v. Loup Power Dist. 295
5. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.
Tiede v. Loup Power Dist. 295
6. The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Eminent Domain

1. There is no vested right in a landowner to the continued flow of traffic by his property, so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability.
International Mov. & Stor. v. City of Lincoln 213
2. In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
International Mov. & Stor. v. City of Lincoln 213
3. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889
4. As Neb. Const. art. I, § 21, is self-executory, a petition alleging

that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889

Employer and Employee

The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.
Ambroz v. Cornhusker Square Ltd. 899

Employment Security Law

1. Appeals under the provisions of Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984) are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
Tuma v. Omaha Public Power Dist. 19
2. Neb. Rev. Stat. § 48-628(b) (Reissue 1984) requires that misconduct for which a disqualification from receiving unemployment benefits may result must be committed in connection with the employee's work.
Tuma v. Omaha Public Power Dist. 19
3. Failure to cooperate with an employer which is attempting to furnish a smoke-free environment by a good faith trial and error method constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.
Tuma v. Omaha Public Power Dist. 19
4. Failure to furnish medical justification for prolonged absences from employment, when an employee has stated that such justification will be furnished, constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.
Tuma v. Omaha Public Power Dist. 19

Entrapment

1. The entrapment defense is not mandated by either the state or federal Constitution.
State v. Bocian 613
2. NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
State v. Bocian 613

Equal Protection

The guarantee of equal protection of the laws requires that the state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions.
Meis v. Grammer 360

Equity

1. In an appeal of a declaratory judgment in an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50
2. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
Hughes v. Enterprise Irrigation Dist. 230
Johnson v. NM Farms Bartlett 680
Pallas v. Black 728
3. A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.
Evertson v. Cannon 370
4. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
Graff v. Burnett 710
5. An action for specific performance is an equitable matter triable de novo on appeal to this court.
Pallas v. Black 728
6. If one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party.
Pallas v. Black 728
7. For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
In re Estate of West 813

8. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
In re Estate of West 813
9. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
In re Estate of West 813

Escape

When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547

Evidence

1. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it.
Bell v. Williams Care Center 1
2. The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
State v. Nesbitt 32
State v. Ryan 59
Turner v. Welliver 275
State v. Carter 636
3. Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence.
State v. Nesbitt 32
4. The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
State v. Ryan 59
5. Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence.
State v. Ryan 59
6. In determining the appropriate sentence, evidence as to a

defendant's life, character, and previous conduct is highly relevant.
State v. Schreck 172

7. The seriousness of the offense is an important factor in imposing a sentence.
State v. Schreck 172

8. Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court.
State v. Jacobs 184

9. To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty party.
State v. Jacobs 184

10. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
State v. Jacobs 184

11. In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
International Mov. & Stor. v. City of Lincoln 213

12. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270

13. Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of sound discretion.
Turner v. Welliver 275

14. For purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.
Turner v. Welliver 275

15. Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
State v. Smith 419

16. The credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence.
State ex rel. S.B. v. Dybdall 473

17. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
Bay v. House 521

18. In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
State v. Parsons 543

19. In a proceeding in error, if it appears that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order will be affirmed. Competent evidence in such a case means evidence that tends to establish the fact in issue.
Hroch v. City of Omaha 589

20. After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636

21. A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial.
State v. Carter 636

22. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
State v. Carter 636

23. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.
State v. Carter 636

24. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.
State v. Madsen 722

25. Absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant.
State v. Warren 810

26. Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace or settle a controversy without respect to

legal liability, is not admissible against the person making it.
Luschen Bldg. Assn. v. Fleming Cos. 840

27. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
State v. Todd 906

Expert Witnesses

1. The admission of opinion testimony of an expert is generally discretionary with the trial court.
Bell v. Williams Care Center 1

2. Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
In re Interest of T.C. 116

3. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
Turner v. Welliver 275

4. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
Turner v. Welliver 275

5. The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
Bay v. House 521

6. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
Nice v. IBP, inc. 538

7. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.
Nice v. IBP, inc. 538

8. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
Jones v. Malloy 559

9. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
Jones v. Malloy 559

Final Orders

1. While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no jurisdiction until there has been a judgment or final order in the

court from which the appeal is taken.
Johnson v. NM Farms Bartlett 680
Federal Land Bank of Omaha v. Johnson 877
W & K Farms v. Hi-Line Farms 895
2. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Federal Land Bank of Omaha v. Johnson 877
3. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
Federal Land Bank of Omaha v. Johnson 877
4. Generally, an order overruling a motion for additional time is not a final order from which an appeal may be taken.
W & K Farms v. Hi-Line Farms 895
5. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895

Fire Protection Districts

If either a fire protection district organized under Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1984) or a municipality seeks a judicial adjustment of matters arising out of annexation by a municipality, proceedings under Neb. Rev. Stat. § 31-766 (Reissue 1984) must be commenced as soon as it becomes evident that an agreed adjustment cannot be reached.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50

Foreclosure

1. In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
2. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
Graff v. Burnett 710
3. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying

the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

4. Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
Standard Federal Savings & Loan Assn. v. Meins 853

Foreign Judgments

1. Under the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), the court in the responding state may fix the support payment at a different amount than that specified by the judgment in the initiating state.
State of Iowa ex rel. Petersen v. Miner 551

2. In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.
State of Iowa ex rel. Petersen v. Miner 551

Franchises

Absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto.
Bard v. Cox Cable of Omaha, Inc. 880

Fraud

1. The elements constituting fraudulent concealment, which must be proved whether seeking rescission or damages, are (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

2. The negligent failure to reveal a fact generally does not amount to fraudulent concealment.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

3. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

4. To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result.
Pawnee County Bank v. Droge 314
5. For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
In re Estate of West 813
6. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
In re Estate of West 813
7. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
In re Estate of West 813
8. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
In re Estate of West 813
9. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence

of an abuse of discretion.
In re Estate of West 813
10. *Collude* means to connive with another; conspire; or plot. *Collusion* is a secret agreement or secret cooperation for a fraudulent or deceitful purpose, such as a secret agreement between two or more persons to defraud a person of his rights, often by the forms of law.
In re Estate of West 813
11. As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, especially where the court was imposed upon thereby and the complaining party was prevented from having his interests fairly presented or fully considered by the court.
In re Estate of West 813
12. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
In re Estate of West 813
13. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.
In re Estate of West 813

Guaranty

1. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492
2. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Habeas Corpus

Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.
Anderson and Hochstein v. Gunter 724

Health Care Providers

1. When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
   Jones v. Malloy 559
2. Consent to medical treatment will be presumed, in the absence of fraud or misrepresentation.
   Jones v. Malloy 559
3. Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment.
   Jones v. Malloy 559
4. Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.
   Jones v. Malloy 559
5. The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
   Jones v. Malloy 559
6. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
   Jones v. Malloy 559
7. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
   Jones v. Malloy 559
8. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
   Jones v. Malloy 559

Hearsay

1. A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial

authorities have made a good faith effort to obtain the witness' presence at trial.
State v. Carter 636
2. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
State v. Carter 636

Homicide

1. Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification.
State v. Parsons 543
2. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
State v. Williams 647
3. The state of mind required for second degree murder may be inferred from the evidence of the criminal act.
State v. Williams 647
4. Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence of second degree murder.
State v. Tully 651
5. Under the provisions of Neb. Rev. Stat. §§ 28-105 and 28-304(2) (Reissue 1985), a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years.
State v. Ward 809

Impeachment

Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) does not require exclusion of evidence concerning subsequent repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached.
Rahmig v. Mosley Machinery Co. 423

Implied Consent

1. *Miranda* warnings are not required prior to an officer's request of

a driver to submit to a chemical analysis under the Nebraska implied consent law.
Heusman v. Jensen 666
2. The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
Heusman v. Jensen 666
3. Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is not unconstitutionally vague or overbroad.
Heusman v. Jensen 666
4. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666
5. Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person of his privilege to request an independent test.
Heusman v. Jensen 666
6. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759

Indictments and Informations

The district court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
State v. Aldrich 645

Informed Consent

1. Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.
Jones v. Malloy 559
2. The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
Jones v. Malloy 559

3. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
Jones v. Malloy 559
4. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
Jones v. Malloy 559

Initiative and Referendum

The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
State ex rel. Spire v. Public Emp. Ret. Bd. 176

Injunction

1. A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle the claimant to relief.
Hughes v. Enterprise Irrigation Dist. 230
2. By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.
Hughes v. Enterprise Irrigation Dist. 230
3. The purpose of an injunction is preventive, protective, and prohibitory, and it will not issue against discontinued acts unless there are probable grounds to believe that there will be a resumption of the violations or activities.
Johnson v. NM Farms Bartlett 680

Insurance

Communications between an insurer and insured about an agent of an insurer may be qualifiedly privileged.
Turner v. Welliver 275

Intent

1. If a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document.
Washington Heights Co. v. Frazier 127
2. Intent with which an act is committed 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. Schreck 172

3. The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
4. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
5. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
6. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333
7. The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship.
Evertson v. Cannon 370
8. As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
9. An intent sufficient to support a conviction of burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.
State v. Matz 581
10. A forcible and unauthorized nocturnal entry into a building known to contain property is a circumstance from which a jury may infer an intent to steal.
State v. Matz 581
11. Burglary does not require an actual theft or asportation of property.
State v. Matz 581
12. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594

13. When considering a series or collections of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
In re Application U-2 594
14. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
State v. Williams 647
15. The state of mind required for second degree murder may be inferred from the evidence of the criminal act.
State v. Williams 647

Investigative Stops

1. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
2. An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
State v. Thomte 659
3. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
State v. Thomte 659

Invitor-Invitee

While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury.
Tiede v. Loup Power Dist. 295

Joint Ventures

1. A joint venture arises when there is an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance

and control of the agencies used therein, though one may entrust performance to the other.
Evertson v. Cannon 370
2. The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship.
Evertson v. Cannon 370
3. A joint venture can exist only by voluntary agreement of the parties, and cannot arise by operation of law.
Evertson v. Cannon 370
4. The existence of a joint venture is a question of fact.
Evertson v. Cannon 370
5. The existence of a close business relationship may be a factor to be considered in determining whether a fiduciary relationship exists, but it alone is not generally sufficient.
Evertson v. Cannon 370

Judges

Where the trial judge as the finder of fact has viewed the premises and the record discloses what the judge saw and the findings he made as a result thereof, the Nebraska Supreme Court, provided the record contains competent evidence to support those findings, gives consideration to any competent, relevant facts revealed by the view and to the findings made as a result thereof.
Johnson v. NM Farms Bartlett 680

Judgments

1. A trial court may vacate or modify its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court.
Frerichs v. Nebraska Harvestore Sys. 220
2. Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
State v. Cottingham 270
3. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.
Parker v. St. Elizabeth Comm. Health Ctr. 526
4. The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
Third Party Software v. Tesar Meats 628
5. While it may be appropriate under certain circumstances to bifurcate trials, the Nebraska Supreme Court acquires no

jurisdiction until there has been a judgment or final order in the court from which the appeal is taken.
Johnson v. NM Farms Bartlett 680
Federal Land Bank of Omaha v. Johnson 877
6. Generally an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.
Luschen Bldg. Assn. v. Fleming Cos. 840
7. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Federal Land Bank of Omaha v. Johnson 877
8. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
Federal Land Bank of Omaha v. Johnson 877
9. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895

Judicial Notice

1. A court must take judicial notice of its own records in the case under consideration.
In re Interest of R.A. 160
2. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.
State v. Cottingham 270
3. Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
Zybach v. State 396
4. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
5. On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
Standard Federal Savings & Loan Assn. v. Meins 853
6. Courts take judicial notice of the public and general acts of Congress.
Standard Federal Savings & Loan Assn. v. Meins 853

Juries

1. A jury verdict may not be set aside unless 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.
Bell v. Williams Care Center 1
2. Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice to one accused of a crime.
State v. Ryan 59
3. To secure a change of venue on the basis of pretrial publicity, the defendant must show that the publicity has made it impossible to secure a fair and impartial jury.
State v. Jacobs 184
4. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
5. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
6. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195
7. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195
8. The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury.
Chadd v. Midwest Franchise Corp. 502
9. The questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury.
Chadd v. Midwest Franchise Corp. 502
10. The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury.
Chadd v. Midwest Franchise Corp. 502
11. It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.
Bay v. House 521
12. When the terms of the contract are in dispute and the real

intentions of the parties cannot be determined from the words used, the jury, and not the court, should determine the issue from all the facts and circumstances.
Luschen Bldg. Assn. v. Fleming Cos. 840

Jurisdiction

1. In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
State v. Ryan 59
2. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
State v. Ryan 59
3. Where a notice of appeal was not filed within 1 month from the entry of the final order appealed from, as required by Neb. Rev. Stat. § 25-1912(1) (Reissue 1985), this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.
State v. Reed 575
4. In all cases of apparent conflict between the state and federal courts, the latter are the exclusive judges over their jurisdiction of the subject of the action.
Craig v. Logemann 587
5. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759
6. The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Juror Qualifications

1. A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
State v. Jacobs 184
2. Under the provisions of Neb. Rev. Stat. § 25-1636 (Reissue 1985), it is not a "cause of challenge that a juror has read in the

newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement."
State v. Jacobs 184
3. A party who fails to challenge prospective jurors for disqualification and passes them for cause waives any objection to their selection as jurors.
Bittner v. Miller 206
4. A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
Bittner v. Miller 206

Jurors

1. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial.
Rahmig v. Mosley Machinery Co. 423
2. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
Rahmig v. Mosley Machinery Co. 423

Jury Instructions

1. Where it appears that the trial court's response to a question from the jury could not result in prejudice to any of the parties, the presence of the parties or their counsel is unnecessary.
Sesostris Temple Golden Dunes v. Schuman 7
2. It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
Professional Recruiters v. Oliver 16
3. The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal.
State v. Ryan 59
4. All of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
State v. Ryan 59
5. In instructions to the jury, fragments, though open to criticism

when considered by themselves, are not necessarily prejudicial to the complaining party if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence.
International Mov. & Stor. v. City of Lincoln 213

6. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
Bergman v. Anderson 333

7. NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
State v. Bocian 613

8. Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.
Omaha Mining Co. v. First Nat. Bank 743

9. The trial judge is under a duty on his own motion to correctly instruct on the law, and the Supreme Court may take cognizance of plain error indicative of a probable miscarriage of justice.
Omaha Mining Co. v. First Nat. Bank 743

Jury Trials

1. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
State v. Miller 576

2. A demand for a jury trial by a defendant is necessary to invoke the statutory right to a jury trial.
State v. Miller 576

Juvenile Courts

1. In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
State v. Ryan 59

2. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical

rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
State v. Ryan 59
3. As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
In re Interest of T.C. 116
In re Interest of C.C. 263
4. Separate juvenile courts must make a verbatim record of evidentiary proceedings before them.
In re Interest of R.A. 160

Leases

1. A lease is to be construed as any other contract.
Chadd v. Midwest Franchise Corp. 502
2. Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant.
Chadd v. Midwest Franchise Corp. 502
3. An action for breach of a lease presents an action at law.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752
4. In the absence of a statute or an express and distinct contract provision requiring otherwise, a forfeiture of a lease may be declared only where a breach is so material and substantial as to defeat the objects of the parties in making the contract.
Caeli Assoc. v. Firestone Tire & Rubber Co. 752

Legislature

1. L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
2. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
Banner County v. State Bd. of Equal. 236
3. A constitutional provision is not self-executing if such provision merely indicates a line of policy or principles without supplying the means by which such policy or principles are to be carried into effect; if the language of the constitutional provision is directed to the Legislature; or if the language of a constitutional provision indicates that subsequent legislation is contemplated or necessary for effectuation of such provision.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
4. Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

5. As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
In re Application U-2 594
6. Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.
In re Application U-2 594
7. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594
8. Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
In re Estate of West 813
9. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
In re Estate of West 813
10. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.
In re Estate of West 813

Lesser-Included Offenses

Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence of second degree murder.
State v. Tully 651

Liability

1. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
Delaware v. Valls 140

2. There is no vested right in a landowner to the continued flow of traffic by his property, so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability.
International Mov. & Stor. v. City of Lincoln 213

3. Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice.
Turner v. Welliver 275

4. As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage.
Bergman v. Anderson 333

5. A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
Johnson v. NM Farms Bartlett 680

6. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680

7. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the

damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680
8. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

Libel and Slander

1. In the law of libel and slander, a communication is privileged if made bona fide by one who has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer or speaker to give the information.
Turner v. Welliver 275
2. Where a qualified privilege exists, there can be no recovery without proof of malice.
Turner v. Welliver 275
3. Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.
Turner v. Welliver 275
4. A communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct.
Turner v. Welliver 275
5. Communications between an insurer and insured about an agent of an insurer may be qualifiedly privileged.
Turner v. Welliver 275
6. Generally, whether a publication was a privileged one is a question of law to be determined by the court.
Turner v. Welliver 275
7. Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice.
Turner v. Welliver 275
8. As a general rule, in a case of alleged libel or slander, truth is a complete defense absent proof of actual malice.
Turner v. Welliver 275
9. Actual malice may be defined as hate, spite, or ill will toward the person about whom a statement has been published.
Turner v. Welliver 275
10. A defamatory communication may consist of a statement in the

form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
Turner v. Welliver 275

11. A communication between those sharing a common interest is conditionally privileged.
Turner v. Welliver 275

Licensee

The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.
Moseman v. L & P Investment Co. 677

Licenses and Permits

1. Under Neb. Rev. Stat. § 39-669.28 (Reissue 1984), which provides that notice of revocation of an operator's license may be served by mailing it to the "last-known residence" of the operator, the notice should be sent to the last address of the licensee as shown by the files of the department.
State v. Moderow 470

2. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666

3. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759

Liens

1. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
Graff v. Burnett 710

2. When the owner of livestock contracts with another to feed and care for the owner's livestock, Neb. Rev. Stat. § 54-201 (Reissue 1984) provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care.
Graff v. Burnett 710

Limitations of Actions

1. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
   Tylle v. Zoucha 476
2. When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
   Jones v. Malloy 559

Livestock

1. An action for determination of the amount of a lien, pursuant to Neb. Rev. Stat. § 54-201 or § 54-202 (Reissue 1984), and foreclosure of such lien is an equity action.
   Graff v. Burnett 710
2. When the owner of livestock contracts with another to feed and care for the owner's livestock, Neb. Rev. Stat. § 54-201 (Reissue 1984) provides the agister with a lien upon the stock for the agister's keeping, and the owner cannot lawfully obtain possession of the stock until the owner has paid or tendered to the agister the amount due for the feed and care.
   Graff v. Burnett 710

Malpractice

1. When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions.
   Jones v. Malloy 559
2. The statutory language of Neb. Rev. Stat. §§ 44-2816 and 44-2820 (Reissue 1984) regarding informed consent applies to malpractice actions against chiropractors.
   Jones v. Malloy 559
3. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
   Jones v. Malloy 559
4. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
   Jones v. Malloy 559
5. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
   Jones v. Malloy 559

Mandamus

The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.
Larson v. City of Omaha 751

Medical Malpractice

A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
Bittner v. Miller 206

Mental Competency

1. A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
State v. Tully 651
2. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
State v. Tully 651
3. Mental retardation does not necessarily imply incompetence to plead or stand trial.
State v. Tully 651
4. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Tully 651

Minors

1. The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).
State v. Jensen 40
2. Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind 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.
Cain v. Cain 203
3. If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

4. Regarding negligence, the special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408
5. What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408
6. In a Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1984), proceeding, the law of the responding state controls with respect to the age at which a minor's custodian ceases to be entitled to child support.
State of Iowa ex rel. Petersen v. Miner 551

Miranda Rights

Miranda warnings are not required prior to an officer's request of a driver to submit to a chemical analysis under the Nebraska implied consent law.
Heusman v. Jensen 666

Modification of Decree

1. Modification of child support is an issue entrusted to the sound discretion of the trial court.
Dobbins v. Dobbins 465
2. The paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children.
Dobbins v. Dobbins 465
3. Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.
Dobbins v. Dobbins 465
4. Evidence of the increased age of children alone will not furnish a satisfactory basis for modification of an award of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
Dobbins v. Dobbins 465
5. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, that rule includes only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order.
Dobbins v. Dobbins 465

Mortgages

1. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
   Keith County Bank v. Wheat Belt Pub. Power Dist. 850
2. Where a foreign corporation, as defined in Neb. Rev. Stat. § 21-2002(2) (Reissue 1983), is trying to foreclose a mortgage given by residents of Nebraska on Nebraska land, Neb. Rev. Stat. § 21-20,105(8) (Reissue 1983) provides that such corporation need not obtain a certificate of authority from the Nebraska Secretary of State before engaging in such activity.
   Standard Federal Savings & Loan Assn. v. Meins 853

Motions for Continuance

This court will not reverse an order granting or refusing a continuance except where there has been an abuse of sound legal discretion by the lower court.
State v. Carter 636

Motions for Mistrial

1. The decision to grant a motion for mistrial is squarely within the sound discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
   State v. Nesbitt 32
   State v. Jacobs 184
   State v. Alvarado 195
2. A mistrial is properly declared when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.
   State v. Jacobs 184
3. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.
   State v. Johnson 618

Motions for New Trial

1. The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
   State v. Cottingham 270
2. New evidence on which a motion for new trial is based must not be merely cumulative, but must be of such a potent nature that, by strengthening the evidence already offered, it would have probably produced a substantially different outcome.
   State v. Cottingham 270

3. Ordinarily, the failure to object to instructions when submitted to counsel for review will preclude raising an objection thereafter. That does not prevent the trial judge from correcting his instruction error by sustaining a motion for a new trial.
Omaha Mining Co. v. First Nat. Bank 743

Motions to Dismiss

1. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
State v. Jacobs 184
2. In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
Tiede v. Loup Power Dist. 295
3. In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
Tiede v. Loup Power Dist. 295

Motions to Vacate

1. For the purpose of Neb. Rev. Stat. § 25-2008 (Reissue 1985), equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful, if begun.
In re Estate of West 813
2. As authorized under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), a proceeding to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law or legal remedy conferred by statute. Whether the relief is sought by a motion addressed to a court's equity jurisdiction or a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in character, available or administered on equitable principles, and extended on equitable terms.
In re Estate of West 813
3. A court's jurisdiction based on Neb. Rev. Stat. § 25-2001 (Reissue 1985) is concurrent with a court's independent equity jurisdiction.
In re Estate of West 813

4. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
In re Estate of West 813

5. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), in reviewing a trial court's action in vacating, or refusing to vacate, a judgment or order made in a previous term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.
In re Estate of West 813

6. As a general rule, if a judgment has been obtained through fraud and collusion, the judgment may be vacated or set aside in a subsequent action, especially where the court was imposed upon thereby and the complaining party was prevented from having his interests fairly presented or fully considered by the court.
In re Estate of West 813

7. Setting aside or vacating a judgment may be an appropriate remedy where a judgment was obtained against a litigant by collusion between the attorney for the litigant and the adversary of the litigant.
In re Estate of West 813

8. If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985) to the injured party.
In re Estate of West 813

Motor Carriers

1. In determining whether a carrier's operation in hauling goods between points in one state through another state is a subterfuge, courts should look to the reasonableness of the carrier's modus operandi, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the "local" route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority, and (3) the incidental or

dominant character of the intrastate traffic as a portion of the carrier's overall operation. No single factor is controlling as to the outcome.
In re Application of Silvey Refrig. Carr. 668
2. A logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing, and does not indicate subterfuge to avoid state regulation.
In re Application of Silvey Refrig. Carr. 668
3. The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
In re Application of Silvey Refrig. Carr. 668
4. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
In re Application of Silvey Refrig. Carr. 668
5. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
In re Application of Silvey Refrig. Carr. 668

Municipal Corporations

1. If either a fire protection district organized under Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1984) or a municipality seeks a judicial adjustment of matters arising out of annexation by a municipality, proceedings under Neb. Rev. Stat. § 31-766 (Reissue 1984) must be commenced as soon as it becomes evident that an agreed adjustment cannot be reached.
Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha 50
2. Before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality.
Bard v. Cox Cable of Omaha, Inc. 880
3. One is excused from making a demand upon a municipality to adjust a rate if such demand would be unavailing.
Bard v. Cox Cable of Omaha, Inc. 880

Names

Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind 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.
Cain v. Cain 203

Nebraska Power Review Board

The Nebraska Power Review Board lacks authority to determine whether a supplier of electricity may insist upon the payment of another's delinquent charges as a condition of providing electric service.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Negligence

1. The negligent failure to reveal a fact generally does not amount to fraudulent concealment.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
2. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
Delaware v. Valls 140
3. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
Delaware v. Valls 140
4. The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
Delaware v. Valls 140
5. Negligence is actionable only when it results in damages.
Bittner v. Miller 206
6. For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
Tiede v. Loup Power Dist. 295
7. The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
Tiede v. Loup Power Dist. 295
8. The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk.
Tiede v. Loup Power Dist. 295
9. A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a

particular standard of conduct toward another.
Tiede v. Loup Power Dist. 295
10. While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury.
Tiede v. Loup Power Dist. 295
11. The duty to warn others of a particular peril is not absolute; the need to warn depends upon, among other things, the age, intelligence, and information of those to whom the warning might be due, and the obligation disappears entirely where it is shown that the injured person did in fact know of and fully appreciate the peril.
Tiede v. Loup Power Dist. 295
12. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
Tiede v. Loup Power Dist. 295
13. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
Tiede v. Loup Power Dist. 295
14. Power companies are not insurers and are not liable for damages in the absence of negligence.
Tiede v. Loup Power Dist. 295
15. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
Tiede v. Loup Power Dist. 295
16. One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
Tiede v. Loup Power Dist. 295
17. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
Tiede v. Loup Power Dist. 295

18. To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts.
Tiede v. Loup Power Dist. 295

19. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.
Tiede v. Loup Power Dist. 295

20. If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

21. Regarding negligence, the special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

22. What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

23. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

24. Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what a reasonably prudent person under the same circumstances would or should, in the exercise of reasonable care, have anticipated.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408

25. In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the

question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
Rahmig v. Mosley Machinery Co. 423

26. In a cause of action for products liability on account of a design defect, the test for a manufacturer's strict liability in tort is the user-contemplation test or consumer-contemplation test reflected in Restatement (Second) of Torts § 402 A (1965).
Rahmig v. Mosley Machinery Co. 423

27. Regarding Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)), encouragement of remedial measures is the principal reason for the rule excluding evidence that such measures were taken. The policy underlying Neb. Evid. R. 407 encourages people to take safety precautions.
Rahmig v. Mosley Machinery Co. 423

28. Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
Rahmig v. Mosley Machinery Co. 423

29. Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.
Rahmig v. Mosley Machinery Co. 423

30. Contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action based on strict liability for a defective and unreasonably dangerous product.
Rahmig v. Mosley Machinery Co. 423

31. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing

actions for professional negligence.
Tylle v. Zoucha 476
32. As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
Stansbery v. Schroeder 492
33. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492
34. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.
Moseman v. L & P Investment Co. 677
35. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680
36. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680

New Trial

1. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.
Omaha Mining Co. v. First Nat. Bank 743
2. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

Notice

1. Under Neb. Rev. Stat. § 39-669.28 (Reissue 1984), which provides that notice of revocation of an operator's license may be served by mailing it to the "last-known residence" of the operator, the notice

should be sent to the last address of the licensee as shown by the files of the department.
State v. Moderow 470
2. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by them.
Hroch v. City of Omaha 589
3. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Obscenity

The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).
State v. Jensen 40

Ordinances

1. Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.
State v. Cottingham 270
2. Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
Zybach v. State 396

Other Acts

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive."
State v. Jacobs 184
2. Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court.
State v. Jacobs 184

Parental Rights

1. In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to

the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
In re Interest of T.C. 116
In re Interest of C.C. 263
In re Interest of J.K.B. and C.R.B. 701
In re Interest of P.J.M., R.E.M., and S.A.M. 764
In re Interest of Z.R. 770

2. In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
In re Interest of T.C. 116
In re Interest of C.C. 263

3. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
In re Interest of T.C. 116
In re Interest of C.C. 263

4. As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
In re Interest of T.C. 116
In re Interest of C.C. 263

5. Because the record must establish by clear and convincing evidence the basis for termination of parental rights, the observance of formal court procedures is encouraged.
In re Interest of R.A. 160
In re Interest of C.W. 719

6. When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. Parents in such proceedings have a right to cross-examine adverse witnesses.
In re Interest of R.A. 160
In re Interest of J.K.B. and C.R.B. 701

7. An order of termination of parental rights is reviewed de novo, and evidence erroneously admitted is not considered.
In re Interest of R.A. 160

8. An order of termination of parental rights must be supported by clear and convincing evidence and should only be issued when there is no reasonable alternative.
In re Interest of R.A. 160
In re Interest of Z.R. 770

9. Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a

final disposition be made without delay.
In re Interest of R.A. 160
In re Interest of Z.R. 770
10. A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation.
In re Interest of R.A. 160
11. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.
In re Interest of R.A. 160
12. A child's future need not be subject to the risks of awaiting uncertain parental maturity.
In re Interest of R.A. 160
13. Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home.
In re Interest of R.A. 160
14. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
15. In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
In re Interest of J.K.B. and C.R.B. 701
16. In a proceeding to terminate parental rights, an indigent parent does not have the right to be represented by counsel of his or her own choosing; neither is the mere distrust of, or dissatisfaction with, appointed counsel enough to secure the appointment of substitute counsel.
In re Interest of J.K.B. and C.R.B. 701
17. Where there is a need for a rehabilitation plan, a parent has not substantially complied with a reasonable court-ordered rehabilitation plan, the prognosis for rehabilitation is poor, and it is in the child's best interests that the parent's rights be terminated, such rights are to be terminated.
In re Interest of J.K.B. and C.R.B. 701
18. The order terminating parental rights must be supported by clear and convincing evidence and must also be in the best interests of the child.
In re Interest of P.J.M., R.E.M., and S.A.M. 764
19. The primary consideration in a termination proceeding is the best interests of the child. This standard means that the ultimate decision of the court, after sufficient evidence has been presented,

must be rendered in the best interests of the child.
In re Interest of Z.R. 770
20. An adjudication order is an appealable order. In the absence of an appeal, such an order may not be reviewed after the time for appeal has expired.
In re Interest of Z.R. 770
21. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. The past is an indication of the future.
In re Interest of Z.R. 770
22. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
In re Interest of Z.R. 770

Parol Evidence

Parol evidence is admissible to explain vague language contained in a written contract.
Washington Heights Co. v. Frazier 127

Parties

1. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
Turner v. Welliver 275
2. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
Koch v. Koch 305

Paternity

A paternity action is an action at law, and, when a jury has been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
State ex rel. S.B. v. Dybdall 473

Photographs

1. Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the

photographs outweighs the possible prejudice to one accused of a crime.
State v. Ryan 59
2. Photos of the victim in a murder case are admissible, even if gruesome, if proper foundation is laid and they are received into evidence to show the condition of the body or the nature and extent of the wounds; to establish malice or intent, particularly in conjunction with the examining pathologist's testimony; or for purposes of identification.
State v. Parsons 543

Physician and Patient

A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
Bittner v. Miller 206

Plea in Abatement

Any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
State v. Schreck 172
State v. Jacobs 184
State v. Carter 636

Pleadings

1. A request to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed.
Bittner v. Miller 206
2. At certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue.
Bittner v. Miller 206
3. The statute concerning amendments to pleadings should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice.
Bittner v. Miller 206
4. A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.
Frerichs v. Nebraska Harvestore Sys. 220
5. A defendant must prove all elements of an affirmative defense.
Pawnee County Bank v. Droge 314
6. Under a code system of pleading, such as that in Nebraska, it is not necessary to state a cause of action in any particular form. It is

only necessary to plead the facts, and not the theory of recovery.
Bergman v. Anderson 333
7. Alleging that a will is not "subscribed and attested in accordance with Nebraska law" is sufficient pleading to raise an issue as to validity of testator's signature.
In re Estate of Villwok 693
8. On a demurrer, a petition should be read as though incorporating everything of which the courts take judicial notice.
Standard Federal Savings & Loan Assn. v. Meins 853
9. Pleadings in ordinary actions are to be liberally construed; if with such a construction a petition states a cause of action, a demurrer is to be overruled.
Bard v. Cox Cable of Omaha, Inc. 880
Slusarski v. County of Platte 889
10. A demurrer which challenges the sufficiency of the allegations is a general one.
Slusarski v. County of Platte 889
11. In ruling on a general demurrer, a court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
Slusarski v. County of Platte 889
12. As Neb. Const. art. I, § 21, is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to the foregoing article and section numbers nor the pertinent constitutional language.
Slusarski v. County of Platte 889
13. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895
14. As a general rule, the granting or withholding of permission to file a late pleading rests within the proper discretion of the trial court as a means of preventing delays and avoiding congestion of the trial docket.
W & K Farms v. Hi-Line Farms 895
15. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Ambroz v. Cornhusker Square Ltd. 899
16. For the purposes of our review, we accept the well-pleaded facts in the petition, as distinguished from conclusions, as true, and consider only the facts set forth in the petition.
Ambroz v. Cornhusker Square Ltd. 899

Pleas

1. A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.
   State v. Rivers 353
2. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
   State v. Slezak 404
3. For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.
   State v. Slezak 404
4. In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
   State v. Tully 651
5. A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
   State v. Tully 651
6. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
   State v. Tully 651
7. Mental retardation does not necessarily imply incompetence to plead or stand trial.
   State v. Tully 651
8. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
   State v. Tully 651
9. Where a defendant was unaware of the penal consequences of his guilty plea because he had been misinformed by the court, his plea is not voluntary.
   State v. Golden 863

Police Officers and Sheriffs

1. The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief

the action was appropriate, then probable cause exists.
State v. Moore 347
2. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
3. A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
State v. Thomte 659

Political Subdivisions Tort Claims Act

1. A drainage district is a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
Parriott v. Drainage Dist. No. 6 123
2. A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
Hughes v. Enterprise Irrigation Dist. 230
3. When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1986), or in an action under the language of Neb. Const. art. I, § 21, which provides, inter alia, that the property of no person shall be damaged for a public use without just compensation.
Slusarski v. County of Platte 889

Polygraph Tests

The Nebraska Licensing of Truth and Deception Examiner's Act, Neb. Rev. Stat. §§ 81-1901 et seq. (Reissue 1981), provides for the licensing of polygraph and other similar examiners and restricts the use of truth and deception examination of employees by employers.
Ambroz v. Cornhusker Square Ltd. 899

Postconviction

1. When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.
State v. Rivers 353
2. A motion for postconviction relief may not be used to obtain

review of issues which could have been raised on direct appeal.
State v. Rivers 353
3. A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
State v. Rivers 353
State v. Tully 651
4. Although an evidentiary hearing is not always necessary on an application for postconviction relief, such a hearing is usually advisable to avoid protracted litigation.
State v. Rivers 353
5. An evidentiary hearing on a postconviction motion is required upon an appropriate motion containing factual allegations which, if proved, constitute an infringement of a constitutional right.
State v. Jackson 857

Presumptions

1. All statutes are presumed constitutional, and the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional.
Tylle v. Zoucha 476
2. 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.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
3. An exemption from taxation is never presumed. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
4. In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
State v. Parsons 543
5. Consent to medical treatment will be presumed, in the absence of fraud or misrepresentation.
Jones v. Malloy 559
6. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
State v. Duff 567
7. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.
In re Application U-2 594

Pretrial Procedure

After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636

Principal and Agent

An attorney in fact has no implied or apparent authority to do that which the principal himself would not be authorized to do.
Zybach v. State 396

Prior Convictions

1. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
State v. Slezak 404
2. For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.
State v. Slezak 404
3. In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
State v. Johnson 618

Prisoners

1. Prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.
Meis v. Grammer 360
2. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights.
Meis v. Grammer 360
3. Running a prison is an inordinately difficult undertaking, requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.
Meis v. Grammer 360
4. In the absence of substantial evidence that prison officials have exaggerated their response to their concerns for internal security of the institution, courts should generally defer to their expert judgment.
Meis v. Grammer 360

5. Several factors are relevant in determining the reasonableness of prison regulations. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.
Meis v. Grammer 360
6. Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.
State v. Sorich 547
7. When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547
8. Habeas corpus is available as a remedy to a person held pursuant to a judgment of conviction only upon a showing that the judgment, sentence, and commitment are void. The writ is not available merely to challenge the conditions of confinement of a prisoner under valid sentence.
Anderson and Hochstein v. Gunter 724

Probable Cause

1. The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Moore 347
2. In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
State v. Duff 567
3. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
State v. Duff 567

4. In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
State v. Duff 567
5. In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.
State v. Duff 567
6. A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
State v. Thomte 659
7. An investigatory stop must be justified by an objective manifestation that the person stopped has been, is, or is about to be engaged in criminal activity.
State v. Thomte 659
8. A vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle. Such a circumstance supports an officer's justifiable belief that the weaving vehicle is being driven by a person who is under the influence of alcohol, in violation of the drunk driving statute, Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986).
State v. Thomte 659
9. An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant.
State v. Hinton 787
10. The test for issuance of a wiretap order under the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986), is whether the sworn information before the court is of sufficient apparent reliability to justify a finding that there is probable cause to believe that an offense cognizable under said statutes has been or is being committed.
State v. Hinton 787

Products Liability

1. In products liability, there is a significant distinction between a

manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
Rahmig v. Mosley Machinery Co. 423

2. In a cause of action for products liability on account of a design defect, the test for a manufacturer's strict liability in tort is the user-contemplation test or consumer-contemplation test reflected in Restatement (Second) of Torts § 402 A (1965).
Rahmig v. Mosley Machinery Co. 423

3. To recover on a claim of strict liability in tort for a defectively designed product, a plaintiff is required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
Rahmig v. Mosley Machinery Co. 423

4. In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer.
Rahmig v. Mosley Machinery Co. 423

5. Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact.
Rahmig v. Mosley Machinery Co. 423

6. Assumption of risk, under appropriate circumstances, may be an affirmative defense in an action brought for a manufacturer's strict liability in tort for a design defect.
Rahmig v. Mosley Machinery Co. 423

7. In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect.
Rahmig v. Mosley Machinery Co. 423

8. A user's knowledge about the general danger or hazard in using a product will not support the defense that the user knew the product's specific defect and dangerous condition resulting from such defect.
Rahmig v. Mosley Machinery Co. 423
9. In a products liability case, misuse is not an aspect of assumption of risk.
Rahmig v. Mosley Machinery Co. 423
10. Contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action based on strict liability for a defective and unreasonably dangerous product.
Rahmig v. Mosley Machinery Co. 423
11. Insofar as *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.
Rahmig v. Mosley Machinery Co. 423

Proof

1. The party seeking recovery has the burden of proving damages with as much certainty as the case permits.
Sesostris Temple Golden Dunes v. Schuman 7
Shadow Isle, Inc. v. Granada Feeding Co. 325
2. The elements constituting fraudulent concealment, which must be proved whether seeking rescission or damages, are (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
3. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
4. To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to

render it impossible for him or her to be the guilty party.
State v. Jacobs 184
5. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
6. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
7. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195
8. At certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue.
Bittner v. Miller 206
9. By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.
Hughes v. Enterprise Irrigation Dist. 230
10. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275
11. Where a qualified privilege exists, there can be no recovery without proof of malice.
Turner v. Welliver 275
12. As a general rule, in a case of alleged libel or slander, truth is a complete defense absent proof of actual malice.
Turner v. Welliver 275
13. The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
Tiede v. Loup Power Dist. 295
14. The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk.
Tiede v. Loup Power Dist. 295
15. A defendant must prove all elements of an affirmative defense.
Pawnee County Bank v. Droge 314
16. In order to establish a defense of undue influence, the party

asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence.
Pawnee County Bank v. Droge 314

17. To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result.
Pawnee County Bank v. Droge 314

18. To recover on a claim of strict liability in tort for a defectively designed product, a plaintiff is required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
Rahmig v. Mosley Machinery Co. 423

19. In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer.
Rahmig v. Mosley Machinery Co. 423

20. Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact.
Rahmig v. Mosley Machinery Co. 423

21. Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
Rahmig v. Mosley Machinery Co. 423

22. Insofar as *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable

alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.
Rahmig v. Mosley Machinery Co. 423

23. As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
Stansbery v. Schroeder 492

24. In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.
Stansbery v. Schroeder 492

25. The burden of proving exemption from taxation is on the party claiming such exemption.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

26. Where, in a suit on a contract, the plaintiff's evidence establishes acceptance of the offer, it is the burden of the offeree to establish that the offeree revoked the acceptance prior to communication of the acceptance to the offeror.
Stremmel v. Kinney 555

27. Whether a specific manner of treatment by a physician demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter usually to be proved by expert testimony.
Jones v. Malloy 559

28. Expert testimony is required for informed consent cases as to the standard of care for a particular profession.
Jones v. Malloy 559

29. Before a plaintiff may recover damages in any action based on failure to obtain informed consent, it shall be established by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.
Jones v. Malloy 559

30. NJI 14.34 (entrapment) is proper in that it places the burden on the State to prove beyond a reasonable doubt the predisposition of the defendant to commit the crime as part of the larger burden to prove that the defendant was not improperly induced.
State v. Bocian 613

31. Neb. Rev. Stat. §§ 28-401 and 28-402 (Reissue 1956) define degrees of the single crime of homicide; the unlawful killing

constitutes the principal fact and the condition of the mind or the attendant circumstances determine the degree or grade of the offense. When the greater degree has been committed, the lesser has also been committed, the lesser necessarily having been involved as a constituent part of the greater. Therefore, evidence which proves first degree murder proves the existence of second degree murder.
State v. Tully 651

32. One seeking postconviction relief bears the burden of establishing the basis for such relief.
State v. Tully 651

33. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666

34. The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
In re Application of Silvey Refrig. Carr. 668

35. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
In re Application of Silvey Refrig. Carr. 668

36. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
In re Application of Silvey Refrig. Carr. 668

37. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680

38. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680

39. In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of

frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.
Johnson v. NM Farms Bartlett 680

40. The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
In re Estate of Villwok 693

41. One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
Graff v. Burnett 710

42. A party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.
Pallas v. Black 728

43. Under Neb. Rev. Stat. § 25-2001(4) (Reissue 1985), to vacate a judgment or order after the term in which the judgment or order was made, the party seeking to vacate such judgment or order allegedly obtained through fraud practiced by the successful party must prove: (1) The judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.
In re Estate of West 813

44. Third degree sexual assault does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose.
State v. Charron 871

Property

1. When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.
Parriott v. Drainage Dist. No. 6 123

2. A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not

in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.
Evertson v. Cannon 370

Prosecuting Attorneys

1. Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), which allows the county attorney to appeal any ruling or decision of the court made during the prosecution of a cause, does not permit review of issues upon which no ruling was made.
State v. Jensen 40
2. A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
State v. Alvarado 195
3. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
State v. Alvarado 195
4. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
State v. Alvarado 195
5. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
State v. Alvarado 195

Proximate Cause

1. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
Delaware v. Valls 140
2. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
Delaware v. Valls 140
3. *Cause* is defined as that which produced an effect, result, or consequence. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
Hughes v. Enterprise Irrigation Dist. 230

4. By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.
Hughes v. Enterprise Irrigation Dist. 230

Public Service Commission

1. In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
In re Application of Silvey Refrig. Carr. 668
2. The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest.
In re Application of Silvey Refrig. Carr. 668
3. If the evidence shows that the proposed transportation by the contract carrier can be performed as well by common carriers as by contract carriers, the application should be denied.
In re Application of Silvey Refrig. Carr. 668
4. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
In re Application of Silvey Refrig. Carr. 668

Public Utilities

1. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
Tiede v. Loup Power Dist. 295
2. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
Tiede v. Loup Power Dist. 295
3. Power companies are not insurers and are not liable for damages in the absence of negligence.
Tiede v. Loup Power Dist. 295
4. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
Tiede v. Loup Power Dist. 295

5. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.
Tiede v. Loup Power Dist. 295
6. In order to judicially challenge a rate set by a legislative body, one must allege a special injury peculiar to himself or herself aside from and independent of that suffered by the nonsubscribing general public.
Bard v. Cox Cable of Omaha, Inc. 880

Quo Warranto

Absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto.
Bard v. Cox Cable of Omaha, Inc. 880

Rates

1. In order to judicially challenge a rate set by a legislative body, one must allege a special injury peculiar to himself or herself aside from and independent of that suffered by the nonsubscribing general public.
Bard v. Cox Cable of Omaha, Inc. 880
2. Before one may resort to a judicial challenge of rates set by a municipality, he or she must first seek redress from the municipality.
Bard v. Cox Cable of Omaha, Inc. 880
3. One is excused from making a demand upon a municipality to adjust a rate if such demand would be unavailing.
Bard v. Cox Cable of Omaha, Inc. 880
4. Courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law.
Bard v. Cox Cable of Omaha, Inc. 880
5. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), does not preclude state judicial review of basic and nonbasic community antenna television service rates charged prior to December 29, 1986.
Bard v. Cox Cable of Omaha, Inc. 880

Real Estate

1. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing

actions for professional negligence.
Tylle v. Zoucha 476
2. Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
Pallas v. Black 728

Receivers

1. A receiver appointed in a mortgage foreclosure action serves for the purpose of conserving the mortgaged property and applying the rents and profits of said premises to the satisfaction of the debt secured by the mortgage.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850
2. Absent some sort of malfeasance, a receiver will not be held personally liable for the debts of the estate in receivership.
Keith County Bank v. Wheat Belt Pub. Power Dist. 850

Records

1. A court must take judicial notice of its own records in the case under consideration.
In re Interest of R.A. 160
2. Separate juvenile courts must make a verbatim record of evidentiary proceedings before them.
In re Interest of R.A. 160
3. An order of the district court affirming a judgment of the county court cannot be reviewed unless the record before the Supreme Court contains the judgment of the county court reviewed by the district court.
State v. O'Neill 866

Rescission

1. In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135
2. Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.
Platte Valley Fed. Sav. & Loan Assn. v. Gray 135

Revocation

1. In an appeal from an order of the director of the Department of Motor Vehicles revoking an operator's license under Nebraska's

implied consent law, it is the licensee's burden to prove the invalidity of the revocation order.
Heusman v. Jensen 666

2. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759

Right to Counsel

1. Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "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. Masilko 45

2. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), the trial court must 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. Masilko 45

3. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
State v. Slezak 404

4. The driver of a vehicle is not entitled to consult with an attorney before submitting to a chemical test under Nebraska's implied consent law.
Heusman v. Jensen 666

5. In a proceeding to terminate parental rights, an indigent parent does not have the right to be represented by counsel of his or her own choosing; neither is the mere distrust of, or dissatisfaction with, appointed counsel enough to secure the appointment of substitute counsel.
In re Interest of J.K.B. and C.R.B. 701

Robbery

Robbery of contraband may be subject to the penal sanction of Neb. Rev. Stat. § 28-324 (Reissue 1985).
State v. Dwyer 340

Rules of Evidence

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive."
   State v. Jacobs 184
2. Under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1985), relevant evidence is to be excluded if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice.
   State v. Jacobs 184
3. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
   Turner v. Welliver 275
4. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
   Turner v. Welliver 275
5. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
   Turner v. Welliver 275
6. Regarding Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)), encouragement of remedial measures is the principal reason for the rule excluding evidence that such measures were taken. The policy underlying Neb. Evid. R. 407 encourages people to take safety precautions.
   Rahmig v. Mosley Machinery Co. 423
7. Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
   Rahmig v. Mosley Machinery Co. 423
8. Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) does not require exclusion of evidence concerning subsequent repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached.
   Rahmig v. Mosley Machinery Co. 423
9. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source

other than evidence presented at trial.
Rahmig v. Mosley Machinery Co. 423
10. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
Rahmig v. Mosley Machinery Co. 423
11. In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
State v. Johnson 618
12. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
13. In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
In re Interest of J.K.B. and C.R.B. 701

Search and Seizure

1. Fourth amendment rights are personal rights, which may not be vicariously asserted.
State v. Smith 419
2. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.
State v. Madsen 722
3. In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.
State v. Hinton 787
4. A failure in the ministerial act of returning and filing a search warrant does not void the warrant.
State v. Hinton 787

Search Warrants

1. Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
State v. Smith 419

2. In determining probable cause for issuance of a search warrant, the issuing judge must make a practical, commonsense decision whether, given the totality of all the circumstances before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
State v. Duff 567
3. Only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.
State v. Duff 567
4. In the issuance of a search warrant, where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and where a magistrate has found probable cause, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
State v. Duff 567
5. An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
State v. Duff 567
6. In reviewing the issuance of a search warrant, great deference should be paid to the issuing magistrate's determination of probable cause.
State v. Duff 567
7. In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.
State v. Hinton 787
8. A failure in the ministerial act of returning and filing a search warrant does not void the warrant.
State v. Hinton 787
9. Absent a showing of pretext or bad faith on the part of the police or prosecution, invalidity of a portion of a search warrant does not require suppression of evidence seized pursuant to the valid portions of the warrant.
State v. Warren 810

Second Injury Fund

1. If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual, and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the

employer, then the employer is only required to pay for that portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.
Parker v. St. Elizabeth Comm. Health Ctr. 526
2. The Second Injury Fund concept was created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability.
Parker v. St. Elizabeth Comm. Health Ctr. 526

Security Interests

Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Sentences

1. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Masilko 45
2. The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention.
State v. Ryan 59
3. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
State v. Ryan 59
State v. Schreck 172
State v. Miller 576
4. In determining the appropriate sentence, evidence as to a defendant's life, character, and previous conduct is highly relevant.
State v. Schreck 172
5. The seriousness of the offense is an important factor in imposing a sentence.
State v. Schreck 172
6. The punishment for a criminal act should in all circumstances be commensurate with the offense.
State v. Bocian 613
7. Under the provisions of Neb. Rev. Stat. §§ 28-105 and 28-304(2) (Reissue 1985), a court is not authorized to sentence one convicted

of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years.
State v. Ward 809

Sexual Assault

1. In order for one to commit the offense of sexual assault in either the second or third degree, the victim must be subjected to actual sexual contact.
State v. Charron 871
2. Third degree sexual assault does not require proof of actual sexual arousal or gratification, but only circumstances and conduct which could reasonably be construed as being for such purpose.
State v. Charron 871

Specific Performance

1. An action for specific performance is an equitable matter triable de novo on appeal to this court.
Pallas v. Black 728
2. If one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party.
Pallas v. Black 728
3. Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
Pallas v. Black 728
4. A party seeking specific performance must show his or her right to the relief sought, including proof that he or she is ready, willing, and able to perform his or her obligations under the contract.
Pallas v. Black 728
5. The mere fact that the value of property which is the subject of a contract has increased or diminished since the contract was executed will not warrant a court in refusing to grant a decree of specific performance, absent circumstances indicating fraud or bad faith.
Pallas v. Black 728

Standing

1. For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
In re Estate of West 813
2. Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A

court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution.
In re Estate of West 813

Statute of Frauds

1. The Nebraska Uniform Commercial Code's statute of frauds governing contracts for the sale of personal property and goods does not apply to agreements for personal services.
Professional Recruiters v. Oliver 16
2. In order to establish that an oral contract falls within the Neb. Rev. Stat. § 36-106 (Reissue 1984) exception to the statute of frauds found in Neb. Rev. Stat. § 36-103 (Reissue 1984), the proponent of the contract must establish by clear, satisfactory, and unequivocal evidence the terms of the contract, that the acts done in the performance thereof are referable solely to that contract, and that the acts performed are of such a nature that nonperformance of the contract by the other party would amount to a fraud upon the proponent.
Johnson v. NM Farms Bartlett 680
3. A memorandum otherwise adequate to satisfy the requirements of Neb. Rev. Stat. § 36-105 (Reissue 1984) need be signed only by the party to be charged.
Pallas v. Black 728
4. In order to satisfy the provisions of Neb. Rev. Stat. § 36-105 (Reissue 1984), a memorandum, in addition to being signed by the party to be charged or by his or her agent actually or apparently authorized to do so, must state with reasonable certainty, (1) each party to the contract either by his or her own name, or by such a description as will serve to identify him or her, or by the name or description of his or her agent, (2) the land, goods, or other subject matter to which the contract relates, and (3) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.
Pallas v. Black 728

Statutes

1. Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).
In re Application A-15738 146
2. In order for a defendant to challenge a statute on the ground of

vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
State v. Schreck 172
3. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
State v. Schreck 172
4. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more.
State v. Schreck 172
5. Statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
6. The party challenging the constitutionality of a statute has the burden to show it is unconstitutional.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
Tylle v. Zoucha 476
7. L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.
State ex rel. Spire v. Public Emp. Ret. Bd. 176
8. The statute concerning amendments to pleadings should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice.
Bittner v. Miller 206
9. Neb. Rev. Stat. §§ 77-1502 and 77-1504 (Reissue 1986) were not repealed by 1985 Neb. Laws, L.B. 271.
Banner County v. State Bd. of Equal. 236
10. The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
11. Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are clear and comprehensive and constitute a complete and comprehensive act dealing with the matter of tax exemptions.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
12. As a series or collection of statutes pertaining to a certain subject

matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
In re Application U-2 594
13. State laws are accorded a presumption of constitutionality, and when a law is constitutionally suspect, this court will endeavor to interpret it in a manner consistent with the Constitution.
In re Application U-2 594
14. In considering and applying a statute, this court will determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language thereof, considered in its ordinary sense.
In re Application U-2 594
15. While a penal statute is to be construed strictly, it is to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
In re Interest of Richter 874
16. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
In re Interest of Richter 874

Summary Judgment

1. A motion for summary judgment should be granted if the pleadings, depositions, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from such facts and that the moving party is entitled to judgment as a matter of law.
Frerichs v. Nebraska Harvestore Sys. 220
Chadd v. Midwest Franchise Corp. 502
Moseman v. L & P Investment Co. 677
In re Estate of Villwok 693
Luschen Bldg. Assn. v. Fleming Cos. 840
2. A court may not enter summary judgment on an issue not presented by the pleadings.
Frerichs v. Nebraska Harvestore Sys. 220
3. Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
Chadd v. Midwest Franchise Corp. 502
Luschen Bldg. Assn. v. Fleming Cos. 840
4. In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence.
Moseman v. L & P Investment Co. 677
Luschen Bldg. Assn. v. Fleming Cos. 840

5. When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment.
Luschen Bldg. Assn. v. Fleming Cos. 840

Taxation

1. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
Banner County v. State Bd. of Equal. 236
2. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
Banner County v. State Bd. of Equal. 236
3. The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power.
Banner County v. State Bd. of Equal. 236
4. The first amendment to the U.S. Constitution does not prohibit a state's requirement that a religious organization must comply with state statutes which reasonably prescribe a basis or procedure to obtain an exemption from state taxation. States may constitutionally require that religious organizations comply with and satisfy statutes allowing a tax exemption, before such organizations obtain an exemption from taxation of their property.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
5. Neb. Const. art. VIII, § 2, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
6. 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.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
7. An exemption from taxation is never presumed. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
8. The burden of proving exemption from taxation is on the party claiming such exemption.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510
9. Under Neb. Rev. Stat. § 77-202.03 (Cum. Supp. 1984), an integral part of the process to obtain a tax exemption is reapplication for such exemption, that is, a new application, before a previously granted exemption has expired. Failure to make reapplication for

exemption or file a new application as required by § 77-202.03 results in cessation of the tax exemption when the current exemption expires.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

10. Neb. Rev. Stat. §§ 77-202.01 through 77-202.07 (Reissue 1981 & Cum. Supp. 1984) are clear and comprehensive and constitute a complete and comprehensive act dealing with the matter of tax exemptions.
Indian Hills Comm. Ch. v. County Bd. of Equal. 510

11. Whether the Nebraska estate or excise tax, Neb. Rev. Stat. § 77-2101.01 (Reissue 1986), is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature outside the State of Nebraska.
In re Estate of West 813

12. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.
In re Estate of West 813

13. While Neb. Rev. Stat. § 77-2101.01 (Reissue 1986) sets out the method for computing the amount due as the Nebraska estate tax and refers to the federal estate tax law in specifying the computation, existence of the Nebraska estate tax results only from, and depends entirely on, the power of the Nebraska Legislature to enact legislation imposing a tax on the estate of every Nebraska resident—a legislative power exercisable irrespective of, and independent from, federal estate tax law, but exercised with correlated reference to federal law as a practical matter of convenience to the estate and economy for the state. The Nebraska Legislature, not the United States, has statutorily dictated that the credit for state death taxes in the federal estate tax scheme is the basis for computing the Nebraska estate tax. Therefore, § 77-2101.01 is not an unconstitutional delegation of legislative power.
In re Estate of West 813

Telecommunications

The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (1982 & Supp. II 1984), does not preclude state judicial review of basic and nonbasic community antenna television service rates charged prior to December 29, 1986.
Bard v. Cox Cable of Omaha, Inc. 880

Tender

1. One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay and the present ability of immediate performance at the time of the tender.
   Graff v. Burnett 710
2. A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
   Graff v. Burnett 710
3. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
   Graff v. Burnett 710
4. Although a tender of payment does not have to be in cash unless so demanded by the creditor, the tender must demonstrate an ability to carry out the terms of the contract.
   Graff v. Burnett 710

Termination of Employment

When employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee for whatever cause it chooses without incurring liability.
Ambroz v. Cornhusker Square Ltd. 899

Testimony

Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275

Time

1. In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
   State v. Tully 651
2. The filing of the transcript of the proceedings relating to the revocation of a driver's license by the director of the Department of Motor Vehicles, within the time set out in Neb. Rev. Stat. § 60-420 (Reissue 1984), is a necessary step to the acquisition of

subject matter jurisdiction of an implied consent proceeding by the district court and this court.
Ernest v. Jensen 759
3. An order granting additional time to file a pleading, upon the failure of which the action is to stand dismissed, is simply a conditional judgment, which is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
W & K Farms v. Hi-Line Farms 895
4. As a general rule, the granting or withholding of permission to file a late pleading rests within the proper discretion of the trial court as a means of preventing delays and avoiding congestion of the trial docket.
W & K Farms v. Hi-Line Farms 895

Tort-Feasors

The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
Delaware v. Valls 140

Torts

1. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
2. A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
Bergman v. Anderson 333
3. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
4. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333
5. As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage.
Bergman v. Anderson 333

Trial

1. The evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness.
   Sesostris Temple Golden Dunes v. Schuman 7
2. The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
   State v. Nesbitt 32
   Turner v. Welliver 275
3. Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence.
   State v. Nesbitt 32
4. The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
   State v. Ryan 59
5. Because the record must establish by clear and convincing evidence the basis for termination of parental rights, the observance of formal court procedures is encouraged.
   In re Interest of R.A. 160
6. When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. Parents in such proceedings have a right to cross-examine adverse witnesses.
   In re Interest of R.A. 160
   In re Interest of J.K.B. and C.R.B. 701
7. Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.
   State v. Jacobs 184
8. The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
   State v. Alvarado 195
9. The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.
   State v. Alvarado 195
10. An abuse of discretion exists when a ruling of the trial court is untenable such as to deprive a party of a substantial right and deny that party a just result.
    Bittner v. Miller 206
11. In order to establish reversible error due to a violation of a

sequestration order, the defendant must make a showing of prejudice.
State v. Cottingham 270
12. Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of sound discretion.
Turner v. Welliver 275
13. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
Turner v. Welliver 275
14. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
Turner v. Welliver 275
15. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
Turner v. Welliver 275
16. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
Turner v. Welliver 275
17. For purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.
Turner v. Welliver 275
18. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.
Center State Bank v. Dana, Larson, Roubal & Assoc. 408
19. In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
Rahmig v. Mosley Machinery Co. 423
20. Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony.
Rahmig v. Mosley Machinery Co. 423

21. In cases which are tried to the bench, there is a presumption that the judge considered only competent, relevant evidence.
State v. Parsons 543
22. Generally, when an incarcerated criminal defendant makes a timely request to be tried in civilian clothing, the request must be granted.
State v. Sorich 547
23. When an incarcerated criminal defendant is charged with escape, no prejudice results from trying the defendant while he or she is wearing jail clothing.
State v. Sorich 547
24. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
Third Party Software v. Tesar Meats 628
25. After a motion to suppress has been overruled, an objection to the evidence must be made at trial in order to preserve any error in the ruling on the motion to suppress.
State v. Carter 636
26. In general, the validity of a plea is to be determined by the law as it existed when the plea was accepted.
State v. Tully 651
27. A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
State v. Tully 651
28. The issue of one's competency to plead or stand trial is one of fact to be determined by the trial court, and the means used to resolve it are discretionary with the court.
State v. Tully 651
29. Mental retardation does not necessarily imply incompetence to plead or stand trial.
State v. Tully 651
30. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Tully 651
31. At a proceeding to terminate parental rights, a juvenile court may not take judicial notice of facts or opinions other than as provided in the rules of evidence.
In re Interest of J.K.B. and C.R.B. 701
32. In proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).
In re Interest of J.K.B. and C.R.B. 701

33. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error in the reception of such evidence.
State v. Todd 906

Trusts

A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.
Evertson v. Cannon 370

Undue Influence

In order to establish a defense of undue influence, the party asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence.
Pawnee County Bank v. Droge 314
In re Estate of Villwok 693

Uniform Commercial Code

1. Where a case has been tried on the theory that the Uniform Commercial Code is applicable, upon appeal it will be decided upon the same theory.
Sesostris Temple Golden Dunes v. Schuman 7
2. The Nebraska Uniform Commercial Code's statute of frauds governing contracts for the sale of personal property and goods does not apply to agreements for personal services.
Professional Recruiters v. Oliver 16
3. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for the indebtedness is not a defense to an action upon the guaranty agreement.
First Nat. Bank v. Greene 633

Valuation

1. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
Banner County v. State Bd. of Equal. 236
2. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural

purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
Banner County v. State Bd. of Equal. 236
3. The effect of the 1984 amendment to Neb. Const. art. VIII, § 1, is to permit the valuation of agricultural and horticultural land by a different method. However, the result must be correlated with the value of all other land.
Banner County v. State Bd. of Equal. 236

Vendor and Vendee

Want of mutuality in respect to the remedy of specific performance in a suit by vendors of land to enforce the contract of purchase is not a defense where the vendors complied with or tendered performance of their contractual obligations.
Pallas v. Black 728

Venue

1. A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985) is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
State v. Jacobs 184
2. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Jacobs 184
3. To secure a change of venue on the basis of pretrial publicity, the defendant must show that the publicity has made it impossible to secure a fair and impartial jury.
State v. Jacobs 184
4. The factors to be evaluated in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
State v. Jacobs 184
5. The Nebraska Supreme Court will not disturb the ruling of the trial court on a motion to change venue in a civil action unless an abuse of discretion is shown.
Bittner v. Miller 206

Verdicts

1. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the

benefit of inferences reasonably deducible from it.
Bell v. Williams Care Center 1
2. A jury verdict may not be set aside unless 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.
Bell v. Williams Care Center 1
3. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
State v. Jacobs 184
State v. Parsons 543
4. A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
State v. Dwyer 340
5. A jury verdict will not be disturbed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
Bay v. House 521
6. When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
Omaha Mining Co. v. First Nat. Bank 743

Waiver

1. In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
State v. Ryan 59
2. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
State v. Ryan 59
3. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
State v. Slezak 404

4. Objection to allegedly illegally seized evidence is waived where objection is not made at least 10 days prior to trial.
State v. Madsen 722

Waters

1. The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
In re Application A-15738 146
In re Application U-2 594
2. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest.
In re Application A-15738 146
3. The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right.
In re Application A-15738 146
4. The appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes, but does not acquire ownership of such water.
In re Application A-15738 146
5. The second characteristic of the appropriative right of water in a natural stream is that the application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired.
In re Application A-15738 146
6. Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriation right.
In re Application A-15738 146
7. Although there may be some unappropriated water available at a proposed diversion point, the existence of a dependable water supply is essential to the success of any irrigation project and where, on the average, but an insignificant supply of water in relation to the maximum demand of the proposed appropriator is available, there is not a source of unappropriated water at the proposed diversion site.
In re Application A-15738 146
8. For a quantity of unappropriated water to be available at a proposed diversion point, it must be available in a supply which is

fairly continuous and dependable.
In re Application A-15738 146

9. Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).
In re Application A-15738 146

10. In order to be able to assess the impact on the public interest of a proposed project for the diversion of water, the project's design must be definite enough to reflect its impacts and implications to generally apprise the public of the efficacy of the proposed use of the planned facility and of its potential impact.
In re Application A-15738 146

11. Where the evidence supports the proposition that the benefits to the state would be greatly enhanced by using the available unappropriated water in the river of its origin, rather than to divert it to another river basin, a denial of such transbasin diversion is demanded by the public interest.
In re Application A-15738 146

12. Ground water, as defined in Neb. Rev. Stat. § 46-657 (Reissue 1984), is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.
In re Application U-2 594

13. A landowner has no liability for damages resulting from discharged diffused surface waters brought about by an act of nature.
Johnson v. NM Farms Bartlett 680

14. The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
Johnson v. NM Farms Bartlett 680

15. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that

this is done in a reasonable and careful manner and without negligence.
Johnson v. NM Farms Bartlett 680
16. Waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
Johnson v. NM Farms Bartlett 680
17. The alteration of natural drainage is acceptable where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present.
Johnson v. NM Farms Bartlett 680
Slusarski v. County of Platte 889
18. The owner of a dam creating a nonstorage reservoir is liable, in the event the dam breaks, only if he or she negligently constructed or maintained the dam; in such a case, the plaintiff establishes a prima facie case by proving the breakage of the dam and resulting injury, and the defendant must then show that the dam was not negligently constructed or maintained.
Johnson v. NM Farms Bartlett 680
19. Where water from another source has been added to water from a source for which a defendant is liable and the combined waters cause damage, it is incumbent upon the plaintiff to establish either that his or her entire damages would have occurred from the water for which the defendant is liable, or to establish the amount of the damages caused by the water for which the defendant is liable.
Johnson v. NM Farms Bartlett 680
20. Diffused surface waters which collect and concentrate in volume and velocity and flow into a natural depression, draw, swale, or other drainageway lose their character as diffused surface waters.
Slusarski v. County of Platte 889
21. A lower landowner may not obstruct waters which have collected and concentrated in volume and velocity from flowing through a natural depression, draw, swale, or other drainageway.
Slusarski v. County of Platte 889

Wills

1. Alleging that a will is not "subscribed and attested in accordance with Nebraska law" is sufficient pleading to raise an issue as to validity of testator's signature.
In re Estate of Villwok 693

2. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
In re Estate of Villwok 693
3. Testamentary capacity is tested by the state of a testator's mind at the time the will is executed.
In re Estate of Villwok 693
4. The elements which must be proved in order to successfully contest a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence.
In re Estate of Villwok 693

Wiretaps

1. The Nebraska Supreme Court looks to federal law in interpreting the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986).
State v. Hinton 787
2. An application for an order permitting the interception of telephone conversations serves a purpose similar to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or warrant.
State v. Hinton 787
3. The test for issuance of a wiretap order under the provisions of Nebraska's intercepted communications statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1981 & Cum. Supp. 1986), is whether the sworn information before the court is of sufficient apparent reliability to justify a finding that there is probable cause to believe that an offense cognizable under said statutes has been or is being committed.
State v. Hinton 787
4. Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap and eavesdrop explain away all possible alternative techniques of investigation.
State v. Hinton 787
5. Substantial, not strict, compliance with the statutes governing interception of telephonic communications is required; that is, the interceptions must be conducted in such a manner as not to violate a party's substantive rights.
State v. Hinton 787

Witnesses

1. The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
   State v. Ryan 59
2. In order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice.
   State v. Cottingham 270
3. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
   Turner v. Welliver 275
4. In attacking the credibility of a witness by cross-examination under Neb. Rev. Stat. § 27-609 (Reissue 1985) by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
   State v. Johnson 618
5. A witness is unavailable if the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A witness is not unavailable unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial.
   State v. Carter 636
6. It is within the sound discretion of the trial court whether unavailability of a witness has been shown. Absent a showing of an abuse of discretion, the trial court's decision will be upheld.
   State v. Carter 636
7. A police officer, as a nonexpert witness, may testify regarding his or her opinion about another's state of intoxication, provided the officer has made detailed observations upon which the opinion is based.
   State v. Thomte 659

Words and Phrases

1. Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "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. Masilko 45

2. Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence.
State v. Ryan 59
3. A drainage district is a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
Parriott v. Drainage Dist. No. 6 123
4. An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
Delaware v. Valls 140
5. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
Delaware v. Valls 140
6. Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriation right.
In re Application A-15738 146
7. Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).
In re Application A-15738 146
8. *Cause* is defined as that which produced an effect, result, or consequence. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
Hughes v. Enterprise Irrigation Dist. 230
9. Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.
Turner v. Welliver 275
10. A communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is

one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct.
Turner v. Welliver 275
11. Actual malice may be defined as hate, spite, or ill will toward the person about whom a statement has been published.
Turner v. Welliver 275
12. A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
Turner v. Welliver 275
13. A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
Tiede v. Loup Power Dist. 295
14. One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
Tiede v. Loup Power Dist. 295
15. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
Tiede v. Loup Power Dist. 295
16. To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts.
Tiede v. Loup Power Dist. 295
17. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
Bergman v. Anderson 333
18. A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
Bergman v. Anderson 333
19. An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
Bergman v. Anderson 333
20. The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an

apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
Bergman v. Anderson 333
21. A joint venture arises when there is an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.
Evertson v. Cannon 370
22. In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect.
Rahmig v. Mosley Machinery Co. 423
23. For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
Tylle v. Zoucha 476
24. Consent may be express or implied; implied consent may be inferred from the patient's action of seeking treatment or some other act manifesting a willingness to submit to a particular course of treatment.
Jones v. Malloy 559
25. Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.
Jones v. Malloy 559
26. One possesses testamentary capacity if he understands the nature of his act in making a will, knows the extent and character of his property, knows and understands the proposed disposition of his property, and knows the natural objects of his bounty.
In re Estate of Villwok 693
27. A tender of payment is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of

cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made.
Graff v. Burnett 710
28. A tender of payment is the offer of a sum of money to satisfy a debt and is made by presenting and showing such payment to the creditor and expressing a willingness to deliver that payment to the creditor.
Graff v. Burnett 710
29. Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
30. Earning power is synonymous neither with wages nor with loss of physical function; nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
31. *Collude* means to connive with another; conspire; or plot. *Collusion* is a secret agreement or secret cooperation for a fraudulent or deceitful purpose, such as a secret agreement between two or more persons to defraud a person of his rights, often by the forms of law.
In re Estate of West 813
32. "Preservation of the peace," as used in Neb. Rev. Stat. § 28-906(1) (Reissue 1985), means maintaining the tranquillity enjoyed by members of a community where good order reigns.
In re Interest of Richter 874
33. The word "physical" describes that which has material, substantive, and objective existence.
In re Interest of Richter 874
34. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
Federal Land Bank of Omaha v. Johnson 877

Workers' Compensation

1. If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual, and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the employer, then the employer is only required to pay for that

portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out of the Second Injury Fund.
Parker v. St. Elizabeth Comm. Health Ctr. 526

2. The Second Injury Fund concept was created so that employers would be encouraged to hire the handicapped and would be secure in the knowledge that if there is a work-related accident, the employer and its insurance carrier would be liable only for those injuries that would have resulted had there been no preexisting disability.
Parker v. St. Elizabeth Comm. Health Ctr. 526

3. The findings of fact of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside where they are supported by credible evidence and are not clearly wrong.
Parker v. St. Elizabeth Comm. Health Ctr. 526
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737

4. Permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his or her previous occupation or in any other established field of employment for which he or she is fitted. Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact.
Parker v. St. Elizabeth Comm. Health Ctr. 526

5. A worker should not be denied compensation benefits for what is currently total permanent disability simply because his or her employability and earning capacity might become enhanced by rehabilitation and the permanent disability possibly reduced at some time in the future.
Parker v. St. Elizabeth Comm. Health Ctr. 526

6. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.
Nice v. IBP, inc. 538

7. The compensation court's determination after rehearing as to an employee's ability to return to work in which he is previously skilled is a factual question which will not be disturbed on appeal to this court unless clearly wrong.
Nice v. IBP, inc. 538
Thom v. Lutheran Medical Center 737

8. Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn

wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
9. Earning power is synonymous neither with wages nor with loss of physical function; nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted.
Thom v. Lutheran Medical Center 737
10. While there is no numerical formula for determining one's earning power following an injury to the body as a whole, the percentage of body as a whole impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.
Thom v. Lutheran Medical Center 737
11. Neb. Rev. Stat. § 48-162.01 (Cum. Supp. 1986) permits an award of vocational rehabilitation benefits when, as the result of a compensable injury, a worker is unable to perform work for which he or she has previous training or experience or when such rehabilitation will reduce the amount of earning power loss the worker would otherwise suffer.
Thom v. Lutheran Medical Center 737
12. The compensation court's determination on rehearing that there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by a worker is a question of fact which will not be disturbed on appeal to this court unless clearly wrong.
Thom v. Lutheran Medical Center 737