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JAMES L. HUSEBO, APPELLEE AND CROSS-APPELLANT, V. AMBROSIA, LTD., APPELLANT AND CROSS-APPELLEE.

283 N. W. 2d 45

Filed September 4, 1979. No. 42249.

1. **Motor Vehicles: Negligence: Damages.** The measure of damages for injuries to a motor vehicle which is not used solely for business or commercial purposes, when that vehicle can be repaired so that, when repaired, it will be in as good condition as it was before the injury, is the reasonable cost of repair plus the reasonable value of the use of the motor vehicle while being repaired with ordinary diligence, not exceeding the value of the motor vehicle immediately before the injury.
2. **Motor Vehicles: Negligence: Damages: Time.** Reasonable value of the use of a motor vehicle injured through the negligence of another party is that amount which does not exceed either the fair rental value of a vehicle of like or similar nature and performance for a reasonable length of time, or the amount actually paid, whichever is the least, and is a question of fact to be determined at the time of trial.
3. **Words and Phrases: Evidence: Time.** Fair rental value as used in this instance is a question of fact to be determined at the time of trial from evidence relating to prevailing community or area standards.
4. **Words and Phrases: Negligence: Evidence: Time.** Reasonable length of time as used in this instance presumes ordinary diligence on the part of the injured party and those performing the repair work, and is a question of fact to be determined at the time of trial.
5. **Motor Vehicles: Leases: Damages.** Normal costs of operation of a leased vehicle while in the possession of the lessee are not allowable as damages under rules providing for the recovery of loss of use damages.

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

Daniel P. Chesire of Kennedy, Holland, DeLacy & Svoboda, for appellant.

John E. North, Jr. of Lathrop, Albracht & Swenson, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and COADY and NORTON, District Judges.

NORTON, District Judge.

This matter arises out of an award of damages by the trial court for loss of use of a motor vehicle used principally for purposes other than business, and which is commonly characterized as a "pleasure" vehicle. We affirm as hereinafter modified.

The facts are not in dispute. The plaintiff-appellee, James L. Husebo, hereinafter referred to as plaintiff, was the owner and operator of a 1970 Chevrolet Blazer which was involved in an intersection collision with another vehicle in Douglas County, Nebraska, on April 25, 1974. The other vehicle was owned by the defendant-appellant, Ambrosia, Ltd., hereinafter referred to as the defendant, and was being operated by an employee of defendant at the time of the collision. Plaintiff's vehicle was damaged but not beyond repair, and on April 30, 1974, he took the same to a local car dealer seeking repairs. Repair parts were not immediately available. Plaintiff's vehicle was returned to the dealer on June 27, 1974, where it was repaired and released to plaintiff on or about July 2, 1974.

On or about May 3, 1974, the plaintiff entered into an agreement with a car rental firm for the use of a substitute motor vehicle. On that date the plaintiff obtained the use of a Monte Carlo automobile which he used until June 10, 1974, when he returned it to the dealer and secured the use of a pickup truck. The record would not indicate that the plaintiff used these vehicles for any purpose other than as a substitute for his personal vehicle.

The action in the trial court grew out of the refusal of the defendant to reimburse the plaintiff for those costs incurred in the rental of substitute motor vehicles during the period of time that his personal vehicle was unusable or being repaired. Trial was to the court. Evidence received indicated that the plaintiff's vehicle was used only for family use and driving to and from work. The evidence further dis-

closed that the physical damage to the plaintiff's vehicle for necessary repairs resulting from the injuries received as a result of the collision was $679.37. There was also evidence showing that the value of the plaintiff's vehicle immediately prior to the accident exceeded $3,000. There was no showing of the value of the vehicle immediately after the accident. Over objection, the trial court received evidence from the plaintiff showing that the cost of rental of the two substitute motor vehicles was $834.41, consisting of a base rental charge of $704.21 together with the sum of $130.20 which represented a mileage charge for miles that the substitute vehicles were actually driven by the plaintiff during the term of the lease. Upon submission, the trial court found for the plaintiff on the issue of liability and, as a portion of total damages awarded, included the sum of $679.37 for necessary repairs to plaintiff's vehicle and $704.21 for the loss of use thereof during the period required to secure the parts and complete the repair. Defendant duly filed a motion for a new trial alleging error in the allowance of damages for loss of use. This motion was overruled and defendant perfected its appeal. Plaintiff cross-appealed on the disallowance of the rental mileage charges noted above.

The applicable rule in cases of this type is set forth in Hatch v. Heim, 200 Neb. 735, 265 N. W. 2d 444. In that case, the issue presented to the trial court involved the measure of damages for injury to a vehicle not used for business or commercial purposes. The case did not involve damages for loss of use. At page 739, we stated: "Where personal property can be repaired so that, when repaired, it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the article while being repaired with ordinary diligence, not exceeding the value of the article before the injury."

This rule leads inevitably to the question of how to measure the reasonable value of the use of the motor vehicle injured while it is being repaired with ordinary diligence. We believe the correct measure is that amount which does not exceed either the fair rental value of a vehicle of like or similar nature and performance for a reasonable length of time, or the amount actually paid, whichever is the least. What constitutes the "fair rental value" will vary from locality to locality and is a question of fact to be determined from evidence at the time of trial relating to prevailing community or area standards. "Reasonable length of time" presumes ordinary diligence on the part of the injured party in procuring the repairs and on the part of those performing the repair work, and is also a question of fact to be determined from the evidence at the time of trial. Normal costs of operation of the leased vehicle, while in the possession of the lessee, are not allowable as damages under this rule.

The total damages awarded in this matter by the trial court for injuries to the vehicle involved were $1,383.58. These did not exceed the value of the vehicle immediately before the injury. There is no evidence indicating that the charges actually paid by the plaintiff for the use of the leased vehicles were not fair and reasonable, or that they exceeded the fair rental value of such vehicles in the locality involved. There is no evidence showing that the time to repair was unduly prolonged, or that the leased property was held for an unreasonable length of time. The trial court, in fixing the award for loss of use, deducted from the total cost of the lease that amount charged for mileage incurred, which could be characterized as a charge for depreciation of the rented vehicle during the period of the lease. This charge represented no actual costs of operation by the plaintiff, being only an integral part of the costs of the lease which the plaintiff was required to pay.

There seems to be no justification for the disallowance of this item. Plaintiff's vehicle was depreciating likewise during the period while it was unusable or being repaired. To disallow the mileage charge is, in effect, to compel the plaintiff to pay for depreciation to his own vehicle while it is unusable due to the negligent actions of another. Inclusion of this amount will not raise the total award of damages for injuries to plaintiff's vehicle to a figure which exceeds its value immediately prior to the injury. The judgment of the trial court should be modified to the extent of setting aside this disallowance and amending the judgment against the defendant to the amount of $834.41 for the loss of use item.

The judgment of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF FAITH ANN SOUZA, A CHILD UNDER EIGHTEEN YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BONITA SOUZA SPITTLER, NATURAL MOTHER, APPELLANT.

283 N. W. 2d 48

Filed September 4, 1979. No. 42348.

1. **Constitutional Law: Minors: Statutes: Parent and Child.** Section 43-209 (6), R. R. S. 1943, is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness.
2. **Evidence: Proof: Statutes: Parent and Child.** Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence.
3. **Supreme Court: Appeal and Error: Parent and Child: Proof.** In a case terminating parental rights, review in the Supreme Court is made de novo on the record. Where a correct judgment or order has been made, it will not be reversed for the reason that it may have been arrived at under an incorrect standard of proof.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH MOYLAN, Judge. Affirmed.

John B. Ashford of Bradford & Coenen, for appellant.

Donald K. Knowles, Douglas County Attorney, and Francis T. Belsky, for appellee.

Heard before BOSLAUGH, CLINTON, WHITE, and HASTINGS, JJ., and KORTUM, District Judge.

WHITE, J.

This is an appeal from an order of the Separate Juvenile Court for Douglas County, Nebraska, terminating the parental relationship between Faith Ann Souza and her mother, Bonita Souza, now Bonita Spittler.

From the time of the child's birth on January 8, 1976, until August 2 of that year, the child lived with her mother at various residences in Omaha. At least some of the residences were suggested by Douglas County Social Services. On August 2, 1976, a petition was presented by the county attorney for Douglas County alleging that Faith Ann Souza was a homeless, destitute child under the age of 18 years within the meaning of section 43-202 (1), (2) (a), and (2) (b), R. R. S. 1943, and asking that immediate custody of the child be taken from Bonita Souza, the natural mother, and further, that after notice and hearing the parental rights be terminated under section 43-209 (2), R. R. S. 1943.

Section 43-202, R. R. S. 1943, defines the jurisdiction of the juvenile court. It states, in pertinent part: "(1) Exclusive original jurisdiction as to any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

"(2) Exclusive original jurisdiction as to any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian;

(c) 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 child; (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child; or (e) who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child; * * *."

Section 43-209, R. R. S. 1943, the termination section, provides in part, after summons and notice: "The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist:

"(1) The parents have abandoned the child for six months or more immediately prior to the filing of the petition;

"(2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;

"(3) The parents, being financially able, have willfully neglected to provide the child with the necessary subsistence, education or other care necessary for his health, morals or welfare or have neglected to pay for such subsistence, education or other care when legal custody of the child is lodged with others and such payment ordered by the court;

"(4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child;

"(5) The parents are unable to discharge parental

responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; or

"(6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

The trial court appointed counsel for the mother, Bonita Souza, and appointed a guardian ad litem to represent the interests of Faith Ann Souza. On August 11, 1976, the trial court entered an order placing temporary custody of Faith Ann Souza with Douglas County Social Services for foster home placement. The order for temporary custody was not opposed by Bonita or by her attorney.

On November 8, 1976, hearing was held on the termination petition.

The natural father, who had never married Bonita Souza, did not appear and his parental rights were subsequently terminated pursuant to section 43-209 (2), R. R. S. 1943. That portion of the order is not contested on appeal.

The court, after making findings of fact, found that as to the mother, appellant here, there was insufficient evidence at that time to terminate parental rights. The court did find, however, that Faith Ann was a child within the meaning of section 43-202 (1) and (2), R. R. S. 1943, and retained jurisdiction with custody to remain in Douglas County Social Services pending a disposition hearing.

At the disposition hearing on January 3, 1977, the court continued the custody of Faith Ann Souza in Douglas County Social Services and ordered Bonita Souza to comply with a rehabilitation plan. The plan included the order that Bonita Souza was to participate in therapy at the Immanuel Mental Health Center; obtain and maintain employment or

job training and an adequate income for the support of herself and of her child; obtain and maintain adequate housing and furnishings for herself and her child; become involved in the Positive Parenting Program through the Family Service of Omaha-Council Bluffs; work with the Visiting Nurses Association, obtain any necessary medical treatment for herself, and work with the Child Protective Service worker in the probation office in attempting to comply with the plan of rehabilitation. The order required that the matter be continued for a compliance hearing.

The compliance hearing was held on June 13, 1977. The court also took evidence on a motion for termination of parental rights which had been refiled by the county attorney. The original plan of rehabilitation was amended to delete the requirement of counseling for the mother at Immanuel Mental Health Center. The hearing on the termination motion was continued until August 29, 1977, at which time the court found that the mother had substantially failed to comply with the rehabilitation plan and, accordingly, the child was within section 43-209 (6), R. R. S. 1943, set out above. The court, however, declined to terminate parental rights at that time and set out instead a revised plan of rehabilitation aimed at counseling and education of Bonita in hygiene and child rearing. It provided for weekend visitation in the home by the child every month and required the mother to maintain a clean, physically adequate home at all times.

A review hearing was held on July 18, 1978. At that time the court found that reasonable efforts under the direction of the court over a period of almost 2 years had failed to correct adequately the conditions leading to the previous determinations that the child was within sections 43-202 (1) and (2) and 43-209 (6), R. R. S. 1943. The court therefore terminated the parental rights of the natural mother.

No purpose would be served by explicitly detailing the evidence adduced at the initial hearing in August 1976. There was testimony that the appellant had kissed a 2-year-old child in the genital area. There was also testimony that the appellant "cooed" to her daughter: " 'Mommy will drown you.' " These allegations were denied or explained away by the appellant and, as appears by the trial court's findings of fact, were given little, if any, weight in the determination. The court found that appellant had physically assaulted a woman while that woman was holding Faith Ann. Other than that, the evidence related to and presented a clear picture of a mother who was lacking in either the knowledge or the desire to maintain adequate physical surroundings for a small child. The evidence throughout is overwhelming that Bonita Souza was personally dirty, and that the environment and hygienic care provided for the child were totally lacking. The surroundings frequently reeked of feces and urine. The child suffered from a number of diseases including constant diaper rash, thrush, and cradle cap, all of which, in their persistence, were associated with improper hygiene and care. These problems continued despite efforts of Douglas County Social Services on their own and through the visiting nurses to educate the appellant. It is not seriously argued that this evidence was insufficient to support the court's original finding of jurisdiction under section 43-202, R. R. S. 1943. Rather, the appellant bases her attack on the court's final order terminating parental rights. That attack rests mainly on two grounds: (1) That the statute under which the parental rights of Bonita Souza were terminated is unconstitutional as vague and indefinite; and (2) that there was not "clear and convincing evidence" to show that Bonita Souza had not complied with the orders of the Separate Juvenile Court in the rehabilitation plan. The vagueness objection was answered adversely to ap-

pellant's position in the recent case of State v. Metteer, 203 Neb. 515, 279 N. W. 2d 374. In addition, we note that the "conditions" to which section 43-209 (6), R. R. S. 1943, refers were plainly set forth in the findings of fact and order entered following the original adjudication hearing. That fact is amply illustrated by this colloquy which took place at the June 6, 1977, hearing: "THE COURT: Do you understand what you were doing wrong? MS. SOUZA: Yes, I do. THE COURT: With regard to the child? MS. SOUZA: Yes, I do. THE COURT: What do you understand? MS. SOUZA: That I did not clean her right and take care of her properly." We find the constitutional challenge to the statute on the basis of vagueness to be without merit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359.

Next we address appellant's claim that: "It was error for the court to fail to find that the burden of proof required to terminate parental rights should be clear and convincing evidence rather than a preponderance of the evidence." Somewhat related are the claims that the statute is unconstitutional for failure to require a showing of a substantial degree of harm prior to termination, and that it was error for the court to terminate the parental relationship upon the evidence presented and to fail to state specifically the reasons for termination. In support of the argument that termination of parental rights should be ordered only upon "clear and convincing" evidence, as opposed to a "preponderance" standard, appellant cites Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S. D. Iowa, 1975), affirmed in part, 545 F. 2d 1137 (8th Cir., 1976). That holding was based on a determination similar to that made by this court in State v. Metteer, *supra*, that family integrity was a fundamental right.

While our statute, section 43-206.03 (3), R. R. S.

1943, specifies that the initial finding of jurisdiction may be based on a preponderance of the evidence, it does not specify a standard for termination, nor did the juvenile court specifically relate the standard which it applied. We agree that termination should be based on clear and convincing evidence. Because we are convinced, however, that the evidence before the juvenile court clearly satisfied even the stricter "clear and convincing" standard, we decline to reverse on this ground. Although findings of fact by the juvenile court are accorded great weight, the matter is triable de novo in this court. See §§ 43-238 and 25-1925, R. R. S. 1943. In a recent case, we were concerned that the District Court had given excessive deference to the challenged findings of the mental health board. After reviewing the evidence, however, we declined to reverse since the District Court, under whatever standard of review might be applied, could not conceivably have found other than it did. "Where a correct judgment or order has been made, the mere fact that it contains erroneous declarations of law does not require reversal." Lux v. Mental Health Board of Polk County, 202 Neb. 106, 274 N. W. 2d 141.

Although this principle and our de novo review obviate the need for speculation, we add in passing that it clearly appears that the juvenile court was fully aware of the gravity of its order, was actually reluctant to make it, and did so only after receiving a great volume of persuasive evidence at numerous hearings over a 2-year period. The only argument relating to the facts which finds any support whatever in the record is that the appellant showed some improvement at a time shortly before the termination was finally entered. On several visits to the appellant's home in July of 1978 by caseworkers and a visiting nurse, the apartment, although still unkempt, was apparently greatly improved over past conditions. It must be noted, however, that all the evi-

dence on this matter pertained to a period of only 2 weeks. The court cannot be found to have abused its discretion for weighing that fact against the evidence - that the objectionable conditions of the previous 2 years had persisted through May 1978.

The juvenile court exhibited great patience in attempting to aid appellant. When appellant refused, contrary to court order, to continue mental therapy at Immanuel Mental Health Center, that requirement was dropped. When appellant married a steady wage earner, the requirement of employment was dropped. When she was expelled from the Positive Parenting Program classes for immature and disruptive behavior, an alternate plan was ordered. There is no question that the direction of the court was "reasonable," both in the sense of not being too difficult to comply with and in the sense of being calculated to correct the conditions leading to the original determination. As stated by the Iowa Supreme Court: "* * * we will not gamble with the child's future; she cannot be made to await uncertain parental maturity." Long v. Long, 255 N. W. 2d 140 (Iowa, 1977). Here, after 2 years, the objectionable conditions persisted.

We note that this is not the case of a mere "messy house" which has been criticized as a basis for termination. See Matter of Sherol A. S., 581 P. 2d 884 (Okla., 1978). It is, instead, a case of consistently poor sanitary conditions and deficient personal hygiene which could, and quite evidently did, work to the physical injury of the child.

The order of the Separate Juvenile Court terminating appellant's parental rights is affirmed.

AFFIRMED.

JERRY L. CUNNINGHAM, APPELLANT, V. ESTHER B. COVALT ET AL., APPELLEES.

283 N. W. 2d 53

Filed September 11, 1979. No. 42232.

1. **Deeds: Reformation.** Reformation of a deed for mistake will be granted where the mistake is mutual to both parties.
2. **Deeds: Reformation: Evidence.** Evidence of such mutual mistake must be clear, convincing, and satisfactory.
3. **Deeds: Reformation.** The fact that one party denies such mistake does not preclude reformation.

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

Holtorf, Hansen, Kovarik & Nuttleman, P.C., for appellant.

Reddish, Curtiss & Moravek and Thomas A. Danehey, for appellees.

Heard before BOSLAUGH, MCCOWN and BRODKEY, JJ., and RIST and WOLF, District Judges.

RIST, District Judge.

Plaintiff-appellant, Jerry L. Cunningham, asserting ownership of the south one-half of Section 17, Township 20 North, Range 47 West of the 6th P.M., Morrill County, Nebraska, brought this action in equity against defendants-appellees, Esther and Floyd Covalt and F & P Covalt Co., Inc., owners of the remainder of the section, to determine the north line of plaintiff's land as surveyed for the erection of a permanent fence thereon and to enjoin defendants from interfering with plaintiff's use of his land to that line. Defendants answered and cross-petitioned for reformation of the deeds from defendants to plaintiff, under which plaintiff claims title, upon the basis of mutual mistake as to the north boundary line of plaintiff's land and to enjoin plaintiff from trespassing north of such line as reformed.

After trial, during which the trial court viewed the premises, a decree was entered dismissing plain-

tiff's petition, reforming the deeds as prayed for by defendants, and quieting title to the area in dispute in the defendant, Esther B. Covalt. Plaintiff appeals, assigning as error the reformation of the deeds, the finding of sufficient evidence to sustain the reformation, and the failure to grant plaintiff the relief he sought.

The record reflects that until January 26, 1976, defendant, Esther B. Covalt, owned all of the section here involved. On that date she and her husband, Floyd, conveyed an undivided two-thirds interest in the south one-half of the section to F & P Covalt Co., Inc., a family corporation, reserving certain mineral rights in grantor.

In late 1975 Mrs. Covalt was contacted by plaintiff and his brothers seeking to purchase the south one-half of the section. During the discussion Mrs. Covalt gave plaintiff an ASCS aerial photograph of the section upon which she had drawn a line dividing it at the approximate location of a partial fence dividing the pasture ground in the north half of the section from the cultivated ground in the south half. There is some dispute as to whether Mrs. Covalt talked of selling the south half of the section or only the land south of the fence, she maintaining, however, that the line she drew was intended to refer to the fence line as extended and that she was selling the crop ground south of the fence.

The evidence shows that in the approximate middle of the section there is a partial fence running generally east and west, neither end of which extended to the east and west boundaries of the section. Plaintiff was familiar with the fence and its location prior to the sale. It further appears that, except for a triangular piece of pastureland of approximately 25 acres in the northeast corner thereof, the land south of the fence as extended is crop ground while to the north it is predominantly pasture.

In April 1976, the plaintiff advised Mrs. Covalt he had arranged his finances for the purchase of the land and the parties met on Saturday, April 3, 1976, in the office of Robert Bulger, attorney for the Covalts. At that time Mrs. Covalt had a written memorandum concerning the sale which was read by the plaintiff. In it Mrs. Covalt had described the land to be sold as "S½-Sec 17-20-47-300 acres more or less. Bounded by county road. South side, county road west side, School Section on east side. North side — pasture fence line, fence to be extended on both east and west to the road." She also had another aerial photograph of the section on which she had noted "To sell S½ 17-20-47, 300 acres more or less." Following discussion by the parties, Mr. Bulger drew up a memorandum agreement for the sale of the south half of the section which provided in part that "Buyers [sic] has inspected premises and accepts in present condition an acreage of approximately 300 acres, except that seller will extend north fence to east and west boundaries." The parties executed this agreement.

Bulger subsequently prepared a more detailed contract which the parties did not sign but which Bulger testified reflected the parties' understanding on April 3. This agreement described the premises as the south half of the section and provided in part: "The total acreage of the real estate being sold is approximately 300 acres and that it is bounded on the south and west by a county road, on the east by a school section and on the north by a partial fence. The Sellers agree to extend the north fence in a straight line to the west to the County road and to the east to the school section boundary."

Plaintiff testified he recalled no conversation in Bulger's office that the fence line was to be a boundary but thought he was buying the south one-half of the section.

The deeds subsequently prepared by Bulger, which

were executed and delivered on May 17, 1976, described the real estate as the south one-half of the section containing 300 acres more or less but with no reference to boundaries.

Subsequent to the sale the Covalts extended the existing fence east to the east line of the section without protest or objection from the plaintiff. They held up extending the fence west at plaintiff's request so he could fill in a blowout in that area.

Plaintiff installed two pivot irrigation systems in the south part of the section but when he operated the one in the southwest quarter thereof it ran through the existing fence on the north tearing out a portion of it. Plaintiff initially expressed regret that this happened.

In late April 1977, plaintiff caused a survey to be made to locate the half section line running east and west through the section. The survey line ran north of the fence line, being from 30 feet to over 100 feet north of the fence line at various points. Plaintiff testified he understood the north line of the property he purchased to be a survey line. Defendants testified they had told plaintiff a survey was not necessary and that they were selling the land south of the fence as extended.

The trial court reformed the deeds from defendants to provide that the interests conveyed to plaintiff were "[A]ll that part of Section 17, Township 20 North, Range 47, West of the 6th P.M., Morrill County, Nebraska, situated south of the pasture fence extending east and west in the approximate middle of Section 17 as it existed April 3, 1976, and as extended to the east and west boundaries of said Section 17, commonly known as South Half, and consisting of 300 acres more or less." The trial court also quieted in Esther B. Covalt "Title to all that portion of Section 17, Township 20 North, Range 47, West of the 6th P.M., in Morrill County, Nebraska, north of the pasture fence line as it existed April 3, 1976, as ex-

tended to the east and the west boundary lines of said Section 17 * * *."

This being an equitable action, it is tried de novo in this court, giving consideration to the fact that the trial court observed the witnesses, their manner of testifying, accepted one version of the facts rather than the opposite, and also that the trial court inspected and viewed the premises. Waite v. Salestrom, 201 Neb. 224, 266 N. W. 2d 908; Webb v. Lambley, 181 Neb. 385, 148 N. W. 2d 835.

The basic question to be decided is whether the evidence justifies the reformation of the deeds. The applicable rules of law are: (1) Reformation for mistake will be granted where the mistake is mutual to both parties. Waite v. Salestrom, *supra*: Booth v. Wilkinson, 195 Neb. 730, 240 N. W. 2d 578. (2) Such mutual mistake must be proved by clear, convincing and satisfactory evidence. Waite v. Salestrom, *supra*; Booth v. Wilkinson, *supra*.

We find the record discloses evidence to the degree required by law that both parties understood the fence line as extended was to be the north line of the property purchased by plaintiff. It is clear that the fence was known to both parties; it was referred to as the boundary in Mrs. Covalt's memorandum which plaintiff read before the memorandum agreement was prepared and signed; and it is so referred to in the memorandum agreement set out in the unexecuted contract which Mr. Bulger testified represented the understanding of the parties. This is reinforced by the action of the Covalts in extending the existing fence east without protest from the plaintiff and their delay in extending it west upon request by plaintiff so that he could fill in a blowout in that area. The trial court was justified in finding from such evidence that the parties understood the fence was the line notwithstanding other references to the south half of the section.

It is appropriate to note that a visible monument

known to both parties and considered by them as defining the boundaries is particularly persuasive evidence of the boundary location notwithstanding a deed description to the contrary. Burke v. Welch, 92 Neb. 773, 139 N. W. 684; Booth v. Wilkinson, *supra*. When all parties to a deed intended that it convey a certain property with a designated boundary, and there is no mistake about the identity of the property to be conveyed, but the deed incorrectly includes more land than the parties intended and both parties labored under the same misapprehension that the deed only described the land intended to be conveyed, there is a mutual mistake in the deed which equity may reform. Lippire v. Eckel, 178 Neb. 643, 134 N. W. 2d 802. Such is the case here.

We are aware that plaintiff disputes this finding and maintains his understanding was that he purchased the south half of the section as reflected by survey. We conclude, however, that the evidence outlined above is legally sufficient and more persuasive that the finding and decision of the trial court were correct. The fact that plaintiff denies it does not preclude the reformation. Booth v. Wilkinson, *supra*; Olds v. Jamison, 195 Neb. 388, 238 N. W. 2d 459.

Plaintiff argues that certain evidence was improperly received and considered at trial. Such matters were not assigned as error and will not be considered here. McClellen v. Dobberstein, 189 Neb. 669, 204 N. W. 2d 559. Moreover, our examination of the record discloses no error as would require our taking note of the same absent such assignment.

The judgment and decree of the trial court are correct and are affirmed.

AFFIRMED.

MILLARD WAREHOUSE, INC., A NEBRASKA CORPORATION, APPELLEE, V. HARTFORD FIRE INSURANCE COMPANY, FIREMAN'S FUND INSURANCE CO., AND THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, EACH A CORPORATION, APPELLANTS.

283 N. W. 2d 56

Filed September 11, 1979. No. 42266.

1. **Pleadings: Insurance.** An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured.
2. **Pleadings: Insurance: Words and Phrases.** A petition alleging a nuisance does not, by itself, allege an accident.
3. **Liability: Insurance: Words and Phrases.** Under a liability policy issued by an insurance company to its insured obligating it to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage "caused by an occurrence," and to defend any suit against the insured seeking damages on account of such bodily injury or property damage, and defining "occurrence" as meaning an "accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured," the insurance company is not obligated to defend its insured in an action brought against it by a third party based upon "nuisance" nor to pay any sums which the insured shall become legally obligated to pay by virtue of said action.
4. **Liability: Insurance: Words and Phrases: Damages.** Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended.
5. **Liability: Intent: Words and Phrases: Torts.** The lack of intent to do harm on the part of the actor does not by itself compel a conclusion that the result was caused by accident. The element of foreseeability cannot be ignored.
6. **Liability: Torts: Words and Phrases.** An effect which is the natural and probable consequence of an intentional act or of a course of action is not an accident.
7. **Torts: Words and Phrases: Damages.** One who takes a calculated risk by pursuing a course of action after being advised of the possibility of harm resulting therefrom may not claim that the resulting damage was accidental.

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

Pilcher, Howard & Dustin, for appellant Hartford. Ronald H. Stave of the Law Offices of Emil F. Sodoro, P.C., for appellant Fireman's Fund.

Cassem, Tierney, Adams, Gotch & Douglas, for appellant Pennsylvania.

Marks, Clare, Hopkins & Rauth, for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and HASTINGS, JJ., and FAHRNBRUCH, District Judge.

PER CURIAM.

The defendants, Hartford Fire Insurance Company, Fireman's Fund Insurance Co., and The Insurance Company of The State of Pennsylvania, have appealed to this court from a decree entered by the District Court for Douglas County in an action brought by the plaintiff, Millard Warehouse, Inc., a Nebraska corporation, to obtain a declaratory judgment against the three defendants, requesting that the court construe the provisions of the several policies of insurance issued by the defendant companies to the plaintiff, and praying that the court order each of the defendants to defend the plaintiff in an action brought against it by Ralph E. Tetrick and his wife, Marilyn Tetrick, hereinafter referred to as "Tetricks;" and also that the court order the defendants to pay any judgment that may be rendered against it in that action within the defendants' policy limits.

In its decree entered after trial on June 20, 1978, the court found that the allegations of the petition for declaratory judgment were generally true; and that the defendants, Hartford Fire Insurance Company, hereinafter referred to as "Hartford," and Fireman's Fund Insurance Co., hereinafter referred to as "Fireman's Fund," were obligated under the terms and conditions of their respective insurance policies issued to the plaintiff to defend the plaintiff against the claims asserted by Tetricks in their ac-

tion above referred to, and were also obligated under their policies to pay any judgment for damages awarded to Tetricks in said lawsuit, within the limits of the coverage thereunder. The court further found that the defendant, The Insurance Company of The State of Pennsylvania, hereinafter referred to as "Pennsylvania," was obligated to satisfy any judgment in favor of the Tetricks in excess of the policy limits of the insurance policies issued by the other two defendants, in any amounts within the limits of Pennsylvania's policy, and subject to a deduction for self-insured retention. In this decree, the court also found that the plaintiff was entitled to an allowance of attorney's fees and set the amount thereof, after a separate hearing for that purpose.

The record reveals that plaintiff, Millard Warehouse, Inc., is a corporation generally engaged in the warehouse business in Omaha, Nebraska. In the early 1960's, it bought a parcel of real estate which is now located on the outskirts of the city of Omaha, east of 132nd Street, and bordered on the south by the west branch of the Little Papillion Creek, hereinafter referred to as the "Creek." At the time the real estate was purchased, it was zoned "Industrial." Because of the fact that some of the property bordering the Creek was low-lying, the Omaha city council, in 1974, rezoned the property, including plaintiff's property, as "S-3" zoning, which is "flood plain" zoning. Under that zoning classification, all construction upon the property so zoned was forbidden unless the property level was raised above the 100-year flood level. The above change in zoning became effective on November 20, 1974. Prior to that date, however, the plaintiff had begun filling in its low-lying lots and had constructed a dirt pad adjacent to its existing warehouse, upon which it planned to build an additional warehouse. Pursuant to such plans, plaintiff removed dirt from its property adjacent to the creek banks to complete the fill and build

the pad, widened the channel of the Creek, and graded the banks so as to improve the Creek's capacity during flood stages. After the completion of the pad and fill, and being aware that contentions were being made by certain government agencies that the plaintiff's project would be an obstruction in the Creek and would increase the possibility of upstream flooding, the plaintiff, in 1974, retained the services of one Wilbur F. Rogers, a professor at the University of Nebraska at Omaha, and an eminent hydrologist, to assist in the planning for the construction of the new warehouse upon the fill and pad, and to meet the objections of which plaintiff had been apprised. Dr. Rogers made engineering studies of the flood flows and backwater profiles which had been developed by the Nebraska Natural Resources Commission from previous studies by the U.S. Army Corps of Engineers. In his report, Dr. Rogers concluded that because of channel improvements made by the Millard Warehouse and other improvements made during the construction of the Millard airport, the channel capacity of the west branch of the Creek had been increased, the effect of which was to lower the flood levels. He also pointed out that the Nebraska Natural Resources Commission's backwater profile shows that the expected flood level of the Millard Warehouse pad was actually 3 feet lower than expected flood levels above or below that point; and that the net effect of the work done by the Millard Warehouse actually reduces flood levels. He further concluded that the effects of the improved reach of the Millard Warehouse are transmitted upstream and result in even lower flood levels upstream. He stated that engineering facts clearly show that no adverse flood level effects result as a consequence of the Millard Warehouse construction. He concludes by stating: "I can foresee no adverse effects to property upstream or downstream as the result of the Millard Warehouse con-

struction." Also in his report on the matter made to HUD/FIA in Kansas City, Missouri, dated June 4, 1976, Dr. Rogers in his conclusion stated: "Based upon all observed and calculated expected hydraulic conditions, there is almost no chance that the Millard Warehouse construction will adversely affect 100-year flood flows in the West Branch of the Papillion Creek." Dr. Rogers also concluded that the proposed 100-year flood level determined by the U.S. Army Corps of Engineers was much too high, and, in fact, would be considerably less than their projections.

Based upon the foregoing information, the plaintiff, in April 1975, filed an application before the Omaha city council to have its property rezoned from "flood plain" classification to "industrial." Objections to the requested rezoning were made to the Omaha city council by the Nebraska Natural Resources Commission, the Papio Natural Resources District, and the Omaha Airport Authority. The Omaha city council, after hearing, voted to grant the rezoning of plaintiff's property, but the mayor vetoed that action. However, in April 1976, the city council voted 5 to 2 to override the mayoral veto, and the plaintiff's property was thereupon rezoned to "Industrial," following which the plaintiff proceeded to construct its warehouse upon the pad.

A short time prior to that date, however, to wit, on February 6, 1976, Ralph E. Tetrick and Marilyn Tetrick obtained title to a piece of property located a short distance upstream from the plaintiff's property and on the opposite bank of the Creek, by virtue of foreclosing a mortgage thereon and the issuance of a sheriff's deed to the property following its sale upon foreclosure. On March 3, 1977, after the construction of the plaintiff's warehouse had been substantially completed, Tetricks filed their action against the Millard Warehouse in the District Court for Douglas County for an order requiring the

Millard Warehouse to abate and remove the nuisance, or in the alternative, for a judgment against the Millard Warehouse for $700,000 and general damages. In their petition, the Tetricks alleged the filling and building of the pad by the Millard Warehouse and that the Millard Warehouse was aware that its property was located within the floodway and flood plain of the west branch of the Papillion Creek; that the building and the pad constituted an artifical obstruction in the floodway of the Creek "and as such constitutes a *public nuisance*, specially damaging the plaintiffs as hereinafter alleged." (Emphasis supplied.) They further alleged that the building and pad will impair and impede the flow of the water in the west branch of the Papillion Creek and will considerably raise the level of the water during flood periods so as to flow onto the plaintiffs' (Tetricks) land; and that prior to the construction of the building and pad, plaintiffs' land would not have been inundated by flood water. Tetricks further alleged that their property was damaged and that they "have been deprived of the use of said land *in that* before the plaintiffs can use their land, they will be required to fill or otherwise raise the level of their land at an approximate cost of $700,000.00." (Emphasis supplied.) They alleged further that there will be future damage to the plaintiffs because of the depreciation of the value of their land. Tetrick testified by deposition that he had been damaged because he had intended to use the property for commercial purposes, rather than agricultural, but was unable to obtain commercial zoning as the result of his property being placed in the flood plain, and he therefore suffered a loss of income.

Following the filing of the Tetricks' lawsuit, Millard Warehouse notified the defendant insurance companies of that fact and requested that they provide it with a legal defense to the suit, under the terms of their respective policies. The defendant in-

surance companies declined to do so, and denied that their respective policies required them to provide a defense to Tetricks' action or to pay any judgment entered against the defendant in that action. Thereafter, on May 4, 1977, plaintiff filed its petition for a declaratory judgment in the instant case against the defendants, alleging that the insurance companies were obligated under the terms of their policies issued to plaintiff to defend against the Tetricks' claims and to pay any judgments against plaintiff. All parties thereafter filed motions for summary judgment, which were subsequently overruled; and the matter came to trial, with the results previously indicated.

The types of coverage and pertinent provisions of the insurance policies issued by the defendants in this case were as follows: On October 17, 1973, defendant Hartford issued to plaintiff its special multi-peril policy, effective from October 17, 1973, to October 17, 1976, whereby, in addition to other coverages, it insured the plaintiff against liability by its SMP liability insurance form and comprehensive general liability, with limits up to $300,000 for personal injury or property damage. On October 17, 1976, defendant Fireman's Fund issued to plaintiff its so-called "portfolio policy," effective from October 17, 1976, to October 17, 1979, which, in addition to other forms of coverage, insured plaintiff by a comprehensive general liability clause, with limits up to $300,000 for personal injury or property damage. On October 14, 1973, defendant Pennsylvania issued to plaintiff an "umbrella liability policy" effective for the period from October 14, 1973, to October 14, 1976; and said policy was thereafter renewed for the period of October 14, 1976, to October 14, 1977. Under that policy, defendant Pennsylvania insured plaintiff in the sum of $3,000,000 against liability in excess of its underlying insurance coverages, but subject to a deduction, referred to as a "self-insured

retention," in the amount of $25,000.

The insurance policies issued by defendants Hartford and Fireman's Fund contained substantially identical clauses, reading as follows: "COVERAGE — BODILY INJURY AND PROPERTY DAMAGE LIABILITY.

"The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

" 'OCCURRENCE' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

" 'PROPERTY DAMAGE' means (1) physical injury to or destruction of tangible property which occurs during the policy period, including loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period."

The "umbrella liability policy" issued by Pennsylvania contains no provisions requiring that company to defend any actions brought against its insured, and plaintiff concedes this fact, and admits that its

reason for making Pennsylvania a party defendant to the lawsuit was because it felt that Pennsylvania was a necessary party to the lawsuit. Plaintiff contends, however, that in the event the Tetricks obtain a judgment against the Millard Warehouse, Pennsylvania under its excess liability provisions is obligated to pay any amount of such judgment in excess of the basic insurance liability for which the other defendants may be liable, less, of course, the self-retention liability of Millard Warehouse. Pennsylvania's liability is limited to the amount of its "Ultimate Net Loss," as that term is defined in its policy.

In their briefs on appeal, defendants list numerous assignments of error, their principal contentions being that the court erred in finding and holding that there was an "occurrence" within the meaning of the policies of insurance issued by them; that the court erred in finding that there was property damage within the policy definitions of that term; that the court erred in its assessment and award of attorney's fees; and, in addition, Pennsylvania has assigned as error the failure of the trial court to find that plaintiff had not exhausted its underlying coverage and its self-retention, which are conditions precedent to coverage under that defendant's policy.

It seems clear that before Hartford and Fireman's Fund have the duty under their policies to defend actions against the insured for damages or to pay claims or judgments against their insured for such damages, it must first appear that such damages were caused by an "occurrence," which term is defined in the policies as meaning an " '*accident*,' including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured*." (Emphasis supplied.) Before discussing the question of whether the facts in the instant case do or do not fit within the above definition of "occurrence," we first consider the

question of whether Tetricks' cause of action against Millard Warehouse was properly pleaded in their petition so as to require those insurance companies to defend against the lawsuit. The rule is well settled in Nebraska that an insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co., 196 Neb. 158, 241 N. W. 2d 674 (1976); Hartford Acc. & Ind. Co. v. Olson Bros., Inc., 187 Neb. 179, 188 N. W. 2d 699 (1971). It is clear from an examination of the allegations contained in Tetricks' petition that their action against Millard Warehouse is based upon the contention that the actions of Millard Warehouse, in artifically obstructing the floodway of the west branch of the Papillion Creek, constituted a "public nuisance," and they specifically so allege. In Town of Tieton v. General Ins. Co., 61 Wash. 2d 716, 380 P. 2d 127 (1963), a case strongly relied upon by the defendant insurance companies, that court stated: "A complaint alleging an unconstitutional taking or damaging, *or nuisance*, by itself, did not allege an accident." We point out, also, that under the policy definition of "occurrence," an occurrence is specifically defined as an accident, notwithstanding the arguments advanced by Millard Warehouse to the effect that an occurrence is broader than an accident. Also, in American Cas. Co. of Reading, Pa. v. Minnesota F.B.S. Co., 270 F. 2d 686 (8th Cir., 1959), that court stated: "The Farm Bureau had created and maintained a nuisance as was so characterized by the attorney for the claimants and as was charged in the various complaints in the suits against the Farm Bureau in state court. It cannot, logically, be said that the resulting damages complained of were caused by accident." In Clark v. London & Lancashire Indemnity Co., 21 Wis. 2d 268, 124 N. W. 2d 29 (1963), the court held that there is no

duty to defend when a complaint against the insured alleges a nuisance. To the same effect, see Farmers Elevator Mut. Ins. Co. v. Burch, 38 Ill. App. 2d 249, 187 N. E. 2d 12 (1962). While there are concededly cases holding to the contrary, we believe that the rule as stated above constitutes the general rule. In view of the foregoing rules, and particularly in view of the fact that Tetricks' petition contains no allegations as to an "occurrence" or an "accident," it would seem that the defendant insurance companies are correct in their contention that they were not obligated to defend Millard Warehouse in the Tetricks' lawsuit.

Even assuming, however, that the allegation of a "nuisance" could be construed as being sufficiently broad to inferentially allege an "occurrence" or an "accident," we believe that the facts of this case as revealed by the record are insufficient to establish an "occurrence" as that term is defined in the policy provisions. Defendants rely principally upon the following cases in support of their contention that they are not obligated to provide a defense or to pay any judgment which may be rendered against Millard Warehouse. In Foxley & Co. v. United States Fidelity & Guaranty Co., 203 Neb. 165, 277 N. W. 2d 686, decided on April 24, 1979, the policy involved contained the identical definition of "occurrence" as contained in the Hartford and Fireman's Fund policies. The facts of that case were that both Foxley and American Savings Company claimed ownership of a waterline system and hydrants in certain lands in the northern part of an existing water distribution system of an ordnance plant in Mead, Nebraska, each claiming under a quitclaim deed from the United States. Foxley & Co. caused a number of the water hydrants to be severed from the water system under claim of ownership; and American Savings Company then filed an action against Foxley, and recovered a judgment in its ac-

tion, which judgment was not appealed. Foxley & Co. then instituted an action against its insurer for its failure to defend it in the American Savings Company action or to satisfy the judgment. The insurance company took the position that the actions of Foxley & Co. resulting in damage to the water system were intentional and therefore not an "accident" within the meaning of the policy provision. In our opinion we held that where one intentionally does damage to the property of another in the mistaken belief that the property belongs to him, the property damage is not, within the meaning of an insurance policy, an "accident" neither expected nor intended from the standpoint of the insured. In our opinion we quoted with approval Thomason v. United States Fidelity & Guaranty Co., 248 F. 2d 417 (5th Cir., 1957), where that court stated: "Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended."

All three defendants cite and rely upon the case of Town of Tieton v. General Ins. Co., *supra*, in which the Supreme Court held that contamination of the property owner's well caused by seepage from a sewage lagoon, which was located approximately 300 feet from the well and which had been constructed by the town with knowledge of the potential hazard of pollution, was not caused by "accident" within the town's liability policy covering injury to property caused by accident. In that case it was stipulated that the lagoon was designed by and constructed upon the advice and with the approval of certain professional engineers employed by the town of Tieton, and that the lagoon was constructed by the town in a manner which was approved by state and local health agencies. It was operated precisely in the manner planned, expected, desired, and intended, and in the same manner as numerous other sew-

age lagoons similarly designed and planned. The town of Tieton did not intend that the well would become contaminated, but the record indicated that the seepage is the normal and expected result of the operation of this type of sewage facility. There was no dispute that the state agencies, the town, and the engineers recognized the possibility of contamination of the well. The mayor testified that the main basis of his and the town council's determination to assume the risk of the danger of contamination was the fact that the engineers had obtained the approval of the pollution control commission and the state health department regarding the location and construction of the lagoon. The court in its opinion stated: "No one contends that the contamination of the well was intended. Yet, the lack of such intent does not by itself compel us to conclude that such result was 'caused by accident.' The element of foreseeability cannot be ignored. * * * The evidence most favorable to respondent supports no more than a finding that respondent took a calculated business risk that the Pugsley property would not be damaged. * * * But, when, under the facts of this case, the possibility of contamination became a reality, it cannot be said that the result was 'unusual, unexpected, and unforeseen.' " In City of Kimball v. St. Paul Fire & Marine Ins. Co., 190 Neb. 152, 206 N. W. 2d 632 (1973), the court distinguished Town of Tieton v. General Ins. Co., *supra*, and impliedly approved that case upon its distinctive facts, by stating: "We have no question about that case. It is readily distinguishable from the instant one. The Town of Tieton had several reports in writing that there was a possibility of contamination of the adjoining property owner's well because of the nature of the soil. Disregarding this possibility, it went ahead with construction without making a prior arrangement with the well owner." In the City of Kimball case there was no evidence that the city ever had any knowl-

edge of the possibility of contamination of the well.

It is Millard Warehouse's contention that because of the fact it followed the advice of its own expert, a hydrologist, after being forewarned of the possibility of resulting flood damage from the erection of its building and pad, that it cannot be said the resulting damage, if any, was intended or expected. The president of the warehouse, Larry Larsen, specifically testified that he did not intend to cause harm or damage to any property owner, and relied upon the conclusion and advice of his own expert in that regard. A similar contention was made in the case of Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla., 1953). In that case the court stated: "Assuming that the surveyor made a mistake in locating the boundary line and that the Plaintiff relied on the erroneous survey, nevertheless the fact Plaintiff constructed his building so that it encroached upon the adjoining lot cannot be termed an accident. When a person understands facts to be other than they are and is free from negligence, a 'mistake of fact' occurs. An effect which is the natural and probable consequence of an act or course of action is not an *accident*. The effect which was the natural and probable consequence of the Plaintiff's act in erecting the building was the encroachment on the adjoining property. This is true whether the Plaintiff knew the facts as they were or understood them to be other than they were. The result or effect would be the same.

"Plaintiff deliberately and designedly (although erroneously) located the building on a part of the adjoining property and he intended to build it at that particular site. The fact that he relied upon a survey does not change the situation in the least. To hold that the mere fact the surveyor made a *mistake* and that the Plaintiff in reliance on the erroneous survey, constructed his building on the adjoining property by *accident* would lead to the result that

one insured, who relied on his own calculations of where the true boundary line existed, and encroached on contiguous property would be denied a recovery, and another insured, who relied on a survey, would be allowed to recover. The inequitable consequences of such an interpretation forbid *our concurrence* therein." Similarly, in Thomason v. United States Fidelity & Guaranty Co., 248 F. 2d 417 (5th Cir., 1957), the court held that a policy undertaking to pay damages because of injury to or destruction of property caused by "accident" did not cover damage caused by trespass upon the property of a country club by an employee of an insured contractor, when an employee operating a bulldozer mistakenly took out-of-bounds markers of the club for the boundary stake and cleared up to them, since the trespass was the result of mistaken and erroneous belief of the employee as to where he was to go for the doing of that which he was directed to do.

Similarly, although Larsen, the president of Millard Warehouse, contends that he acted pursuant to the best advice of his hired expert, and that he had no intention of causing harm, it appears that he took a calculated risk in so doing, after being advised of the possibility of flood damage, and that his actions in constructing the warehouse and pad did not constitute an "occurrence" or "accident" as defined in the policies issued by the defendant companies. In view of our conclusion, we deem it unnecessary to deal with other issues raised in the briefs of the parties.

We conclude that the trial court erred in ordering Hartford and Fireman's Fund to defend the plaintiff herein in the Tetricks' action, and to pay all damages and judgments awarded to said Tetricks; and also in ordering Pennsylvania to afford coverage and pay any amounts as excess coverage under their policy. We also find that the trial court erred in awarding attorney's fees to plaintiff for the serv-

ices of its attorney because of its failure to prevail in this appeal; and that the judgment of the District Court must be and hereby is reversed.

REVERSED.

BRODKEY, J., dissenting.

I must respectfully dissent from the majority opinion. Not only do I feel that it has applied incorrect legal principles, but I feel the result is highly inequitable.

I start my discussion with the very recent case of Pachucki v. Republic Ins. Co., 278 N. W. 2d 898, decided May 30, 1979, by the Supreme Court of Wisconsin. The homeowner's policy in that case provided that the policy did not apply to bodily injury or property damage which is either expected or intended from the standpoint of the insured. In its opinion the court outlined three general rules that have emerged with respect to the construction of an intentional tort exclusion, as follows: "(1) The minority view follows the classic tort doctrine of looking to the natural and probable consequences of the insured's act; (2) The majority view is that the insured must have intended the act and to cause some kind of bodily injury; (3) A third view is that the insured must have had the specific intent to cause the type of injury suffered." The same rule would apply to property damage.

Which view has Nebraska adopted? I believe that Nebraska has clearly adopted the majority rule. In State Farm Fire & Cas. Co. v. Muth, 190 Neb. 248, 207 N. W. 2d 364 (1973), which case involved a homeowner's insurance policy containing an exclusion for "bodily injury . . . which is either expected or intended from the standpoint of the insured," although admittedly factually dissimilar from the instant case, this court clearly stated: "We hold on the basis of the authorities which we hereinafter cite that, under the language of the exclusion in question, an injury is either expected or intended if the in-

sured acted with the specific intent *to cause harm to a third party.* It seems to us to be immaterial whether the injury which results was specifically intended, i.e., the exclusion would apply even though the injury is different from that intended or anticipated." (Emphasis supplied.) This to me clearly indicates the adoption of the majority rule referred to above. State Farm Fire & Cas. Co. v. Muth, *supra*, has never been overruled by this court, and still remains the law of this state. Foxley & Co. v. United States Fidelity & Guaranty Co., 203 Neb. 165, 277 N. W. 2d 686 (1979), cited in the majority opinion, was a division opinion, not an opinion of the full court, and involved a mistake of law rather than a mistake of fact. However that may be, the fact remains that although the court mentioned Muth in passing, it did not specifically overrule Muth. The specific holding in Foxley is set out in the opinion as follows: "While we are aware of cases to the contrary, we hold that a policy undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another when the damage is the natural result of the intentional act of the policyholder."

In this case, the record is clear that Millard Warehouse did not build the pad or the warehouse with the specific intention of causing harm to the Tetricks or any other person. Not only did the president of the corporation, Mr. Larsen, not harbor any such intention, as he testified, but on the contrary he had been assured by a competent expert, and on the basis of his own experience with the Creek extending over a long period of years, that the threatened flood danger was exaggerated and practically nonexistent, and could safely be disregarded. There is also evidence in the record establishing there have been no floods despite the fact that there have been very heavy downpours of rain in the intervening years.

Nor is it likely that Millard Warehouse would have intentionally risked its very large investment in its physical facilities, or the 10 million dollars in customers' property stored on its premises, by intentionally and knowingly increasing the danger of loss or damage which would be caused by the flooding of its premises. Under the majority rule, above cited, it is clear that Millard Warehouse did not intend damage to anyone; and hence the policy exclusion is not applicable, and the insurance companies should be required to defend the lawsuit brought by the Tetricks. We might add that the authorities cited by the majority are clearly distinguishable from the instant case for the reason that in none of the cases cited by the majority had the insured ever received expert or professional advice, contrary to the claims of the government agencies involved, that it was safe to proceed with the course of action planned, as was true in this case.

As a further basis for reversing the judgment of the District Court, the majority opinion makes two other points. They cite the general rule adopted in Nebraska to the effect that the duty of an insurance company to defend an action must at the outset be judged by the allegations contained in the pleadings filed by the third party against the insured. They point out that the Tetricks' lawsuit specifically alleges that the construction of the warehouse and pad by Millard Warehouse constitutes a "public nuisance," and they cite authorities in support of the rule that an allegation of a "nuisance" by itself does not allege an accident, none of which cases are, however, Nebraska cases. We point out, however, that there is a split of authority in the country on the question, and there are also many decisions holding to the contrary. See, Annotation, Allegations in third person's action against insured as determining liability insurer's duty to defend, 50 A.L.R. 2d 458; Annotation, Injury from nuisance maintained by in-

sured as within coverage of public liability policy, 98 A.L.R. 2d 1047.

In White v. Smith, 440 S. W. 2d 497 (Mo. App., 1969), the court stated: "Instant plaintiffs' suit was 'for nuisance.' An actionable nuisance may be ' "anything wrongfully done or permitted, which injures or annoys another in the enjoyment of his legal rights." ' '[N]uisance is a condition, and not an act or failure to act of the person responsible for the condition.' 66 C.J.S. Nuisances § 11a, 1.c. 752. It does not rest or depend upon the degree of care used, but upon the degree of danger existing with the best of care. So, in determining liability for the maintenance of a nuisance, whether defendant was negligent and what his intention, design or motiff may have been alike became immaterial."

Also, in Grand River Co. v. Ohio Cas. Ins. Co., 32 Ohio App. 2d 178, 289 N. E. 2d 360 (1972), the court stated: "The amended petition in the Lake County case contains two causes of action, each founded upon different theories of liability. The first cause of action contains allegations of nuisance and trespass. It is alleged that Grand River was guilty in the following respects. * * * [i]n allowing said industrial wastes to be emitted in large quantities from their stacks and to settle on the person, houses, automobiles, and other chattels of the plaintiff, constitute a continuing nuisance and trespass in the following particulars, to wit: * * *.

"The allegations as made in the second cause of action assert the knowledge and willful intent of the defendant. Such allegations are not based upon nuisance, trespass or negligence as such are to be found in the first cause of action.

"We hold, and the plaintiff concedes, that the defense of the second cause of action could not be required under the definition of 'occurrence' as contained within the policy. Such allegations would not constitute a claim for damages 'neither expected

nor intended from the standpoint of the insured.'

"However, allegations of knowledge and intent do not appear in the first cause of action, and could well come within the meaning of 'occurrence' as contained within the policy." See, also, Wolk v. Royal Indemnity Co., 27 Misc. 2d 478, 210 N.Y.S. 2d 677 (1961). I am of the opinion that the duty of an insurance company to defend under its policy should not rest upon a narrow interpretation of perhaps loosely used words in a petition, words chosen by a third party suing the insured, but should be controlled by the actual facts of the case; and the nature of the Tetricks' claim is such as to require the defendant insurance companies to defend.

I also note that the Tetricks' case is still pending trial; and that as plaintiffs therein, the Tetricks may still have the opportunity, and may well decide, to amend or add allegations to their petition, with the result that defendants might be obligated to render a defense to Millard Warehouse.

I would sustain the judgment of the District Court, and would also, as did that court, allow attorney's fees for plaintiff's attorney in the amount it determined after a separate hearing thereon, without, however, allowance of interest on said attorney's fees.

FAHRNBRUCH, District Judge, joins in this dissent.

IN RE INTERESTS OF LETA HAMILTON, TINA HAMILTON, AND BOBBI JO HAMILTON, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LINDA HAMILTON, NATURAL MOTHER, APPELLANT.

283 N. W. 2d 66

Filed September 11, 1979. No. 42307.

1. **Parent and Child: Statutes: Evidence.** An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence.

2. **Parent and Child: Appeal and Error: Proof.** Where review in this court is de novo and a correct judgment or order was made by the trial court, it will not be reversed because the trial court may have applied an incorrect standard of proof.

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

Michael C. Washburn of Starr, Slowiaczek & Washburn, P.C., for appellant.

Donald K. Knowles, Douglas County Attorney, and Robert E. Huston, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and HAMILTON and HENDRIX, District Judges.

HENDRIX, District Judge.

This is an appeal from an order of the Separate Juvenile Court for Douglas County, Nebraska, terminating the parental rights of Linda Hamilton, now Linda Floyd, in three of her children, Leta, Tina, and Bobbi Jo Hamilton. The appellant will hereafter be referred to as Linda.

The original petition was filed by a deputy county attorney on September 7, 1976, and stated that Linda was the mother and Roberto Cantu was the father of the children. The petition further alleged dependency based upon section 43-202 (1), R. S. Supp., 1975, and neglect based upon section 43-202 (2)(b), R. S. Supp., 1975. A guardian ad litem for the children and attorneys for Linda and Roberto Cantu were appointed. Hearings were held regarding detention, evaluation, and review. On June 9, 1977, and pursuant to the stipulation of the parties, the children were adjudged dependent and the charge of neglect was dismissed. On June 9, 1977, and again at a review hearing on January 6, 1978, custody of the children was placed in the Douglas County Social Services at the home of Linda. At this time jurisdiction of the court over Roberto Cantu was terminated, he

having died. Linda was ordered to make certain efforts to correct deficiencies in the care of the children. On March 21, 1978, a supplemental petition was filed alleging failure to correct the condition leading to the determination of dependency and praying for termination of parental rights. On March 30, 1978, a detention hearing was held at which Linda failed to appear, and an adjudication hearing was held on May 17, 1978, and again Linda failed to attend. Further disposition hearing was held on July 3, 1978, with Linda present. On that date the court terminated parental rights under authority of section 43-209 (6), R. S. Supp., 1976. Upon a motion for new trial being overruled, this appeal was lodged. We affirm the judgment of the Separate Juvenile Court.

Facts recited to support the dependency stipulation were that just prior to the filing of the original petition the children were found very dirty and alone in a very dirty apartment. The children had the back panel off of a television set so that the wires were exposed and in reach of the children. One of the children had a wound on her foot that was swollen and evidently untreated. There was also mention of a bad condition regarding warm winter clothing.

During the pendency of the action, the court set down and continued conditions designed to correct the dependency. Guidance and supervision was ordered and provided by a number of persons throughout Douglas County. The court held hearings and admonished. Notwithstanding these efforts, however, there was no substantial improvement in the care which Linda gave the children. They continued to be dirty and ill-clothed. In a report of the supervisor of a day care center dated February 16, 1978, it was stated that the children had worn the same clothes every day since January 18th. At the center, it was frequently observed that Bobbi Jo

had on no underwear. She wore clothes that had not been cleaned for an entire week and continued to wear them the following week without cleaning. It was necessary for the personnel at the day care center to bathe the children and clean their clothes. The children were seen without mittens or hats in very cold weather. Court-directed attendance at the day care school was only sporadic. When contacted, Linda expressed little concern in this regard. Leta, the only child of school age, had nine unexcused absences from school in the first quarter of the 1977-78 school year which consisted of 42 days, and 20 unexcused absences in the second quarter which consisted of 47 days. Linda did not keep appointments with the supervising officers, and both a supervising probation officer and a supervising service officer stated that during certain periods they were successful in contacting Linda only two times in 10 visits to the home. Linda did not maintain contact with supervising personnel, her counsel, or the court. Linda failed to attend many of the positive parenting classes prescribed. The children expressed love for their mother, and are comfortable in her presence. However, during the course of this matter the children have been in a foster home or homes. Upon the infrequent visits by Linda to foster homes, the conduct and attitude of the children reveal a minimal trauma in the separation. In May of 1978 Linda was married to Jessie Floyd. While it appears that this might provide a more stable environment for Linda, there is no evidence that the marriage would materially affect Linda's care of the children.

The claim made on behalf of Linda is that the trial court may have used the wrong standard of proof in disposition. In findings made at the adjudication hearing, the trial court stated certain allegations in the supplemental petition to be true by a preponderance of the evidence. No findings were made of

either proof by clear and convincing evidence or proof beyond a reasonable doubt. The claim is that in termination of parental rights, such additional standards should be used.

A similar contention was made in State v. Souza-Spittler, *ante* p. 503, 283 N. W. 2d 48, decided September 4, 1979. In that case we said: "While our statute, section 43-206.03(3), R. R. S. 1943, specifies that the initial finding of jurisdiction may be based on a preponderance of the evidence, it does not specify a standard for termination, nor did the juvenile court specifically relate the standard which it applied. We agree that termination should be based on clear and convincing evidence. Because we are convinced, however, that the evidence before the juvenile court clearly satisfied even the stricter 'clear and convincing' standard, we decline to reverse on this ground. Although findings of fact by the juvenile court are accorded great weight, the matter is triable de novo in this court. See ss. 43-238 and 25-1925, R. R. S. 1943." If, on trial de novo, we find the order terminating the parental rights of Linda is supported by clear and convincing evidence, we must affirm.

An examination of the record reveals an initial dependency by agreement of the parties. It further reveals, throughout the entire court proceedings, a period of about 22 months, the continued neglect of the children by Linda. The court and the people of Douglas County provided an abundance of guidance, supervision, encouragement, and discipline. It was, however, to no avail. Under these circumstances the children will benefit from, and the people of the State of Nebraska have a right to impose, conditions which may distrub the parent-child relationship. The decision of the Separate Juvenile Court was supported by clear and convincing evidence and should be affirmed.

AFFIRMED.

BURLINGTON NORTHERN, INC., APPELLEE, V. CITY OF McCOOK, DON BLANK, MAYOR, AND BETTY COUFAL, CITY CLERK AND TREASURER, APPELLANTS.

283 N. W. 2d 380

Filed September 18, 1979. No. 42153.

1. **Special Assessments: Property.** A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction.
2. **Special Assessments.** A property owner who attacks a special assessment as void has the burden of establishing its invalidity.
3. **Special Assessments: Property.** Special assessments are charges imposed by law on land to defray the expenses of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general.
4. **Special Assessments.** Where the physical facts are such that the property was not and could not have benefited to any extent approaching the amount of the assessment, the levy of assessment is then arbitrary and constructively fraudulent and therefore void.

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

Keith Sinor, for appellants.

Knudsen, Berkheimer, Endacott & Beam, for appellee.

Heard before BOSLAUGH, McCOWN, BRODKEY, and WHITE, JJ., and KNAPP, District Judge.

KNAPP, District Judge.

This action in equity was brought by plaintiff to have a special assessment upon its real estate in sewer district No. 47 of the City of McCook declared void and collection thereof enjoined upon the grounds that defendants had failed to comply with certain of the statutes governing formation of sewer districts, thus rendering the assessment fundamentally and jurisdictionally deficient, and that the sewer system as constructed does not benefit the plaintiff to any extent approaching the assessment, and that therefore the levy of the assessment is arbitrary and constitutes a constructive fraud upon the plaintiff.

The trial court found for plaintiff upon both of its positions and granted the relief prayed. Defendants appeal, assigning essentially that the decision is not sustained by sufficient evidence and is contrary to law. We affirm.

The principles governing this appeal include several of those restated in Nebco, Inc. v. Speedlin, 198 Neb. 34, 251 N. W. 2d 710. We there held a property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction; a property owner who attacks a special assessment as void has the burden of establishing its invalidity; special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general.

Further, where the physical facts are such that the property was not and could not have been specially benefited in any amount or could not have benefited to any extent approaching the amount of the assessment, the levy of assessment is then arbitrary and constructively fraudulent and therefore void and subject to collateral attack. Chicago &

N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753.

The record, examined de novo, shows that sewer district No. 47 was created by an ordinance passed on October 9, 1972. The district was bounded on the east by First Street extended, on the west by Beal Street, on the south by the south line of the residential lots on the south side of South Street, and on the north by a line 1,000 feet north of and parallel to the north right-of-way line of South Street. The residences on the south side of South Street had been served by septic tanks and cesspools, the frequent overflowing of which gave rise to the creation of the sewer district.

The properties north of South Street and included within the district were industrial in nature, consisting of a total of 66.59 acres divided into nine tracts of from 2.17 acres to 28.73 acres, the largest tract being the property of plaintiff. Plaintiff's tract was served by a private sewer line installed by it some years prior to the creation of sewer district No. 47.

The district's northern boundary line, 1,000 feet north of and parallel to South Street, was set arbitrarily. No topographical, geographical, or functional basis exists justifying or explaining the 1,000-foot requirement. The record contains no hint as to how the northern boundary was determined nor, indeed, by whom it was determined. However, whatever the reason might have been, the effect was to shift the major costs of the sewer system from the residential owners to the industrial owners - from those most benefited to those least benefited.

Although defendant city's engineers testified that they had intended to allocate the assessable costs to the property owners on the basis of 50 percent for front footage and 50 percent for area, the assessments as actually spread were on a 43 percent front footage and a 57 percent area basis. The district, when completed, contained approximately 5,200 feet

of sewer line. Of this, only 110 feet was laid in a street abutting plaintiff's industrial property. The balance of plaintiff's 28.73 acres cannot be adequately served by the system as constructed.

Special assessments in sewer district No. 47 totaled $54,830.84. Of this, plaintiff was assessed $13,684.43, almost one-fourth of the total.

On this evidence, the trial court found, and we concur, that the sewer system was designed to benefit the residential owners and not the industrial owners and that plaintiff's property was not and could not have been benefited to any extent approaching the amount of the assessment. That being so, the levy of assessment complained of is arbitrary, constructively fraudulent, and therefore void. Therefore, we need not address the issue of whether or not sewer district No. 47 was created in conformity with the applicable statutes.

AFFIRMED.

IN RE INTERESTS OF JULIE BOYLES AND JESSIE BOYLES, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARGE DURAN, APPELLANT.

283 N. W. 2d 382

Filed September 18, 1979. No. 42230.

1. **Appeal and Error: Juvenile Courts.** An appeal of a juvenile case is heard in this court by trial de novo upon the record; notwithstanding, findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Evidence: Juvenile Courts: Minors.** A juvenile court may exercise its sound discretion in determining the relevancy, competency, and admissibility of evidence to be considered in a dispositional hearing during proceedings involving minor dependent and neglected children.
3. **Parent and Child: Minors.** The right of parental custody and

control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children.

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

Knapp, State, Yeagley, Mues & Sidwell, for appellant.

Gary L. Hogg, Buffalo County Attorney, and Nancy J. Ludden, for appellee.

Heard before KRIVOSHA, C. J., CLINTON, and WHITE, JJ., and STANLEY and GITNICK, District Judges.

GITNICK, District Judge.

This is an action brought in the county court of Buffalo County, Nebraska, seeking to have two of the appellant's eight children declared dependent and neglected under section 43-202(2), R. R. S. 1943, and to terminate the appellant's parental rights.

After an adjudication hearing, the court found that the minor children, Julie and Jessie Boyles, ages 6 and 7, were dependent and neglected and the children were placed in the custody of the Buffalo County Department of Social Services pending a dispositional hearing.

At the dispositional hearing, the court terminated the parental rights of the appellant and placed the custody of the two minor children in the State Department of Public Welfare. The appellant then appealed the county court's decision to the District Court for Buffalo County. That court entered its order finding that the order of the county court terminating the parental rights of the appellant should be set aside. The court remanded the cause to the county court for further hearing, on the basis that the statutes contemplate notice to both parents in actions to terminate parental rights when the children involved are not born out of wedlock, and in this case notice was not given to the natural father of the children.

After notice to both biological parents of the minor children, the county court of Buffalo County held a second dispositional hearing in this matter, and again terminated the parental rights of the parents, and the children were made wards of the State of Nebraska.

The appellant again appealed the decision of the county court, terminating her parental rights, to the Buffalo County District Court, and on June 6, 1978, the District Court entered its order affirming the findings and order of the county court terminating the parental rights of the appellant to her minor children. Thereafter, appellant filed her motion for new trial, which was overruled, and this appeal followed.

In substance, appellant assigns as error that: (1) The evidence was insufficient to support the juvenile court's finding and order terminating parental rights; (2) the court erred in admitting into evidence, over objection, certain written reports amounting to hearsay evidence; (3) the court erred in not requiring court-supervised rehabilitative efforts to be carried out prior to terminating parental rights; and (4) the court erred in not admitting into evidence additional testimony by the appellant during the second appeal to the Buffalo County District Court concerning the then current circumstances and home environment of the appellant. We affirm the judgment of the court.

Section 43-209, R. R. S. 1943, in part provides: "* * * The court may terminate all parental rights between the parents * * * and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist:

"* * * (2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection * * *."

An appeal of this matter is heard in this court by trial de novo upon the record, although the findings of fact made by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses, and the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence such as to constitute an abuse of discretion. State v. Logan, *ante* p. 204, 281 N. W. 2d 753 (1979).

At the second dispositional hearing, which resulted in termination of parental rights, the evidence shows that the bill of exceptions of the first dispositional hearing and the social service report introduced at that hearing were received in evidence by the court without objection.

In summary, the evidence adduced from the bill of exceptions on the first dispositional hearing shows that the appellant, who was then unemployed, was living in a small trailer home with her third husband who was not the father of the children here involved, but they were going to move to a larger trailer home. She stated her intention to enroll in a course of study so that she could be a licensed practical nurse and that she had attended two parenting counseling sessions in the 3-month period since the adjudication hearing. Visitation with the children was had on a weekly basis. Her job history had been irregular and part time only since the adjudication hearing.

The social service report introduced in evidence at the first dispositional hearing without objection contains a social history of the appellant. In summary, by the time appellant was 20 years of age, she had five children and was unable to cope with the stresses of family life because of her youth and the demands of her five children. She had neither the time nor the opportunity to develop any parenting skills. She found it difficult to deal with the everyday problems of sending the children to school and seeing that they

were kept clean; and the supervision of the children was delegated to the older children or to their grandparents, with the result that as the children felt able to do so, they left the home and now have a history of divorce, dropping out of school, and uncontrollable deportment. The social service agency suggested, in its report, that the appellant see and cooperate with the local mental health center and find a larger and more adequate place of residence.

At the second dispositional hearing, some 5 months following the first dispositional hearing, the evidence shows that the two children here involved had been using obscene language as a normal part of their conversation when first placed in foster care following the adjudication hearing; were preoccupied with sexual activities of various definitions not usual in children of tender years; had poor hygienic habits; were not informed as to basic foods and eating habits; were frail; were in need of immediate dental attention; had bruises, open sores, and cigarette burns about their bodies; took things of others without permission or payment; and were setting fires. The evidence further showed that during the time the children lived with their mother prior to the adjudication hearing, the children were behind in school levels for their ages, were socially backward, were tired and sleepy, had school attendance and behavior problems, were underweight, and were sloppy in dress, unkempt in appearance, and inappropriately dressed for existing weather conditions.

Further evidence regarding appellant shows a history of three marriages with frequent separations therefrom, frequent separations of appellant from her eight children, financial difficulties and interrupted work history, arrests for intoxication and fighting in public, frequent changes in residence, intentional burning of her present husband's clothes on her front lawn because of a fight she had with him, placement of two other unemancipated children with

her mother, and failure to cooperate with the suggested counseling of the local mental health agency.

This court has previously stated that the integrity of the family unit depends upon the protection of its individual members from abuse and neglect and that the parental right of custody and control creates a duty of care and support. State v. Logan, *supra*. The evidence in this case is abundant that the appellant failed to discharge her parental duties and obligations to provide a decent home, a proper environment, a proper role model, support, subsistence, education, attention, love, and other care necessary for the mental and physical health and well-being of her children. While courts cannot and should not deprive a parent of the custody of children merely because a parent has limited resources or financial problems or is not socially acceptable, the evidence in this case goes beyond such criteria. There is ample evidence of neglect and a lack of proper parental care adversely injurious to the mental and physical health and well-being of the children which, if permitted to continue, would probably lead to both serious problems for the children in learning to cope with the stresses of society and an inability to find a suitable place in society in the future as they mature.

At the second dispositional hearing, the court received as evidence, over foundational and hearsay objections, the report of a consulting psychiatrist of the South Central Community Mental Health Center, a school performance report of the Kearney public schools, the arrest record of appellant, a child welfare social study report of the Buffalo County welfare agency, a recommendation of the Nebraska Department of Public Welfare, and the report of a police officer summarizing his knowledge of the drinking and behavioral habits of the appellant and

her present husband from December 6, 1976, through July 1, 1977.

We are met with a challenge by the appellant that the court's determination was based in part on these reports, conclusionary in form, containing hearsay matters and introduced with complete lack of foundation, in violation of appellant's rights of cross-examination. We first point out that section 43-206.03 (4), R. R. S. 1943, provides that strict rules of evidence shall not apply at any dispositional hearing. As we have previously stated, the juvenile court may exercise a sound discretion in determining the relevancy, competency, and admissibility of evidence to be considered at a dispositional hearing. State v. Bailey, 198 Neb. 604, 254 N. W. 2d 404 (1977). We also point out that this record is replete with sufficient evidence to justify the court's termination of parental rights if the evidence to which objection is made had been excluded. While the nature of such reports may be questioned, and a more appropriate procedure would be the submission of such reports to adverse counsel prior to hearing so that a proper opportunity to rebut their content may be afforded, the acceptance of such materials into evidence is better analyzed through an analysis of the nature of the dispositional hearing.

The dispositional hearing affords the trial court an opportunity for a wide-ranging review of a child's complete social history apart from the basic circumstance of the adjudication hearing. It looks only to what is in the child's best interests for such child's future.

As we have previously stated, the Legislature of this state has clearly stated that no strict evidentiary rules shall apply. § 43-206.03(4), R. R. S. 1943. Furthermore, "The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purposes of serving the best interests of the children involved * * *." Healey v. Johnson, 188

Neb. 677, 198 N. W. 2d 466 (1972); State v. Randall, 187 Neb. 64, 187 N. W. 2d 586 (1971). It is presumed the trial court disregarded all irrelevant and incompetent matters in making its decision if there was other sufficient, competent, and material evidence in the record to sustain the court's decision. State v. Bailey, *supra*; Krell v. Sanders, 168 Neb. 458, 96 N. W. 2d 218 (1959).

We, therefore, find that the evidence was sufficient to support the finding of the juvenile court in terminating the appellant's parental rights.

The appellant also argues that the court erred in refusing to order and direct rehabilitative efforts to be undertaken by the appellant prior to termination of parental rights, and asserts, as a basis for this contention, that the policy of the juvenile court act is best exemplified by the statutory language of section 43-209(6), R. R. S. 1943, which reads in part, "* * * (6) Following upon a determination [of neglect or dependency] reasonable efforts, under the direction of the court, have failed to correct the conditions leading to a determination * * *," and the policy considerations as stated in section 43-201.01, R. R. S. 1943, in particular subsection (2), which provides for the intervention of the juvenile court in the interests of any child who is within the provisions of the act, with due regard to parental rights and capacities and the availability of nonjudicial resources, and subsection (3) thereof, which provides for the use of social and rehabilitative services to the involved children and their families, and subsection (4) thereof, which provides that the juvenile court shall separate the child from its parents only when necessary for the child's welfare or in the interest of public safety and that when a temporary separation is necessary, to consider the developmental needs of the individual child in all placements and to assure every reasonable effort possible to reunite the child with his family.

These policy statements are laudable and establish a generalized program for the juvenile courts to follow. The overriding consideration in all cases, however, must be the doctrine which we have long followed in cases such as this, that the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection. The parents' natural and superior rights to have custody of their children have always been protected and maintained by the courts, but those rights are not absolute or inalienable, as society also has a paramount interest in the protection of the right of children to be loved, cared for properly, and to have proper moral training and education. State v. Jenkins, 198 Neb. 311, 252 N. W. 2d 280 (1977). In reviewing the family history of appellant and the difficulties and present status of her other six children, the trial court correctly concluded that rehabilitative efforts would serve no useful purpose. We learn from the past. Appellant incorrectly assumes that because the minor children have only been in difficulty on this one occasion, some second chance should be afforded. The issue in a disposition hearing where a child has been found to be neglected or dependent is not the adjudicated offense with which the children are involved, but rather a broader concern of overall conduct of the children and their parents and what ought to be done to correct the situation in the best interests of the children. The evidence in this case reveals a continuous and habitual pattern of parental misconduct and general irresponsibility and the court must be concerned with the effect which the actions of a parent may create on the impressionable minds of young children.

Appellant also argues that section 43-209, R. R. S.

1943, requires, upon a determination of neglect or dependency, but as a precondition of termination of parental rights, that the court must set forth and supervise efforts to correct the conditions leading to the determination of neglect or dependency. She argues in effect that if subsection (6) of section 43-209, R. R. S. 1943, which reads, "Following upon a determination that the child is one as described in subdivision * * * (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination," is construed as not requiring the institution of rehabilitative programs, then it is a meaningless provision.

We believe appellant misconstrues subsection (6) of section 43-209, R. R. S. 1943, as this subsection of the statute is one of six independent circumstances under which the court may terminate parental rights. This subsection incorporates section 43-202, R. R. S. 1943, within its purview. Section 43-202, R. R. S. 1943, contains the jurisdictional instances when the juvenile court may act. We conclude that the court may terminate parental rights under the first five subsections of section 43-209, R. R. S. 1943, and under the provisions of section 43-202, R. R. S. 1943, provided that when the conditions set forth in section 43-202, R. R. S. 1943, are found to exist, reasonable efforts must be shown to have been taken to correct the conditions leading to the determination that a child is one of those mentioned in section 43-202, R. R. S. 1943, and those measures have failed. We do not read this requirement as existing when termination of parental rights occurs under the provisions of subsections (1) through (5) of section 43-209, R. R. S. 1943. The District Court, in its journal entry after finding that the juvenile court predicated its jurisdiction on section 43-202(2), R. R. S. 1943, made an express finding that the appellant "has substantially and continuously neglected the children and refused

to give the children necessary care and protection. * * *'' This finding was substantially in the words of subsection (2) of section 43-209, R. R. S. 1943, and evidences a clear intent of the court to predicate the termination of parental rights on subsection (2) and not on subsection (6). The court was clearly within its discretionary authority in so determining and did not abuse its discretion in this regard.

The appellant further argues that at the time of the second appeal before the District Court, the appellant should have been permitted to adduce additional testimony of the appellant's family and home circumstances during the 5-month period intervening between the second dispositional hearing and the appeal to the District Court. Section 24-541, R. R. S. 1943, does permit the District Court to receive additional evidence at the time of hearing on appeal if that court determines such evidence is reasonably necessary to determine the issues, make findings of fact, and render judgment thereon. Our review of the record in this case fails to show an abuse of discretion by the District Court in refusing to permit the introduction of this additional evidence.

The appellant also alleges the court erred in terminating appellant's parental rights without making a specific finding as to the existence of one or more conditions enumerated in section 43-209, R. R. S. 1943. The introductory language immediately preceding the enumerated conditions of that section reads: ''The court may terminate all parental rights between the parents * * * and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist * * *.''

In its order, the trial court made specific findings clearly reflective of the substantial and continuous neglect of the children by the appellant, but not in the words of the statute. The District Court, in its journal entry on appeal, made its finding in the

words of the statute. In either event, to follow appellant's theory would permit form to prevail over substance. Appellant's contention is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

ROBERT J. GARTNER AND ROBERTA GARTNER, APPELLANTS, V. WILSON CONCRETE CO., AN IOWA CORPORATION, APPELLEE.

283 N. W. 2d 389

Filed September 18, 1979. No. 42391.

1. **Easements: Adverse Possession: Property.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period.
2. **Equity: Appeal and Error.** On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.

Appeal from the District Court for Hall County: L. W. KELLY, JR., Judge. Affirmed.

John R. Hall of McDermott & Hall, for appellants.

James H. Porter of Grimminger & Porter, for appellee.

Heard before BOSLAUGH, CLINTON, WHITE, and HASTINGS, JJ., and KORTUM, District Judge.

KORTUM, District Judge.

This is an action to establish an easement by prescription across property of the defendant. The District Court held that the use of the defendant's property did not exist for the required 10-year period and

dismissed the plaintiffs' petition. The plaintiffs have appealed alleging generally that the trial court erred in determining that the plaintiffs had not established an easement by prescription. We affirm the judgment of the trial court.

The defendant, Wilson Concrete Co., is the owner of Lot 2, Bachman and Lester Subdivision of Grand Island, Hall County, Nebraska. The subdivision is a commercial area consisting of cement companies, a construction company, and a grain elevator (liquidated by 1975). Plaintiffs, Robert and Roberta Gartner, purchased Lot 3 in 1976 and the southerly parts of Lots 4 and 5 from Grand Island Elevators, Inc., in 1973.

The parcel of land in dispute here runs in a north-south direction and along the west side of Lot 2. The disputed area is approximately 60 feet wide and 719 feet long. Plaintiffs allege that this strip of land was used by them and their predecessors in title.

The evidence presented by the parties is essentially conflicting and contradictory. Plaintiff Robert Gartner testified he was in the trucking business and he used the easement road to haul grain and feed to the warehouses on Lots 4 and 5 and to the elevator scales for a period of nearly 20 years. He further testified that this usage was frequent, from one-half dozen to a dozen times a week. After Gartner purchased part of Lots 4 and 5 in 1973, he and his lessee continued to use the easement road up until it was blocked by the defendant in the fall of 1977. His testimony was corroborated by other witnesses.

The testimony for the defendant was essentially that the roadway was used by others only occasionally, perhaps one-half dozen times in the last 10 years, and that prior to 1967, when the property was purchased by the defendant, Lot 2 had been a cornfield with no track or path across it.

There is persuasive testimony that there was no access to Lot 2 from the north because of a deep ditch

on Second Street. The defendant installed a culvert in the ditch in 1968 and commenced to use it for an access to the north.

The plaintiffs' sole assignment of error is that the trial court erred in determining that plaintiffs had not established an easement by prescription.

The basic rules applicable to prescriptive easements are well settled. " 'The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period.' " Fischer v. Grinsbergs, 198 Neb. 329, 252 N. W. 2d 619. The statutory period for the establishment of title to real estate by adverse possession is 10 years. § 25-202, R. R. S. 1943.

Plaintiffs contend the trial court did not base its decision on the evidence presented at the trial. Plaintiffs point out the comments of the trial judge in reaching his decision: "Now, there is no question but what for some period of time some traffic has been using that entryway. Now, I am familiar with that area * * * and I know that to get from Second Street into any of that property that there is enough of a ditch that there would have to be a culvert to get there, and that someone would have to have put in a culvert to establish a road. The testimony here was that the first culvert was placed there in 1968, which means that as of the closing of this road in 1977, there could not have possibly been the 10-year period of time necessary to establish an easement by right of prescription."

We, of course, consider the matter de novo here. Witness Kenneth Schmidt, testifying for the defendant, stated that the prior owner of Lot 2, the Geer-Melkus Construction Company, had let the lot stand

vacant and that there was no entrance from Second Street across the ditch from 1952 until 1967 when the lot was sold to the defendant.

James McComb, witness for the defendant, also testified that there was no access from Lot 2 onto Second Street, and that Lot 2 was essentially a cornfield from 1957 until 1966. McComb further testified that in 1967 he bladed an access road on Lot 2 to allow equipment of the defendant to move on the lot. In the fall of 1968 the defendant installed a culvert across the ditch from Second Street to Lot 2. In 1977 the defendant closed the north entrance to Lot 2 because of increasing traffic and safety problems and this lawsuit followed.

This is an action in equity and it is thus the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion on such record without reference to the findings of the District Court. § 25-1925, R. R. S. 1943; Fitch v. Slama, 177 Neb. 96, 128 N. W. 2d 377.

The determination of this case necessarily resolves itself into a decision of the weight and persuasiveness of the evidence presented by both parties. It is our conclusion that there was sufficient credible evidence in the record to establish that the plaintiffs did not meet their burden of proof to establish the 10-year period necessary to support a finding of an easement by right of prescription. We reach this conclusion independently and in view of the comments of the trial judge in his findings and conclude that such comments were substantially founded on and corroborated by the evidence adduced at trial.

On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433.

The judgment of the District Court is affirmed.

AFFIRMED.

RICHARD J. MOSER, SR., APPELLANT, V. THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF HUMPHREY, IN THE COUNTY OF PLATTE, IN THE STATE OF NEBRASKA, APPELLEE.

283 N. W. 2d 391

Filed September 18, 1979. No. 42434.

1. **Schools and School Districts: Tenure.** The clear intent of the tenured teacher act is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) Discharge for cause; and (2) reduction in teaching force.
2. **Schools and School Districts: Contracts: Appeal and Error.** The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached.
3. **Schools and School Districts: Tenure.** If a tenured teacher and a probationary teacher are subject to termination due to a surplus of staff, the tenured teacher must be retained so long as he has the required certification in the area.

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

Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, and BRODKEY, JJ., and BUCKLEY and KELLY, J.R., District Judges.

KELLY, J. R., District Judge.

This is an appeal from a decision of the District Court for Platte County, Nebraska, which sustained the action of the Board of Education of the School District of Humphrey (Board) in firing the appellant, Richard Moser (Moser). We reverse and remand.

In the spring of 1977, Moser, then employed by the Board, was terminated. Moser initiated legal proceedings challenging this termination. The proceedings were pending at the beginning of the 1977-1978 school term, as a result of which Moser was unable to resume his teaching duties. A Miss Manguson (Manguson) was therefore hired by the Board to fill the teaching position previously held by Moser. In late September 1977, the Board reinstated Moser upon court order. Students taking subjects taught by Manguson were reassigned equally to Moser and Manguson. Shortly following the reinstatement, 25 students were withdrawn from Moser's classes by parental request.

On March 6, 1978, the Board adopted a policy relating to reductions in the teaching force which read as follows: "The Humphrey Public Schools Board of Education shall reduce staff within the elementary and secondary staff on the basis of the following criteria: (a) Administrative evaluation; (b) Teacher-pupil ratio within a discipline or department; (c) The number of curricular and co-curricular assignments."

By reason of having hired Manguson and being ordered to rehire Moser, the Board had a surplus of teachers in the social studies area. The Board, on April 4, 1978, advised both Moser and Manguson that it was considering the termination of one of them for reasons of reduction in force, pursuant to section 79-1254, R. R. S. 1943. Both teachers requested a hearing on the matter which was held on April 18, 1978. The Board, on the basis of evidence presented at those hearings, terminated the contract of Moser, a tenured teacher, and retained Manguson, a probationary teacher. Specifically, the Board found there was a change of circumstances which created just cause for terminating the contract of Moser in the following areas: (1) Low enrollment in Moser's classes; (2) withdrawal of substantial numbers of

pupils from his classes; (3) a need for a teacher qualified in both social studies and girls' athletics; and (4) the presence in the system of a teacher qualified to handle these areas.

Moser appealed this action to the District Court. On August 4, 1978, Moser filed a motion requesting that findings of fact and conclusions of law be set out in writing by the court. Trial was had on August 16, 1978, wherein evidence previously introduced at the reduction in force hearing was reviewed by the District Court. On the basis of this evidence, the District Court found generally for the Board and against Moser. From said order, Moser perfected this appeal. He contends herein that it was error for the court to make general findings of fact in light of his motion and that it was error to terminate a tenured teacher while retaining a probationary teacher under the guise of reduction in force. With the latter we agree.

We have earlier had opportunity to examine the tenured teacher act, sections 79-1248 to 79-1254.08, R. R. S. 1943, as amended. "The clear intent of the tenured teacher act is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) Discharge for cause; and (2) reduction in the teaching force." Witt v. School District No. 70, 202 Neb. 63, 273 N. W. 2d 669. "The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached." Davis v. Board of Education, 203 Neb. 1, 277 N. W. 2d 414; Sanders v. Board of Education, 200 Neb. 282, 263 N. W. 2d 461.

It is true that there was sufficient evidence to support action by the Board to reduce the teaching force. However, as a matter of law, Moser could not be terminated while Manguson was retained.

The surplus teacher situation was created by the Board's own action when it hired Manguson for the position which Moser had previously held. In effect, the change in circumstances relied upon by the Board to discharge Moser was the surplus of teachers created by the court-ordered reinstatement of Moser the previous September. What the Board was prevented from doing directly in the spring of 1977, it attempted to do indirectly in the spring of 1978. As we have earlier pointed out, such result would emasculate the intent of the tenured teacher act. See Witt v. School District No. 70, *supra*. The evidence indicates that Moser had been employed by the Board for more than 2 years prior to the attempted termination under the guise of a reduction in force. No evidence was presented to indicate that Moser was a probationary teacher. We must therefore presume that Moser, having been employed by the Board for more than 2 years, was a tenured teacher under the provisions of the tenured teacher act, sections 79-1248 to 79-1254.08, R. R. S. 1943, as amended. We therefore find that Moser, the tenured teacher, could not be terminated while Manguson, a probationary teacher, was retained under the reduction in force provision of section 79-1254, R. R. S. 1943.

Such a result is likewise consistent with the legislative action in this area. Section 79-1254.05, R. S. Supp., 1978, which went into effect after the reduction in force hearing, provides as follows: "No such [reduction in force] policy shall allow the reduction of a permanent or tenured employee while a probationary employee is retained to render a service which such permanent employee is qualified by reason of certification and endorsement to perform or where certification is not applicable, by reason of college credits in the teaching area." The legislative intent is clear. If a tenured teacher and a probationary teacher are subject to termination due to

a surplus of staff, the tenured teacher must be retained so long as he has the required certification in the area. Moser was certified in the subject area of social studies. He should have been retained. To have discharged Moser under the circumstances was error and he should be reinstated.

In view of our action herein we need not consider other assignments of error. The judgment of the District Court is reversed and the cause remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SHIRLEY JEAN CASSELMAN, APPELLEE, V. KYLE CASSELMAN, APPELLANT.

284 N. W. 2d 7

Filed October 2, 1979. No. 42306.

1. **Divorce: Statutes: Alimony: Child Support.** The court may in any case, if it finds it necessary, order a person required to make payment under sections 42-347 to 42-379, R. R. S. 1943, to post sufficient security with the clerk to insure payment. Upon failure to comply with the order, the court may appoint a receiver to take charge of the debtor's property to insure payment. Payments included under this section are payments for child support and alimony. § 42-371(5), R. R. S. 1943.
2. **Divorce: Alimony: Child Support.** An order requiring security to be given and appointing a receiver are somewhat extraordinary and drastic measures. The order requiring security should be made only when it appears to the court that such an order is necessary to make sure the payment of alimony and child support as decreed.
3. _____: _____: _____. It is not the court's prerogative to determine what method or means should be used in placing security. It is the court's obligation, however, that once security is offered, to determine whether or not in its opinion it is adequate to secure the payment of the child support and alimony, and, if it deems it is not adequate, require the party to file additional or substitute security.
4. **Attorney's Fees.** This court has jurisdiction to include the award of attorney's fees, which is discretionary with the trial court.

Appeal from the District Court for Scotts Bluff County: Robert O. Hippe, Judge. Affirmed.

Bertrand V. Tibbels, for appellant.

George A. Sommer, for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and BURKE and WHITEHEAD, District Judges.

WHITEHEAD, District Judge.

This is an appeal from the trial court's order requiring defendant to post security for payment of alimony and child support under provisions of sections 42-365 and 42-371(5), R. R. S. 1943, and an allowance of attorney's fees.

The issues raised on appeal are that the court erred in requiring security, erred in failing to describe the type and amount of security required, and erred in awarding attorney's fees. The decree of divorce was entered in this matter on January 5, 1973, and was affirmed by this court on January 18, 1974. Casselman v. Casselman, 191 Neb. 138, 214 N. W. 2d 278.

Under the terms of the decree of divorce the defendant was required to pay $100 per month per child for child support until April 1, 1973, and after that time the child support was increased to $125 per month per child for each of the two minor children of the parties who were in the custody of the plaintiff. The court also awarded monthly payments of alimony of $500 to be continued for 121 months after April 1, 1973. The court additionally decreed that all of defendant's property was subject to a lien for payment of the child support and alimony.

The defendant owns four irrigated farms with a total irrigated acreage of 500 acres which he estimated to be worth $2,000 an acre, several business and commercial properties located in downtown Scottsbluff, other large valuable tracts of undeveloped real estate near the city of Scottsbluff, and

residential rental properties, all of which he estimates to have a value of over 1 million dollars. The defendant has allowed almost all of his property to become tax delinquent and the taxes due as of January 17, 1978, with interest, total $97,923.56. Some of the taxes have been delinquent since 1969. Tax sale certificates have been issued on several of the properties and on one of them foreclosure proceedings have been instituted. Two farm properties are the subject of a foreclosure action now pending. Since the entry of the decree on January 5, 1973, the defendant has consistently been delinquent in his payments of child support and alimony, allowing them to accumulate to delinquencies of as much as $8,500.

The plaintiff, through her attorneys, had to resort to various procedures to collect the alimony and child support, including contempt actions, executions, and garnishment proceedings. There is no showing that the defendant, although aware of the pending tax foreclosures, mortgage foreclosures, unpaid real estate taxes, and the alimony and child support, has made any definite arrangements for payment of these obligations or payment by refinancing the existing mortgages, real estate taxes, and accruing costs. Plaintiff filed a motion to require the defendant to post sufficient security to insure payment of child support and alimony payments under section 42-371(5), R. R. S. 1943, alleging that the defendant had habitually failed to pay the amounts due her for alimony and child support and that it had been necessary to enforce the judgment of the court by executions and garnishment proceedings. Plaintiff also prayed that upon the failure of the defendant to comply with such an order, the court appoint a receiver to take charge of the defendant's property to insure payment of the amounts due the plaintiff. Also, a motion was filed for additional attorney's fees for litigating a previous garnishment proceeding and successfully defending

plaintiff's claim to the garnishment proceeds against the claim of intervenors. The plaintiff's motions were granted and the court entered an order requiring the defendant to post security within 30 days from the date of entry of the order and required the defendant to pay plaintiff $354.65 fees, costs, and expenses, payable within 30 days from the date of the entry of the order. The defendant perfected his appeal from this order.

Section 42-371(5), R. R. S. 1943, provides: "The court may in any case, if it finds it necessary, order a person required to make payments under sections 42-347 to 42-379 to post sufficient security with the clerk to insure payment. Upon failure to comply with the order the court may also appoint a receiver to take charge of the debtor's property to insure payment." Payments included under this section are payments for child support and alimony. This court previously, in interpreting a similar provision in an earlier statute, stated as follows: "The order requiring security to be given and the one appointing a receiver are both somewhat extraordinary and drastic remedies. * * * The order requiring security should be made only as it appears to the court that such an order is necessary to make sure the payment of the alimony decreed." Ford v. Ford, 101 Neb. 648, 164 N. W. 577.

This court has previously ruled that reasonable security for payment of alimony or child support should be invoked only when compelling circumstances require it. Wheeler v. Wheeler, 193 Neb. 615, 228 N. W. 2d 594. The record in this case reflects almost total failure of the defendant to voluntarily pay the child support and alimony since entry of the decree; the plaintiff has suffered considerable trouble, expense, and many extraordinary proceedings, including contempt citations, garnishments, and executions; and there appears to be no attempt by the defendant to comply with the order of the court.

Also, the defendant's conduct appears to be such that much of the security that the plaintiff has may be lost through foreclosure proceedings. Therefore, the court is of the opinion that the order entered requiring security is fit and proper and should be affirmed.

The defendant further states that the court should have outlined what type and amount of security the defendant had to set forth. This court feels just the opposite. There are many means of adequately securing the payments of the alimony and child support. We are not of the opinion that it is the court's prerogative to determine what method the defendant should use in placing security. It is the court's obligation, however, once security is offered, to determine whether or not, in its opinion, it is adequate to secure the payments of the child support and alimony, and, if it deems it is not adequate, require the defendant to file additional or substitute security.

The defendant's objection to allowance of attorney's fees is not well taken. It is specifically provided in section 42-351, R. R. S. 1943, that the District Court has jurisdiction in such matters, including the award of costs and attorney's fees. This court has on numerous occasions stated that an award of attorney's fees is discretionary with the trial court. See, Badberg v. Badberg, 193 Neb. 844, 229 N. W. 2d 552; Sullivan v. Sullivan, 192 Neb. 841, 224 N. W. 2d 542. We find that the court's allowance of attorney's fees was proper, and the court further allows the plaintiff-appellee the sum of $1,000 additional for services of her attorney in this court.

In conclusion, none of the defendant's assignments of error have any merit. The trial court was correct in all respects and its judgment is affirmed.

AFFIRMED.

DOUGLAS COUNTY WELFARE ADMINISTRATION, APPELLEE, V. ELLANORA PARKS AND MELVIN BUGGS, APPELLANTS, IMPLEADED WITH NEBRASKA JOINT MERIT SYSTEM, AND STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, APPELLEES.

284 N. W. 2d 10

Filed October 2, 1979. No. 42383.

1. **Administrative Law.** Rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the Legislature.
2. _____. Procedural rules are binding upon the agency which enacts them as well as upon the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule so long as such rule remains in force. This is true even though the adoption of the rule was a discretionary function, and plenary powers, or powers resting in the absolute discretion of an agency, may thus be rendered subject to procedural limitations.
3. _____. To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

John B. Ashford of Bradford & Coenen, for appellants.

John J. Reefe, Jr., for appellee Douglas County Welfare Administration.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

KRIVOSHA, C. J.

This is an appeal from an order of the District Court for Lancaster County, Nebraska, which found that the appellants, and each of them, had filed their appeals with the Joint Merit System Council of Nebraska out of time. Our examination of the files and records in this case supports the action of the Dis-

trict Court and, accordingly, we affirm the judgment.

The appellants, and each of them, were hired by Douglas County Social Services on February 10, 1975, as child care attendants. Both employees were actually terminated on August 25, 1975, and received official notice of their termination on September 2, 1975. On October 1, 1975, the appellants filed a grievance with the Douglas County Social Services Administration requesting that they be reinstated. On October 27, 1975, the appellants were notified by memorandum from Michael Healy, Social Services Administrator, that due to the fact that they had been probationary employees at the time of their termination, they would not be accorded the right to file a grievance unless it could be shown that the dismissal was the result of union activity.

While the record is somewhat in dispute as to when the parties' initial probationary period terminated, for purposes of this appeal we need not concern ourselves with that fact.

Although both appellants were notified on October 27, 1975, that their appeal would not be heard by the Douglas County Social Services Administration, it was not until January 27, 1976, that the appellants forwarded a letter of appeal to the Joint Merit System Council of the State of Nebraska. The Merit System Director, on February 5, 1976, denied the appeal because it was filed out of time. Almost 1 year later, on January 12, 1977, the Merit System Director reversed his earlier decision and granted the appellants an appeal hearing.

On appeal to the District Court for Lancaster County, Nebraska, the court found that the granting of the second appeal was without authority because the appellants had filed their appeal more than 30 days after their dismissal. Rule 13(4)(a) of the Nebraska Joint Merit System provides: "A permanent

employee who is dismissed, suspended, or demoted shall have the right to appeal to the Council not later than *thirty days* after the effective date of the dismissal, suspension, or demotion." (Emphasis supplied.)

Regardless of which date is considered as the date upon which dismissal occurred, it is clear that the appeal was not filed until long after the 30-day period and was clearly out of time. Generally, rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the Legislature. Likewise, procedural rules are binding upon the agency which enacts them as well as upon the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force. This is true even though the adoption of the rule was a discretionary function, and plenary powers, or powers resting in the absolute discretion of an agency, may thus be rendered subject to procedural limitations. To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights. 2 Am. Jur. 2d, Administrative Law, § 350, p. 162; State ex rel. Ind. School Dist. No. 6 v. Johnson, 242 Minn. 539, 65 N. W. 2d 668 (1954); Havener v. Glaser, 251 N. W. 2d 753 (N.D., 1977); Iowa Civil Rights Com'n v. Massey-Ferguson, Inc., 207 N. W. 2d 5 (Iowa, 1973). In the absence of some evidence which justifies a minor deviation in the interest of justice, we see no reason not to follow this rule.

Appellants urge us to find that the Joint Merit System Council can waive its own rules with regard to filing for an appeal and hear such cases as it desires. Apparently this waiver is to be done on a case

by case basis. We find no authority for such a rule, nor any reason in this case to consider that the rule setting the time for appeal was not applicable, particularly where the unexcused delay was for more than 3 months at the very least.

In view of the fact that appellants failed to file their appeal in time, the Nebraska Joint Merit System Council was without authority to hear the appeal, and the action of the Douglas County Welfare Administration in discharging the appellants was final and binding. The attempt by the Joint Merit System Council to later give itself authority to hear the appeal was a nullity and of no force and effect. The trial court was correct in so holding.

Several other assignments are raised and argued. In view, however, of our disposition of this appeal, they need not be considered.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MILO L. KAREL, APPELLANT.

284 N. W. 2d 12

Filed October 2, 1979. No. 42520.

1. **Statutes.** Changes made by the Revisor of Statutes in preparing supplements and reissued or replacement volumes of the Revised Statutes, under the provisions of section 49-705, R. R. S. 1943, cannot change the substantive meaning of any statute as enacted by the Legislature.
2. **Criminal Law: Statutes.** A violation of section 39-669.07, R. R. S. 1943, is either a misdemeanor or a felony and is not a traffic infraction within the meaning of section 39-602(106), R. R. S. 1943.
3. **Criminal Law: Statutes: Juries.** A defendant charged under section 39-669.07, R. R. S. 1943, is entitled to a jury trial under the provisions of section 24-536, R. R. S. 1943.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Reversed and remanded for a new trial.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The sole issue on this appeal is whether or not the defendant Karel was entitled to a jury trial under the provisions of section 24-536, R. R. S. 1943, upon the charge of drunken driving, first offense, under section 39-669.07, R. R. S. 1943. The offense was alleged to have occurred on August 25, 1976, and the defendant was found guilty on May 11, 1978, in the county court of Butler County. Sentence was thereafter imposed. The court had denied his timely motion for trial by jury. On appeal to the District Court, that court also held he was not entitled to a jury trial and the conviction and sentence were affirmed.

Section 24-536, R. R. S. 1943, provides: "Either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except . . . may demand a trial by jury. . . . All provisions of law relating to juries in the district courts shall apply to juries in the county and municipal courts and the district court jury list shall be used, except that juries in the county and municipal courts shall consist of six persons."

The State contends the charge was a traffic infraction under the provisions of section 39-602(106), R. R. S. 1943, and, therefore, there existed no statutory right to a jury trial under section 24-536, R. R. S. 1943. Section 39-602(106), as it appears in the Revised Statutes of 1943, Reissues of 1974 and 1978, reads: "Traffic infraction shall mean the violation

of any provision of sections 39-601 to 39-6,122 or of any law, ordinance, order, rule, or regulation regulating traffic which is not otherwise declared to be a misdemeanor or a felony and which shall be a civil offense." The defendant's position is that first offense drunk driving is a misdemeanor and not a traffic infraction and, therefore, he was entitled to a jury trial. For reasons hereafter set forth, we find the defendant's position is correct and reverse and remand for a new trial.

It is to be observed that section 39-602(106), R. R. S. 1943, as it appears in the statutory revisions, defines traffic infractions as: ". . . the violation of any provision *of sections 39-601 to 39-6,122* or of any law, . . . not otherwise declared to be a misdemeanor or a felony." (Emphasis supplied.) Section 39-669.07, R. R. S. 1943, appears, therefore, to be included among the sections specifically referred to, that is, sections 39-601 to 39-6,122, R. R. S. 1943. Before the enactment of the new criminal code, section 39-669.07, R. R. S. 1943, did not define driving while intoxicated as either a felony or a misdemeanor. On the surface, therefore, the State's position appears to have some substance. However, things are not as they appear on the surface. In 1973, the Legislature enacted a rather comprehensive, amended version of the Rules of the Road. Laws 1973, L.B. 45, p. 123. Section 39-602(106), R. R. S. 1943, is section 2(106) of L.B. 45. In L.B. 45, section 2(106) reads as follows: "Traffic infraction shall mean the violation of any provision of *this act* or of any law, ordinance, order, rule, or regulation regulating traffic which is not otherwise declared to be a misdemeanor or a felony and which shall be a civil offense." (Emphasis supplied.)

When L.B. 45 was placed in the Revised Statutes by the Revisor of Statutes pursuant to the duties imposed upon him by section 49-705, R. R. S. 1943, he substituted the specific reference, "any provision of

sections 39-601 to 39-6,122," for the words, "this act," of section 2(106) of L.B. 45. This, as already noted, would apparently include section 39-669.07, R. R. S. 1943. However, L.B. 45, Laws of 1973, did not include section 39-669.07, R. R. S. 1943. It appears in its present position in the Revised Statutes only by virtue of the arrangement made by the Revisor of Statutes.

Section 49-705(1), R. R. S. 1943, in part provides: "The Revisor of Statutes, in preparing supplements and reissued or replacement volumes for publication and distribution, shall not alter the sense, meaning or effect of any act of the Legislature, but may . . .," and then goes on to specify the things which he may do. Further specification of his authority appears in subsection (2) of section 49-705, R. R. S. 1943. The authority under subsection (1) includes renumbering sections and rearranging sections. Section 49-705, R. R. S. 1943, makes it clear that such changes made by the Revisor of Statutes cannot make substantive changes in the statute as enacted by the Legislature. Subsection (1) as noted provides that he "shall not alter the sense, meaning or effect of any act of the Legislature." Subsection (2) of section 49-705, R. R. S. 1943, provides in part: "No change made under the provisions of this subsection shall effect any change in the substantive meaning of any section."

Changes made by the Revisor of Statutes in preparing supplements and reissued or replacement volumes of the Revised Statutes, under the provisions of section 49-705, R. R. S. 1943, cannot change the substantive meaning of any statute as enacted by the Legislature. See Shames v. State, 192 Neb. 614, 223 N. W. 2d 481. Since section 39-669.07, R. R. S. 1943, was not included in L.B. 45, Laws of 1973, the crimes therein defined did not become traffic infractions by virtue of the provisions of L.B. 45, but retained their status as misdemeanors or felonies by

virtue of the general statutory definition of section 29-102, R. R. S. 1943, which provides: "The term felony signifies such an offense as may be punished with death or imprisonment in the Nebraska Penal and Correctional Complex. Any other offense is denominated a misdemeanor." Section 29-102, R. R. S. 1943, has since been repealed by L.B. 748, Laws of 1978, and we note the offenses defined in section 39-669.07, R. S. Supp., 1978, are now specifically defined as a class of either misdemeanor or felony.

For a general discussion of the question of classifying certain offenses as traffic infractions, see State v. Knoles, 199 Neb. 211, 256 N. W. 2d 873.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. GARY APKER, APPELLANT.

284 N. W. 2d 14

Filed October 2, 1979. No. 42534.

1. **Criminal Law: Evidence.** The trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion.
2. _____: _____. An exhibit is admissible, so far as identity is concerned,when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified it is immaterial in how many or in whose hands it has been.
3. _____: _____. Important to the determination of the admissibility of demonstrative evidence is the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.

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

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

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

On November 14, 1978, defendant was tried to a jury and convicted of the felony offense of unlawful possession of a controlled substance with intent to deliver the same. The offense had occurred on July 17, 1978. Defendant was sentenced to a term of 2 years probation and as a part of that probation was ordered to serve 30 days in the county jail. On appeal he objects only to the fact that certain evidence essential to his conviction, some plastic baggies containing the controlled substance, were received in evidence without the State having established a proper foundation through tracing of a complete chain of custody. We affirm.

In State v. Allen, 183 Neb. 831, 164 N. W. 2d 662 (1969), after stating "The trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion," we went on to lay down the general rule governing the necessary foundation for evidence which has been in the possession of law enforcement officers: "We hold that an exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified it is immaterial in how many or in whose hands it has been." In State v. Langer, 192 Neb. 525, 222 N. W. 2d 820 (1974), we said: "Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object."

Captain Wintle, deputy sheriff of Douglas County, testified that he, together with Captain Dempsey and others from both the sheriff's office and the Omaha police department, served a search warrant at the home of the defendant. In that connection he seized, together with other items, exhibits 8 and 10, each being small plastic baggies containing a yellow powder found respectively on the kitchen table and in the pocket of a vest lying on the kitchen counter. He marked the exhibits with his initials and kept them with the other items until he took them to the sheriff's property office. There he placed them all in a property division plastic bag marked with SR number A 14549 and gave them to the property officer. This occurred during the early morning hours of July 18, 1978. Generally, according to his testimony, the property officer secures all property thus received, the room is kept guarded at all times, and no property is permitted to leave the room without being logged out. On November 9, 1978, Wintle logged the exhibits out, transported them to Lutheran Hospital to the chemist, William Ihm, then returned them to the property room and logged them back in where they remained until checked out by this witness the day of the trial. Officer Wintle further stated that when taken to the hospital the exhibits were in the larger bag into which he originally placed them, and they were in this same bag when he picked them up the day of the trial. Finally, he stated the exhibits at the time of trial, to the best of his knowledge, were in substantially the same condition as they were when he took them out of the defendant's residence on July 17.

Captain Dempsey stated he had seen the two exhibits when Captain Wintle seized them in the kitchen. Early the following morning, after they had been logged in at the property room, he and the officer in charge, Deputy Lang, logged the exhibits out and took them to Lutheran Hospital where samples

were taken by the chemist. He was present when the samples were taken and had helped carry them to and from the hospital. He said the exhibits were in a large cardboard box but were all marked in individual packets, and when brought over to court the day of the trial were in a larger cardboard box. Also, he testified that in his 8½ years experience in the sheriff's office he knew of no cases where items of evidence had been intermingled.

After qualifying as a certified chemist, William Ihm related how Dempsey had brought the exhibits to him on July 18, that he gave them a lab number of 789, and that his report showed the SR number of A 14549. He identified the exhibits in court by his lab number and also some exhibit numbers that he placed on the items he tested, and stated that the exhibits were the same ones he tested. He didn't remember whether they were all in a box or a sack. He also related he again tested these same exhibits on November 9 when brought to him by a sheriff's deputy and they were in the same condition as when he sent them back on July 18. His analysis on both occasions revealed that exhibits 8 and 10 contained methamphetamine, which findings were not challenged.

In summary, we come to the conclusion that the record reflects a continuous chain of custody of the substances from the confiscating officer, Captain Wintle, to the sheriff's property officer in whose custody they remained in a guarded property room. Of course, they were removed and taken to the chemist on two occasions, returned, and finally brought to court, all as explained by competent witnesses in great detail. However, the chain of custody remained inviolate. Whether the individual baggies were stored and transported in a larger plastic bag or in a cardboard box, which discrepancy in testimony is the main basis for defendant's complaint, is of no consequence. The individual exhibits were

identified at all stages as the controlled substances removed from the defendant's house, with no substantial change having taken place in their condition, and the method of storing and safeguarding described eliminated all reasonable likelihood of intermeddlers having tampered with their contents. Although there is no requirement that the exhibits be stored in sealed containers or that any particular method of identifying markings be utilized, we are inclined to agree with the trial judge's comments that it was "right on the ragged edge of getting pitched. But I think you may have groped around and got enough in." The method of marking for identification left something to be desired. Certainly, however, it does not approach the situation in State v. Bobo, 198 Neb. 551, 253 N. W. 2d 857 (1977), relied on by the defendant, where the witness obtained one bag containing a controlled substance from the defendant and one from another person, put them both in one pocket, and was never able to identify which bag came from the defendant. The situation here is more akin to that found in State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321 (1967), wherein Smith, J., said: "Although the precautions taken by the sheriff win no plaudits, reception of the exhibits in evidence was not a clear abuse of discretion." The same conclusion is compelled in this case and the defendant's assignment of error is without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN HERNANDEZ, APPELLANT.

284 N. W. 2d 17

Filed October 2, 1979. No. 42582.

Motions, Rules, and Orders. A ruling upon a motion for severance will not be disturbed in the absence of an abuse of discretion.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Philip M. Kelly of Scott & Kelly, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant, Kevin Hernandez, and his brother, Jonathan Hernandez, were charged in separate informations with felonious entry of the Alliance Country Club in Box Butte County, Nebraska, on March 21, 1978. The trial court ordered the informations consolidated for trial. The defendant was convicted and sentenced to 2 years probation. He has appealed and contends the evidence does not support the conviction and the trial court erred in overruling his motion for a separate trial.

The record shows that the defendant and a companion, David Embree, broke into the Alliance Country Club and took some liquor and food. Another companion, Kevin Grieser, and the defendant's brother participated in the crime. Later the same night, the defendant returned to the country club with his brother and Grieser and took additional liquor and food from the club.

The defendant contends the evidence was insufficient because some of the prosecution witnesses were impeached. There were questions of credibility for the jury but the evidence of the State was

sufficient, if believed, to sustain the conviction. It is not the province of this court in a criminal case to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.

The evidence of the State implicated both the defendant and his brother in the break-in. Both denied that they participated in the crime. The defendant had an alibi witness who testified in his behalf, and he argues that his chance for an acquittal would have been better if he had been tried separately. This was not a sufficient showing of prejudice to require the trial court to have granted a separate trial to the defendant. A ruling upon a motion for severance will not be disturbed in the absence of an abuse of discretion. State v. Shimp, 190 Neb. 137, 206 N. W. 2d 627.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM REITENBAUGH, APPELLANT.

284 N. W. 2d 19

Filed October 2, 1979. No. 42597.

Criminal Law: Instructions: Juries: Mental Health. It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity.

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

James T. Hansen, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an appeal from a conviction of failure to

appear as per section 29-908, R. S. Supp., 1978. The defense was not guilty by reason of insanity. The court sentenced the defendant to a term of 3 years in the Nebraska penal complex. The defendant appeals assigning a single error, that the trial court refused to instruct the jury as to the consequences of a verdict of not guilty by reason of insanity. We affirm.

On March 20, 1978, the defendant was sentenced to a term of 1 year in the Nebraska penal complex on a charge of third offense driving while intoxicated. At the request of the defendant, the court delayed the date on which the defendant was to begin his sentence and continued the defendant's bond, ordering and directing him to appear 30 days thereafter and surrender himself to the sheriff of Scotts Bluff County, Nebraska. The defendant failed to appear as ordered or within 3 days of the date required. The defendant was later arrested in Denver, Colorado, and returned from that state in October 1978. At a jury trial, defendant tendered the defense of not guilty by reason of insanity. We shall not discuss the appropriateness of the giving of an instruction on the defense of not guilty by reason of insanity since the State does not argue that the instruction was inappropriate. We do, however, note in passing that all witnesses, an area physician, a clinical psychologist, and an alcohol intake officer failed to testify that, in fact, the defendant had a mental illness or was insane on March 20, 1978, or any other day thereafter. Their testimony simply was to the effect that he had an excessive alcohol problem, had a tendency to be irresponsible, possessed a passive, aggressive personality, and had a somewhat disturbed and unfortunate childhood. The point presented to this court is a new one to our jurisprudence. Defendant cites Lyles v. United States, 254 F. 2d 725, a 1957 case, in which the Court of Appeals of the District of Columbia held that such an instruction was required;

that while the average jury person will usually know generally the consequences if he votes guilty or not guilty, he does not have knowledge of the consequences of a verdict of not guilty by reason of insanity. Absent a statute, the rule has not been widely followed. To the contrary are Lonquest v. State (Wyo., 1972), 495 P. 2d 575; People v. Adams, 26 N. Y. 2d 129, 309 N. Y. S. 2d 145, 257 N. E. 2d 610; State v. French, Jr., 166 Mont. 196, 531 P. 2d 373; Pope v. United States, 372 F. 2d 710 (8th Cir., 1967). In that case the Eighth Circuit reviewed the instruction given by Judge Van Pelt of the United States District Court which read as follows: " '[Y]ou have no right to take into consideration, in event you should find him not guilty, whether defendant would be kept in custody and if so for how long such custody would continue, or whether he would be entitled to early or immediate freedom. As a matter of fact, the matter should not even be discussed by you in determining the issue of sanity or insanity. You are to determine only whether the defendant is guilty or not guilty as charged. * * *' " In referring to the trial court, the Eighth Circuit Court of Appeals said: "We, however, find no error and see no reason why we should depart from the long-established principle that, in the absence of some specific statutory provision, a defendant's disposition is not a matter for the jury's concern." This rule has long been the law in Nebraska. See NJI No. 14.80 and cases cited thereunder. Further, see the cases cited at 11 A. L. R. 3d 737. Logically, we see no reason why, if requested by the defendant, an instruction similar in content to NJI No. 14.80 should not be given to the effect that the jury shall have no right to speculate and shall not consider the disposition of the defendant in the event he is found not guilty by reason of insanity.

The judgment of the trial court is affirmed.

AFFIRMED.

McCOWN and CLINTON, JJ., concur in the result.

PENNY JEAN FRIEDENBACH, APPELLEE AND CROSS-APPELLANT, V. GARY F. FRIEDENBACH, APPELLANT AND CROSS-APPELLEE.

284 N. W. 2d 285

Filed October 9, 1979. No. 42404.

1. **Divorce: Minors: Custody.** Generally, divided custody arrangements are not favored.
2. **Divorce: Minors: Custody: Appeal and Error.** Ordinarily, a determination of custody by the trial court will not be disturbed on appeal unless it is clear that the evidence does not support the findings.
3. **Divorce: Bond: Custody: Appeal and Error.** An order determining child custody may not be superseded as a matter of right by filing a bond pursuant to section 25-1916, R. R. S. 1943.
4. **Divorce: Custody: Appeal and Error.** Ordinarily, an order relating to visitation rights may be enforced by the District Court even though an appeal from the judgment of the District Court is pending in this court.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Thomas J. Garvey of Hascall, Jungers & Garvey, for appellant.

James L. Birkel, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The marriage of the parties was dissolved on February 16, 1977. The custody of their three minor children was divided. The petitioner was awarded the custody of Len, now 8 years of age, and Lee, now 7 years of age. The respondent was awarded the custody of Lisa, now 11 years of age. Each party was given reasonable visitation rights.

On August 2, 1978, the petitioner filed an application for permission to remove the boys, Len and Lee, from the jurisdiction of the court because she was planning to move to Michigan, the home of her new husband. On August 14, 1978, the respondent filed

an application to obtain custody of the boys. On August 29, 1978, the petitioner filed an answer to the application of the respondent and a cross-application seeking custody of Lisa.

The applications and the cross-application were consolidated for hearing. The trial court found that the custody of the children should remain the same as fixed in the original decree; that the petitioner should be granted permission to remove the children in her custody from the jurisdiction of the court; and that the parties should pay their own costs and attorney's fees. The respondent appeals and the petitioner cross-appeals.

The respondent contends that the petitioner should not be allowed to retain custody of the boys because there is evidence that she allowed her second husband to stay in her apartment on several occasions before they were married. There is also evidence that on one occasion she struck Len with sufficient force to leave a large bruise on his face. The petitioner contends that the respondent should not be allowed to retain custody of Lisa because she is at home much of the time without supervision while the respondent is at work.

There is evidence also that each of the parties is fit to have custody of the children and that the children seem to be happy and, in general, are well cared for. The trial court interviewed the children in chambers out of the presence of the parties and each child seemed to be satisfied with the existing custody arrangement.

Although divided custody arrangements are not favored, under the facts and circumstances in this case we believe the order of the trial court should not be disturbed. Ordinarily, a determination of custody by the trial court will not be disturbed on appeal unless it is clear that the evidence does not support the findings. Hoback v. Hoback, 201 Neb. 639, 271 N. W. 2d 336.

Since the petitioner has now remarried and is making her home in Michigan we believe it was in the best interests of the children to permit her to remove the boys from this jurisdiction.

After the decision in this case on September 11, 1978, the respondent filed a supersedeas bond. After the appeal had been docketed in this court, the respondent filed a motion alleging that the petitioner had violated the supersedeas by removing the children from the jurisdiction. The respondent also filed a motion to remand the cause to the District Court because the petitioner had violated his visitation rights. Neither motion had merit.

Although an order determining custody of children may in certain cases be stayed by the trial court, such an order is not subject to being superseded as a matter of right under section 25-1916, R. R. S. 1943, by merely filing a supersedeas bond. Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839. As we understand the record, the trial court did not stay the order permitting the petitioner to remove the boys from the jurisdiction. The bond was not effective for that purpose. The enforcement of the respondent's visitation rights was a matter which remained within the jurisdiction of the District Court even though an appeal from the judgment of the District Court was pending in this court. Hall v. Hall, *supra*.

The allowance of fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. We find no abuse of discretion by the trial court and determine that the parties should pay their own fees and costs in this court.

The judgment of the District Court is affirmed.

AFFIRMED.

COUNTY OF HALL, STATE OF NEBRASKA, A BODY POLITIC AND CORPORATE, EX REL. PATRICIA J. WISELY, APPELLANT, V. RONALD LEO MCDERMOTT, APPELLEE.

284 N. W. 2d 287

Filed October 9, 1979. No. 42430.

1. **Trial: Verdicts: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. **Trial: New Trial.** The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. By its terms this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, for example, each of which in itself might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in this case.
3. **New Trial: Appeal and Error.** This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable grounds existed therefor.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

Sam Grimminger, Hall County Attorney, and John Story, for appellant.

O. Wm. VonSeggern of Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

The County of Hall, Nebraska, acting for and on behalf of Patricia J. Wisely (Hall County), appeals from an order of the District Court for Hall County, Nebraska, which granted to the appellee, Ronald Leo McDermott (McDermott), a new trial. Hall County maintains that the trial court abused its discretion in so granting the motion for new trial. We have examined the record in this matter and find

that the trial court did not abuse its discretion in granting McDermott's motion for new trial, and affirm the judgment of the trial court.

This action had its inception in a "Complaint and Petition" filed by Hall County in the District Court for Hall County, Nebraska, seeking to have McDermott determined to be the father of a child born to Patricia J. Wisely. The complaint alleges that Hall County may be required to support the minor child and was in fact supplying child support through its division of welfare at the time the complaint was filed. Thereafter McDermott, through his then retained counsel, filed a demurrer which was overruled by the trial court. On August 31, 1978, counsel for McDermott filed an application with the court for authority to withdraw as counsel. The files indicate that a copy of the application was served on John Story, attorney for Hall County. The record, however, is silent as to any notice of the motion to withdraw being served upon McDermott. Thereafter, on September 12, 1978, the court entered an order permitting McDermott's then counsel to withdraw, at the same time setting the case for trial on October 10, 1978, at 1:30 p.m. The record fails to disclose that McDermott was notified of his counsel's withdrawal, or that any other counsel had been retained by McDermott and would have been prepared to go to trial on October 10, 1978.

The record does disclose, however, that on September 12, 1978, counsel for Hall County mailed a notice to McDermott advising him that trial in the matter was set for *October 23,* 1978, at 1:30 p.m. The certificate indicates that the notice was sent by regular mail and was neither certified nor registered. Thereafter on September 19, 1978, counsel for appellant, recognizing that the date for trial set out in the notice sent on September 12, 1978, was in error, sent a second notice to McDermott advising him that trial would be on October 10, 1978, rather

than October 23, 1978. Again, the certificate filed by Mr. Story indicates that the notice was sent by regular mail and not by certified or registered mail.

On October 10, 1978, at the hour of 1:30 p.m., being the time set for trial, the record discloses that McDermott appeared in court without counsel. The record further indicates that McDermott had earlier in the day appeared before the trial court and requested a continuance for the reason that he was without counsel.

The trial court admonished McDermott for appearing without counsel, pointing out that the court had permitted his former attorney to withdraw on September 12, 1978. Specifically, the trial court said: "I permitted your attorney to withdraw on the 12th of September — which should have been sufficient time for you to obtain an attorney — and I set this matter for trial at that time." All of that, of course, may have been true if it had been shown that McDermott was given notice of those facts on or shortly after September 12, 1978. The record, however, clearly discloses that he was never made aware of his counsel's application to withdraw nor at the time was he advised of the fact that the trial court had sustained the motion to withdraw and that he was then without counsel.

The record is somewhat in conflict with regard to when in fact McDermott became aware that he was without counsel. When McDermott appeared before the trial court on October 10, 1978, he stated that he had received "the deal saying that Mr. Huston had resigned * * * just last week, Tuesday or Wednesday." The record is likewise unclear as to what the "deal saying that Mr. Huston had resigned" in fact was. There is nothing in the record to indicate that a notice of any kind concerning counsel's withdrawal was sent to McDermott. In McDermott's affidavit seeking a new trial, he alleged that he did not become aware of the fact that he was without counsel

until October 9, 1978, the day before trial. Apparently the trial court was concerned by this conflict when granting the motion for new trial.

Hall County argues that the motion for new trial should not have been sustained, citing Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, wherein we said, in part: "Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." With that general principle we do not disagree. However, in Johnson v. Enfield, 192 Neb. 191, 219 N. W. 2d 451, we said: "We have consistently and recently held that the standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. [Citations omitted.] By its terms this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, for example, each of which in itself might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in the case. We have held that this court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable grounds existed therefor." See, also, Lechliter v. State, 185 Neb. 527, 176 N. W. 2d 917.

With those general principles in mind, a brief examination of the record discloses that the trial court acted properly in granting to McDermott a new trial.

To begin with, an action to establish paternity is statutory in nature, and the authority for such action must be found in the statute and must be in accordance with the provisions thereof. Paltani v. Creel, 169 Neb. 591, 100 N. W. 2d 736. This action appears

to have been brought pursuant to the provisions of section 13-111, R. R. S. 1943, which provides: "A civil proceeding to establish the paternity of a child may be instituted in any district court of the district where the child is domiciled or found, *by the mother of such child,* either during pregnancy or within four years after its birth, *or by the guardian or next friend of such child.*" (Emphasis supplied.) The record in this case is unclear as to the County's standing in this matter.

In addition, the record further discloses that the trial court volunteered to aid McDermott. Prior to proceeding to trial the court said: "All right, if it comes to a point that it appears necessary that he [McDermott] have an attorney, we'll see what we can do at that time. * * *" It is reasonable to presume that McDermott believed that if a point was reached where an attorney was necessary, the court would stop the proceedings and provide him with one. An examination of the statutes, however, discloses that that point arrived even before the first witness testified.

Under the provisions of section 13-112, R. R. S. 1943, the method of trial for establishing paternity of a child is the same as in other civil proceedings "except that the trial shall be by the court without a jury *unless a jury be requested by the alleged father.*" (Emphasis supplied.) The right to a trial by jury for the determination of paternity is obviously an important one. Unfortunately, however, McDermott was never advised of the fact that he was entitled to a jury. The presence of counsel might have solved that problem. McDermott, however, was relying on the trial court to help him. The importance of a jury in this case was amply pointed out by the statement made by the trial court when ruling on the motion for new trial. The court said: "So, we are just supposed to take Mr. McDermott's word on this. Maybe that's part of the problem here.

I know him too well. You can put this in the record, too, but he's appeared before me on criminal matters, violation of probation, and everything else." It would appear, therefore, that in a case in which the credibility and truthfulness of the witnesses were of extreme importance, a trial to a jury was likewise of importance to McDermott.

To be sure, the fact that one elects not to obtain counsel and appears pro se should not in itself be sufficient to justify the endless continuances of trial or the granting of a new trial. Orderly process must be obtained and litigation must proceed and at some point come to an end. Nevertheless, the record in this case indicates certain precautions could easily have been taken prior to trial to assure that the absence of counsel would not be prejudicial to McDermott. The trial court could have required that notice of original counsel's application to withdraw be served upon McDermott in order to give him an opportunity to appear and object to the motion. Certainly he had as much interest in the matter as Mr. Story, who was served. Likewise, the trial court could have required original counsel for McDermott to serve notice on him that counsel had been authorized to withdraw and to make showing to the trial court that such notice had been served upon McDermott. That procedure would have done much to eliminate the difficulty which ultimately arose on the afternoon of trial. Likewise, the record discloses the introduction of much immaterial and irrelevant evidence which the presence of counsel could have prevented. None of the County's witnesses were subjected to cross-examination even though the only evidence of paternity was the statement of the mother and the testimony of others who said they saw McDermott with the mother during the fall of 1976. Obviously, in examining the matter in retrospect, the trial court concluded that some further steps might properly have been followed in

this case and that justice demanded the granting of a new trial. We cannot, under the circumstances, conclude that the trial court abused its discretion in that regard and must, therefore, affirm the action of the trial court in granting a new trial.

AFFIRMED.

BEVERLY ANN GRADY, APPELLEE, V. GILBERT DEAN GRADY, APPELLANT.

284 N. W. 2d 402

Filed October 16, 1979. No. 42237.

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

Bauer, Galter, Geier, Flowers & Thompson, for appellant.

Douglas L. Curry of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellee.

Heard before BOSLAUGH, MCCOWN, and BRODKEY, JJ., and RIST and WOLF, District Judges.

WOLF, District Judge.

This is an appeal from a decree of dissolution entered by the District Court for Lancaster County. At the time of the trial in 1978, the parties had been married for 15 years, were 40 and 38 years old, respectively, and had two daughters, Kelly and Brenda, ages 8 and 6. The parties were the sole owners of the corporate stock of six corporations. Flamingo Motel, Inc., was the owner of the Flamingo Motel at El Dorado, Arkansas. Carpenter Enterprises, Inc., was the owner of the White House Inn motel at Bellevue, Nebraska. Sands, Inc., was the lessee of the Sands Inn at Joplin, Missouri. Acme Investments, Inc., was the owner of the West Way Motel at Alliance, Nebraska, and of a Bennet, Ne-

braska, farm. Gil Grady and Associates, Inc., was the owner of rental properties in Lincoln, Nebraska. Mar-And Motel, Inc., was the owner of the Palmer House Motel in Auburn, Nebraska, the B & B Motel in Auburn, Nebraska, and the Thunderbird Motel in Marysville, Kansas. The parties owned a residence in Lincoln, Nebraska, and had various other personal property and debts.

Several other motels were owned by Imperial Investors, Inc., but all of the stock of that corporation was owned by the minor children of the parties and was not considered as marital property by either of the parties to this action.

The District Court awarded the petitioner custody of the two minor children subject to reasonable visitation by the respondent and ordered the respondent to pay as child support $150 per month per child. The court awarded the petitioner all of the stock to Flamingo Motel, Inc., and to Carpenter Enterprises, Inc., but ordered the respondent to pay the Carpenter Enterprises, Inc., notes to the two children, each in the amount of $22,500. The court awarded the petitioner certain household goods, the Lincoln residence subject to a portion of the 1977 real estate taxes, two motor vehicles, and other personal property including her teachers retirement. The court further ordered the respondent to pay petitioner the sum of $15,000, payable at the rate of $500 per month, $3,500 toward her appraiser's fees, and $5,000 toward petitioner's attorney's fees.

The respondent was awarded all of the other property of the marriage and was directed to pay all debts except the corporate debts of Flamingo Motel, Inc., and Carpenter Enterprises, Inc.

The respondent assigns as error: (1) The court erred in its division of property by awarding petitioner substantially more than one-half of the net marital estate; (2) the court erred in awarding Carpenter Enterprises, Inc., and Flamingo Motel, Inc.,

to petitioner; (3) the court erred in making a division of property which would greatly detract from petitioner's ability to give proper care to the two minor children of the parties; (4) the court erred in directing the respondent to pay any portion of petitioner's appraisal fees.

The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. Hanisch v. Hanisch, 195 Neb. 204, 237 N. W. 2d 407.

The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Phillips v. Phillips, 200 Neb. 253, 263 N. W. 2d 447.

In an appeal from a decree of dissolution of marriage, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466.

This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Blome v. Blome, *supra*.

The questions of valuation argued by the respondent relate only to the valuation of the corporate motel properties, as all other assets and liabilities were stipulated. Respondent contends that opinions of the petitioner's expert witness, real estate broker and appraiser Donald Linscott, are not entitled to any weight in the determination of the values of motel properties because he had no prior experience in dealing with or appraising motels. We hold that the opinions of Mr. Linscott were correctly received by the court. The weight to be given such opinion evi-

dence, as well as the weight to be given to the opinion evidence offered by respondent's experts, would depend on many factors including their qualifications and experience as well as their business or personal relationship to the parties and any possible bias.

There are no personal findings by the trial court as to the values it placed upon each of the properties of the various corporations, nor were specific findings requested by either party at or prior to the trial. Under such circumstances, this court will review all of the evidence presented to determine whether, under any reasonable interpretation of the evidence and the circumstances of the parties, the division of property was patently unfair.

Based upon the evidence, we find that it would not have been unfair to the respondent for the court to assign the values asserted by the respondent himself in his testimony for the various motel properties which are: Flamingo Motel, $175,000; White House Inn motel, $275,000; Sands Inn (leasehold), $0; West Way Motel, $525,000; Palmer House Motel, $125,000; B & B Motel, $145,000; and Thunderbird Motel, $80,000.

Another dispute between the parties is the valuation for the commission notes held by the respondent and by Gil Grady and Associates, Inc., in the total sum of $384,578.63. Respondent's experts have testified that the market value of such commission notes in the business generally average from 50 to 60 percent of the face amount. For our purposes of comparison we have used the 60 percent figure and valued the notes at $230,747.17.

Much of the confusion could have been avoided in this action had the parties provided the trial court with opinion evidence as to the value of the corporate stock owned by the parties rather than opinion evidence as to the value of the assets owned by the corporations. Further, the record is not clear in one

or two instances whether some of the corporate debt was also the personal liability of one or both of the parties.

Based on the evidence, we feel the trial court would be amply justified in assigning the following values to the property awarded to the petitioner. Flamingo Motel, Inc., has a net deficit position of $10,687.22, leaving a zero balance for the stock. Carpenter Enterprises, Inc., has a net deficit position of $17,107.61, leaving a zero valuation for the stock. Other assets awarded to the petitioner are: Household goods, $2,500; residence, $44,510.80; 1974 Thunderbird, $3,000; 1974 International Travelall, $2,500; one snowmobile, $100; one cobalt board, $1,500; one boat trailer, $250; one camper, $100; government bonds, $225; teachers retirement, $4,000; and a $15,000 judgment, totalling $73,685.80.

Petitioner also received $3,500 toward her appraiser's fees and should be given credit for $10,150 representing a gift from her parents. This makes the net distribution to the petitioner in the amount of $67,035.80.

This court finds that the trial court would be amply justified in the following valuations for property and debts awarded to the respondent. Sands, Inc., has a net deficit position of $28,503.79, leaving a stock valuation of zero. Acme Investments, Inc., has a net asset position of $57,681.58, which would be the valuation of the stock. Gil Grady and Associates, Inc., has a net deficit position of $171,363.76, leaving a zero valuation for the stock. Mar-And Motel, Inc., has a net deficit position of $2,966.35, leaving a zero valuation for the stock.

Other assets awarded to the respondent include: First State Bank account, $2,100.66; First National Bank account, $64.98; IRS check, $505; miscellaneous accounts receivable, $12,321.25; commission notes, $126,469.47; 1975 Chrysler, $1,000; 1976 Ford pickup, $3,500; 1976 Mark IV, $7,200; 1961 Piper Az-

tec airplane, $18,250; furniture trailer, $1,000; one snowmobile, $100; Kingfisher boat, $100; 20-horsepower motor, $100; boat trailer, $50; green trailer, $100; land rover, $100; stocks, $20,773; bonds, $400; certificate of deposit, $3,250, for a subtotal of $175,192.59, or $232,874.17 total assets, including the corporate stock above.

Respondent was ordered to pay the following debts: First State Bank, $18,000; accrued interest, $1,245.48; 1976 real estate tax on residence, $490.68; personal property taxes, $349.62; interest on taxes, $1,250; Omaha Neon, $3,047.55; John Karns Furniture, $2,000; special assessments on residence, $307.53; Carpenter Enterprises, Inc., note to Kelly Grady, $22,500; Carpenter Enterprises, Inc., note to Brenda Grady, $22,500, for total obligations of $71,690.86.

The computation thus shows that the respondent received $161,183.31 in net assets, for which he should be given credit for $51,646 as property owned before marriage, leaving a net of $109,537.31. From such sum he was required to pay $15,000 to the petitioner and $3,500 toward her appraiser's fees, leaving a net distribution to the respondent of $91,037.31.

This court is aware that there is reference in the evidence to a deficiency judgment against the respondent in a Kansas foreclosure action and reference to a guaranty by the petitioner in the sum of $177,000 which may or may not be presently outstanding. The evidence is not sufficient so as to either determine whether such debts are the joint debts of the parties or are included within the unpaid corporate obligations. Therefore, both such amounts are excluded from consideration herein.

The respondent challenges the award of the two corporations, Flamingo Motel, Inc., and Carpenter Enterprises, Inc., to the petitioner on the grounds that the petitioner is not qualified to operate the motels and for the reason that the time she would spend

in taking care of the motels would prevent her from giving proper care to the minor children. The facts in evidence indicate that the petitioner has participated with the respondent in the management of the various motel properties and it is likely that the court awarded such property to the petitioner so as to provide some income to her as she is not otherwise employed. In this case, the respondent has assigned all the values to the assets of the corporations awarded to the petitioner and cannot now complain as to the net result of the distribution.

The evidence further discloses that the petitioner paid her expert witness, Mr. Linscott, the sum of $5,250 to make appraisals of seven different motels located in three states. No evidence was received as to the fair and reasonable value of the appraisal work; however, even in the absence of such evidence, the trial court may, in an equity case, award either party attorney's fees and expenses of litigation. The award does not appear to be unreasonable nor an abuse of discretion. Further, this court has included such award in computing the division of property between the parties and, after comparison, has determined that the award of $3,500 towards petitioner's appraiser's fees does not render the division unfair.

This court therefore holds that the award of net property values and appraiser's fees of $67,035.80 to the petitioner and of $91,037.31 to the respondent does not indicate any abuse of discretion by the trial court and the decree of dissolution should be affirmed.

It is further ordered that the respondent pay the costs in this court together with an allowance of $1,500 toward the petitioner's attorney's fees.

AFFIRMED.

DALE R. BENGTSON, APPELLEE, V. ESTHER B. BENGTSON, APPELLANT, IMPLEADED WITH OLIVER E. WISE AND RUTH L. WISE, INTERVENORS-APPELLEES.

284 N. W. 2d 406

Filed October 16, 1979. No. 42358.

1. **Divorce: Custody: Evidence: Witnesses.** In a child custody action, a social worker's report may be received in evidence for the consideration of that part properly admissible when the social worker is sworn, subject to cross-examination, and the parties are permitted to call other witnesses to contradict any parts of the report.
2. **Custody: Evidence: Witnesses.** The appropriateness of a hypothetical question to an expert witness is a matter largely for the trial court's discretion, and its rulings will not be disturbed unless there has been an abuse of that discretion.
3. **Divorce: Custody: Evidence: Appeal and Error.** In cases involving questions of child custody, the findings of the trial court, both as to an evaluation of the evidence and as a matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

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

Richard L. Swenson of Lathrop, Albracht & Swenson and Charles S. Lashelle, for appellant.

Everett O. Inbody of Haessler, Sullivan & Inbody, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and HAMILTON and HENDRIX, District Judges.

HENDRIX, District Judge.

This is an appeal from a dissolution of marriage decree determining custody of a minor child. The wife, respondent-appellant, prosecutes this appeal attacking the order of the District Court for Saunders County, Nebraska, which retained legal custody, awarded physical custody in the husband, petitioner-appellee, and granted reasonable visitation to respondent. The parents of the respondent appeared as intervenors in the District Court, but are not parties here. We affirm.

The parties were married February 20, 1971, and began living in the Omaha, Nebraska, area. On September 1, 1973, the respondent gave birth to the parties' only child, Michelle. The pregnancy was planned, and the respondent was happy that she was having the child. During the first year after Michelle was born, the respondent stayed home with her. While the respondent furnished physical care for the child, she had difficulties in adjusting to the pressures of motherhood. At this time the respondent felt she couldn't cope with Michelle and complained that Michelle would "drive her up the wall." About a year after Michelle's birth the respondent wanted to go back to work and the parties agreed that she would do so. The respondent secured the first of several waitress jobs, working at night. She continued to complain that Michelle bothered her so much she couldn't stand it. It was her custom to leave Michelle at the day care center while shopping or going out to lunch.

For some time the parties continued to share the care of Michelle, with the petitioner working days and caring for Michelle during the night and the respondent working nights and caring for Michelle during the day. During this period there were disagreements about the toilet training of Michelle. The petitioner took a much more firm stand on the matter than did the respondent. In May of 1976 the respondent, her mother, and Michelle took a 2-week trip to near Scranton, Pennsylvania. Respondent and her mother reported that during this trip the relationship between the respondent and Michelle seemed normal.

However, shortly after this trip and about the end of June 1976, the respondent moved away from the family home, leaving Michelle with petitioner. During this time the respondent visited Michelle, but the frequency of the visits is in dispute. Respondent testified she visited at least two times a week, ex-

cept for a couple of weeks. The petitioner testified the respondent visited Michelle once a week for the first couple of months, began skipping weeks, and then at one time it was 4 to 6 weeks without contact with Michelle. In about December 1976, the parties worked out a joint custody agreement by which petitioner would deliver Michelle to the day care center Monday mornings, and respondent would have custody until she delivered Michelle to the day care center Thursday mornings. The petitioner would pick up Michelle Thursday night and have custody until Monday morning.

In about May 1977, the petitioner moved to Yutan, Nebraska. In July the petitioner was laid off work, making it difficult for him to pay the day care center. The parties agreed that the petitioner would then have custody. During this time the petitioner had custody the respondent did not visit Michelle, although she may have tried on one occasion. The parties reestablished the joint custody arrangement in the latter part of July or the first part of August when respondent's parents agreed to pay the expenses at the day care center.

The joint custody arrangement continued this time until September 15, 1977. On September 1, 1977, a Thursday, the petitioner noticed a lesion on Michelle's cheek. On September 15, 1977, petitioner noticed a second lesion. Michelle was taken by petitioner to the emergency room at Nebraska Methodist Hospital where she was examined by Dr. Frank O. Hayworth. Dr. Hayworth testified that the lesions appeared to be second degree burns, one at least 5 or 6 days old and the other 1 or 2 days old. The doctor also stated that it was possible the lesions were caused by burns from a cigarette or any round hot instrument. The trial court found the evidence tended to exonerate both parties, but determined that the lesions occurred while the child was in the custody of the respondent. As a result of the

lesions, petitioner terminated the joint custody arrangement, but it was reinstated October 11, 1977, at a conference of parties and counsel.

In the meantime, both parties became sexually involved with other partners; the respondent with a Nick Watson, and the petitioner with a Penny Nelson. The affair between respondent and Mr. Watson, insofar as Michelle was present, began in late summer or early fall of 1977. It was terminated by respondent in November of 1977. At trial time, respondent was living in an apartment in Papillion. The petitioner met Penny Nelson shortly after he moved to Yutan. This developed into a close relationship and they began living together at the end of July or the first part of August of that year. A baby was conceived of the relationship and was expected to be born April 1, 1978. The petitioner and Penny Nelson planned to marry on September 30, 1978, if the dissolution between petitioner and respondent was final by that time. On February 1, 1978, the petitioner and Penny Nelson moved to Hordville, Nebraska, the petitioner believing that to be a better place to engage in his occupation of carpentry. This is where the petitioner and Penny Nelson were living at the time of the trial. The social service worker who made the study of the home in Yutan reported a physical environment which was clean and neatly arranged. She also reported Michelle had a warm and loving attitude towards her father and Penny Nelson. The social worker who made the study of the home in Hordville reported petitioner and Penny Nelson related well to Michelle and that they were able to provide adequate and suitable care. This and other evidence reveals an atmosphere of mutual love and parental relationship between Michelle on one hand and petitioner and Penny Nelson on the other. The director of the day care center which Michelle attended from about October 12, 1977, related that at first Michelle was apprehensive as to who was

picking her up, and on one occasion became very upset and cried when she found out Penny Nelson was picking her up rather than the respondent. She further testified, however, that the situation had improved, and that she did not at trial time see any difference between the way Michelle received petitioner and Penny Nelson as compared to the way she received the respondent.

The respondent objects to the receipt of copies of social workers' reports into the evidence. In Jorgensen v. Jorgensen, 194 Neb. 271, 231 N. W. 2d 360, we held that such reports are not competent unless the investigator takes the stand as a witness, is sworn, and is subject to the usual test of cross-examination. In this case each social worker was sworn, testified, and was cross-examined. Further, the court advised that in receiving the reports it would only consider the evidence properly admissible. Under these circumstances, there was no error.

Respondent further objects to the court's refusal to permit a Mr. Nanos to answer hypothetical questions relating to possibility and effect of a second parental breakup upon a 4-year-old child. Mr. Nanos was qualified as an expert by virtue of being the assistant director of the alcoholics treatment center of Emmanuel Center, with a masters degree in psychiatric social work and postgraduate work primarily in the field of alcoholism. He had been permitted to testify at great length on theory entirely. He had no personal knowledge of any of the parties or the child. His direct examination covers 39 pages in the bill of exceptions. The line was drawn by the court at the place determined by it to prohibit Mr. Nanos from relating matters only involving speculation, possibility, or conjecture. In dealing with questions calling for expert opinion, particularly hypothetical questions, much must be left to the discretion of the trial judge. Fowler v. Bachus, 179 Neb.

558, 139 N. W. 2d 213; Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643. The ruling of the trial judge in this matter was appropriate, and not an abuse of his discretion.

In cases involving questions of child custody, the findings of the trial court, both as to an evaluation of the evidence and as a matter of custody, will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Mason v. Mason, 200 Neb. 476, 263 N. W. 2d 865. The court chose what appeared to be the more stable home and environment for Michelle. The decision does not abuse the discretion of the court, nor is it against the weight of the evidence.

AFFIRMED.

MARGIE HELDT, FORMERLY MARGIE CHAPMAN, APPELLANT, V. EDWIN D. CHAPMAN, APPELLEE.

284 N. W. 2d 409

Filed October 16, 1979. No. 42418.

1. **Divorce: Child Support.** The obligation to support minor children falls upon each parent, both of whose earning capacities shall be considered by the court in fixing the amount of support.
2. _____: _____. In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on appeal.

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

W. G. Whitford, for appellant.

Charles L. Caskey, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Appellee, who was the defendant in the original

1966 divorce action, filed his petition in the District Court seeking to terminate child support payments for Rex Chapman, the nearly 17-year-old son of the parties, for the reason that he was now emancipated. Appellant filed an answer and cross-petition, denying the fact of emancipation, and alleging that since entry of the original decree the cost of living has increased. She asked that the decree be modified by increasing child support payments. After notice and hearing the trial court granted the relief sought by the appellee, finding that Rex was in fact emancipated, and ordered child support to terminate as to him. The court also denied the appellant's request for an increase of child support and ordered that appellee continue to pay the sum of $13.33 per week for the support of the remaining minor child, Lisa. In doing so, it found that there had been no material change in circumstances since the entry of the decree requiring an increase in child support. Appellant has appealed to this court, alleging that the decision of the trial court was not sustained by sufficient evidence and was contrary to law. We affirm.

A divorce decree was entered in this matter on October 7, 1966, by which the minor children, Deano, Rex, and Lisa Mae, born respectively on June 8, 1959, August 28, 1961, and April 12, 1963, were awarded to the appellant and a settlement agreement was approved providing for a total of $40 per week for all three children. Various supplemental petitions have been filed throughout the ensuing years seeking modification of the award as to amount of child support, release of child support liens, and emancipation of the eldest child. The amount of child support has never been changed except, upon a finding of the emancipation of Deano, the award of support was reduced by $13.33. Several times the appellant has been awarded attorney's fees but none were granted in the instant applica-

tion. Although the trial court's decision as to the emancipation of Rex was mentioned as an issue actually tried, it was not specifically assigned as an error nor was it argued in the brief or at the time of oral argument and will be deemed to have been abandoned.

Rex testified he became 16 years of age on August 28, 1977, and shortly thereafter discontinued his schooling. From that time on he worked at various jobs and was to start working full time as a construction worker the day following the hearing. He was unable to give any information as to the income or expenses of his mother's household.

Appellant testified her gross weekly income at this time was $200 as compared to $50 per week at the time of the original divorce decree. She was also paid about $25 a week as board and room from Deano. Other than testifying that groceries for the entire household ran from $200 to $250 and house payments were $150 per month, there was no information as to expenses of the remaining child at this time and no information as to expenses at the time of the original decree.

Appellee testified he has remarried and has a son and that both his wife and son are asthmatics requiring special medicine. His annual gross income has gone from about $6,800 in 1966 to $12,800 in 1977, but his take-home pay at the time of trial was about $652 per month. He itemized his expenses at something slightly in excess of $700 per month at this time. There was no indication as to what his expenses were in 1966.

Appellant's principal complaint is that the trial court erred in finding there had been no material change in circumstances justifying an increase in child support. She relies primarily upon Pfeiffer v. Pfeiffer, 201 Neb. 56, 266 N. W. 2d 82 (1978), in which we said: "We are *permitted* to judicially notice that under present economic conditions $100 per month is

far less than the actual cost of caring for a child in an acceptable manner." (Emphasis supplied.) This, of course, is a correct general statement of the law and is grounded upon section 27-201, R. R. S. 1943, which provides in part that: "(3) A judge or court *may* take judicial notice, whether requested or not. (4) A judge or court shall take judicial notice if requested by a party and *supplied with the necessary information.*" (Emphasis supplied.) Although the record is absolutely devoid of any specific request by appellant, it may be assumed from the trial judge's remarks that her attorney, during final argument, simply asked the court to take judicial notice of the general increase in the cost of living. There was no reasonable attempt to furnish the court with any specific information supporting an increase in the cost of supporting the minor child. In the absence of being "supplied with the necessary information," we cannot say that the trial court abused its discretion in finding no change in circumstances in this regard.

Appellant points to the fact that appellee's gross income had doubled since the original decree. By the same token, her gross income had quadrupled to a point where it was approximately $2,500 less than that of the appellee. In addition, she received board and room payments from one of the children plus child support payments. As provided by section 42-347 et seq., R. R. S. 1943, and particularly section 42-364, the obligation to support minor children falls upon each parent, both of whose earning capacities shall be considered by the court in fixing the amount of support.

The record in this case supports the proposition that the trial court did not abuse its discretion in refusing to increase the amount of child support. "In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on

appeal." Sutton v. Sutton, 195 Neb. 495, 238 N. W. 2d 907 (1976).

As to the failure to award any fees to her attorney, it was the appellant who made necessary a contested hearing over the issue of emancipation which she abandoned on appeal. The appellee had been required to pay fees on several different occasions in the past although they were not in any excessive amounts. However, the matter of awarding attorney's fees is discretionary with the District Court and absent an abuse of discretion the court's order will not be disturbed on appeal. In this case we cannot say that the trial court abused its discretion.

For the reasons given, the judgment of the District Court is affirmed. Each party is to pay his or her own costs of this appeal.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED TRACY CLERMONT, APPELLANT.

284 N. W. 2d 412

Filed October 16, 1979. No. 42554.

1. **Criminal Law: Pleas: Lesser-Included Offenses.** Acceptance or rejection of a plea of guilty to a lesser offense included in the offense charged rests in the discretion of the court.
2. **Criminal Law: Homicide: Evidence: Intent.** In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, and to establish malice or intent.
3. **Criminal Law: Confessions: Evidence.** Voluntary statements made to a police officer during preliminary questioning that preceded the actual performance of a polygraph test are not a part of the polygraph test, nor are they rendered inadmissible under the polygraph exclusion.
4. **Criminal Law: Evidence: Intent.** Malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.
5. **Criminal Law: Verdicts: Evidence.** The verdict of the fact finder

in a criminal case must be sustained if, taking the view most favorable to the State, there is sufficient competent evidence to support it.

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

Terry E. Savage and Joseph M. Caffall, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was charged with second degree murder in the death of his 2-year-old stepson. Jury trial was waived. After trial the District Court found the defendant guilty and sentenced him to 10 years imprisonment.

The defendant and his second wife, Guadalupe, were married January 3, 1978. Two of Guadalupe's children, John, age 2, and his sister, Terri, age 4, lived with the defendant and their mother after the marriage.

At approximately 3 p.m., on July 22, 1978, the defendant took his two stepchildren with him and drove his wife to work. The defendant had not worked for a week and had been babysitting with his stepchildren during that time. When the 2-year-old boy's mother got out of the car at her place of employment, the child started to cry. The defendant testified that he slapped him in the face, leaving a black and blue mark. The defendant also testified that when he and the children returned to their home, the child finished his dinner and was spanked for wetting his pants. The defendant then took him to the bathroom and sat him on the toilet. The boy began to cry and the defendant slapped him on the side of the head causing the child to fall from the toi-

let seat and strike his head on the bathtub. The fall knocked the boy unconscious and the defendant revived him by splashing water on his face. The child was breathing and the defendant testified that he thought the boy was all right and laid him on a bed. The time was approximately 4 p.m.

The defendant then went next door to drink beer with a neighbor. He testified that he returned to his house two or three times to check on the boy, and the last time he returned he discovered that the boy was no longer breathing. The defendant began giving mouth-to-mouth resuscitation and called his wife at approximately 6:45 p.m., to ask her to call an ambulance. The ambulance arrived at approximately 7 p.m., and took the child to the hospital but he was dead on arrival.

Severe bruises and lacerations covered the boy's body, particularly his legs, buttocks, and head. Some of the bruises appeared to be old and some were recent. There was evidence that some of the bruises and lacerations had been caused by various accidents, the latest of which had occurred the day before the boy's death. There was also evidence that the defendant had slapped the boy and beaten him with a belt on several occasions during the week before his death.

The autopsy revealed hemorrhaging in the membrane around the boy's brain, and the medical evidence was that the cause of death was an acute head injury which had been sustained recently, probably within hours before the boy's death. The District Court found the defendant guilty and this appeal followed.

The defendant first contends that the District Court erred in refusing to accept defendant's offer to plead guilty to the lesser-included offense of manslaughter. Generally speaking, the accused has the right to plead guilty to the offense charged, but we find no authority to support the contention that the

accused has any right to require a court to accept a plea of guilty to a lesser-included offense. The general rule of law is that acceptance or rejection of a plea of guilty to a lesser offense included in the offense charged rests in the discretion of the court, and the acceptance of such a plea should be made with great caution. 21 Am. Jur. 2d, Criminal Law, § 494, p. 483; State v. English, 242 Iowa 248, 46 N. W. 2d 13; State v. Ingram, 273 Minn. 356, 141 N. W. 2d 802.

The record in the case now before us establishes that the court determined that it would not be justified in accepting the plea to the lesser-included offense without full knowledge of all the facts in the case. That rationale is supported by the cases. See State v. Koeppel, 250 Iowa 1052, 97 N. W. 2d 926. The District Court was fully justified in refusing to accept a plea of guilty to the lesser-included offense of manslaughter, and there was no abuse of discretion by the trial court.

The defendant next contends that the admission of six color photographs of the body of the 2-year-old victim constituted prejudicial error because the photographs were gruesome in nature, cumulative, and unnecessary to establish the State's case. Each of the six photographs was taken from a different angle showing different aspects of the various injuries to the boy's body. The photographs were offered and used for the purpose of establishing malice and intent, as well as to show the various injuries to the victim's body. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, and to establish malice or intent. State v. Dittrich, 191 Neb. 475, 215 N. W. 2d 637; State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443.

The record in the present case establishes that the

photographs were accurate representations of what they depicted and were relevant to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice and intent. There was no abuse of discretion in admitting them into evidence.

The defendant next contends that certain statements of the defendant were not admissible in evidence because they were a part of a polygraph test and therefore should have been excluded. The record, however, establishes that the statements objected to in this case were neither a part of a polygraph test nor the results of a polygraph test. Instead, the evidence consisted of statements made to a police officer during preliminary questioning prior to the giving of a polygraph test. The statements were not a part of the polygraph test and the officer did not testify as to the polygraph test or results of any polygraph examination.

In People v. Mason, 29 Ill. App. 3d 121, 329 N. E. 2d 794, a statement preceding a polygraph test was held to be admissible evidence for use as part of the factual basis for a guilty plea. The court said: "The appellant made an incriminating statement during a conversation that preceded the actual performance of the test. Such a statement does not fall under the polygraph exclusion, as it is not part of the examination." In the case now before us there is no evidence or contention that the statements were not voluntary. Counsel for the defendant was the one who referred to a polygraph test, not the prosecution. The statements introduced into evidence here were not the results of any polygraph test, nor do they fall under any polygraph exclusion.

Finally, the defendant contends that the evidence is insufficient to support the verdict of guilty to second degree murder. The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. State

v. Johnson, 200 Neb. 760, 266 N. W. 2d 193. The elements of malice and intent concern the state of mind of the slayer. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse, and malice and intent may be inferred from the evidence relating to the circumstances of the criminal act. State v. Johnson, *supra*; State v. Partee, 199 Neb. 305, 258 N. W. 2d 634.

The verdict of the fact finder must be sustained if, taking the view most favorable to the State, there is sufficient, competent evidence to support it. State v. Thompson, 198 Neb. 48, 251 N. W. 2d 387; State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650. The evidence in the present case is more than sufficient to sustain the verdict.

AFFIRMED.

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

284 N. W. 2d 415

Filed October 16, 1979. No. 42589.

1. **Criminal Law: Evidence.** Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence.
2. **Criminal Law: Evidence: Proof.** Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.
3. **Criminal Law: Evidence: Judgments.** To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. Any fact

or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

4. _____: _____: _____. A conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.
5. **Criminal Law: Evidence: Proof.** Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. Mere presence at a place where a narcotic drug is found is not sufficient.
6. **Criminal Law: Evidence: Proof: Motions, Rules, and Orders.** Where, in a criminal case, there is a total failure of competent proof to support a material allegation in the information or where the testimony added is of so weak or doubtful character that a conviction based thereon cannot be sustained, a motion for directed verdict should be granted.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions to dismiss.

James T. Hansen, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

The appellant herein, having been previously charged in a criminal information with possession of more than 1 pound of marijuana and having been found guilty by a jury, appeals to this court contending that appellant's motion for directed verdict made at the close of the State's case should have been sustained. Following an examination of the record in this case, we agree with the appellant, and accordingly reverse and dismiss the information.

The evidence in the record discloses that on the evening of February 13, 1978, armed with a search warrant, State Patrol officials gained access to a

residence at 845 L Street in the city of Gering, Nebraska. At the time the officers entered the premises, no one was at home. The record further discloses that appellant was never seen by the officers at the premises.

Upon entry into the premises, pursuant to the search warrant, the officers discovered a quantity of marijuana seeds weighing more than 1 pound, together with various other paraphernalia which the officers testified was used in connection with the smoking of marijuana. No evidence was offered by the State to in any manner establish that the personal property or the marijuana seeds were the property of the appellant.

The State argues that its failure to establish actual possession of the contraband by the appellant is not fatal to a charge of possession because of our earlier decision in the case of State v. Rys, 186 Neb. 341, 183 N. W. 2d 253. In the Rys case we indeed did say: "Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence." The evidence in this case, however, did not directly connect the appellant with the premises or any of the possessions therein. It was only on the basis of purported circumstantial evidence, if admissible, that the connection could be made.

We have had occasion to discuss the matter of circumstantial evidence insofar as it relates to a criminal conviction, and in the case of State v. Eberhardt, 176 Neb. 18, 125 N. W. 2d 1, we said: " 'Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.' "

In State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187, we said: "To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. [Citation omitted.] Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused." In Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539, we said: "[A] conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained." Further, in State v. Faircloth, *supra*, we said: "Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. [Citation omitted.] But mere presence at a place where a narcotic drug is found is not sufficient."

The only evidence offered by the State in this case to prove the appellant resided at 845 L Street was the testimony of the investigating officer who stated, over objection of the appellant, that he checked the city directory and found the address was listed to a "Charles Klutts." Likewise over objection, the investigating officer testified he had made inquiry of other people and they advised him "Charles Klutts" lived at that address.

The evidence further discloses that during the time the officers were making the inventory at the L Street residence they were visited by a man and woman who identified themselves as Mr. and Mrs.

Charles Klutts. This Mr. Charles Klutts was not the same person as the appellant. The evidence established that Mr. and Mrs. Charles Klutts present at the address were the parents of the appellant and the owners of the property.

From this summary it should be apparent that the objections made by counsel for the appellant concerning testimony offered by the State's witness should have been sustained. Information from the city directory or what others had told the investigating officer was clearly hearsay and not admissible. Section 27-801, R. R. S. 1943, defines hearsay evidence as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; * * *." None of the exceptions to the hearsay rule set forth in Article VIII of Chapter 27 of the Nebraska Statutes could possibly permit testimony concerning either the city directory or what others had told the investigating officer for the purpose of proving that the appellant resided at the premises and had control over the property.

A case almost directly in point is the case of Seay v. State, 228 P. 2d 665, decided by the Oklahoma Criminal Court of Appeals. In the Seay case, the defendant was charged by information with the offense of unlawful possession of whiskey at his residence. To try to prove the residence was occupied by the defendant, the police officer was handed a telephone book which he identified as that of the telephone company at Muskogee, Oklahoma. Thereafter upon interrogation the officer proceeded to testify that the defendant was listed in the telephone book. In reversing the conviction the Oklahoma court said: "This evidence constituted hearsay and therefore was clearly inadmissible. That it was highly prejudicial cannot be doubted, for the recitals contained in the telephone book and the recitals contained in the search warrant constituted the only evidence by

which the defendant was connected with the possession of the liquor, all of which was inadmissible and highly prejudicial to the rights of the defendant." To the same or similar effect see, People v. Crosby, 25 Cal. Rptr. 847, 375 P. 2d 839; Geo. C. Vaughan & Sons v. Harrisburg Nat. Bank, 195 S. W. 2d 613 (Tex. Ct. App., 1946); Dillard v. Jackson's Atlanta Ready Mix Concrete Co., 105 Ga. App. 607, 125 S. E. 2d 656.

Further, over objection, the State's witness volunteered that the appellant's parents told him their son "Tim" lived at the premises. The witness then testified that he knew the appellant as "Tim." The statement as to what the parents said was clearly voluntary and inadmissible. Moreover, had a proper question been asked, it would have been objectionable as hearsay.

The inadmissibility of the testimony of the State's witness as to what other people had told him was clearly hearsay and requires no citation of authority other than reference to the definition of hearsay as contained in the Nebraska statutes. § 27-801 (3), R. R. S. 1943. All of these statements were objected to by the appellant's counsel and all of the objections were overruled. The trial court clearly erred in overruling the objections. Had those objections been sustained as they should have been and the statements not permitted in evidence, there would have been no evidence that would have in any manner connected the appellant with the premises at 845 L Street. Where, in a criminal case, there is a total failure of competent proof to support a material allegation in the information or where the testimony added is of so weak or doubtful character that a conviction based thereon cannot be sustained, a motion for directed verdict should be granted. State v. Bennett, 204 Neb. 28, 281 N. W. 2d 216; State v. Holloman, 197 Neb. 139, 248 N. W. 2d 15. The State, then, having failed to introduce evidence to connect the appellant with the premises, failed to prove its case

and the motion for directed verdict should have been sustained.

Accordingly, we must set aside the judgment and dismiss the information.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

MARLENE JAFARI, APPELLEE, V. LAFI I. JAFARI, APPELLANT.
284 N. W. 2d 554

Filed October 23, 1979. No. 42322.

1. **Divorce: Custody: Minors.** In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child.
2. _____: _____: _____. The disposition of minor children and provision for their support in an action where a dissolution is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it.

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

Robert G. Decker, for appellant.

Michael J. Dugan of Costello & Dugan and Terry M. Anderson of Lathrop, Albracht & Swensen, for appellee.

Heard before BOSLAUGH, CLINTON, WHITE, and HASTINGS, JJ., and KORTUM, District Judge.

KORTUM, District Judge.

The petitioner, Marlene Jafari, filed an application seeking permission of the District Court to remove the minor children of the parties to Sioux Falls, South Dakota. The petitioner was the custodial parent pursuant to a prior decree of dissolution. The

respondent, Lafi I. Jafari, filed an objection to this application and additionally filed a cross-application seeking custody of the children.

The trial court found that, although both parties were fit and proper parents, the best interests of the children would be served by continuing custody in the petitioner and granting the application of the petitioner to take the children to South Dakota with her.

The respondent-appellant sets forth numerous assignments of error but essentially alleges that the findings and judgment of the trial court are not sustained by competent evidence and are contrary to the best interests of the minor children, and that the trial court failed to enforce the provisions of the joint stipulation between the parties which was incorporated into the original decree of dissolution.

The marriage of the parties was dissolved in September of 1977. Pursuant to this decree, the custody of the two minor children, now ages 4 and 10, was awarded to the petitioner. The parties agreed to liberal visitation rights for the respondent.

Between September 1977 and July 1978, both parties hereto spent considerable time with the children. The parties occupied houses directly across the street from each other and, consequently, the children frequently went back and forth between the parents and often stayed overnight with the respondent.

Because the respondent's business did not require regular office hours, he saw the children nearly every day and ate numerous meals with them. In July 1978, the petitioner moved to an apartment and the respondent continued to see the older child on nearly a daily basis and the younger child less frequently.

At the time of the dissolution decree the petitioner was employed in the training program of the Comprehensive Employment and Training Agency

(CETA). Because there appeared to be little chance for advancement for her, the petitioner determined to accept a post in South Dakota to supervise a similar type of program. The new position offered a small increase in salary and additionally offered the petitioner increased potential for career and salary advancement.

The petitioner testified that her new living arrangements and school situation were equal or superior to the ones in Omaha. There was no testimony advanced by the respondent that the children would suffer any substantial disadvantage by the move or that the petitioner was unfit or unable to continue as custodial parent. The main thrust of respondent's testimony was directed toward the guidance and assistance he would be able to provide the children if they were to remain in Omaha.

The general rule in cases where a custodial parent wishes to leave the jurisdiction for any legitimate reason is that the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent.

In Campbell v. Campbell, 156 Neb. 155, 55 N. W. 2d 347, this court held: "In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child." See, also, Erks v. Erks, 191 Neb. 603, 216 N. W. 2d 742.

The trial court, after consideration of the facts as set forth in section 42-364, R. R. S. 1943, found that the best interests and welfare of the children would be served by continuing custody in the petitioner and allowing the children to accompany petitioner to South Dakota.

The trial court was able to see and hear the witnesses. The discretion of the trial court is subject to

review. Its determination, however, will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. The record in this case does not show either. See Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853.

The respondent assigns as error the failure of the trial court to enforce the provisions of the original stipulation between the parties relating to custody, support, and visitation. The law in this jurisdiction is quite clear in this regard. "The disposition of minor children and provisions for their support in an action where a divorce is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it." Koser v. Koser, 148 Neb. 277, 27 N. W. 2d 162.

The order of the trial court is well within its discretion and is affirmed.

AFFIRMED.

WESLEY E. SEDLACEK, APPELLEE, V. R. JAMES PEARSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

284 N. W. 2d 556

Filed October 23, 1979. No. 42330.

1. **Motor Vehicles: Blood, Breath, and Urine Tests.** In a proceeding before the Director of Motor Vehicles under the implied consent law, where the evidence shows that a test was in fact performed which established a blood alcohol content in excess of that prescribed by statute, the sanction prescribed by the statute for refusal to consent to the test should not be imposed.
2. _____: _____. A preliminary refusal followed by a consent to submit to a test for blood alcohol content does not furnish a basis for imposition of the sanction prescribed by the statute if a test was in fact performed and the State was not prejudiced by the delay in performing the test.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Affirmed.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellant.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The State appeals from a judgment of the District Court vacating an order of the Director of Motor Vehicles revoking the motor vehicle operator's license and operating privileges of Wesley E. Sedlacek for a period of 6 months. The order was made pursuant to section 39-669.16, R. R. S. 1943, of the implied consent law.

The record shows that at about 11:30 a.m., on October 24, 1977, Sedlacek was stopped for speeding at a point 3 miles south of Madison, Nebraska. The patrolman who stopped Sedlacek administered a preliminary breath test at about 11:45 a.m., which indicated an alcohol blood content of .12 percent. Sedlacek was then arrested for driving while intoxicated and taken to the police station in Norfolk, Nebraska.

At the police station the patrolman read an implied consent post-arrest advisory form to Sedlacek. Sedlacek signed the form but stated that he would not take the breath test requested by the patrolman until he had talked with his lawyer. Sedlacek was allowed to call a lawyer who agreed to come to the station. Sedlacek refused to take the test until the lawyer arrived. The patrolman left the station and, later, filed an affidavit with the Director of Motor Vehicles alleging that Sedlacek had refused to submit to the breath test.

The lawyer arrived at the station at about 1 p.m. He called the county attorney from the station and requested that the test be administered to Sedlacek.

The county attorney asked an officer at the station to perform the test. Sedlacek was tested at about 1:48 p.m., and the test indicated that he had a blood alcohol content of .11 percent at that time.

A complaint was filed in the county court charging Sedlacek with driving while under the influence of alcoholic liquor, refusal to submit to the breath test, and speeding. Sedlacek pleaded guilty to the first and third counts but was acquitted on the count charging refusal to submit to the breath test.

The State contends that the judgment of the District Court vacating the order of the Director of Motor Vehicles was erroneous because Sedlacek had no constitutional right to consult a lawyer before consenting to the test, and his reply to the patrolman's request to submit to a breath test constituted a refusal within the meaning of the implied consent law.

The statute provides for a suspension or revocation of driving privileges only if the refusal is unreasonable. The question presented by the appeal is whether, under the facts and circumstances of this case, there was an unreasonable refusal to submit to the test requested by the arresting officer.

The State is entitled to have the test administered at a time when it will be effective to disclose the blood alcohol content of the person tested with relation to the time that the vehicle was being operated. Under the evidence in this case it is clear there was no prejudice to the State because of the delay in performing the test.

In a similar case the Colorado Court of Appeals held that delay in consenting to the test, during which the driver conferred by telephone with a lawyer, did not prevent the driver from retracting an earlier refusal unless the delay materially affected the result of the test. The court said: "The implied consent law was enacted to assist law enforcement officers in prosecuting the drinking driver, and the sanction of license revocation was adopted to encour-

age a driver to consent voluntarily to a blood alcohol test. Calvert v. Motor Vehicle Division, 184 Colo. 214, 519 P. 2d 341 (1974). The primary purpose of the statute is to obtain scientific evidence of the amount of alcohol in the bloodstream in order to curb drunk driving through prosecution for that offense. See Colorado Legislative Council Research Publ. # 123, Highway Safety in Colorado 37-46 (1966).

"While a motorist has no right under the statute to confer with counsel prior to deciding whether he will consent to a test, Calvert v. Motor Vehicle Division, *supra,* where, as here, he is permitted to do so, thereafter consents to the test, and the officer is available to see that the test is administered, the primary purpose of the statute is fulfilled unless the delay will materially affect the result of the test. See, e.g., Cavagnaro v. Motor Vehicles Division, 19 Or. App. 725, 528 P. 2d 1090 (1974)." Zahtila v. Motor Vehicle Div., Dept. of Rev. (Colo. App., 1977), 560 P. 2d 847.

The evidence in this case shows that the rate of oxidation of alcohol in the body is approximately .01 percent per hour. Thus the test performed at 1:48 p.m., which showed Sedlacek then had a blood alcohol content of .11 percent, indicated that his blood alcohol content at the time of the arrest was in excess of .13 percent.

There would appear to be no reason to invoke the sanction of the implied consent law for *refusal* to submit to a test where a test was in fact performed and the test established what the test was designed for and intended to show. The State should not be allowed to perform the test and at the same time claim a refusal to submit to the test.

The evidence sustains a finding that the State should not be permitted to rely upon the preliminary refusal of Sedlacek to submit to the test and the sanction provided by the statute should not be im-

posed in this case. The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion for reasons which I will briefly set forth. First: The language of the opinion tends to create uncertainty as to the meaning of the implied consent statutes, section 39-669.08 et seq., R. R. S. 1943, where, under the prior opinions of this court, such uncertainty did not exist. Second: The opinion will tend to create confusion in the application of the law and uncertainty in its enforcement. As a consequence, we can anticipate increased appellate litigation in license revocations and criminal prosecutions under the implied consent statutes until we once again, through the opinions of this court, return to the unequivocal certainty which formerly existed. I hope this dissent will be a step in that direction.

A brief review of the statutory scheme under the implied consent statutes will be useful. A person who operates a motor vehicle on the public highways of this state does, by that act, under the circumstances described in the statute, give his implied consent to a chemical test of the alcoholic content in his body fluids. § 39-669.08 (1), R. R. S. 1943. That statute has been held constitutional by this court and similar statutes have been held constitutional by every court which has had occasion to consider them. State v. Williams, 189 Neb. 127, 201 N. W. 2d 241; State v. Manley, 189 Neb. 415, 202 N. W. 2d 831. The statutes make it a crime to refuse to give the requested sample, constituting a misdemeanor if the refusal is of a preliminary breath test, § 39-669.08 (3), R. R. S. 1943, or a crime punishable in the same manner as driving while intoxicated if the refusal occurs after the arrest, § 39-669.08 (4), R. R. S. 1943. The result of the test, if made in conformity with the statutory requirement, is admissible in a prosecution

for driving while intoxicated. § 39-669.11, R. R. S. 1943. A refusal to take the test may also be the basis of an administrative revocation of the driver's license. § 39-669.15 et seq., R. R. S. 1943.

The driver must be warned of the consequences of a refusal to give the sample. § 39-669.08 (5), R. R. S. 1943. The driver is not entitled to advice of counsel before deciding whether or not to consent to the test. Stevenson v. Sullivan, 190 Neb. 295, 207 N. W. 2d 680; Wiseman v. Sullivan, 190 Neb. 724, 211 N. W. 2d 906. A conditional or qualified refusal is not sanctioned by the act. Wiseman v. Sullivan, *supra*. A suspect's right to counsel in connection with any charge other than the refusal exists as in any other criminal case, but the right simply does not apply to the request for the taking of samples. Wiseman v. Sullivan, *supra*. Only one request need be made by the officer, but more than one request is permissible. Stender v. Sullivan, 196 Neb. 810, 246 N. W. 2d 643.

If the person arrested pursuant to section 39-669.08, R. R. S. 1943, refuses to submit to the test, it "shall not be given and the arresting officer shall make" the sworn report to the Director of Motor Vehicles, which initiates the administrative revocation procedure. § 39-669.15, R. R. S. 1943.

The majority opinion does not expressly purport to overrule any of the opinions of this court. Some of its language, however, creates confusion. The opinion says: "The statute provides for a suspension or revocation of driving privileges only if the refusal is unreasonable. The question presented by the appeal is whether, under the facts and circumstances of this case, there was an unreasonable refusal to submit to the test requested by the arresting officer." The opinion, however, never answers the question which it asks. No facts are suggested in the opinion which justify a refusal.

Some may read the opinion as indicating that a request for counsel justifies refusal. However, the

opinion does not overrule our prior precedents on this point and its quotation from the Colorado court's opinion in Zahtila v. Motor Vehicle Div., Dept. of Rev. (Colo. App., 1977), 560 P. 2d 847, reiterates our prior holdings on the point of no right to counsel. What the opinion seems to do is to authorize a stalling tactic founded on a request for counsel. If the sample is finally given and the test is made, then some sort of waiver is found.

The opinion interjects the issue of whether the State is prejudiced by the delay. This creates additional problems. Who has the burden of showing lack of prejudice and how, as a practical matter, is lack of prejudice to be shown?

Other problems are also created. In this case, the criminal prosecution and the administrative procedure for revocation were proceeding simultaneously. The administrative procedure was concluded first and the revocation order issued. Later, the defendant pled guilty to a charge of driving while intoxicated and was found not guilty of the misdemeanor of refusal to submit to the test. The record does not disclose that the results of the test were ever received in evidence, since the defendant pled guilty to driving while intoxicated. Undoubtedly the results of the test may have been the inducement to plead. The rationale for overturning the administrative revocation on this appeal is unclear, but I suspect it is based on some sort of estoppel theory. Would the result be different if the defendant had been tried and found not guilty on the driving while intoxicated charge? Is this court on the way to saying that only one course, either administrative or criminal, may be pursued? In this instance, the administrative proceeding was concluded first. What would have been the result had there been no criminal conviction? Sedlacek was found not guilty of the misdemeanor charge of refusal. As noted, this occurred after the revocation. Is this court now saying that

the subsequent criminal proceedings have the effect of overturning the administrative decision?

In this case, Sedlacek, after being advised of the consequences of refusal, first refused to give a sample until he consulted his attorney. The officer then let him call his lawyer. After he had talked to his lawyer he still refused to give a sample. The arresting officer then departed. The sample was later given when the county attorney directed another officer to take the sample, which the defendant was then willing to give. This was more than 2 hours after the arrest.

The opinion, because of the ambiguity of its rationale, creates uncertainty rather than dispelling it. The arresting officer, after the refusals, was charged by law with making the sworn report required by section 39-669.15, R. R. S. 1943. He could not have done otherwise without violating his statutorily imposed obligation. He followed exactly the mandate of the statute in not giving the test after the refusals, which, under existing precedents of this court, constituted clear violations of section 39-669.08 (4), R. R. S. 1943. I suggest that, under the statute, the test given after refusal was given illegally and would not have been admissible in evidence in the driving while intoxicated prosecution. However, whatever objection Sedlacek had on this account was waived, with the advice of counsel, when he pled guilty to the driving while intoxicated charge.

Under the circumstances, the arresting officer is left in a quandary. He must either tolerate refusal and stalling, along with the resultant problems they may cause, or he must make only one request and proceed administratively. The latter is his only reasonable course. Otherwise, he risks an ineffectual administrative revocation. Officers, whose duty it is to follow the statutes and the settled precedents of this court, will now be unsure as how to proceed. Nor will they have any additional guidance until

there is further litigation.

This appears to be an instance where the court has chosen to substitute its judgment for that of the Legislature without any constitutional basis for so doing. No question of double jeopardy is involved. Callan v. Commonwealth, Department of Transportation, 19 Pa. Commw. Ct. 635, 339 A. 2d 163. See, also, Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75, where we held that an acquittal on the charge of driving while intoxicated does not prevent administrative revocation for refusal to submit to the chemical test of the implied consent law.

On an appeal to the District Court from the director's revocation, the admission into evidence of a judgment in some subsequent criminal proceeding is impossible to justify on the basis of relevance or materiality. The burden on the appeal is on the licensee to establish grounds for reversal. Mackey v. Director of Department of Motor Vehicles, 194 Neb. 707, 235 N. W. 2d 394. Sedlacek establishes no such basis in this case. I would reverse the judgment of the District Court and affirm the revocation of the license by the Director of the Department of Motor Vehicles.

BRODKEY, J., joins in this dissent.

SILVEY AND COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. LOUIS G. ENGEL, APPELLEE.

284 N. W. 2d 560

Filed October 23, 1979. No. 42360.

1. **Evidence: Witnesses.** The admissions by a party to an action upon a material matter are admissible against him as original evidence.
2. **Courts: Instructions: Appeal and Error.** The trial court is under a duty on its own motion to correctly instruct on the law and this court may take cognizance of plain error indicative of a probable miscarriage of justice.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and remanded for a new trial.

Byron J. Brogan of Galvin & Brogan, for appellant.

Smith, Smith & Boyd, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is an action for damages in the District Court for Dakota County as a result of a no-contact accident on May 9, 1976. The case was tried to a jury and the jury returned a verdict in favor of the defendant. The plaintiff appeals. We reverse and remand.

On the 9th day of May 1976, the plaintiff corporation, through its employee, Virgil Schroder, was operating a semitruck, without the trailer attached, southbound on U. S. Highway 77 south of Dakota City, Nebraska, traveling in the same direction as the defendant, Louis G. Engel. Both were following an unidentified slower-moving vehicle. According to the plaintiff's version of the accident, the plaintiff's truck had pulled into the passing lane and had drawn abreast of the defendant's car when the defendant suddenly accelerated and turned into the passing or northbound lane of highway 77, forcing the plaintiff to suddenly and violently apply his brakes. Plaintiff's driver ultimately lost control of the truck, the tires of his semitruck skidded, and the truck left the traveled portion of the highway and entered the east ditch where it overturned, causing substantial damage to the truck. The defendant's version was to the effect that he had pulled into the passing lane prior in time to the plaintiff's truck, and that he accelerated as the truck appeared to be gaining on him. The truck then appeared to apply its brakes, lose control, and go into the ditch.

There are four assignments of error, only one of

which will be discussed in this opinion. The plaintiff-appellant asserts that the court erred in giving instruction No. 12: "You have heard testimony concerning statements allegedly made by a witness prior to this trial which may be inconsistent with his testimony at this trial. This testimony has been admitted solely for impeachment purposes to aid you in estimating the credibility of the witness and to determine the weight to be given to his testimony. *You may consider it for that limited purpose only and not as evidence of the facts declared in the prior statement.*" (Emphasis supplied.)

The only out-of-court statements introduced by any party to the action were those of the defendant. In a statement given to State Patrolman Yosten at the scene, the defendant stated: " * * * he started to pass a vehicle and did not see the other vehicle already in the passing lane and at this time he did not have time to return to his lane of traffic and did observe the other vehicle go into the ditch." The witness, Jay Smith, testified that in a conversation with the defendant in response to the question, "How did the accident happen?", the defendant answered: "He had pulled out to pass the car that was in front of him and that as he looked up he didn't see anybody behind him, because apparently the truck was behind him in his blind spot." In a written statement of May 11, 1976, admitted into evidence, the defendant stated: "I was about four car lengths behind the car and ran up to about one car length and pulled out and got completely into the other lane. I was about 3/4 of the way or so out into the left lane when I saw a truck in my outside rearview mirror. He was in the left lane or nearly so and about 3-3 1/2 car lengths behind me. This was the first I even knew he was around."

The trial court excluded from evidence another statement of the defendant by a witness, Charles J. Raymond III, a passenger in the defendant's car.

An offer of proof was made to the effect that: "Mr. Engel or the person who could be identified as the driver of this particular unit would testify he had stated he owed this truck driver his life * * *." Although not assigned as error, the statement of the defendant was obviously admissible. The admissions by a party to an action upon a material matter are admissible against him as original evidence. Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902.

The instruction given by the trial court did not allow the jury to consider as evidence the facts contained in the defendant's statements. Notably, his version of the accident varied from statement to statement. The error was plain and prejudicial to the plaintiff. It is true that plaintiff's counsel at the instruction conference did not object to the form of the instruction and merely requested the word "witnesses" be deleted and the word "defendant" be included. Plaintiff's counsel, unaware of the error in the court's instructions, may have invited the court to instruct wrongly. It is a rule that this court will not normally consider instructions not properly objected to and raised at a motion for new trial. Breiner v. Olson, 195 Neb. 120, 237 N. W. 2d 118. However, the trial court is under a duty, on its own motion, to correctly instruct on the law and this court may take cognizance of plain error in instructions indicative of a probable miscarriage of justice. Barta v. Betzer, 190 Neb. 752, 212 N. W. 2d 352; Nat. Bank of Commerce Trust & Savings Assn. v. Mitchell, 203 Neb. 634, 279 N. W. 2d 625. Since the plaintiff was prevented from having the jury consider declarations against interest of a party defendant, as evidence in favor of the plaintiff, the cause must be reversed and remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., concurring.

I concur in the opinion directing reversal and new trial. I believe, however, the court should also have

considered an additional assignment of error which also justifies reversal. Should this error recur on the new trial, an appeal may again be required should the defendant obtain the verdict.

The error in question relates to the testimony of the police officer who made the investigation at the accident scene. During cross-examination of that witness, the following occurred: "Q- Did you list a contributing factor on this particular accident report as to the cause of this accident?

MR. BROGAN: I'm going to object to this line of questioning, Your Honor, as invading the province of the jury; it's calling for a conclusion for which there is no proper foundation laid and ask the Court to restrict opposing counsel to (sic) inquiring further into matters which this jury has to decide.

THE COURT: Overruled. He may answer.

MR. BOYD: Would you repeat the question for him, please?

Q- (By Reporter) Did you list a contributing factor on this particular accident report as to the cause of this accident?

A- I did.

Q- What factors, without stating what the — your conclusion or your cause was, what factors lead you to making that statement on the report?

A- My own personal observation of the accident scene.

Q- This would include the skid marks that you testified to, the beginning of them, the length involved, the final resting place of the Silvey vehicle?

A- Yes, sir.

Q- What did you list as a contributing cause of this accident?

MR. BROGAN: Same objection, Your Honor.

THE COURT: Overruled. He may answer.

A- Exceeding safe speed.

Q- For which vehicle?

A- Vehicle number 1."

Immediately before that testimony, the following had been adduced from the witness: "Q- From a practical point of view, do you ever make a determination based on what you observe as to the speed of a particular vehicle involved in an accident?

A- I have on accidents.

Q- Did you on this particular accident?

A- No, sir."

The defendant-appellee defends this "opinion" testimony of this "expert" or "skilled" witness by asserting that it was admissible under the provisions of sections 27-702 and 27-704, R. R. S. 1943, which provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." § 27-702, R. R. S. 1943.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." § 27-704, R. R. S. 1943.

The witness, a member of the Nebraska State Patrol, did not see the accident occur. His qualifications were as follows. He had been a member of the patrol for 14 years and had conducted many investigations of highway motor vehicle accidents. In the present case, he observed the position of the vehicles after the accident, made measurements at the accident scene, and took various photographs of the scene and the vehicles involved, including tire marks made by the plaintiff's truck. He also made measurements of the distance from the point where the tire marks began to the front of the truck at the place where it finally came to rest in the borrow pit. He did not measure the skid marks themselves.

The testimony of the officer and the photographs indicate the tire marks were not solid, but of a

"skipping type" caused, in the officer's opinion, by the fact the tractor carried no trailer and no load. The officer also took statements from the operators of the two vehicles, including the statement referred to in the majority opinion.

It is to be observed first of all that the witness did not testify directly as to his opinion as to the rate of speed, nor directly give his opinion that it was a contributing factor. He was permitted to testify as to what he put in his report. I suggest that what went into the report was clearly inadmissible as hearsay. In this instance, it was used to indirectly permit the opinion of the witness as to "contributing cause" to be presented to the jury. It should not have been permitted, for reasons which will be developed.

The witness stated he made no determination of speed. No foundation was laid to qualify him to determine speed from skid marks. Neither were the weight of the truck, the condition of the tires or brakes, nor the degree of friction between the tires and the highway surface in evidence. No attempt was made to qualify the witness to give an expert opinion on the speed of moving vehicles not personally observed by him.

I suggest, first of all, that since the witness testified he made no determination of speed, he was not qualified to express an opinion, either as a lay witness or as an expert, as to the part the speed of the truck played in the causation of the accident. There is nothing whatever to suggest the speed of the truck either exceeded the applicable speed limit, or that its speed was excessive under the then existing circumstances. The speed, whether 30, 40, or 55 miles per hour, is wholly irrelevant as a contributing cause unless it can be said the speed was evidence of negligence. There is not a scintilla of evidence to suggest the speed was in excess of the posted speed limit.

Whether the speed was excessive under the circumstances depended upon other factors not within

the personal knowledge of the officer. Such factors would be the relative location of the two vehicles, their relative speeds, and the relative times they moved into the passing lane. It seems to me that it was plain error to permit the officer, whether as a layman or an expert, to give his opinion, albeit indirectly, as to the speed of the truck.

The commentary to Rule 704, pertaining to opinion on the ultimate issue as contained in N.C.L.E., Evidence, 1975, prepared by Professor G. Michael Fenner, Creighton University School of Law, summarizes the principles and cites the applicable authorities. The summary is as follows: " 'The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions.'[13] If the lay opinion is either not 'helpful' to the trier of fact or not rationally based on the perception of the witness, it will be excluded under Rule 701. If the expert opinion does not 'assist' the trier of fact, it will be excluded under Rule 702. If the probative value of the opinion is substantially outweighed by the danger of prejudice, confusion, needless repetition or delay, it may be excluded under Rule 403. Finally, Rule 705 gives the judge some control over too broad an opinion by giving him the discretion to require that the underlying facts or data be disclosed before the opinion can be given.'[14] For example, an opinion as to the negligence of a party[15] would still be excluded, as neither helpful nor of assistance to the trier of fact. In any event, any probative value which such an opinion might have would generally be outweighed by the prejudice and confusion which it would cause."

Although the officer was clearly qualified as an accident investigator, there was no foundation to qualify him as an expert in the reconstruction of accidents from physical and scientific evidence. His opinion was given totally without consideration of the relevant factors previously mentioned. In addition, the testimony was not "helpful," nor did it

"assist" the jury in determining the issue of either negligence or causation. It seems obvious to me that its probative value, if any, is clearly outweighed by the prejudice and confusion it would cause.

If we are to consider the officer merely as a lay witness, his testimony was also inadmissible because it was not "rationally based on the perception of the witness." § 27-701, R. R. S. 1943. Perception in this context means personal observation. See commentary to Rule 701 and authorities there cited. Op. Cit., *supra*.

MYRON J. BUCHELE, APPELLEE, V. DEBRA W. TUEL, FORMERLY KNOWN AS DEBRA W. BUCHELE, APPELLANT.

284 N. W. 2d 564

Filed October 23, 1979. No. 42379.

1. **Divorce: Custody: Minors.** The best interests of the minor children is the paramount consideration in determining custodial issues.
2. _____: _____: _____. The judicial focus in matters relating to the modification of custody is on what the trial court actually knew at the time of the entry of the custody decree and not on what the parties knew or should have known which was not produced at the time of trial.
3. ____: ____: ____. The relationship between a minor child and a woman living in the same household is a factor to be considered in a determination of the best interests of the child in matters relating to custody.

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

Michael W. Amdor, for appellant.

Larry F. Fugit, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

The appellant herein, Debra W. Tuel, was formerly Debra W. Buchele, the wife of the appellee, Myron J. Buchele. Their marriage was dissolved by a decree of the District Court for Sarpy County entered on March 11, 1977. Both appellant and appellee have since married other spouses. In this opinion, the appellant will be referred to as "Debra" and the appellee as "Myron."

Debra and Myron were married on January 26, 1972, in Minot, North Dakota; and on April 20, 1973, one child, Kristopher M., was born as an issue of their marriage. In its decree entered on March 11, 1977, the District Court dissolved the marriage and awarded custody of Kristopher to Myron, with reasonable rights of visitation in Debra. At the hearing for dissolution of the marriage, Debra voluntarily appeared in the proceedings without the assistance of counsel, testified, and consented that custody of Kristopher be given to Myron, about which more will be said later in this opinion.

On November 30, 1977, Debra, having subsequently married her present husband, Wallace Tuel, filed a petition for modification of the divorce decree with reference to custody of Kristopher. Following a trial upon the petition for modification, and evidence produced therein, the court dismissed that part of Debra's petition requesting modification of the decree with respect to custody of Kristopher, but, due to the difficulty shown by Debra in obtaining visitation rights provided her in the decree, the court granted her request for a specific visitation schedule. Debra has perfected her appeal to this court from the order of the District Court dismissing her petition for modification insofar as the award of the custody of the minor child, Kristopher, is concerned, and from the overruling of her motion for a new trial. In her appeal to this court she assigns as error and contends that the order of the trial court was con-

trary to the evidence presented, and that the trial court improperly excluded evidence which existed prior to the entry of the original decree of divorce and which related to the fitness of Myron to have custody of Kristopher. We reverse and remand for further proceedings.

In her petition for modification filed in the District Court, Debra alleged that a significant change in circumstances had occurred since the entry of the decree, which made Myron an unfit and improper person to have custody of their minor child. The testimony adduced at the hearing for modification established that Debra and Myron, prior to their marriage, had agreed that if any problems developed between them and they should have to separate, any male children would go with the father and any female children would go with the mother. Debra further testified that it was because of this agreement she surrendered custody and possession of Kristopher to Myron and she did so on Myron's representation that she was to have visitation with Kristopher at any time she wished to see him. She thought at the time Myron would carry out his assurances to her and did not anticipate the problems with respect to the visitation privileges which subsequently arose. The record is clear the court was not advised of this agreement at the time of the entry of the original decree, although Myron admits that such an agreement existed.

The record further reveals Myron and Debra separated in August of 1976; and in September of 1976, Myron began living with a woman, Kathy, whom he subsequently married. The marriage of Myron and Kathy occurred immediately after the service of summons on the petition for modification and 1 day prior to a hearing held on a temporary restraining order entered in connection therewith. Although Myron and Kathy, with whom he was living at the time, had intended to marry a few months later,

Myron admitted they had moved the wedding date ahead for appearance purposes with regard to the custody hearing.

The evidence presented to the District Court came from the parties to the action, their spouses, and three other witnesses who testified as to the treatment received by Kristopher in Myron and Kathy's home. Two of the witnesses, called on behalf of Myron, testified that the child was well treated and well adjusted. Debra called as her witness one Geraldine Pickard, who had been a babysitter for Kristopher for the period of time extending from August 1976 to the fall of 1977. Her proffered testimony was excluded by the court, upon the objection by opposing counsel to lack of foundation, for the reason that it was not limited to the period of time after the entry of the original decree in which she was employed as a babysitter. In announcing its decision in the case, the court stated as its reason for excluding Mrs. Pickard's testimony: "There was never any attempt to show any of her observations, conversations or otherwise were limited to the time after March 11th of 1977. Rather all the questions that were introduced to her where objections were sustained, and the record can correct me if I'm wrong, but, * * *, you can look at it and I think I'll be absolutely correct, every single question where there was an objection as to foundation sustained, the question went with 'during the time that you sat for Kristopher' and the testimony clearly was that that time included six months prior to the decree and six months after the decree, and absent breaking that down, the foundational objection was good."

The record reveals, however, that counsel for Debra made offers of proof as to what Mrs. Pickard would have testified to, if permitted. These were on a question by question basis and are too lengthy to be included in detail in this opinion. It is sufficient to state at this point the offers indicate that had Mrs.

Pickard been permitted to testify, she would have testified, among other things, that she had seen Kathy mistreat Kristopher, strike him, and "threaten to beat the hell out of Kristopher;" that she had cautioned Myron, whom she knew as "John," to be careful of Kathy because of her treatment of Kristopher; and had asked him why he would marry a woman who would treat Kristopher as Kathy did. Also under the offers of proof, Mrs. Pickard would have testified that she had heard Kathy address Kristopher as "dumbo," that Kristopher arrived at her home dirty and she had on occasion bought clothing for him, and on occasion had to prepare breakfast for him. She also would have testified that when Kristopher had arrived at her home during rainy or snowy seasons he would not have been dressed suitably for the weather, and he on occasion arrived at her home without coat or boots. She would have further testified she had discussed with Kristopher bedwetting and defecation problems he was having and he had told her that if he should have a potty accident Kathy would spank him. Also, according to the offer of proof, Mrs. Pickard would have testified that on six or seven occasions she admonished and cautioned Myron that his wife-to-be, Kathy, would mistreat Kristopher and would not properly care for him, and would in fact present a threat to his well-being. She also would have testified that about once a week she cautioned Kathy about her demeanor toward Kristopher, and in answer to her question to Kathy as to why she was marrying John, Kathy replied "that she was angry because she had to end up with a guy who had a damn kid." It should also be noted that in her own testimony, Kathy admitted she was a very short-tempered person. Debra contends that it was error on the part of the trial court not to admit the evidence of the babysitter, Mrs. Pickard, even though part of it related to matters which occurred prior to the entry of the original decree.

The principles which control herein may be stated as follows. The best interests of the minor children is the paramount consideration in determining custodial issues. Fleharty v. Fleharty, 202 Neb. 245, 274 N. W. 2d 871 (1979); Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682 (1973). Where a decree has been entered following trial on the merits which awards custody of the minor children, it is ordinarily not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree. Walters v. Walters, 177 Neb. 731, 131 N. W. 2d 166 (1964); Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542 (1974). When a party obtains a divorce by default and fails to bring to the court's attention existing matters which concern custody of the minor children, upon proper motion for modification the court will consider such factors in determining whether a change in circumstances has occurred. Bartlett v. Bartlett, 193 Neb. 76, 225 N. W. 2d 413 (1975); Perkins v. Perkins, 198 Neb. 401, 253 N. W. 2d 42 (1977). Where one of the parties has induced the other party to permit an uncontested decree and custody award to be entered, facts establishing fraud, misrepresentation, or duress will constitute a material change of circumstances upon which a modification in custody may be based. Cline v. Cline, 200 Neb. 619, 264 N. W. 2d 680 (1978).

The original decree awarding custody to Myron was concededly not a situation involving fraud, duress, or misrepresentation upon Debra; neither was it a default decree, as she was present and testified. Sporer v. Herlik, 158 Neb. 644, 64 N. W. 2d 342 (1954). However, there was not total disclosure to the court of all factors relating to the awarding of child custody, specifically with regard to the living arrangement of Myron and the custody agreement based on the sex of the child. As we stated in Cline v. Cline, *supra*: "The judicial focus in cases such as this has been on what the trial court actually knew

at the time of the entry of the custody decree and not on what the parties knew or should have known which was not produced at the time of trial. This court has continually adhered to the principle that the best interests of the child are the governing considerations in determining custody. Modern authority supports the view that where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, *and particularly in default cases,* where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody." (Emphasis supplied.) The rule does not appear to be restricted exclusively to default judgments. See, also, Annotation, 9 A. L. R. 2d 623, at p. 624.

The trial court was unaware of the living arrangements of Myron and his current wife at the time of the entry of the original decree awarding custody to Myron. While this factor by itself might not require admission of it as evidence at a subsequent modification hearing, in this case the woman was residing in the same household as the minor child and exercised authority over the child as to his discipline and upbringing, and yet the court had no knowledge of her existence. The relationship between the minor child and the woman living in the same household is a factor to be considered in a determination of the best interests of the child in matters relating to custody. From our review of the record, we believe that the testimony which the witness, Mrs. Pickard, sought to give related directly to the relationship between the minor child and Myron's current wife. The focus here is on what the trial court knew at the time of the entry of the custody decree. The trial court did not know of the relationship between the

child and Myron's friend, Kathy. Mrs. Pickard could have produced evidence as to this relationship but was not permitted to do so. Such evidence would be a factor worthy of consideration in determining the best interests of the minor child with regard to custody. The trial court should have allowed Mrs. Pickard to testify and its failure to do so necessitates a further hearing.

In view of what we have said herein, we need not examine the other errors assigned by Debra. We reverse and remand for further hearing to explore fully the evidence and determine which party, based on the best interests of the minor child, should have custody of Kristopher.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NANCI A. RINDERKNECHT, APPELLEE AND CROSS-APPELLANT, V. WILLIAM A. RINDERKNECHT, APPELLANT AND CROSS-APPELLEE.

284 N. W. 2d 569

Filed October 23, 1979. No. 42428.

1. **Divorce: Alimony: Property.** The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal.
2. **Divorce: Property.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
3. **Divorce: Attorney's Fees.** An award of attorney's fees in an action for dissolution of marriage involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

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

Donald A. Roberts of Lustgarten & Roberts, for appellant.

L. W. "Jim" Weber and Stanley H. Foster, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is a dissolution of marriage proceeding in which actions were pending simultaneously in two states. Following the entry of an in rem decree of dissolution in Indiana, the Nebraska court entered judgment ordering a property division; awarding custody of the minor child, child support, and alimony to the wife; and assessing attorney's fees and costs to the husband. The husband has appealed.

On May 3, 1976, the wife filed her petition for legal separation in the District Court for Sarpy County, Nebraska, and sought custody of the minor child, child support, and a property division. The husband was personally served with summons in Nebraska. On May 7, 1976, the husband, a sergeant in the Air Force stationed at Offutt Air Force Base in Nebraska, filed a petition for dissolution of marriage in Indiana, his legal residence.

On May 21, 1976, by agreement of the parties, the District Court for Sarpy County, Nebraska, entered its order granting temporary custody and control of the minor child to the wife, subject to reasonable visitation rights of the husband, and directed the payment of $130 per month for temporary support and maintenance of the child. The Nebraska District Court also granted use and possession of a Matador automobile to the wife and directed the husband to make all payments on the car.

On July 16, 1976, the Circuit Court of Hendrix County, Indiana, entered its decree dissolving the marriage, awarding custody of the minor child to

the wife, and awarded child support. The decree also made a property division, assigned the Matador automobile to the husband, and awarded an older automobile to the wife.

The wife appeared specially in the Indiana proceeding by her counsel for the sole purpose of contesting jurisdiction. Thereafter she perfected an appeal to the Court of Appeals of Indiana upon the ground that the Circuit Court of Indiana did not have in personam jurisdiction over the wife, the minor child, or the personal property located in Nebraska. The Court of Appeals of Indiana agreed. On February 23, 1978, the Circuit Court of Hendrix County, Indiana, in accordance with the mandate of the appellate court, entered an amended judgment and decree of dissolution which essentially dissolved the marriage of the parties, awarded the husband an automobile, and any other personal property except property in which the wife had any interest.

On March 23, 1978, the wife filed a second amended petition in the action pending in the District Court for Sarpy County, Nebraska, and summons was again personally served on the husband. The amended petition alleged the entry of a dissolution of marriage decree in Indiana, and prayed for custody of the minor child, child support, property division, alimony, and attorney's fees, including those incurred in the Indiana proceeding. Thereafter the District Court for Sarpy County, Nebraska, entered judgment awarding the wife the custody of the minor child, subject to reasonable visitation rights in the husband; directed the husband to pay the sum of $150 per month child support with specified reductions for summer visitation periods and provisions for medical and dental expenses; awarded the wife the personal property in her possession, including approximately $1,300 in United States government Series E bonds and a 1975 Matador automobile; and directed the husband to pay the indebtedness against

the car. The court also awarded the wife the sum of $2,500 gross alimony, payable $50 per month, and ordered the husband to pay $2,000 attorney's fees to her Nebraska attorney and costs of the action.

On appeal to this court the husband now contends that the District Court in Nebraska had no authority to award any attorney's fees incurred in the Indiana proceeding, and that the attorney's fees awarded to the wife's Nebraska counsel were excessive. The husband also contends that the division of property and alimony award were unreasonable.

Indiana counsel for the wife testified at the Nebraska trial that the reasonable value of the legal services for the wife in the Indiana court proceedings, including costs advanced, was $4,578, no part of which had been paid. The District Court made no award or allowance for any Indiana attorney's fees. The court, however, indicated that the alimony award and the award of the savings bonds to the wife might be sufficient to cover such indebtedness.

Unquestionably the court had authority to make a property division which took into account indebtedness reasonably incurred by the wife during the pendency of the proceedings and prior to final disposition. The evidence also established that the wife was employed as a waitress with a gross pay of $432.19 a month, while the husband was a staff sergeant in the Air Force with gross pay of $928.34 per month, who was contemplating retirement in the near future and commencement of a teaching career.

The fixing of alimony or distribution of property, rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal. Phillips v. Phillips, 200 Neb. 253, 263 N. W. 2d 447. The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.

This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466. The award of alimony and the division of property in the present case were not patenty unfair on the record, nor was there any abuse of discretion on the part of the trial court.

Finally, the husband contends that the attorney's fees awarded to the wife in the Nebraska proceeding were excessive. An award of attorney's fees in an action for dissolution of marriage involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Pfeiffer v. Pfeiffer, 203 Neb. 137, 277 N. W. 2d 575. The record in the present case shows that the legal services involved on the part of Nebraska counsel extended over a period of more than 2 years and involved interrogatories, motions, hearings, and correspondence and consultation with Indiana counsel during the pendency of the Indiana proceedings. The trial court was fully aware of the nature and extent of the services and carefully considered the evidence. The $2,000 fee allowed was ample, but we cannot say there was an abuse of discretion in setting the fee.

The judgment of the District Court is affirmed. Each party shall pay his or her own attorney's fees in this court.

AFFIRMED.

NELLIE SCHEIBEL, APPELLEE, V. RALPH SCHEIBEL, APPELLANT.

284 N. W. 2d 572

Filed October 23, 1979. No. 42499.

Divorce: Child Support. In the absence of evidence that a person ordered to pay child support was materially prejudiced, subsequent remarriage of the parties will not operate to bar enforcement of the order.

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

Jacobsen, Orr & Nelson, for appellant.

Ross, Schroeder & Fritzler, for appellee.

Heard before KRIVOSHA, C.J., BRODKEY, WHITE, and HASTINGS, JJ., and HOWARD, District Judge.

WHITE, J.

This is an appeal from an order denying a motion to quash a writ of execution. We affirm.

Appellant, Ralph Scheibel, and appellee, Nellie Scheibel, were divorced on April 30, 1958. The decree provided that appellant, Ralph Scheibel, should pay to appellee the sum of $25 per month for the support of the minor child of the parties. On September 28, 1964, the parties were remarried and subsequently again divorced on January 15, 1973. The parties agree that the sum of $1,875 of the child support due between the date of the first divorce and subsequent remarriage was unpaid. The parties concede that no part of the amount is outlawed by section 42-371 (2), R. R. S. 1943.

The appellant assigns as error the court's failure to determine that the claim of the appellee was unenforceable and barred by the doctrine of laches. With the exception of copies of the two decrees of divorce, a matrimonial certificate, and a stipulation in which the dates of the divorce, remarriage, and subsequent divorce appear, no evidence was introduced.

"Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced - an inequity founded upon some change in the condition or relation of the parties." Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618. The question is, then, whether the subsequent remarriage of parties operates as a matter of law, independent of any other circumstances, to automatically bar any action for child support not paid between the time of the first decree of divorce and the subsequent remarriage. We decline to so hold. Laches has been defined as a neglect to assert a right under such circumstances and for such a length of time as, when not induced by fraud or otherwise shown to be justified, will lead a court of equity to refuse its aid. Smith v. Smith, 168 Ohio 447, 156 N. E. 2d 113.

Delay in asserting a right does not of itself constitute laches and in order to successfully invoke the equitable doctrine of laches, it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim. Smith v. Smith, *supra*.

In the absence of any evidence whatever that the appellant was materially prejudiced by the delay in the assertion of the claim for support, we decline to hold that the remarriage of the parties will operate as a matter of law to prohibit the party for whose benefit the support was ordered from instituting action to collect the arrearages.

AFFIRMED.

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

284 N. W. 2d 573

Filed October 23, 1979. No. 42631.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

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

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The defendant appeals from a sentence to life imprisonment for second degree murder in the death of his wife. The sole issue is whether the sentence was excessive.

The defendant was originally charged with first degree murder. Pursuant to a plea bargain, an amended information was filed and the defendant entered a plea of guilty to second degree murder. After a hearing pursuant to section 29-2027, R. R. S. 1943, the trial court found the defendant guilty of murder in the second degree. The defendant was then committed to the penal complex for evaluation and a presentence report was prepared. Finally, a sentencing hearing was held at which the defendant was sentenced to life imprisonment.

The record shows the defendant shot his wife at about 2:30 a.m., on July 10, 1978, at their apartment in Lincoln, Nebraska. Police investigation indicated the victim had been shot at close range with a .22 caliber rifle while seated in a chair. The autopsy report describes some 22 wounds on the right side of her body. Twelve bullets were recovered from her body.

The defendant is 31 years of age with no prior criminal record. He has a college education and a satisfactory employment record. He has a history of alcoholism and serious emotional instability. The defendant had been drinking at the time the killing occurred and the record indicates the killing was an intentional and deliberate act.

The defendant contends that the sentence should be reduced to a definite term because of his age and education, his social background, and his lack of a prior criminal record. Under the circumstances in this case we do not consider these to be mitigating factors. The trial court found that a lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law. The trial court further found that the defendant was in need of prolonged correctional treatment. The record fully supports these findings.

The defendant argues that he is an excellent candidate for rehabilitation and reformation. While this may be questionable in view of his past behavior, the State points out that for purposes of parole the sentence imposed is equivalent to an indeterminate sentence with the statutory minimum as the minimum term. See State v. Thompson, 189 Neb. 115, 201 N. W. 2d 204.

We find the sentence to be not excessive. The judgment of the District Court is affirmed.

AFFIRMED.

EDDIE ADDISON, APPELLANT, V. ROBERT PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

284 N. W. 2d 574

Filed October 23, 1979. No. 42665.

Criminal Law: Habeas Corpus: Prisoners. An application for a writ

of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisioner is confined.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Roger C. Lott, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Petitioner's application for a writ of habeas corpus was dismissed by the District Court for lack of jurisdiction. Petitioner appeals.

In his application petitioner alleged he had been convicted of various felonies in the District Courts for Sheridan, Dawes, and Scotts Bluff Counties, Nebraska, and the Circuit Court of Pennington County, South Dakota, and three additional felonies in the District Court for Sheridan County, each resulting in enhanced sentences under the habitual criminal statute, section 29-2221, R. R. S. 1943, based on his prior convictions set forth above. He further alleged that his convictions as to the habitual criminal counts were void because the multiple use of the same past convictions constitutes double jeopardy and cruel and unusual punishment, so as to deprive him of due process of law and equal protection of the laws. In addition, he attached to his application, as exhibits, motions to vacate judgments and sentences relating to District Court for Sheridan County cases, Nos. C-1406, C-1407, and C-1443, and District Court for Dawes County case No. 10161 generally on grounds of incompetent counsel. There is no way to determine from the record whether these latter cases are the same ones referred to in his application.

He asked that respondent show cause why petition-

er's custody by him was not illegal and that upon hearing petitioner be discharged from respondent's custody.

On February 6, 1979, the trial judge wrote to the petitioner stating that he assumed "that but one case is to be filed which is the Application for a Writ of Habeas Corpus, and that the four 'Motions to Vacate and Set Aside Judgment and Sentence Entered Herein' are to be attached as exhibits to that application." He went on to advise that the application would be taken up the morning of February 14, 1979. Petitioner did not respond to Judge Moran's letter, but at the hearing an attorney appeared simply as an observer to report to the petitioner. The county attorney appeared and objected to the court's jurisdiction.

It is apparent from the application that both petitioner and respondent were at all times residing in Lancaster County, the one as an inmate at and the other as the warden of the Nebraska Penal and Correctional Complex. In Gillard v. Clark, 105 Neb. 84, 179 N. W. 396 (1920), we said: "We are therefore of the opinion that an application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. * * * And where proceedings are instituted in another county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings."

The trial court was correct in dismissing this application for lack of jurisdiction and its action in so doing is affirmed, but without prejudice to the petitioner to institute post conviction relief proceedings in the proper manner if he so desires.

AFFIRMED.

MARGARET D. WEEKS, APPELLANT, V. STATE BOARD OF EDUCATION OF THE STATE OF NEBRASKA ET AL., APPELLEES.

284 N. W. 2d 843

Filed October 30, 1979. No. 42325.

1. **Administrative Law: Statutes.** Administrative rules and regulations as defined by section 84-901 (2), R. R. S. 1943, of an administrative agency are not effective until promulgated, approved, and filed as required by statute.
2. **Evidence: Appeal and Error.** Evidence which does not appear in the record cannot be considered by this court on appeal.
3. **Administrative Law: Statutes.** Contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. § 84-901 (3), R. R. S. 1943.
4. **Statutes: Appeal and Error.** The availability of an appeal under the provisions of section 84-917 (1), R. R. S. 1943, does not prevent resort to other means of review, redress, or relief provided by law.
5. **Property: Due Process.** Where a public employee has a property interest in continued employment he cannot be deprived of that interest without a due process hearing. However, whether or not such a property interest exists is determined by state law.

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

Steven D. Burns of Noren and Burns, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This action originated from a grievance filed by the appellant, Margaret D. Weeks, against her employer, the State Department of Education. Weeks sought promotion to the position of supervisor of the Right to Read program. The position was filled by another woman not previously employed by the department. After a hearing before the State Board of

Education under procedural rules promulgated by that board, Weeks was denied both the promotion and the alternative relief she sought, an equivalent position together with pay benefits retroactive to December 29, 1976. Weeks appealed from the denial by the Board, purportedly under the provisions of the Administrative Procedure Act, to the District Court for Lancaster County. That court denied relief and issued a memorandum opinion giving various reasons for the denial.

Weeks has appealed to this court and makes the following contentions: (1) As an employee of the State Department of Education at the time the vacancy opened, she had a property interest in and entitlement to promotional opportunities under the provision of section II, C-3 of the personnel manual of the State Department of Education. This provision allegedly gave her a preferential right to the promotion over persons not then employed by the department. (2) She had a property interest in and a right to promotion under the Affirmative Action Plan promulgated by the department and was the victim of discrimination contrary to the provisions of the Affirmative Action Plan. (3) She was, under the Fourteenth Amendment to the United States Constitution, entitled to and did not receive due process in that a notice required by the above section of the personnel manual was not given to her. (4) The findings made by the State Board of Education were not sufficient to satisfy the requirements of section 84-915, R. R. S. 1943. (5) The various reasons given by the District Court for its decision were without merit. Included among these reasons was a finding that the policies purportedly established by the personnel manual were unconstitutional and in violation of public policy and Article VII, section 4, of the Nebraska Constitution, which section grants the State Board of Education power to appoint all employees of the State Department of Education

upon recommendation of the Commissioner of Education.

The Board defends on various grounds, including the following: (1) The matter before the Board was not a "contested case" as defined by section 84-901 (3), R. R. S. 1943, and therefore was not entitled to be appealed to the District Court on the provisions of section 84-917 (1), R. R. S. 1943. (2) The "rules" of the personnel manual were not shown to have been properly promulgated under the Administrative Procedure Act, were not offered or received in evidence, and are not contained in the bill of exceptions to this court. Furthermore, the rules in question are rules for internal management of the department and not rules and regulations within the meaning of the Administrative Procedure Act. (3) The Affirmative Action Plan of the department prohibits discrimination in employment, promotion, etc., only where such discrimination is founded on political or religious opinions or affiliations, race, age, sex, national origin, or physical disability. The record contains no evidence whatever that Weeks was the victim of discrimination in any of these respects.

We affirm the denial of relief to Weeks by the Board and the District Court, but in so doing approve only the results of the District Court's judgment and not its rationale.

The personnel manual rule upon which Weeks bases her claim to a property interest in a promotion does not appear in the bill of exceptions; nor was it offered or received in the District Court. It is not contended that the personnel manual was ever promulgated, approved, and filed in accordance with the provisions of the Administrative Procedure Act. §§ 84-902, 84-904, 84-905, 84-905.01, 84-906, R. R. S. 1943. If we assume, for the purposes of this appeal, that the contents of the personnel manual were rules and regulations within the meaning of section

84-901 (2), R. R. S. 1943, and not mere regulations for the internal operation of the department as the Board contends (a determination we need not make), then such rules did not become operative because they were not properly promulgated, approved, and filed. Administrative rules and regulations as defined by section 84-901 (2), R. R. S. 1943, of an administrative agency are not effective until promulgated, approved, and filed as required by statute. School Dist. No. 228 v. State Board of Education, 164 Neb. 148, 82 N. W. 2d 8.

Weeks contends that the personnel manual was a part of her employment contract. Brady v. Board of Trustees of Nebraska State Colleges, 196 Neb. 226, 242 N. W. 2d 616. If that be the case, then proof thereof was a matter of evidence and the manual should have been offered in evidence and included in the bill of exceptions. Evidence which does not appear in the record cannot be considered by this court on appeal. Hanson v. Hanson, 198 Neb. 675, 254 N. W. 2d 699; Lanc v. Douglas County Welfare Administration, 189 Neb. 651, 204 N. W. 2d 387.

The Board argues this case is not properly before the court for the reason that an appeal from the action of the State Board of Education under the provisions of the Administrative Procedure Act was not available because this is not a "contested case." Section 84-901 (3), R. R. S. 1943, provides: "Contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." We need not decide whether or not the requirements for appeal of a contested case were satisfied. Weeks' petition in the District Court, together with process issued and served thereon, clearly satisfied the requirements of an action for a declaratory judgment. The District Court had jurisdiction to determine the rights of the parties under Weeks' contract of em-

ployment, which Weeks claims included, as a result of provisions of the personnel manual, the preferential right to the promotion previously mentioned. The availability of an appeal under the provisions of section 84-917 (1), R. R. S. 1943, does not prevent resort to other means of review, redress, or relief provided by law. We hold, therefore, the District Court and this court acquired jurisdiction and we treat the case as one for a declaratory judgment. See Brady v. Board of Trustees of Nebraska State Colleges, *supra*.

Underlying Weeks' claim to due process are the holdings of the Supreme Court of the United States in Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548; Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570; and Bishop v. Wood, 426 U. S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684. These cases hold that where a public employee has a property interest in continued employment he cannot be deprived of that interest without a due process hearing. However, whether or not such a property interest exists is determined by state law. Bishop v. Wood, supra. In Nebraska, such a property interest may arise from the terms of the employment contract or from employment policies, rules, and regulations which have become a part of the contract of employment. Brady v. Board of Trustees of Nebraska State Colleges, *supra*.

Weeks cites no cases in which we, or any other court, have had occasion to consider a preferential right to promotion as such a property interest. We will assume, for purposes of this appeal, that it is possible such an interest may arise. The proof in this case, however, does not permit such an interest to be found. Insofar as the provisions of the personnel manual are concerned, there was no proof either before the State Board of Education or the District Court and such evidence is not before this court. Weeks has clearly failed to prove any right arising

from the provision of the personnel manual. In fact, the record is clear that although the written grievance which she filed before the Board made reference to both the provisions of the personnel manual and the written Affirmative Action Plan which had been adopted by the Board, only the document establishing the Affirmative Action Plan was offered. All of the other evidence received was directed at establishing a right claimed under that plan.

An examination of the Affirmative Action Plan clearly indicates it was intended to eliminate discrimination in employment on account of political or religious opinion or affiliation, race, age, sex, national origin, or physical disability. The policy was enacted pursuant to Title IX, Equal Employment Opportunity Act—Education Amendment, 1972, and was directed solely to discrimination of the above types. The Affirmative Action Plan clearly does not purport to grant any preferential rights to present employees solely on the basis of present employment. The record does not contain any hint that hiring a female not previously employed by the department rather than giving a promotion to Weeks was based upon any of the discriminatory factors listed in the policy. Weeks has failed to prove any property interest in a promotion. The judgment is affirmed.

AFFIRMED.

HIGH-PLAINS COOPERATIVE ASSOCIATION, APPELLANT, V. JERRY L. STEVENS, APPELLEE.

284 N. W. 2d 846

Filed October 30, 1979. No. 42359.

1. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different from that which was claimed due.

2. **Accord and Satisfaction.** The acceptance of the substituted performance in full satisfaction of the claim discharges the indebtedness.
3. _____. It is essential that there be a bona fide dispute between the parties, that the substituted performance be tendered in full satisfaction of the claim, and that the tendered performance be accepted.
4. **Accord and Satisfaction: Words and Phrases.** An executed compromise settlement of a good faith controversy is an accord and satisfaction.
5. **Trial: Instructions.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence.
6. _____: _____. Where the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form.

Appeal from the District Court for Perkins County: JACK HENDRIX, Judge. Affirmed.

H. L. Jackman and R. H. Roberts and Girard and Gale, for appellant.

Padley, Dudden, Schroeder & Schoon, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

This was a suit on an open account for fertilizer, chemicals, and other agricultural supplies sold to the defendant, Jerry L. Stevens, by the plaintiff, High-Plains Cooperative Association. The jury returned a verdict for the defendant and the plaintiff has appealed. The principal assignments of error relate to the sufficiency of the evidence to sustain the verdict, an evidentiary ruling by the trial court, and the instructions to the jury.

The evidence shows that the defendant farms near Grant, Nebraska. Since sometime in the late 1960's the defendant has done business with the plaintiff. In December 1975, the manager of the plaintiff, Robert Ryland, talked to the defendant about purchasing all of his fertilizer and chemicals for the 1976 season

from the plaintiff. As an inducement to the defendant, Ryland told the defendant that if the purchases were "booked" in 1975, the defendant would receive a cash dividend in 1976 from the materials used during that year. The defendant finally agreed to a "booking" in the amount of $52,000, which represented chemicals and fertilizer purchased by the defendant to be delivered by the plaintiff in 1976.

Starting in August or September 1976, Ryland asked the defendant for a payment on his account. The defendant claimed that he had not received itemized statements of his account and asked for such a statement. During this time the defendant had submitted several claims against the plaintiff. The plaintiff had submitted the claims to its insurance carrier, which had refused payment. On November 18, 1976, and again on January 11, 1977, the defendant and Ryland had a conversation at Ryland's office concerning the account and some of the matters which the defendant was complaining about.

On January 18, 1977, the defendant delivered a 4-page letter and check in the amount of $25,000 to Ryland. The letter discussed the complaints which the defendant had against the plaintiff and stated that the check was to be used for "complete settlement" of the defendant's accounts with the plaintiff. The plaintiff cashed the check and applied $10,271.90 of the proceeds to pay the defendant's Southwestern Farms, Inc., account in full and applied the balance of $14,728.10 to the defendant's account in his own name. This action was commenced on February 3, 1977. The plaintiff claimed the defendant was indebted to it in the amount of $61,959.58.

The principal issue is whether the $25,000 payment to the plaintiff on January 18, 1977, was an accord and satisfaction that discharged the defendant's debt to the plaintiff. An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different

from that which was claimed due. The acceptance of the substituted performance in full satisfaction of the claim discharges the indebtedness. Farmland Service Coop., Inc. v. Jack, 196 Neb. 263, 242 N. W. 2d 624. It is essential that there be a bona fide dispute between the parties, that the substituted performance be tendered in full satisfaction of the claim, and that the tendered performance be accepted. An executed compromise settlement of a good faith controversy is an accord and satisfaction.

The evidence shows that there were a number of disputed items between the parties. The defendant claimed that Ryland, the plaintiff's manager, had told him that his cash dividend in 1976 would be approximately $20,000. The actual dividend which was applied to the account was less than $3,000. The defendant further claimed that a large part of the fertilizer, which the plaintiff claimed had been delivered to the defendant and applied to his fields, had in fact not been delivered. The defendant also claimed that the plaintiff did not furnish and apply chemicals to his fields in accordance with their agreement; that some were never applied and the defendant had to make other arrangements; and that others were applied improperly or at the wrong time, with the result that the defendant had to hire hand labor to weed some of the fields. The defendant made adjustments to the account for these items and arrived at the $25,000 figure which he tendered to the plaintiff on January 18, 1977.

The letter delivered with the check stated plainly in the first paragraph that the check was to be used in complete settlement of the defendant's accounts to the plaintiff. It is undisputed that the plaintiff accepted the check, cashed it, and appropriated the proceeds.

In regard to the authority of Ryland to accept a compromise settlement of a disputed account, there was evidence that soon after Ryland had been em-

ployed as manager by the plaintiff he had negotiated the settlement of a disputed account with the defendant.

The evidence was conflicting and there were many questions of fact to be resolved by the jury. The defendant's evidence was sufficient, if believed, to permit the jury to find that the defendant's indebtedness to the plaintiff was discharged by the $25,000 payment and that Ryland had at least apparent authority to bind the plaintiff to the settlement.

The evidentiary rulings in dispute concerned an attempt by the plaintiff to cross-examine the defendant as to whether an attempt to settle an $86,959.58 debt for $25,000 was unconscionable. The questions were argumentative in nature, the defendant having already testified as to how he computed the amount he believed he owed the plaintiff. The rulings in question were not erroneous.

In instruction No. 2 the trial court summarized the issues and advised the jury concerning the burden of proof. The instruction stated in part that before the plaintiff could recover it must prove that during the period from May 24, 1975, to January 29, 1977, the plaintiff sold and delivered various goods and fertilizer to the defendant; that the selling and delivering were furnished under circumstances that raised an implied promise that the plaintiff would receive compensation therefor; the fair and reasonable value, if any, of any selling and delivering of goods and fertilizer; and the amount, if any, now due and unpaid for such selling and delivering.

The plaintiff contends that instruction No. 2 was erroneous because, if the plaintiff failed to prove any necessary element as to any item in the account, the jury was required to return a verdict against the plaintiff as to the entire account. The instruction was not subject to that construction. In effect, the jury was advised it must find the fair and reasonable value of the goods sold and delivered to

the defendant by the plaintiff. There was no direction that the plaintiff could not recover anything unless each item claimed was proved in full.

Instruction No. 8 defined accord and satisfaction. The jury was advised that in order for there to have been an accord and satisfaction there must have been a bona fide dispute over the amount claimed, followed by a meeting of the minds in which the parties intended and agreed that the payment and receipt of the check for $25,000 would be in full consideration for, and satisfaction and payment of, the account, and that in pursuance of the agreement the check was so paid and received. The plaintiff contends that the instruction was erroneous because it failed to instruct the jury with regard to the rule as to an account stated. A requested instruction submitted by the plaintiff stated in part that an account rendered which is not objected to within a reasonable time is regarded as correct.

The evidence in this case shows that the statements submitted to the defendant included the $52,000 booking, although it was understood by the parties that in fact some items included in this amount were not delivered to the defendant. In attempting to prove its case the plaintiff resorted to weight tickets, applicator reports, and other documents which had never been furnished to the defendant. The plaintiff conceded that the defendant was entitled to a credit in excess of $6,000 against the booking. The evidence in this case would not sustain a finding of an account stated and the trial court was not required to instruct in that regard. See, also, B. C. Christopher & Co. v. Danker, 196 Neb. 518, 244 N. W. 2d 79.

The plaintiff further contends that the instruction was erroneous because it failed to advise the jury as to what would not be an accord and satisfaction. The plaintiff requested a number of instructions to that effect which were refused. It is the duty of the

trial court to instruct the jury upon the issues presented by the pleadings and the evidence. In this case it was the duty of the trial court to instruct the jury as to the elements of an accord and satisfaction. This was done by instruction No. 8. There was no duty to instruct the jury as to what would not be an accord and satisfaction. See 88 C. J. S., Trial, § 303, p. 819. Where the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form.

We have considered the other assignments of error and find that they have no merit.

The judgment of the District Court is affirmed.

AFFIRMED.

DONNA F. FOREMAN WATTERS, APPELLANT, V. GEORGE ELLIS FOREMAN, APPELLEE.

284 N. W. 2d 850

Filed October 30, 1979. No. 42393.

1. **Divorce: Decrees: Alimony.** Where the parties by their agreement in writing, or the court by its decree, provide that a specific amount of alimony shall be paid for a specific period of time, and shall terminate only upon the occurring of a specific event set out in the agreement or decree and otherwise shall not be subject to amendment or revision, the payment of such alimony shall terminate only upon the happening of the event set out in the agreement or decree. Under such circumstances the remarriage of a party receiving alimony shall not cause the alimony to terminate, absent a specific provision in the agreement or decree to such effect, and the use of the word "remarriage" is not necessary.
2. **Trial: Summary Judgments.** Where there exists no genuine issue of a material fact and a litigant is entitled to judgment as a matter of law, it is error for the trial court to overrule the litigant's motion for summary judgment.

Appeal from the District Court for Madison Coun-

ty: EUGENE C. MCFADDEN, Judge. Reversed and remanded with directions.

Martin A. Cannon of Matthews & Cannon, P.C., for appellant.

Dennis P. Hogan III of Gaines Otis Mullen & Carta, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

The appellant herein (Watters) appeals from a judgment of the District Court for Madison County, Nebraska, entered by District Judge Eugene McFadden, which sustained the appellee's (Foreman) motion for summary judgment and denied Watters' motion for summary judgment. We have examined the files and records in this case and have concluded that the trial court was in error in sustaining Foreman's motion for summary judgment and denying Watters' motion for summary judgment, and therefore reverse the action of the trial court and remand the proceeding to the District Court for Madison County with directions to enter summary judgment in favor of Watters and against Foreman.

The issue in this appeal is whether, under the provisions of section 42-365, R. R. S. 1943, the remarriage of Watters results in a termination of alimony provided for by the trial court's decree. We think the record is clear as a matter of fact that only the death of Watters could terminate the payment of alimony and that as a matter of law Watters remains entitled to receive payment notwithstanding her subsequent remarriage.

The evidence discloses that on May 23, 1974, after 33 years duration, the marriage between Watters and Foreman was dissolved. The decree entered by District Judge George Dittrick recited in part: "That the stipulation and agreement entered into by

the parties in open court is fair and reasonable and should be approved, allowed and incorporated in this Decree." The record before the court does not fully disclose what was the stipulation and agreement entered into by the parties, but presumably it is in part what was thereafter reflected in the decree.

The decree provided that Watters should be awarded the sum of $18,500 "in full and complete settlement of all property rights of said petitioner in the property of the parties, save and except such as is awarded to her herein." She likewise received a 1973 Cadillac, free and clear of all encumbrances, and the household furniture and fixtures in her possession, as well as her own personal property. All other property of the parties, whether real, personal, or mixed, was awarded to Foreman, except with regard to the interest the parties had in property in Mexico, which is not otherwise described in the decree. With regard to the property in Mexico, real, personal, and mixed, it was to be assigned equally to the parties. Foreman was likewise ordered to pay Watters' attorney the sum of $5,000. The awarding of such a fee in a noncontested case raises some presumption that the value of the marital estate was considerable, and that an award of $18,500, a 1973 Cadillac, and household goods not otherwise described would be considerably less than a fair and equitable division of the marital estate of the parties. The deposition of Foreman, taken on April 7, 1978, and considered by the trial court in its ruling on the two motions for summary judgment, indicates, by Foreman's own admission, the existence of a marital estate in excess of $200,000 at the time of the dissolution of the marriage.

The provision of the decree which causes the difficulty herein is paragraph 6, which provides: "That said Respondent [Foreman] shall pay to said Petitioner [Watters] the sum of $1,000.00 monthly for a period of 10 years and 1 month, which payments

shall commence on the first day of July, 1974, and shall continue for 121 consecutive monthly payments upon like day of each month, which includes the first payment, which payments shall cease upon the death of said Petitioner [Watters] prior to the making of all of such payments, which payments shall be for the support and maintenance and as alimony for said Petitioner [Watters], and in the event of the death of said Respondent [Foreman], the personal representative of said deceased Respondent [Foreman] shall continue to make such payments during the period herein provided, all of which payments shall be deductible by said Respondent [Foreman] for income tax purposes and shall be includable in taxable income of said Petitioner [Watters], *and said provisions for alimony and property settlement are final and complete and not subject to revision or amendment.*" (Emphasis supplied.)

Thereafter, on October 1, 1977, Watters remarried. On November 30, 1977, Foreman filed an application in the District Court for Madison County, Nebraska, alleging that Watters had remarried and that therefore, pursuant to the provisions of section 42-365, R. R. S. 1943, all further alimony payments should terminate. Section 42-365, R. R. S. 1943, provides in part as follows: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." Foreman argues that the requirements of section 42-365, R. R. S. 1943, are absolute and self-executing, and therefore as a matter of law, Watters having remarried, the order for alimony must terminate. It was apparently on that basis that the trial court granted the motion for summary judgment.

Foreman's position would be well taken were it not for the introductory language of the pertinent portion of section 42-365, R. R. S. 1943, which provides: "Except as otherwise agreed by the parties

in writing *or by order of the court* * * *." (Emphasis supplied.)

As reflected by its introductory language, the decree ordered by the court appears to reflect the intention of the parties. Watters maintains that the intention of the parties and the order of the court are to the effect that neither party could seek to have the decree revised or modified as to alimony and that only the death of Watters could relieve Foreman from paying Watters $1,000 per month for 121 months. Nothing else, including her remarriage, could result in a revision or amendment. We believe a clear reading of the record and the decree supports that view as a matter of law.

The central question which must be addressed in reviewing this matter relates to the trial court's direction in the decree that the "provisions for alimony and property settlement are final and complete and not subject to revision or amendment." The provisions with regard to the payment of $18,500, the Cadillac, the household goods, and the property in Mexico could not be subject to revision or amendment. The payment of money and the division of property were to be made forthwith and were not subject to revision. The only item remaining which could be subject to later amendment or revision was the provision for installment payments in paragraph 6 of the decree; and with regard to those payments, the court specifically ordered it was to be "final and complete and *not subject to revision or amendment.*" (Emphasis supplied.)

Can the exception to section 42-365, R. R. S. 1943, regarding remarriage, take effect only if the word "remarriage" is used, or can we look to the entire document? We think the use of the word "remarriage," while desirable and helpful, is not absolute. The language used in the decree undoubtedly could have been clearer, yet any other conclusion than that reached by our decision herein would render

the language meaningless. In view of the words used, we can only presume the court intended that the payments provided for by paragraph 6 of the decree were to remain absolute and constant for 121 months, subject to termination only in the event of Watters' death. That is the clear meaning of paragraph 6, and it is sufficient to bring the decree within the exception to section 42-365, R. R. S. 1943, regarding remarriage.

Foreman argues that, having failed to specifically spell out the exceptions to section 42-365, R. R. S. 1943, the parties in the first instance and the court by its decree intended to incorporate the termination provisions of section 42-365, R. R. S. 1943. The language of the decree, however, will not support that view. In the absence of contrary language, *both* happenings, the death *or* the remarriage of the spouse awarded alimony, cause the alimony to terminate. In this decree it was provided that the death of Watters *would* cause the alimony to terminate. Nothing was said about remarriage, and the decree further provided that the ordered payments, *except* in the event of Watters' death, were not to be modified or amended.

Had the court intended to subject the decree to the provisions of section 42-365, R. R. S. 1943, *both* as to death *or* remarriage, it would not have been necessary to say anything about death. Section 42-365, R. R. S. 1943, would have taken care of that situation, just as it would have taken care of remarriage. However, by including *only* the death provision of section 42-365, R. R. S. 1943, and otherwise prohibiting any other act from modifying or amending the decree, it appears clear beyond question that the trial court intended that *only* death could terminate the required payments.

Other courts that have been called upon to review similar language have in fact reached such a conclusion. In the case of Rheuban v. Rheuban, 238 Cal.

App. 2d 552, 47 Cal. Rptr. 884, the court was called upon to examine a decree almost identical to the decree involved in the instant case. The California decree, after setting out its various provisions, provided: "It is intended by the parties that these terms and provisions for the support and maintenance of First Party shall forever remain fixed as set forth herein and shall not be subject to change or modification except as may be set forth herein. In this regard, First Party now and forever waives any future right to any change or modification of the provisions for her alimony and support, and the Second Party likewise joins in the waiver of any rights to so change or modify same." The agreement further provided that the decree was to survive the death of the husband. No mention was made with regard to remarriage. Section 139 of the California Civil Code reads in part as follows: "Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party." In holding that the quoted language was sufficient to satisfy the statutory requirement, the California court said: "The agreement now before us says, as clearly as words could say, that it was the definite intention of the parties that the payments provided for by paragraph II should continue for the full 128 months agreed upon, no matter what happened. Unless we are to hold that the application of section 139 can be obviated only by an agreement which not only is in writing but which uses a magical formula that includes the exact words 'remarriage' and 'death,' the language used by the Rheubans is sufficient to show that (in the words of the opening clause of the statutory paragraph relied on) they had 'otherwise agreed.' We can see no reason why, if the intent of the parties is clear, any particular words should be

required to accomplish their purpose; the agreement here complied with the statutory requirement." To similar effect, see, In re Marriage of Nicolaides, 39 Cal. App. 3d 192, 114 Cal. Rptr. 56.

We likewise conclude that an examination of the court's decree discloses that the provision for support payments was intended to continue at $1,000 per month for 121 months, regardless of whether the wife remarried. Where the parties by their agreement in writing, or the court by its decree, provide that a specific amount of alimony shall be paid for a specific period of time, and shall terminate only upon the occurring of a specific event set out in the agreement or decree and otherwise shall not be subject to amendment or revision, the payment of such alimony shall terminate only upon the happening of the event set out in the agreement or decree. Under such circumstances the remarriage of a party receiving alimony shall not cause the alimony to terminate, absent a specific provision in the agreement or decree to such effect, and the use of the word "remarriage" is not necessary. Watters was entitled as a matter of law to have judgment entered in her favor, finding that her remarriage did not cause her alimony to terminate. Where there exists no genuine issue of a material fact and a litigant is entitled to judgment as a matter of law, it is error for the trial court to overrule the litigant's motion for summary judgment. § 25-1332, R. R. S. 1943; Dougherty v. Commonwealth Co., 172 Neb. 330, 109 N. W. 2d 409. We accordingly reverse the decision of the trial court in granting appellee's motion for summary judgment and remand the cause to the District Court for Madison County, Nebraska, with directions to enter summary judgment for the appellant, finding as a matter of law that her remarriage does not terminate appellee's obligation to make payments

pursuant to paragraph 6 of the decree entered on May 23, 1974.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion. Section 42-365, R. R. S. 1943, provides that alimony orders shall *terminate* upon the death of either party or remarriage of the recipient, except as otherwise agreed by the parties in writing or by order of the court. The majority opinion holds that, in this case, the order directed "otherwise" in the case of remarriage by using the language, "and said provisions for alimony and property settlement are final and complete and not subject to revision or amendment."

The language of the statute is the "alimony orders shall terminate." This indicates to me that the statute is self-executing, and the obligation to pay ends by operation of law when the event occurs, in this instance, remarriage of the recipient. No action by the court is necessary for the termination to take place. An order of the court "otherwise" in an alimony decree should be specific and in clear terms negate the specific condition or conditions which do not operate to terminate the obligation. In this case the decree did not mention remarriage as an occurrence which would not operate to terminate the alimony obligation. It used the terms, "final and complete and not subject to *revision* or *amendment*." (Emphasis supplied.) Further, the quoted language refers not only to alimony, but to property settlement as well. Section 42-365, R. R. S. 1943, obviously does not pertain to property settlements. Revision and modification are terms related to court action and clearly do not refer to "termination" by operation of law. It is not difficult to draw an unambiguous decree. How the language the court used in this case permits a summary judgment to be entered for

the appellant is beyond my understanding. I would affirm the judgment of the District Court.

CREDIT BUREAU OF BROKEN BOW, INC., A CORPORATION, APPELLANT, V. JOHN V. MONINGER ET AL., APPELLEES.
284 N. W. 2d 855

Filed October 30, 1979. No. 42435.

1. **Security Interest: Liens.** An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest and before it is perfected.
2. **Property: Liens: Execution.** A lien on personal property is acquired at the time it is seized in execution.
3. **Property: Execution.** A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that he in express terms asserts his dominion over it by virtue of such writ.
4. **Property: Execution: Notice.** Notice of a purported interest claimed by a third party given by a debtor to a sheriff when he was proceeding to attach or to levy upon property is not notice to the creditor for whom the levy is made.
5. **Motor Vehicles: Liens.** One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Reversed and remanded.

Joseph E. Twidwell of Johnson, Spencer & Twidwell, for appellant.

Carlos E. Schaper, for appellee Broken Bow State Bank.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

This is an appeal from an order of the District

Court for Custer County which affirmed a judgment entered by the county court of Custer County awarding the proceeds from a sheriff's sale of a 1975 Ford pickup truck to the Broken Bow State Bank (hereinafter referred to as Bank). We reverse and remand.

The facts which give rise to this action are not in dispute. The Credit Bureau of Broken Bow, Inc. (hereinafter referred to as Bureau) obtained a default judgment against John Moninger (hereinafter referred to as Moninger) in the amount of $1,518.27 on October 20, 1977. No appeal was taken from this judgment. On May 16, 1978, Moninger renewed his prior note to the Bank in the amount of $2,144.74. The renewed note was to be secured by a security agreement on feeder pigs and a 1975 Ford pickup owned by Moninger, but no security agreement was entered into at that time. On June 27, 1978, at the request of the Bureau, a writ of execution was issued on its judgment in the amount of $1,338.50, the balance remaining due on the judgment.

The deputy county sheriff who received the writ examined the motor vehicle title records on July 7, 1978, to determine if a lien existed as of that date on the pickup owned by Moninger. Finding no encumbrance of record, the deputy sheriff proceeded to Moninger's place of employment to levy on the vehicle. The deputy sheriff found Moninger, served him with a copy of the writ, and informed Moninger that he was executing on the pickup. Moninger testified he informed the officer that there was money borrowed from the Bank against the pickup, and that the Bank had title to the vehicle. Following this conversation, the officer proceeded to the vehicle, "grabbed ahold of the pickup," and stated: "I execute on the pickup for the County of Custer." The officer did not take possession of the vehicle at that time, nor did he ask for the keys to the vehicle.

On July 10, 1978, after being informed of the events

which occurred on the 7th, the Bank and Moninger executed a security agreement on the vehicle which was then filed. Notation of the security interest was made on the title to the pickup truck that same day. The vehicle was seized by deputy sheriffs on July 13, 1978, and sold at sheriff's sale on August 14, 1978, for $2,050.

The sheriff filed a motion in the county court for a determination of the division of the proceeds from the sheriff's sale. The Bank joined the action by application for the proceeds of the sheriff's sale, basing its claim on its alleged status as a secured creditor. Prior to a hearing on these matters, a stipulation was entered into by all parties whereby this dispute was limited to the distribution of the proceeds of the sheriff's sale, the pickup having previously been sold.

Hearing on the motion and the application was had on August 21, 1978. The county court orally ruled that the deputy sheriff had knowledge of the possible lien against the vehicle as of July 7, 1978; that such notice made any execution subject to the lien; that the vehicle was not ponderous and physical possession could have been taken by the officer; that the notice of the possible lien resulted in a valid lien in the Bank as of July 7, 1978; that the proceeds of the sheriff's sale should go to the Bank; and that the sheriff in making a levy "at that time" (July 7, 1978) used due care and acted properly as a stakeholder.

However, the written order entered by the county court differed in certain respects from the oral ruling at the hearing. By its written order, the county court found that the sheriff was a stakeholder; that a valid levy was not made on the vehicle until July 12, 1978; that the Bank's lien was perfected on July 10, 1978; that the sheriff had notice of the claim to a lien on July 7, 1978; that the knowledge of the sheriff was imputed to the Bureau; that the Bank's lien was prior to the Bureau's lien; and that the proceeds of

the sheriff's sale should be paid to the Bank.

An objection to the written order was filed on September 8, 1978, and hearing was held thereon, contesting the apparent discrepancies therein, particularly as to the date when levy was made on the vehicle. This objection was overruled. Appeal was had to the District Court assigning as error the finding of the county court with regard to the validity of the execution on July 7, 1978, and the failure of the county court to correct the purported conflict between the oral ruling and the written order. After reviewing the bill of exceptions from the county court, the District Court affirmed the judgment of the county court. This appeal followed.

The Bureau first assigns as error the ruling of the trial court which found the Bank's security interest in the vehicle to be superior to the execution lien of the Bureau. Specifically, the Bureau contends that the actions of the deputy sheriff on July 7, 1978, amounted to a valid levy which bound the vehicle for the satisfaction of the Bureau's judgment against Moninger. § 25-1504, R. R. S. 1943. On that date, the Bank held only an unperfected security interest in the vehicle. The Bureau contends that since the levy of execution made the Bureau a lien creditor, and since the lien creditor has an interest superior to that of an unperfected secured party, the trial court was in error in ruling that the Bank had a superior interest in the proceeds.

In effect, the Bureau is relying on section 9-301, U. C. C., which relates to the relative priorities as between unperfected security interests and lien creditors. "[A]n unperfected security interest is subordinate to the rights of * * * a person who becomes a lien creditor without knowledge of the security interest and before it is perfected." § 9-301 (1) (b), U. C. C. The correctness of the Bureau's position turns on two issues: (1) Whether the Bureau was in fact a lien creditor on July 7, 1978; and (2) whether the

Bureau was a lien creditor without knowledge of the Bank's alleged security interest prior to the perfection of such interest by the Bank.

From an examination of the record, we conclude that the Bureau was a lien creditor on July 7, 1978. Section 9-301, U. C. C., defines a lien creditor as "a creditor who has acquired a lien on the property involved by attachment, levy or the like * * *." A lien on personal property is acquired in this state at the time it is "seized in execution." § 25-1504, R. R. S. 1943. Therefore, the Bureau became a lien creditor within the meaning of section 9-301, U. C. C., when the sheriff levied on the vehicle.

The rule by which to test the validity of a levy has been earlier set out by this court. " 'A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that he in express terms asserts his dominion over it by virtue of such writ.' " Battle Creek Valley Bank v. First Nat. Bank of Madison, 62 Neb. 825, 88 N. W. 145 (1901); Boslow v. Shenberger, 52 Neb. 164, 71 N. W. 1012 (1897). See, also, Miller v. Crosson, 131 Neb. 88, 267 N. W. 145 (1936); Meyer v. Michaels, 69 Neb. 138, 95 N. W. 63 (1903). We believe a review of the record makes it clear that a valid levy did occur before the Bank had perfected its security interest in the chattel.

The deputy sheriff expressly asserted his dominion over the vehicle by virtue of the writ. He likewise exerted control over the vehicle as against all others at the time of levy. At that time the deputy sheriff informed Moninger that he was sorry that he had to execute on the vehicle but that it was his job. He further stated that he hoped Moninger would straighten the problem out with the Bureau. It should be noted that the officer's report, as well as the return on the writ, clearly indicated that the of-

ficer "executed" on the vehicle on July 7, 1978. On the basis of this evidence, we conclude that a valid levy took place at that time.

The Bank would have us hold that the pickup should have been physically seized to make the levy valid. We do not believe that failure to take physical possession in this case goes to the validity of the levy. The deputy sheriff did all that was required by the laws of this state with regard to levying under a writ of execution. Whether or not the officer took physical possession after he levied relates to the ability of the officer to produce the property levied on, and to his possible civil liability for failure to do so, not to the validity of the levy. It is, of course, possible that the failure of a levying officer to protect and preserve the property levied upon might give rise to an action between the officer, or his bonding company, and the judgment creditor. In this connection see 33 C. J. S., Executions, § 97, p. 245. We therefore reject the Bank's contention and conclude that the Bureau was a lien creditor on July 7, 1978, by virtue of the deputy sheriff's levy on the writ of execution.

We now turn to the issue of notice and whether the Bureau was a lien creditor without knowledge of the Bank's interest. The Bank would have us hold that the sheriff was placed on notice of its security interest prior to making the levy on the vehicle, and that such notice would be imputed to the judgment creditor, the Bureau. In 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 1, p. 133, it is stated: "Peace officers are agents of the law and ordinarily are not agents of the parties. Thus, a sheriff is not an agent of an execution creditor except for certain purposes, and the latter is bound only by such acts of the sheriff as are within his lawful authority. Nor is he an agent of a party who may purchase at a sale conducted by him." As stated in Riggs v. Gardikas, 78 N. M. 5, 427 P. 2d 894 (1967): " 'Notice by a debtor

to a sheriff when he was proceeding to attach or to levy upon property is not notice to the creditor for whom the levy is made. * * * "* * * if notice by the debtor to the sheriff was held sufficient, it would almost render nugatory the statute requiring mortgages of personal property to be recorded; for if the mortgagee could depend upon the custody, care, and diligence of the mortgagor, it would not be necessary to record any such mortgage. It would only be necessary, when any one came to attach, that notice should be given." ' " We believe the above rule is applicable in this case.

The position taken by the Bank would place too great a burden upon the sheriffs and constables of this state when levying upon property as it would require them to inquire into the validity of statements made by the debtor, or information from other sources as to any interest claimed by other parties in the property sought to be levied on. This would, in our view, result in unnecessary delays and burdens in the carrying out of their statutory duties. We also note that our statutes already provide for procedures for the resolution of disputes and the adjudication of rights which third parties may have in or claim to the property levied upon. §§ 25-1521 to 25-1523, R. R. S. 1943. There is no justification to delay the levy of an execution merely on the word of a judgment debtor, who obviously has an interest in retaining possession of the item. We conclude that in levying the execution in this case, the deputy sheriff was carrying out a statutory duty and was acting as an agent of the law, and not as an agent of the judgment creditor. Thus, any information obtained by the deputy sheriff in the performance of his duties would not be imputed to the judgment creditor. We therefore hold that the Bureau was a lien creditor without knowledge of the security interest which the Bank claimed in the vehicle. The Bureau attained this status on July 7, 1978. The rec-

ord discloses that the Bank did not perfect its security interest in the vehicle until July 10, 1978, when it filed a security agreement entered into on that date. As previously stated, the law of this state is clear that a lien creditor without notice has a superior interest to that of parties holding an unperfected security interest in the property. The Bureau thus has prior rights to the proceeds of the sheriff's sale.

It also seems clear that the Bank itself was responsible for any loss it may suffer because of its own inaction and neglect. Section 60-110, R. R. S. 1943, provides for the notation of security interests on certificates of title in order to give notice to third parties of this interest. If the Bank had timely complied with the statute in the instant matter, this dispute would not have arisen. In First Nat. Bank v. Provident Finance Co., 176 Neb. 45, 125 N. W. 2d 78 (1963), we stated: " 'In Nichols v. Bogda Motors, Inc., 118 Ind. App. 156, 77 N. E. 2d 906, it was held that the statute relating to certificates of title to motor vehicles was enacted for the protection of owners of such vehicles, those holding liens thereon, and the public; and that one holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.' * * * 'It is a general rule that where one of two innocent persons must suffer by the acts of a third, he whose conduct, acts or omissions enables the third person to occasion loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment.' "

We hold, therefore, that the Bureau has prior rights to the proceeds of the sheriff's sale. In view of the decision we reach herein, we need not examine other errors assigned. The judgment of the

District Court is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

DAVID L. WOHLGEMUTH, APPELLEE, V. R. JAMES PEARSON, DIVISION OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

285 N. W. 2d 102

Filed November 6, 1979. No. 42140.

1. **Appeal and Error: Implied Consent Law.** On appeal from a revocation of a motor vehicle operator's license under the implied consent statute, this court reviews the finding of the trial court de novo.
2. **Implied Consent Law: Trial: Licenses and Permits: Proof.** On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license under the implied consent statute, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal.
3. **Implied Consent Law: Blood, Breath, and Urine Tests.** A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act.
4. _____: _____. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it.
5. _____: _____. To constitute a refusal to submit to a chemical test requested under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take.

Appeal from the District Court for Seward County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellants.

Earl J. Witthoff of Perry, Perry, Witthoff & Guthery, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

In this appeal from the District Court for Seward County, Nebraska, the District Court reversed the finding of the appellant, the director of the Department of Motor Vehicles, who had determined that the appellee, David L. Wohlgemuth, had failed to comply with this state's implied consent law by refusing to submit to a body fluid test when properly requested to do so. When we review the findings of the trial court de novo as in equity, Wiseman v. Sullivan, 190 Neb. 724, 211 N. W. 2d 906, we take into account that on appeal to the District Court the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for the reversal. Mackey v. Director of Department of Motor Vehicles, 194 Neb. 707, 235 N. W. 2d 394. The trial court made no specific findings as to the plaintiff's contentions. However, it is clear from a reading of the record that the arresting officer clearly had reasonable grounds to believe that plaintiff had been driving a motor vehicle while under the influence of intoxicating liquor. It is further clear that the arresting officer made a series of requests to Wohlgemuth, appellee here, and was refused either conditionally or otherwise. We have stated before that a conditional or qualified refusal is not sanctioned by the implied consent law and such refusal is a refusal to submit to tests within the meaning of the act. Preston v. Johns, 186 Neb. 14, 180 N. W. 2d 135; Rusho v. Johns, 186 Neb. 131, 181 N. W. 2d 448.

The sole and only issue raised in the trial court to

which appellant addresses himself is whether, within the meaning of section 39-669.10, R. R. S. 1943, the appellee was a person who was otherwise "in a condition rendering him incapable of refusal." It was and remains the position of the State that Wohlgemuth was at all times conscious and capable of refusal. It will be necessary to set forth the facts of this case.

The evidence before the trial court shows that on April 24, 1977, at about 7:15 p.m., the state patrol was summoned to the scene of a one-vehicle accident on a gravel road near Seward. When the trooper arrived, he observed David Wohlgemuth lying on his back next to the left rear wheel of the pickup involved. In bending over Wohlgemuth, who was conscious, the trooper saw numerous abrasions and cuts, a large gouge in his right leg, and his left arm appeared to be broken. He also detected a strong odor of alcohol about his breath. He observed that his eyes were bloodshot and that his pupils appeared to be dilated. Around and inside the vehicle were numerous beer cans and bottles, and one can appeared to contain liquid and was cold to the touch. Wohlgemuth testified he did not recall anything from the time of the accident until the next day, including any request that he submit to a chemical test. Witnesses, including family members, described him at the accident scene and later at the hospital as conscious but not responsive to questions, disoriented, and not able to carry on a conversation. The treating physician testified by deposition that Wohlgemuth sustained a cerebral concussion, that he was in a semistuporous condition, though always conscious, and that he repeated questions directed to him over and over.

At the direction of the arresting trooper, another trooper followed Wohlgemuth to the hospital emergency room and obtained permission from the physician to talk to Wohlgemuth. The implied consent advisory form was read to Wohlgemuth and he was

requested to submit to a urine or blood test. Wohlgemuth responded that he was not taking any tests, that he wanted his wife present. The request was repeated and the only response received was that Wohlgemuth wished his wife present, with the exception of at least one occasion when no response was given. The arresting trooper arrived at the hospital and was told of Wohlgemuth's previous responses. He went to Wohlgemuth and again asked if he would submit to a test. The trooper stated: "At this time, he responded with a large amount of obsenities [sic] to myself and said that he was not going to take any tests until his wife was present." The trooper testified that Wohlgemuth appeared hostile but that his responses were rational. The doctor further verified that the officers requested Wohlgemuth to submit to a blood alcohol test in his presence at least three times while in the emergency room, during a period of about a half hour, and each time Wohlgemuth refused. The physician testified by deposition: "* * * it was my opinion at that time — it has not changed — that he [Wohlgemuth] did not have the presence of mind at that time to make a valid judgment as to the proper course of action in view of the fact of his injuries — and particularly, the contusions and abrasions about his head and face — he would seem, to me, to have symptoms and signs consistent with a cerebral contusion. Q Would you say he, in his state at that time, in his mental state, he understood the questions? A Well, I really couldn't say. I don't think I could really answer that. Q Would you say that he was mentally incompetent at that time? A Yes, I think so."

The State urges us to adopt the rule in State v. Hurbean, 23 Ohio App. 2d 119, 261 N. E. 2d 290: "All the understanding requisite to a refusal to take the test is an understanding that one has been asked to take a test. One who does not understand he has been asked to take a test cannot, of course, be said

to have refused to take a test. Whether one who has been asked to take a test has understood that such a request has been made is a question of fact to be determined by the court from all the evidence. In this case it was admitted. This evidence may include the licensee's claim that he did not understand the advice as to the consequences of the refusal to take the test. But an understanding of the consequences of the refusal to take the test is not an element of understanding that a request to take the test has been made, nor a precondition of refusal."

The appellant points out that it has long been the rule in other jurisdictions that a person is not exempted from the provisions of a refusal statute merely because he was too intoxicated to appreciate the consequences of his refusal. Perryman v. Florida, 242 So. 2d 762 (Fla. App., 1971).

The court in Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685, stated: "It is the opinion of this court that a refusal to submit to the test occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test."

In this essentially civil proceeding, any other result would force the director and the trial court into a psychological guessing game as to the appellee's state of mind and his degree of capability of comprehension. We do not suggest that both the director and the trial court, on review, should not examine whether the suspect was capable of understanding that he was asked a question. If the suspect knew that he was being asked a question and manifested a refusal, he was for the purpose of the statute, refusing to take a test.

The evidence is overwhelming that the appellee understood he was requested to take the test and did, in fact, articulate a refusal. Therefore, the

judgment of the trial court that the appellee was mentally "incapable of refusal" does not satisfy the terms of the statute and does not constitute a defense to the action of the director in suspending his license.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I think it is fundamentally unsound, generally, to impose penalties or sanctions upon the basis of declarations or statements made while the declarant was mentally incompetent. The undisputed medical evidence in this case shows that Wohlgemuth was mentally incompetent because of a cerebral contusion, not voluntary intoxication, at the time the alleged refusals were made.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DEAN E. ERICKSON, RESPONDENT.

285 N. W. 2d 105

Filed November 6, 1979. No. 42304.

1. **Disciplinary Proceedings: Attorneys at Law: Proof: Evidence.** In a proceeding for the disbarment of an attorney-at-law the presumption of innocence applies, and the charge made against him must be established by a preponderance of the evidence.
2. **Disciplinary Proceedings: Attorneys at Law: Evidence: Appeal and Error.** The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof.
3. _____: _____: _____: _____. To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

Original action. Judgment of suspension.

Paul L. Douglas, Attorney General, and C. C. Sheldon, for relator.

Dean E. Erickson, pro se.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This is a disciplinary proceeding brought against Dean E. Erickson, a practicing member of the Nebraska State Bar Association. Following hearings held before the Committee on Inquiry of the Third Judicial District and the Advisory Committee, formal charges against respondent were filed in the Supreme Court of Nebraska on September 1, 1978. This court then appointed a referee to hear the matter, who held a hearing on the charges. The evidence adduced at that hearing consisted of the testimony presented before the Committee on Inquiry of the Third Judicial District, the files and records of the Counsel for Discipline, and testimony of the respondent. The referee filed his report in this court on December 26, 1978, recommending a 6-month suspension of respondent's license to practice law. No exceptions were filed to the referee's report, and on January 29, 1979, the relator filed its motion for final judgment on the report of the referee. However, the motion was overruled. The matter was briefed, argued, and submitted to the court.

The formal charges as filed in this matter consisted of counts I, II, and III involving, respectively, complaints by Mary Glenn and two complaints of Ben Foos, with a conclusionary allegation that the actions of the respondent as set forth in the various counts were in violation of the attorney's oath of office provided for by section 7-104, R. R. S. 1943, and in violation of the following Canons and Disciplinary Rules of the Code of Professional Responsibility: Canon 1, DR 1-102 (A) (1) (5); Canon 6, DR 6-101 (A)

(2) (3); and Canon 7, DR 7-101 (A) (1) (2) (3). Additionally, a fourth count was added by stipulation of the parties at the hearing before the referee held on November 30, 1978. This related to a suit against James R. Sutton. By agreement of the parties, the transcript from that case, filed in this court as case No. 41627, was received in evidence and both parties waived the necessity of formal amendment of the complaint.

Count I involved a suit filed in the municipal court of Lincoln by Gamble-Robinson Co., a food wholesaler, against Mary Glenn for various sales and deliveries of merchandise. The suit alleged a balance due of $1,274.03. The answer filed by respondent on behalf of Mrs. Glenn claimed that the debt complained of was in fact the debt of Larry Christianson. A motion to set for trial was filed by the plaintiff. Notice of the time of hearing that motion was served on respondent. On the date set for hearing the motion was sustained without argument, and the case was set for trial on March 28, 1977. The respondent failed to notify Mrs. Glenn of the trial and as a consequence neither of them appeared and trial proceeded without them, resulting in a judgment in favor of plaintiff in the amount of $1,274.03. Mrs. Glenn first learned that judgment had been taken against her when her bank account was garnished as a result of summons issued April 6, 1977. Respondent did file a motion to set aside the judgment, which was set for hearing on May 2, 1977. However, he did not advise Mrs. Glenn and it was plaintiff's attorney who told her what day the motion was set for hearing. She appeared in court but respondent failed to appear. The court found the judgment entered was after trial rather than by default, so the motion was overruled. Mrs. Glenn did admit she had guaranteed the first delivery so did in fact owe approximately $200 of the total judgment, but had a defense to the remainder. She stated she had heard

nothing at all from respondent since before the judgment was entered.

During the course of the hearing before the referee, in explanation of his actions in the Glenn case as well as the other matters, respondent stated that in April of 1977 he was "committed, somewhat voluntarily" to the chemical dependency unit of Lincoln General Hospital as an alcoholic, where he remained until June 9, 1977. However, when it was pointed out to him that his failure to appear in court in the Glenn matter predated his hospitalization, he simply stated he had no recollection as to what might have occurred that accounted for his failure to appear. He also admitted he had not talked to Mrs. Glenn since his hospitalization and had not attempted to contact her, but suggested he was not certain that the results would have been any different had he appeared. However, he said he did feel obligated to recompense her for whatever her loss might have been due to his failure to appear in court. On June 1, 1977, respondent had written a letter to the then Counsel for Discipline in which he said: "In regard to the letter of Mary Ellen Glenn I will accept responsibility for any improper loss. I would like to discuss this matter in person with you and her upon my release." According to Mr. Gushard, the Counsel for Discipline, respondent talked to him in July of 1977, and said he had been drinking quite heavily during the early spring of 1977 and undoubtedly this had something to do with his loss of memory in connection with the missed hearing. He repeated his intention to contact Mary Glenn within the next few days to make arrangements to reimburse her for any loss. He was reminded again by Mr. Gushard on several occasions and each time he promised to make arrangements for reimbursement, but still had not done so.

Count II refers to a lawsuit in which respondent represented Benjamin Foos as to a claim made

against him in the county court of Hall County by Benjamin & Associates, Inc., for $1,045.10 for alleged services rendered. This was filed February 15, 1977, following which, and after filing a special appearance, respondent filed a general denial on behalf of defendant. The case was set for trial on May 26, 1977, and a notice of hearing was sent to respondent by the court. Respondent failed to notify his client of the trial date and failed to appear himself. Judgment, including attorney's fees and costs, was entered in the amount of $1,352.08. Mr. Foos was not aware of the trial or the fact that a judgment had been entered against him until June or July of that same year when he was contacted by the sheriff. When questioned by his client as to why he didn't appear at the trial, respondent simply replied. "Oh, it slipped my mind." Mr. Foos felt that he had a meritorious defense to that lawsuit because, according to him, the agreement with the plaintiff was that their services would be of a contingent nature, i.e., if the project for which plaintiff had drawn plans went through, they would get a percentage of the total cost of the overall job. Respondent's response to the complaint of Mr. Foos in this particular case is that Foos never denied the obligation represented by that lawsuit. He gave no explanation for his failure to act which, it can also be assumed, was because it was during the time he was hospitalized.

The case in count III was a suit filed by the respondent on behalf of Mr. Foos against the Hensons in the county court of Merrick County, seeking recovery of $730 arising out of the lease of a house to defendants. The attorney for the defendants Hensons filed a motion to make more definite and certain, which was noticed for hearing on March 29, 1977, at which time respondent failed to appear. The court sustained the motion and ordered Mr. Foos to amend his petition by April 20. On May 4, defendants filed a motion to dismiss for the reason

that plaintiff had failed to comply with the previous order of court. This was set for hearing on May 20 and respondent was properly noticed. In the meantime, although respondent did not appear at the hearing on the motion to dismiss, an amended petition was filed on behalf of the plaintiff as of that same date. However, the court found that not only was the amended petition filed out of time but it failed to comply with the court's previous order, and as a result plaintiff's petition and amended petition were ordered dismissed.

Mr. Foos in his testimony before the Committee on Inquiry stated he was not exactly sure whether or not he could have collected any money from the Hensons even if he had obtained a judgment. He further testified that on more than one occasion he asked respondent when the trial was to be had and was told he would be informed. However, the next information he received was when he happened to be in Central City and went into the court to inquire and was told the matter had come up and that the case had been dismissed. According to the Counsel for Discipline, respondent indicated he wasn't sure whether he received the various notices of hearings, that he probably had, and that the dates involved would have been during the time he was in the hospital. Mr. Gushard then stated the respondent indicated to him he was aware of the various hearings and that he made no attempt to contact Mr. Foos, the court, or the attorneys, and offered no explanation as to why he had not.

Finally, as to the Sutton matter, the defendant, Dr. James R. Sutton, was sued in the District Court for Douglas County in the amount of $7,500 for alleged fraud and misrepresentation. This was on March 4, 1976. The case is Vlcek v. Sutton, 201 Neb. 555, 270 N. W. 2d 906 (1978). The facts as set forth in the published opinion indicate the case was called for trial before the jury panel of January 1977, at

which time jury trial was waived, and the case was set for trial to the court on March 28, 1977. Plaintiff and his counsel appeared at that time but respondent, representing defendant, informed the court he was ill and requested the matter be reset. Accordingly, the case was rescheduled for April 28, 1977, when plaintiff and his counsel again appeared but defendant and respondent did not. The court reset the case for trial on May 6, 1977. Again, both plaintiff and his counsel appeared ready for trial but both defendant and respondent were absent. The matter was once more reset for trial at 9:30 a.m., May 25, 1977, at which time plaintiff and his attorney appeared, but neither defendant nor respondent were present. However, at approximately 10:15 a.m., defendant appeared by himself and was informed by the court that the matter would proceed to trial. The case was tried and resulted in judgment in favor of plaintiff in the amount of $6,500. The journal entry was signed on June 21, 1977. In each instance respondent had received notice of the various settings.

Respondent filed an affidavit on June 30, 1977, to the effect that he had been in the hospital on May 25. This was attached to his motion for new trial found in the transcript which alleged that trial was had without defendant's counsel being present and the trial was held without due and proper notice since the original notice of hearing indicated trial would be had on May 27. It is true that the last notice of trial sent out by plaintiff's attorney indicated it would be held on May 27, but in the court's order of judgment of June 21, it recited that although the matter was originally set for May 27, it was immediately reset by the court on its own motion to May 25. Although no notice appears in the record, the court recited in its order that respondent had been notified of the various settings. The motion for new trial was overruled. The complaint as to this partic-

ular case was not made by Sutton but on the initiative of the relator itself, and consequently defendant in that case did not testify at any of the disciplinary proceedings.

It is respondent's position that Doctor Sutton had acknowledged to him he was indebted to Vlcek for some amount and that he had advised Sutton to take out bankruptcy, which Sutton refused. Respondent again claimed his mail was not coming directly to him during the period of time he was in the hospital and therefore he was not aware of the trial until after it had happened.

Respondent questions generally whether he ever received some of the various notices, although the record is clear that in each instance they were mailed to him at his correct address. Upon further questioning he admitted in most cases he probably did receive the notices, but stated because of his heavy drinking and his hospitalization he does not have a very good memory. He also stated that he practices without secretarial help or the aid of cocounsel, and during the time of his hospital confinement his wife and daughter, who had access to his office during that time, brought him the mail at their convenience and at infrequent intervals. Also, he said he was discouraged by his counselor from conducting any business while he was at the hospital, and his access to a telephone was limited. In further defense to the Merrick County action, he stated he had refiled the case and it was currently still open, which he claimed would indicate a lack of prejudice to Mr. Foos on that matter. Respondent stated hopefully he has overcome the alcohol problem, although admitted he had had several minor slips but is attempting to remain an abstainer. As far as making any changes in the organization of his office so as to set up a docket control or anything like that, he merely said he felt he has been keeping a better record and paying more attention to dates

when legal papers should be filed.

The referee found the respondent was guilty of misconduct as to all four of the matters in litigation in that he failed to act competently by neglecting a legal matter entrusted to him, DR 6-101 (A) (3); that he failed to carry out the terms of his employment to use all reasonably available means to seek the lawful objectives of his client, in violation of DR 7-101 (A) (1); and that he violated a disciplinary rule contrary to DR 1-102 (A) (1).

From our review of the record, there is no question but what these findings are supported by a clear preponderance of the evidence so that we are satisfied to a reasonable certainty that those particular charges are true. State ex rel. Nebraska State Bar Assn. v. Hollstein, 202 Neb. 40, 274 N. W. 2d 508 (1979). As stated in that case: "In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. * * *

"The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof."

In a disciplinary proceeding the presumption of innocence applies and the charges against the attorney must be established by a clear preponderance of the evidence so that we are satisfied to a reasonable certainty that they are true. State ex rel. Nebraska State Bar Assn. v. Hollstein, *supra*. The evidence does establish by these standards the particular violations found by the referee. In addition, it is apparent that, as also charged, respondent violated DR 1-102 (A) (5) by engaging in conduct prejudicial to the administration of justice; DR 7-101 (A) (2) in failing to carry out a contract of professional employment; and DR 7-101 (A) (3) by prejudicing his client during the course of the professional relationship.

To determine whether and to what extent discipline should be imposed, it is necessary for this court to review the evidence de novo. State ex rel. Nebraska State Bar Assn. v. Hollstein, *supra*. In making this determination we must consider the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Cook, 194 Neb. 364, 232 N. W. 2d 120 (1975).

At the outset it should be observed that respondent assigns alcoholism as the primary source of his problems and, to a lesser extent, the absence of clerical or professional assistance. Both are the result of voluntary action on the part of respondent and afford no justification for his conduct. The monetary loss which he has caused his clients is difficult if not impossible to determine, but certainly they have been deprived of their day in court. Their resultant attitude toward the legal profession can do nothing but damage the reputation of the bar as a whole.

It is respondent's attitude which is one of the most disturbing factors in this case. The fact that he arbitrarily determined that his clients had suffered no loss of prejudice has been referred to earlier in this opinion. Particularly, he stated to the referee: "My personal feeling in regard to Mr. Foos is that I am not, I do not feel in any way obligated to him. And in fact, subsequent to the letter from Mr. Foos I, or just prior to his contacting me in the hospital, I'm not sure of the exact dates, I had, for the first time, rendered statements to Mr. Foos on a number of these matters. I had rendered statements to him prior to that time on other matters which were still unpaid. But my feeling is that Mr. Foos had put me into the same category as the other creditors, namely that he wished to beat it in some way, * * *."

Also, although the Committee on Inquiry did not see fit to make a formal charge in this regard, there is evidence that respondent continued to hold himself out as a certified public accountant as late as August of 1976, by furnishing a balance sheet to Benjamin Foos on his CPA stationary when in fact, according to Mr. Gushard, he had given up his license as long ago as 1969.

Finally, in response to a question by the referee as to why he had not attended the hearings of the Committee on Inquiry held on March 30, 1978, and June 14, 1978, 1 year after his period of hospitalization, he replied: "I believe the only reason that I did not appear at those hearings was the fact that I had not received notice of the hearing or the continuance, or whatever that subsequent hearing was. * * * Had I attended I think that some of the matters that were brought out this morning about the two parties involved would have been a [sic] made a matter of record. And I think that especially as to Mr. Foos, the committee would have realized that there was no pecuniary loss to Mr. Foos." The truth of the matter is that a notice of the first hearing was served on respondent by certified mail, sent to his correct business address. It was receipted for by a Mr. Wissen, who officed across the hall from respondent. Mr. Gushard verified with Mr. Wissen that he had delivered the notice to respondent, and respondent himself acknowledged to Mr. Gushard that he had in fact remembered being given the notice and "he was busy at the time, just leaving the office, and he had apparently gotten the letter and put it in his desk drawer and forgot all about it, without opening it." Mr. Barlow, chairman of the Committee on Inquiry, Third Judicial District, by his testimony at the hearing on June 14, 1978, related that respondent had acknowledged receiving the written notice as well as a recorded telephonic notice of the first hearing, but had not listened to his messages until some-

time after that date. Mr. Barlow also caused a typed copy of all testimony from the first hearing to be sent to respondent and advised him to read it and to make any reply in writing by May 1, including any request to reopen the hearing. He again tried, by telephone and by leaving recorded messages, to reach respondent, and finally by letter extended the deadline to reply to the committee to May 22. Respondent failed to reply until May 23, at which time he called Mr. Barlow and a June 2 date was scheduled and confirmed by Mr. Barlow's letter of May 24, but respondent failed to reply.

Respondent has made no significant change in his office procedure since 1977, which would tend to correct the obvious inadequacies of his docket control. He stated in oral argument that he would pay Mrs. Glenn $1,100 to cover her loss, but has been unable to do so as yet. Although he suggests he has made attempts to overcome his problem with alcohol, for which he should be commended, he admitted during oral arguments that he had experienced several "slips," the latest having been when notified of the date of hearing in this court. It is obvious that unless this problem is controlled he is not competent to continue the practice of law. Although the acts here were of an entirely different nature than those in State ex rel. Nebraska State Bar Assn. v. Cook, 194 Neb. 364, 232 N. W. 2d 120 (1975), the language used in that opinion is nevertheless pertinent here: "The nature of the acts here do, however, go to the heart of the administration of justice." Complete disregard of a client's interests affords him no justice at all. However, contrary to the language of State ex rel. Nebraska State Bar Assn. v. Cook, *supra*, we are not persuaded that "there is no likelihood of repetition of this * * * conduct."

Under the circumstances reflected in the record here, the recommended period of suspension is inadequate. We find respondent should be suspended

from the practice of law for a period of 1 year from and after December 1, 1979. If, at the end of 1 year from the effective date of his suspension, respondent makes an affirmative showing sufficient to satisfy this court that he has successfully controlled his problem of alcoholism, and is prepared to institute office procedures designed to furnish him adequate docket control, as to both of which he can ask for and obtain help from either his local or state bar association; has arrived at a satisfactory settlement of the loss to Mrs. Glenn, as he outlined in his oral argument; has not engaged in the practice of law in this or any jurisdiction or engaged in any conduct which would subject him to discipline under the disciplinary rules if he were engaged in the practice of law, and will not do so in the future, then he will be reinstated and allowed to engage in the practice of law. However, upon failure to make such showing, then the suspension herein provided for is to become permanent. All costs of this proceeding are to be taxed to respondent.

JUDGMENT OF SUSPENSION.

JEANNE M. CAMPBELL, APPELLANT, V. MICHAEL L. CAMPBELL, APPELLEE.

285 N. W. 2d 111

Filed November 6, 1979. No. 42432.

Divorce: Custody: Appeal and Error. In cases involving questions of child custody, the findings of the trial court will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

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

Colfer, Lyons, Wood, Malcom & Goodwin, for appellant.

John J. Battershell of Cunningham Law Office, P.C., for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and HOWARD, District Judge.

HOWARD, District Judge.

In an action for dissolution of marriage brought by Jeanne M. Campbell, appellant, against Michael L. Campbell, appellee, the decree, in part, awarded custody of the minor child of the parties to appellee. Appellant assigns as error the trial court's failure to award custody of the child in her, and also that the decision is contrary to law and the evidence and is an abuse of discretion.

At the time of trial Richard Todd, the child of the parties, was a little over 13 months old. The parties reside in McCook, as do both sets of grandparents. At trial Michael was 21 years old and Jeanne was 20. Michael was employed as a Honda mechanic and lived with his brother Tim, who worked for an electronics firm, of which their father is president. Jeanne lives at home with her parents. Michael has had possession of the child since April 1978, and by stipulation of the parties, approved by the court, was granted custody in May 1978, before the trial in August. Before the separation, the grandparents divided babysitting chores during the times Jeanne was employed, but Jeanne stayed at home with Todd from December 1977, until March 1978, when the separation occurred. Both sets of grandparents have a deep interest in Todd and desire to help in his upbringing.

The marriage was a stormy one. Jeanne testified that Michael had struck her several times both before and after the marriage. The record is silent as to the severity of the blows or other details. Michael was suspicious and jealous of Jeanne. Conflicting testimony concerning the behavior of Michael and Jeanne at parties and elsewhere ac-

counts for much of a lengthy record. There was no unfavorable testimony as to the care of Todd while under the attention of either party. It is conceded that when Michael was 16, he and Jeanne were going together and as a consequence of a breakup, Michael shot himself and was hospitalized.

Following an argument on March 17, 1978, Michael took Todd to his parents' home and stayed there that night, taking Todd to visit Jeanne the next day. She had moved to her parents' home. A few days later he was served with a summons in this action. Reconciliation was discussed, and on March 31 Jeanne told him she wanted to go to Topeka to see her maid of honor at the wedding. They went to her parents' home, talked it over, and Michael told her he didn't care if she went "as long as she went to get her head on straight, to find out what she wanted." Todd was left with Jeanne's parents. Michael understood she was to return on the following Monday, but she returned 6 weeks later. She had gone instead to Dallas, Texas, where, it is admitted, she cohabited with a McCook friend of both parties and engaged in sexual relations with him. Jeanne did call Michael and her parents from time to time, but for about 10 days after she left, she did not disclose where she was. She had told both Michael and her parents that she was going to Topeka. Michael testified, and Jeanne denied, that in a telephone conversation while she was in Dallas, when asked what she was going to do with Todd, she replied that the person with whom she was living "makes up for Todd."

Todd has been cared for by Michael and his parents since April 1978. A babysitter stays with Todd during the day at Michael's home, and after work Michael takes Todd to his parents' home where they have dinner, and he stays there with Todd until Todd goes to bed. In the morning he picks up Todd and the babysitter and takes them back to his own home. Jeanne has Todd from Friday evening until Sunday

evening. She testified she intends to get a job, stay with her parents until she is financially secure, and go to a beauty school, during which time her mother would take care of the child.

There appears to be no question that Todd has been well cared for while in the custody of Michael, and there is no evidence of maltreatment or neglect by either party before the separation.

In his decision, announced from the bench, the trial judge emphasized his concern over Jeanne's leaving the child for the Dallas episode and concluded that "there is at this point a bit more stability in the father than in the mother." He pointed out that for a while the grandparents "are going to have to be a rock in the storm."

In cases involving questions of child custody, the findings of the trial court will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Mason v. Mason, 200 Neb. 476, 263 N. W. 2d 865. Section 42-364, R. R. S. 1943, provides: "In determining with which of the parents the children, or any of them, shall remain, the court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other."

We cannot say that, in determining the more stable environment for the child, the trial court abused its discretion by giving weight to the then recent actions of the mother in leaving the child for an extended time in order to pursue her own interests in a manner suggesting her immaturity and a degree of instability. Nor can it be said that the weight of the evidence shows Michael to be unfit, especially in view of his unblemished record as a custodian during approximately 4 months before the trial. The trial judge, mindful that the progress of Todd can be monitored and assisted by the grand-

parents, residing locally, made a decision subject to change on readily available evidence of changed circumstances. Finally, the inestimable advantage of the trial judge in observing the witnesses during the lengthy trial must be conceded.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAY COWAN, APPELLANT.
285 N. W. 2d 113

Filed November 6, 1979. No. 42543.

1. **Criminal Law: Self-Defense: Statutes.** There is nothing in the justification for the use of force act which appears designed to change the ancient common law rule that, in order to justify the defense of self-defense, the belief that the use of force is necessary must be reasonable and in good faith.
2. **Criminal Law: Trial: Evidence.** There is no rule of law which requires the trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact.
3. **Criminal Law: Evidence: Verdicts.** In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.
4. **Criminal Law: Statutes: Presentence Reports.** Section 29-2261 (1), R. R. S. 1943, authorizes but does not require a presentence investigation in the case of a conviction of a misdemeanor.

Appeal from the District Court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

David E. Veath of Fisher & Veath, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

Defendant Cowan was found guilty in the county

court of Box Butte County of having, on September 10, 1978, in violation of section 28-411, R. R. S. 1943, committed an assault upon one Dusty Roebuck and was sentenced to a term of 14 days in the county jail. On appeal to the District Court and after trial on the record, the finding and judgment were affirmed.

On appeal to this court, the defendant assigns as error: (1) The court erred in not making a specific finding as to whether or not there existed a defense of justification under the provisions of sections 28-836 and 28-837, R. R. S. 1943, now sections 28-1409 and 28-1410, R. S. Supp., 1978, rather than simply rendering a finding of guilty. (2) The court erred in sustaining objection to questions asked of witnesses by defendant who acted as his own counsel in the county court. (3) Misconduct by the prosecutor deprived the defendant of a fair trial. (4) The court erred in not ordering and considering a presentence investigation before pronouncing sentence. We affirm.

Section 28-836, R. R. S. 1943, reads in part as follows: "Subject to the provisions of this section and of section 28-841, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." Section 28-837, R. R. S. 1943, provides in part as follows: "(1) Subject to the provisions of this section and of section 28-841, the use of force upon or toward the person of another is justifiable to protect a third person when:

"(a) The actor would be justified under section 28-836 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect;

"(b) Under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

"(c) The actor believes that his intervention is necessary for the protection of such other person."

In connection with the above statutes, we said, in State v. Eagle Thunder, 201 Neb. 206, 266 N. W. 2d 755, there is nothing in the justification for the use of force act which appears designed to change the ancient common law rule that, in order to justify the defense of self-defense, the belief that the use of force is necessary must be reasonable and in good faith.

The defendant was tried to the court without a jury. An examination of the bill of exceptions discloses no evidence which would permit a finding of justification under the above statutes. The uncontroverted facts seem to be that in the early morning hours of September 10, 1978, two persons one of whom was Roebuck, assaulted a friend of the defendant. At about the same time, they also broke the windshield of that person's motor vehicle with some object.

The defendant was not present during that altercation. However, after it had ended, the defendant was informed thereof, hurriedly left the bar where he had been, and went to the scene of the altercation. When he arrived, the parties to the earlier affair were standing together talking. The defendant got out of his motor vehicle, carrying a loaded .38 caliber revolver. He pointed the loaded weapon at Roebuck and told him not to leave the place until the police arrived. He then fired one shot in the air, and again pointed the weapon at Roebuck and told him that if he moved he would shoot his kneecap off.

The defendant testified he believed that because his friend had been assaulted, he had good reason to believe that he too might be assaulted. He argues that, therefore, justification became an issue. He testified that at one time during these events, he believed Roebuck was moving toward him. It is clear, however, this was during the time the weapon was

pointed at Roebuck. There is nothing in the foregoing evidence which could possibly justify the actions of the defendant under the provisions of the justification for the use of force act.

Even if we assume the evidence raised the issue of justification, it presented simply a factual question for the finder of fact to determine. There is no rule of law which requires the trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact. "In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it." State v. Allen, 198 Neb. 755, 255 N. W. 2d 278.

Defendant argues he has no way of knowing if the court considered the matter of justification. It will be presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it otherwise clearly appears. In any event, the record of the de novo trial in the District Court indicates the matter was considered. At that time defendant was represented by counsel, briefs were submitted, and the claim of justification was clearly called to the attention of the District Court.

We have examined the assignments with reference to improper rulings on evidence and alleged prosecutorial misconduct and find them to be completely without merit. They do not warrant discussion. As to his fourth assignment, that sentence should not have been pronounced until after a presentence investigation, we simply point out that section 29-2261 (1), R. R. S. 1943, requires a presentence investigation only in the case of felony convictions. It authorizes, but does not require, an investigation

in other cases. The fourth assignment, therefore, is also without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD KNAFF, APPELLANT.
285 N. W. 2d 115

Filed November 6, 1979. No. 42568.

1. **Criminal Law: Instructions: Evidence.** It is only in those cases where, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater, but not the lesser, offense that the lesser-included offense instruction must be given.
2. _____: _____: _____. Where the evidence is uncontroverted on an essential element of the crime, mere speculation that the jury may disbelieve it does not entitle the defendant to such an instruction.
3. **Criminal Law: Police Officers and Sheriffs: Reports.** Alleged nondisclosed police report examined and found to contain no conflicts in information regarding this case, as shown by the various witnesses.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Rodney J. Rehm, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

Defendant has appealed a conviction and sentence of 3 to 5 years for robbery under the provisions of section 28-414, R. R. S. 1943. He assigns as error the trial court's refusal to instruct on the lesser-included offense of larceny from the person, its failure to

order a new trial when it was discovered that the State had not complied with a pretrial disclosure order, and that although the crime was committed on August 19, 1978, defendant was sentenced on January 24, 1979, under the statute in force at the time of the crime rather than the Nebraska Criminal Code, section 28-101 et seq., R. S. Supp., 1978, which became effective January 1, 1979. However, counsel for the defendant abandoned this last assignment of error at the time of oral argument, the issue having been resolved against defendant's position by this court in State v. Weinacht, 203 Neb. 124, 277 N. W. 2d 567 (1979), and State v. Munn, 203 Neb. 810, 280 N. W. 2d 649 (1979).

During the early morning hours of August 19, 1978, Stephen Fiero was sleeping in his bedroom while still fully clothed. He felt someone touching him, but thought it was a friend telling him he was there. He then felt someone trying to get into his back pocket. He raised up and saw two black males, one standing in the doorway and the other at the foot of his bed. The one near the bed had what looked like a large dowel stick or metal rod about 3 feet in length in his hand, and the other appeared to be grasping a revolver or pistol in both of his hands, pointing at the victim. Immediately realizing they were attempting to take his billfold, and believing if he resisted he would be shot or clubbed, he lay back down and pretended to be asleep. He felt his billfold being taken from his pocket by one of the men and, upon hearing them leave, got up and called the police. Mr. Fiero was unable to recognize either of the men, and the identity of the defendant and his presence at the scene were established by fingerprints and other evidence. The defense offered no evidence and no one else testified concerning the facts of the actual taking.

It is on the basis of the foregoing evidence that defendant insists he was entitled to an instruction on

the lesser-included crime of larceny from the person. The elements of robbery are the *forcible* taking of property from the person of another *by violence or putting in fear,* section 28-414, R. R. S. 1943, whereas larceny from the person requires the taking of property from another *without putting such person in fear by threats or the use of force and violence,* section 28-505, R. R. S. 1943. There is no question, of course, but that larceny from the person is a lesser-included offense of robbery, as the former crime "is one which is fully embraced in the higher offense." State v. Tamburano, 201 Neb. 703, 271 N. W. 2d 472 (1978).

The only evidence presented to the jury was that the victim was awake, saw a club and what he believed to be a gun, and permitted his property to be taken because he was afraid of injury to his person. It is only in those cases where, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater, but not the lesser, offense that the lesser-included offense instruction must be given. Where the evidence is uncontroverted on an essential element of the crime, mere speculation that the jury may disbelieve it does not entitle the defendant to such an instruction. State v. Tamburano, *supra.* The undisputed facts established in this case did not require the submission of a lesser-included offense instruction.

Defendant's motion for disclosure, which was sustained by the court, contained the following at paragraph 5: "Conflicts in information regarding this case as shown by the various witnesses, scientific tests, tangible objects and other relevant circumstances." The disclosure which the defense claims the State failed to make, resulting in prejudice to defendant, was a police report, particularly with regard to a recitation of the alleged facts of the

crime by the victim to Roger Schmidt, the investigating police officer. Defendant's counsel concedes that the police report was given to him immediately following the testimony of Mr. Fiero and at the commencement of the testimony of Officer Schmidt, the next witness. Defense counsel also agrees that if he had desired, he could have recalled Mr. Fiero if there was any information in the police report with which the witness could have been impeached. As stated by counsel during the argument on the motion for a new trial: "I didn't feel I made a judgment that I didn't need to bring — I just couldn't bring the victim back on the witness stand and have his testimony repeated which would be the only way I felt that I could impeach him." It is somewhat difficult to see prejudice to the defendant's position in this regard because whether he attempted to impeach the witness during his original cross-examination or during a recall, the questions and answers would undoubtedly have been the same.

Be that as it may, an examination of the testimony of the witness and the police report reveals no significant discrepancies which would have afforded the basis for a meaningful impeachment. The police report disclosed that the witness told Officer Schmidt that the man holding the stick or club had raised it above his head in a threatening manner, whereas at the trial he said the man held it at his side and never waved it in a threatening manner. Clearly, the trial testimony was more favorable to the defendant.

Also, Mr. Fiero told the police officer that the other man had his arms extended, hands together and fingers locked pointing directly at him, and he thought for sure the party had a handgun. He stated he did not in fact see a handgun, but automatically assumed the man had one. During his trial testimony, he said: "The one standing in the doorway was standing up, and he was in this position in my door

(indicating). * * * Like this pointing at my head (indicating). * * * Well, when I seen this (indicating) I just said to myself it was a gun. It — his — his fingers couldn't be as long as what it looked like, so — * * * I thought it was a gun." This hardly justifies defendant's allegation that at the time of the report to the police officer the witness was more confused about the existence of a gun than at the trial.

Finally, defendant claims that the police report indicates the witness said the party standing by the door called the party near the bed "Frank," and that Mr. Fiero testified at the trial that sizewise the defendant came closest to the person near the bed, so why was he called "Frank," which in no way sounds like the defendant's first name of Ronald. He said in his brief that this raises a serious question as to the conclusiveness of the State's identification of the defendant. In the first place, defendant has never raised insufficiency of the evidence as error. Secondly, the witness at no time claimed to be able to identify the defendant. As earlier stated, this was accomplished by other evidence as to which defendant raised no complaint. Finally, the police report reveals facts entirely opposite from those claimed by defendant. The report reflects that "He [the witness] said the party did eventually get the wallet out of his pants and at this time he heard the black/male standing to his east say, 'let's go' and then the party mumbled something, he said it sounded like a name, however, he said he had no idea what the mumbling sounded like. He did say, he thought it might have been the word 'frank' and possibly might have started with an 'F' however he also indicated that after calling Headquarters somebody had said the name 'Frank' over the phone, he said that this might have been the case." If anything, it was the one who "came closest sizewise" to the defendant who called his companion in the doorway Frank. There

was no inconsistency here.

Even if the report had never been furnished to the defendant, which it was, it contained no "conflicts in information regarding this case as shown by the various witnesses," and did not violate the trial court's order to disclose. Defendant's motion for a new trial was correctly overruled.

Defendant's assignments of error are not sustained by the record and the judgment of the trial court is affirmed.

AFFIRMED.

GARNER TOOL & DIE, A CORPORATION, APPELLANT, V. JOHN LAUX AND FARELL RAKOWSKI, DOING BUSINESS AS LINCOLN MACHINE AND MARINE, APPELLEES.

285 N. W. 2d 219

Filed November 13, 1979. No. 42220.

1. **Trade Secrets and Unfair Competition.** The elements of a cause of action for misappropriation of a trade secret are: (1) The existence of a trade secret or secret manufacturing process; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer's right by reason of discovery or ownership to the use and enjoyment of the secret; and (4) the communication of the secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's prejudice.
2. _____. A trade secret must be a particular secret of the complaining employer and not the general secrets of the trade in which he is engaged.
3. _____. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

4. **Trade Secrets and Unfair Competition: Employer and Employee.** In the absence of any agreement between employer and employee to the contrary, the general rule is that an employee, after his term of service has expired, is entitled to compete in business with his former employer. Accordingly, if an employee does not bind himself by contract to refrain from entering the services of a competitor after termination of the employment, the employee violates no duty to his former employer in so doing.
5. _____: _____. Unless restricted by some agreement with his former employer, an employee's right to compete in business with such former employer is the same as that of a stranger to the contract of employment, subject to the qualification that a former employee is precluded from using for his own advantage, and to the detriment of his former employer, information or trade secrets acquired by or imparted to him in the course of his employment.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

Heard before KRIVOSHA, C. J., CLINTON, and WHITE, JJ., and STANLEY and GITNICK, District Judges.

STANLEY, District Judge.

This is an action in equity for the wrongful use of confidential information and trade secrets. Plaintiff seeks both money damages and injunctive relief. Trial was to the court which found for the defendants, and dismissed the plaintiff's petition. The plaintiff appeals, contending the trial court erred in failing to find that the defendants misappropriated and wrongfully used confidential trade secrets adequately protected by the required element of secrecy. We affirm the judgment of the trial court.

In appeals in equity from the District Court to the Supreme Court, this court reviews the issues by trial de novo on the record. Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433.

Garner Tool & Die is a products manufacturer and

toolmaking concern. Part of its business is designing tools or processes to produce a specific product. It is owned principally by Ed Garner, a journeyman tool and die designer. Defendants Laux and Rakowski were employed by Garner for several years prior to 1972 as tool and diemakers. Then both defendants quit and started their own business known as Lincoln Machine and Marine. Prior to trial Rakowski and Laux dissolved their partnership. Laux continued in the machine shop, and Rakowski went into the marine business.

In 1969, while Laux and Rakowski were still working for Garner, Goodyear Tire and Rubber Company contacted Garner and requested that he develop processes to sharpen carbide knives and to punch holes in rubber stretch bands. Garner designed the tools and dies, Laux helped build the fixtures, and within 2 weeks Garner began to perform the requested service for Goodyear.

In 1975, 3 years after the defendants left Garner's employ, Laux began sharpening knives and punching holes in stretch bands for Goodyear. Thereafter, Goodyear awarded bid contract orders to both Laux and Garner. However, at the time of trial Garner was no longer sharpening knives, but was punching stretch bands. It is undisputed that both Garner and Laux used identical processes for this work, and that Goodyear was their only customer. As a result of this competition, Garner started this action alleging that Laux, by virtue of a confidential employer-employee relationship, was under a duty not to disclose or use certain information gained in the course of his employment. The issues are whether the processes, sharpening carbide knives and punching holes in rubber stretch bands, were trade secrets constituting confidential information of the plaintiff, and whether they had been wrongfully appropriated by the defendants.

The trial court, in finding for the defendants, found

that the dies utilized by Garner for punching holes in rubber stretch bands had been sold to Goodyear or its customers, and had become public knowledge. Therefore, no claim of a trade secret could be made. The trial court further found that, as to the sharpening of carbide knives, the tools and dies constructed by both Garner and Laux for this purpose utilized many general principles known throughout the tool and diemaking craft and thus did not constitute a trade secret. In addition, the court found that Garner did not maintain the required element of secrecy throughout the entire knife sharpening process.

Restatement, Torts, § 757, p. 5, defines trade secrets. "*Secrecy.* The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret."

In 55 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 704, p. 28, it is stated in part as follows: "The elements of a cause of action for misappropriation of a trade secret are: (1) The existence of a trade secret or secret manufacturing process; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer's right by reason of discovery or ownership to the use and enjoyment of the secret; and (4) the communication of the secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's prejudice." Section 705, p. 29, states in part: "A trade secret must be a particular secret of the complaining employer, and not the general secrets of the trade in which he is engaged." Section 706, p. 29, states in part: "A trade secret is something known

to only one or a few, kept from the general public, and not susceptible of general knowledge. If the principles incorporated in a device are known to the industry, there is no trade secret which can be disclosed. * * * The nature of a trade secret is such that so long as it remains a secret it is valuable property to its possessor, * * * a public sale of the article or description of the article in literature available to the public — destroys the secret."

In Henkle & Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N. W. 2d 772, this court held, "Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

A review of the testimony and exhibits follows. Garner testified that operation of the processes in issue was conducted in the rear area of his shop; that if any people, other than employees, were in this area they were always escorted; and that Laux and Rakowski operated and were familiar with the equipment. Garner stated the processes he designed and developed were unique; that he had not seen such fixtures in any other shop, catalog, or commercial handbook on tool and diemaking; that he recouped his developmental costs in the unit price charged to the customer; and that both Laux and Rakowski were competent journeyman tool and diemakers when they left his employ.

On cross-examination Garner admitted having seen this process in other plants. When he con-

structed the die sets for punching holes in bands, he purchased some of the component parts and fabricated other parts. He sold some punch dies to Goodyear and their customers, but there were no patents on either process.

Witness William Boyden testified that an experienced tool and diemaker could, simply by observing the fixtures used in both processes, build identical parts; that a commercial grinder could be adapted to sharpen the knives by adding an additional holding clamp; and that the floating punch, used by Garner for punching holes in stretch bands, is illustrated in a textbook on basic diemaking.

Defendant Laux testified that he had worked for Garner for about 18 years, and that he did not have an employment contract containing a covenant restricting him from competition. Also, there was no agreement between him and Garner regarding competition when he left his employment. He had assisted Garner in developing both processes. The grinding fixture took approximately 20 hours to make and its cost was about $360. The dies used to punch stretch bands cost about $1,850, which was recovered when the specimen die was sold to Goodyear. In this sale Garner recovered its costs and made a profit. About 3 years after he left Garner's, Laux contacted Goodyear and advised them he was now operating a machine shop. Goodyear sent him a price quotation form to bid on the knife sharpening and punching of stretch bands. He was awarded some work and in 1975 and 1976 received about ½ of the total Goodyear order. In 1977 he received all of the knife sharpening orders under the process governed by Goodyear specifications. The floating punch dies used by Garner, those owned by Goodyear and its customers, would all fit into his fixture for punching holes in stretch bands. There are several kinds of universal grinders available to sharpen knives, and on any of them all that has to be added

is a clamp to hold the knife to the grinding wheel.

On cross-examination defendant Laux stated he was acquainted with Goodyear's engineers when he worked for Garner and he knew Goodyear was the only customer of Garner's for these two processes, both of which were handled in the production area where lesser-skilled employees performed this work. The die for punching holes in stretch bands, exhibit 11 offered by Garner, bore the words "Property of Xerox," denoting that Garner had sold the die. Exhibit 28, the Goodyear file on tooling it owned, listed at least 12 punching dies made by Garner and sold to Goodyear or its customers, as shown by the invoices. The dies sold for various prices up to $1,850 each. The purchase orders for the dies made by Garner and sold to Goodyear all state language substantially as follows: "Above originally manufactured on P. O. 16912 and is being retained on hand at vendor's [Garner's] shop for future use in punching Xerox part number 23P-224 until recalled by Goodyear." The same exhibit 28 indicates the dies for punching stretch bands used by Laux are also the property of Goodyear, bought by them and left at Laux' shop until called for by Goodyear. Exhibit 25, the elementary textbook for tool and diemakers entitled "Basic Die Making," demonstrates the method ordinarily used in the punching process. Evidently, such information is a matter of public or general knowledge in the diemaking craft.

Laux contends he has a right to use his learning, training, and experience to pursue his craft. He cites Annotation, 43 A. L. R. 2d 105: "In the absence of any agreement between employer and employee to the contrary, the general rule is that an employee, after his term of service has expired, is entitled to compete in business with his former employer. Accordingly if an employee does not bind himself by contract to refrain from entering the services of a competitor after termination of the employment, the

employee violates no duty to his former employer in so doing. Thus, unless restricted by some agreement with his former employer, the employee's right to compete in business with such former employer is the same as that of a stranger to the contract of employment, subject to the qualification that a former employee is precluded from using for his own advantage, and to the detriment of his former employer, information or trade secrets acquired by or imparted to him in the course of his employment. Aside from this limitation, the employee, after the termination of his contract of employment, may seek the patronage of his former employer's customers; and in so doing he may make use of information which he gained in the course of the employment." Any form of postemployment restraint reduces the economic mobility of employees and limits their personal freedom to pursue a preferred course of livelihood. The employee's bargaining position is weakened because he is potentially shackled by the acquisition of alleged trade secrets; and thus, paradoxically, he is restrained, because of his increased expertise, from advancing further in the industry in which he is most productive. Moreover, society suffers because competition is diminished by slackening the dissemination of ideas, processes, and methods.

In substance Laux maintains that Garner, in selling the specimen die for punching rubber stretch bands, lost all protectable interest therein, and that the grinding fixture for sharpening carbide knives is a matter of general knowledge of the tool and die-making craft and is not a protectable trade secret. We agree.

The judgment of the trial court is affirmed.

AFFIRMED.

CLEM R. POKORSKI, APPELLEE, V. WILLIAM W. MCADAMS ET AL., APPELLEES, IMPLEADED WITH RAYMOND L. OLSON ET AL., APPELLANTS.

285 N. W. 2d 824

Filed November 13, 1979. No. 42346.

1. **Property: Adverse Possession: Evidence.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. **Property: Adverse Possession.** A claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.

Appeal from the Distict Court for Burt County: WALTER G. HUBER, Judge. Affirmed in part, and in part reversed.

James T. Gleason of Collins & Gleason, L. J. Tierney of Cassem, Tierney, Adams, Gotch & Douglas, for appellants.

William J. Tighe, for appellee Pokorski.

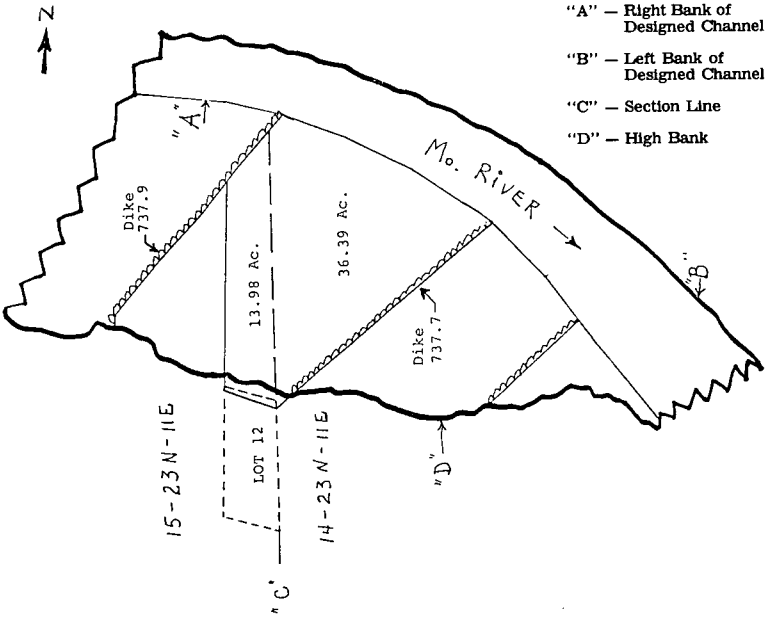
Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

Defendants, Raymond L. Olson and Judy A. Olson, appeal from a decree entered by the District Court for Burt County, Nebraska, quieting title to an irregular tract located in Sections 14 and 15, Township 23 North, Range 11 East of the 6th P.M., in Burt County, Nebraska. Although William W. McAdams and his wife were originally made parties defendant to the action, they were voluntarily dismissed with prejudice by the plaintiff prior to trial, and are not appellants herein. In its decree the District Court found that the plaintiff, Clem R. Pokorski (herein-

after referred to as Pokorski), and his predecessors in title, had acquired legal title to the area in question by adverse possession for the statutory period of time. The District Court quieted title to the property in Pokorski, and further dismissed the Olsons' counterclaim for damages. We reverse in part and affirm in part.

The irregular tract to which the court quieted title consisted of 50.37 acres. However, the dispute between the parties involved in this appeal only concerns a tract consisting of 36.39 acres between the designed channel and the high bank of the Missouri River (hereinafter referred to as River), located in Section 14. In order to understand the controversy, we have prepared a sketch of the area involved which, however, is only approximately correct and is used for illustrative purposes only.



While various formations, identified in the evidence as islands and sandbars, later appeared, the record is clear that the area was at least partially covered with water from the date of the installation of the dikes until the date of trial, March 1978. The use of the tract prior to the time of trial was recreational in nature, primarily for hunting and fishing purposes.

The evidence adduced at trial may be summarized as follows. The Corps of Engineers, in an attempt to stabilize and channelize the River, arranged for the construction and installation of dikes 737.7 and 737.9, shown on the sketch referred to. As shown, dike 737.7 was connected to the high bank of the River in Section 14 on land owned by the Olsons' predecessor in title, William W. McAdams (hereinafter referred to as McAdams). Dike 737.9 was connected to the high bank of the River at a point upstream from the land owned by Pokorski's predecessor in title to Lot 12, Melvin Stillman (hereinafter referred to as Stillman). Lot 12 is an 8-acre tract located in Section 15, adjacent to McAdams' land and extending approximately 380 feet along the high bank to the west of the dividing line between Sections 14 and 15. The dikes were completed in the fall of 1963, and thereafter, from that date until the date of trial, material was deposited by the River in the area between the dikes, eventually forming sandbars and islands.

Stillman, who was the record owner of Lot 12 at the time of the installation of the dikes until August 19, 1974, testified that he had used the "island" to fish on since the time of its formation. However, he could not state exactly when this commenced. He further indicated that the "island" had been formed sometime between 1963 and 1965. His son-in-law, James Reno, who was the record owner of Lot 12 and all accretions thereto from August 19, 1974, to December 20, 1974, testified that in 1963 he hunted on a sandbar formed at the end of dike 737.9, the upstream dike. He further testified that he hunted and

fished in this area from that time until the time of trial. Pokorski testified that he had hunted "in the area" in 1964, and from 1967 until the date of trial.

Sometime after 1964, Stillman commenced leasing Lot 12 to various persons to use as cabin and trailer house sites. He gave his tenants permission to hunt in the area between the dikes. We shall not repeat in detail the testimony of Pokorski's other witnesses at the trial. Suffice it to say they testified they had hunted in the area from sometime after 1964 until the date of trial.

As previously stated, the trial court found generally for Pokorski and against the Olsons. Title to the tract was quieted in Pokorski, and a counterclaim for damages filed by the Olsons was dismissed. On appeal to this court, the Olsons assign as error that the findings of the trial court were contrary to the law and contrary to the evidence.

An action to quiet title to real estate is an equitable action and is tried de novo on appeal. § 25-1925, R. R. S. 1943; Neylon v. Parker, 177 Neb. 187, 128 N. W. 2d 690 (1964). In such action it is the duty of this court to reach an independent conclusion without reference to the findings of the District Court. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Barnes v. Milligan, 200 Neb. 450, 264 N. W. 2d 186 (1978). A review of the record convinces us that Pokorski has not met this burden.

Pokorski claims adverse possession of a tract which was partially covered with water. While we have held that title to an island in a stream which would normally belong to a riparian owner may be acquired by adverse possession, Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57 (1958), we have never specifically passed upon the question of whether land covered by water was subject to adverse pos-

session, although we recognize that at least some jurisdictions do permit it. It is clear, however, that the problems involved in proving possession and use for the full statutory period with respect to land covered by water would be most difficult to resolve as a practical matter, if not impossible. While the evidence in the record may possibly be interpreted as indicating a claim of Pokorski to an island, we believe it falls far short of establishing any claim by him of property underlying the water surrounding an island. There is absolutely no evidence to indicate that the "island" and any accretion thereto covered the *entire* area to which the title was quieted by the trial court. As a matter of fact, the record reveals that a part of the area to which title was quieted in Pokorski was located on the high bank in Section 14, adjacent to Lot 12. It would obviously be impossible for any portion of the accretion to the "island" to be located on the high bank, and the record is clear that Pokorski at no time attempted to possess that area. We believe the District Court erred in quieting title to the entire tract; and the most that can be said is that Pokorski may have proved adverse possession to an "island."

However, an examination of the record convinces us that Pokorski has even failed to establish by evidence his claim of adverse possession to an "island." In order to prove adverse possession, it is necessary that the claimant prove that the possession was actual, open, exclusive, and continuous for a period of 10 years. Barnes v. Milligan, *supra*. Pokorski obtained record title to the property on December 20, 1974, by virtue of a deed to him from James Reno. Pokorski claims his predecessors in title had obtained adverse possession for the full statutory period prior to their deed to him, and had established their title to the tract by adverse possession by November of 1974. Assuming this to be true, adverse possession by his predecessors in title must

have been commenced not later than November of 1964, in order for the full 10-year period to run. The record is unclear and inconclusive as to when the "island" was formed. Stillman could do no more than place it somewhere between 1963 and 1965, and further testified that the "island" was, during certain periods, covered by water. James Reno testified that he hunted on a sandbar in 1963 and 1964. However, whether the sandbar he hunted on was the same land mass as the "island" to which Stillman referred is not established. Photographs introduced in evidence as exhibits do no more than show what appears to be sandbars in existence as of October 1963. A subsequent photograph, taken in 1965, clearly shows several islands in existence. Likewise, the most recent aerial photograph, taken in 1971, clearly reveals at least four separate and distinct islands located in the area in controversy. Moreover, no photograph or other evidence establishes that the sandbar or island at the end of dike 737.9, which Reno testified he hunted on, was ever connected to any of the other islands. Also, no evidence was introduced to identify or distinguish the island that Stillman was referring to in his evidence. As revealed by the record, the earliest indication of any islands which might have been capable of being adversely possessed was in September of 1965. The record reveals that McAdams caused a fence to be placed along the section line between Sections 14 and 15 in December of 1974; therefore it is clear that in order for the 10-year statute of limitations to run, Pokorski's predecessors in title would have had to begin their adverse possession by December of 1964. However, there is no persuasive evidence that there was any land present at that time which was subject to adverse possession. Pokorski testified on direct examination, in response to a question presented to him as to where the land was and how it grew, as follows: "In *1978* the land encompasses a *good area*

on both sides of the dividing line here of 36 39 [the acreage designation of the contested property] and 13 98 [the acreage designation of the area located immediately to the west thereof]." (Emphasis supplied.) It is clear, then, that as late as 1978, the land did not cover the entire area of the tract in dispute between the parties.

In 2A C. J. S., Adverse Possession, § 264, p. 21, the rule is stated: "A claimant of title by adverse possession must further show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description." Also, in Harvat v. Clear Creek Drainage Dist., 197 Neb. 352, 249 N. W. 2d 209 (1977), this court held that the right to hunt and fish cannot be established by prescription where the use is not exclusive or its extent is too indefinite for a determinate description. We conclude that Pokorski did not establish the extent of his predecessors' possession with sufficient definiteness. This failure to meet his burden of proof upon this issue necessitates a reversal of the decree of the District Court and obviates the necessity of further discussion of other errors assigned by the Olsons with respect to Pokorski's failure to establish all of the necessary elements of adverse possession.

One further matter, however, must be commented upon. As previously stated, the District Court in its decree dismissed the counterclaim filed by the Olsons for damages to their commercial hunting operation. In their counterclaim they alleged that their commercial hunting business had been damaged due to the dispute over the tract and due to the proximity of Pokorski's blind to their operation. While they may not have been able to successfully operate a commercial blind on this land, such fact, even if true, would not establish harm to their entire

commercial operation as alleged in their counterclaim. The record reveals that the Olsons had other areas which they could and did use for commercial hunting purposes. Nowhere in the record is there evidence that they had to turn away any business due to their inability or unwillingness to use the land in Section 14. They simply failed to show that the loss of the use of the land in Section 14 harmed the rest of their operation to any extent. See, El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 199 Neb. 697, 261 N. W. 2d 358 (1978); K & R, Inc. v. Crete Storage Corp., 194 Neb. 138, 231 N. W. 2d 110 (1975). That they were not able to establish a commercial blind on land in Section 14 adjacent to Lot 12 would not amount to proof of damages to their commercial hunting operation, and the trial court was correct in dismissing this counterclaim.

In view of what we have stated above, that part of the decree of the trial court quieting title to the tract in question in Pokorski must be reversed and title to the disputed 36.39 acres is ordered quieted in the Olsons and further, that part of the decree of the trial court dismissing the Olsons' counterclaim for damages should be and hereby is sustained.

AFFIRMED IN PART, AND IN PART REVERSED.

IN RE INTEREST OF LESLIE SUE RICE, A MINOR CHILD UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLANT, V. LESLIE SUE RICE ET AL., APPELLEES.

285 N. W. 2d 223

Filed November 13, 1979. No. 42402.

1. **Courts: Juveniles: Appeal and Error.** An appeal from the order of a county court sitting as a juvenile court to the District Court and to this court requires that we review the adjudication de novo on the record and reach an independent conclusion on disputed issues of fact.

2. **Minors: Parent and Child: Statutes: Evidence.** Whether a parent has neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is a question of fact, and each case must be determined on its own facts.
3. **Minors: Parent and Child: Statutes: Schools and School Districts.** Neglect of a parent to provide proper or necessary education for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is not proved by simply establishing that the compulsory school attendance law, section 79-201, R. R. S. 1943, has been violated.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Milton R. Larson, Lincoln County Attorney, and Marianne C. Vainiunas, for appellant.

Thomas J. Guilfoyle of Guilfoyle, Fogarty & Lund, Craig F. Swoboda of Swoboda & Katz, and Scott P. Helvie, Lincoln County Public Defender, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This is an appeal by the State of Nebraska from a judgment of the District Court reversing a finding by the county court of Lincoln County, sitting as a juvenile court, that Leslie Sue Rice, a minor, was a "child * * * whose parent * * * neglects or refuses to provide proper or necessary * * * education, or other care necessary for the health, morals, or well-being of such child," as provided for in section 43-202 (2) (c), R. R. S. 1943.

The dispositional hearing was held on December 1 and 2, 1977. At that time the minor was just past 13 years of age. She lived in Wallace, Nebraska, with her mother and father, and had completed the sixth grade in the Wallace public school system the preceding year. However, both she and her parents

were what they denominated "born-again Christians," and as such, among other things, believed in a more or less literal and fundamental interpretation of the Bible; supported the view of creation and rejected totally the theory of evolution; and believed that the responsibility of all education of a child rested solely with the parents rather than the state. For some time they had been dissatisfied with the curriculum and textbooks of the public school system, primarily because they were not religiously oriented, and they had been searching for a satisfactory alternative. They became aware of and made inquiry to the Christian Liberty Academy of Prospect Heights, Illinois, which operated a conventional religious primary and secondary school accredited by the state of Illinois, as well as approximately 300 satellite schools consisting of 1,000 students scattered throughout the 50 states. As a result, the Rice Christian Academy was created, consisting of Lesley Rice, the minor's father, as headmaster; Dixie Rice, the mother, as teacher; and, of course, Leslie Sue as the only student. A classroom was set up in the home, and textbooks, lesson plans, reading lists, problems, and tests were furnished by the parent organization in Prospect Heights, which offered needed consultation by telephone when required, and read and graded the various work papers and tests. There appeared to be no question but what the minor attended seventh grade classes at the Rice Christian Academy on a daily basis and during regular and conventional school hours.

The mother had one semester of college, but possessed no teaching experience. Mr. Rice had engaged successfully in several of the building trades, was currently well employed, and, in addition, he and his wife owned and operated a hotel, a laundromat, and several rental properties. The academy was not approved by the State of Nebraska, nor were the textbooks accepted for the teaching of

American history, as required by state law. Leslie Sue attended no school during the 1977-78 school year other than Rice Christian Academy.

Other than the lack of official approval, the only criticism of the quality of education offered by the Rice Christian Academy was by the Wallace superintendent of schools. He agreed that he had not spent enough time to make a worthwhile overall evaluation. However, he questioned the history book as being more of a summary than an in-depth investigation of American history, and noted the apparent absence of courses of study in physical education and health and safety. Other deficiencies pointed out by another witness related to the absence of presentation of alternative philosophies and beliefs and of daily interactions with peer groups.

On the other hand, an assistant professor of psychology from the University of Nebraska at Omaha, after extensive testing of Leslie Sue and a comparison with her tests from prior years while attending public schools, noted a general deterioration of her relative achievement standing up through the testing in the fall of 1977, but considerable progress from then until July of 1978, after her 1 year at the Rice Christian Academy. Based upon Leslie Sue's progress, as revealed by the various tests, the witness ventured the opinion that her education was quite satisfactory.

Another witness who qualified as an expert in the field of education and curriculum review testified that from his examination of the subjects taught at Rice Christian Academy he found them to be comprehensive and adequate.

It is conceded by all parties concerned that the Rice Christian Academy is not an approved school by state standards. Rule 14, Revised, of the Nebraska State Department of Education, is the regulation and procedure for approving the continued operation of all schools and the opening of new schools. It was

enacted pursuant to authority granted by the Legislature in section 79-328, R. R. S. 1943. Rule 14-(O), General Provisions, thereof, provides in part: "Only school systems approved for continued legal operation by the State Board of Education are considered to be providing a program of instruction which is in compliance with the compulsory attendance laws." Rule 14 was properly introduced into evidence by the State at the hearing in the District Court.

An appeal from the order of a county court sitting as a juvenile court to the District Court and to this court requires that we review the adjudication de novo on the record and reach an independent conclusion on disputed issues of fact. §§ 43-202.03, 24-541, and 25-1925, R. R. S. 1943; State v. Worrell, 198 Neb. 507, 253 N. W. 2d 843 (1977). However, this court will give great weight to the findings of fact made by the trial court because it heard and observed the parties and the witnesses. State v. Bailey, 198 Neb. 604, 254 N. W. 2d 404 (1977). Whether a parent has neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is a question of fact, and each case must be determined on its own facts. State v. Randall, 187 Neb. 64, 187 N. W. 2d 586 (1971).

The State contends that the compulsory attendance laws as found in Chapter 79 of the Nebraska statutes, and Rule 14, *supra*, must be construed in pari materia with the juvenile court act, Chapter 43, article 2, including section 43-202 (2) (c), R. R. S. 1943, and that therefore the "proper or necessary * * * education * * * necessary for the health, morals, or well-being of such child" which must be provided by the parent is attendance at a school approved for compulsory attendance. In furtherance of its position, it points to section 79-211, R. R. S. 1943, which, after having provided for written warn-

ing to the person in charge of a child not attending school under section 79-201, R. R. S. 1943, requires that a complaint be filed in juvenile court, and section 79-216, R. R. S. 1943, mandates that anyone violating this act shall be guilty of a misdemeanor and be fined from $5 to $100, or be imprisoned in the county jail for not more than 90 days, or both.

Sections 79-201 and 79-211, R. R. S. 1943, were originally enacted in 1901, and have remained in more or less their present form. However, section 43-202 (2) (c), R. R. S. 1943, makes no reference to the proceeding mentioned in section 79-211, nor does section 43-202 (4) (b), which grants the juvenile court exclusive jurisdiction of a child "who is habitually truant from school or home; * * *." The present-day language of section 43-202 (4) (b), R. R. S. 1943, was enacted in 1913, and then for the first time defined habitual truancy as an act of delinquency aimed at the child itself. Therefore, at Chapter 79, our laws proscribed the conduct of parents in not sending children to school, and section 43-202 (4) (b) accomplished the same purpose as to the child. This would seem to cover completely the subject of compulsory school attendance, but these laws were not invoked by the State in this case.

In 1955, the Legislature, in separating for definitional purposes a dependent and a neglected child, included the present-day language of section 43-202 (2) (c), R. R. S. 1943. This for the first time included the provision relating to the neglect or refusal of a parent to provide proper education "necessary for the health, morals, or well-being" of a child. It is obvious from an examination of that language that the legislative intent was to categorize children who were destitute or without home or support as neglected; those who were abandoned for practical purposes or were not receiving the proper kind of parental care as neglected; and those who were vicious or with criminal bent as delinquent. In 1973,

the Legislature deleted the identifying names as "dependent," "neglected," or "delinquent," but the descriptions remain as subsection (1), subsection (2), and subsections (3) and (4), respectively, of section 43-202, R. R. S. 1943.

It is our opinion that Chapter 79, R. R. S. 1943, relating to compulsory school attendance, and section 43-202 (2) (c), R. R. S. 1943, regarding the neglect of children, generally do not pertain to the same subject matter and should not be construed in pari materia. From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441 (1953). Additionally, the Legislature when enacting legislation is presumed to have knowledge of all previous legislation on the subject so that if it intended to equate nonattendance under Chapter 79 with "neglect" under section 43-202 (2) (c), R. R. S. 1943, it would have said so. Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860 (1960).

We feel that section 43-202 (2), including subsection (c), R. R. S. 1943, relates to actions by parents amounting to neglect, abandonment, or denial of proper care such as will endanger the health, morals, or well-being of a child. From our view of the evidence, such a situation does not exist here, and is not proved simply by establishing that the parents *may* be violating the compulsory school attendance law, which latter question we do not here decide.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

ALDONA BALIULIS, APPELLANT, V. CAMPELL SOUP COMPANY, APPELLEE.

285 N. W. 2d 227

Filed November 13, 1979. No. 42444.

1. **Workmen's Compensation: Evidence: Judgments.** The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case, and will not be set aside on appeal unless clearly wrong.
2. **Trial: Evidence.** Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence.

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

Jon S. Okun and John H. Bernstein of Eisenstatt, Higgins, Kinnamon & Okun, P.C., for appellant.

John R. Timmermier and Rodney G. Gnuse of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, WHITE, and HASTINGS, JJ., and HOWARD, District Judge.

HOWARD, District Judge.

Plaintiff appeals from an order of the Nebraska Workmen's Compensation Court dismissing her petition for benefits, on rehearing following the award of benefits to her by the one-judge court in the original hearing.

Plaintiff testified that on Monday, August 23, 1976, she and a coemployee, Gloria Hudson, were lifting a heavy box, 250 to 280 pounds, when the box slipped, the entire weight was thrown onto plaintiff, and she felt a pop in her back. She stated she went to see the employer's staff nurse about 5 minutes later and Jerry Janousek, another coemployee, gave her a ride to another building some distance away where the nurse's office was located. Mr. Janousek recalled plaintiff complaining about her back and taking her to the building but he did not accompany her

into the nurse's office. Plaintiff did not notify the working foreman, to whom injuries are supposed to be reported, but said she told him about it after seeing the nurse. The foreman had no memory of the event. Gloria Hudson has no recollection of the box slipping or of any such incident and testified that plaintiff never told her she was injured or that the box slipped. The head nurse denies that she saw plaintiff on August 23 or that plaintiff ever complained of the alleged accident or any back injury. She identified the daily log on which such a complaint would be recorded as well as on the worker's individual chart, to which such information is transferred, neither of which contains a notation of the alleged incident or injury. She did see plaintiff, as the log verifies, on August 26, 3 days later, when plaintiff complained of a persisting ankle problem, a dolly having rolled over her foot some time earlier. Plaintiff saw the company physician for that problem. Two coemployees, who did not see the alleged incident, testified that plaintiff told them she had hurt her back while lifting a box.

Plaintiff continued working on the day of the alleged accident, a Monday, and for the remainder of the week. Her vacation started the next week, and she did not go to a doctor. Soon into the vacation her son died tragically and she "landed in the hospital with my nerves" and was heavily sedated. Medical and hospital records received in evidence show that the first complaint of the back was made on October 28 when she consulted Dr. J. E. Ryder about back pain "of several days' duration." She gave no recorded history of an injury. Dr. Ryder also testified by deposition that he had seen plaintiff on October 11 and she had no complaint of back pain. The first recorded indication of an alleged accident appears in the records of Archbishop Bergan Mercy Hospital in June 1977, where it is noted, "* * * may have injured herself at work. She was

lifting a 300 pound object with two other workers and felt 'something popping.' " Dr. Ryder testified that until the June 1977, hospitalization he had no history of an injury, which came to him from Dr. Schima whom he had called in to examine plaintiff. Dr. Ryder stated that in August, September, October, and November 1976, he was treating plaintiff for hives, asthma, and depression and he believes the drugs involved in the treatment would mask symptoms of a back problem. Also, he does not remember plaintiff's mentioning the alleged accident to him, although he stated she later told him she had done so.

Plaintiff underwent a laminectomy in January 1977, and Dr. Ryder testified to a remaining temporary total disability, which he attributes to the alleged accident of August 23, 1976.

The Nebraska Workmen's Compensation Court on rehearing concluded that plaintiff had failed to prove by a preponderance of the evidence that her back disability resulted from an accident arising out of and in the course of her employment by the defendant. Plaintiff contends that the compensation court ignored the testimony of Dr. Ryder with respect to the medical cause of her back problem and substituted its own judgment for that of the only medical witness. The threshold determination for the finder of fact, however, is whether an accident occurred, and it was this question to which the Nebraska Workmen's Compensation Court addressed itself in its comprehensive order of dismissal.

The standard of review is defined in section 48-185, R. R. S. 1943, as follows: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment,

order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award." By this standard the findings of fact made by the Nebraska Workmen's Compensation Court will not be set aside unless clearly wrong; and in testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, with the benefit of every inference that can reasonably be drawn therefrom. Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92.

Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Meadows v. Skinner Manuf. Co., 178 Neb. 856, 136 N. W. 2d 184. The Nebraska Workmen's Compensation Court could well have been influenced by plaintiff's continued work on the day of the alleged accident and for the remainder of the week, her lack of intention to seek medical attention during her vacation, the subjective nature of her complaints, the adverse testimony of her coworker on the other end of the box, her failure to report the accident to the working foreman, the adverse testimony of the nurse and the absence of any record of the alleged accident or back complaint, her visit to the nurse and company physician 3 days later for another condition without mention of the alleged accident, her failure to report such a history to her physician, the length of time before the onset of any symptoms, and the elapse of approximately 10 months before any such history was recorded.

We cannot say on this record that the findings of fact made by the Nebraska Workmen's Compensa-

tion Court after rehearing are clearly wrong. The evidence instead is clearly sufficient to support the findings.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM G. HILL, APPELLANT.

285 N. W. 2d 229

Filed November 13, 1979. No. 42513.

1. **Criminal Law: Guilty Pleas: Motions, Rules, and Orders.** A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence.
2. **Criminal Law: Guilty Pleas.** Before accepting a guilty plea a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.
3. _____: _____. Although questioning the defendant as to the factual basis is not required where the defendant enters a plea of nolo contendere, the court must satisfy itself that there is a factual basis for the charge.

Appeal from the District Court for Wayne County: EUGENE C. MCFADDEN, Judge. Affirmed.

Rosenberg & Yungblut and Stephen K. Yungblut, for appellant.

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

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BRODKEY, J.

The defendant, William G. Hill (hereinafter referred to as Hill), has appealed to this court from a denial of his motion to withdraw his plea of nolo contendere to first degree sexual assault. We affirm.

On July 1, 1977, Hill was charged with first degree sexual assault and with assault with intent to commit sodomy. A preliminary hearing on said charge was held on December 16, 1977, and the court found that probable cause existed that Hill committed said offenses. He was bound over to the District Court and arraigned on February 1, 1978, at which time he entered a plea of not guilty to both counts. Trial was set for April 26, 1978. On April 24, 1978, a hearing was held on motions made by Hill for a change of venue and for a continuance, which motions were denied. Later that day, pursuant to a plea bargain, Hill withdrew his plea of not guilty to the first count and entered a plea of nolo contendere to that charge, following which the second count was dismissed. Sentencing was set for June 7, 1978, but was postponed because of Hill's desire and subsequent motion to initiate sexual sociopath proceedings. Although his motion was overruled, such proceedings were later initiated upon the court's own motion.

Hill was examined pursuant to the sexual sociopath act and found to fit within the legal definition of a sexual sociopath. New counsel was retained by Hill, and on October 4, 1978, hearing was had on a motion to withdraw the plea of nolo contendere, which motion was denied, then renewed on October 26, 1978, and again denied. On November 1, 1978, the sexual sociopath proceedings were dismissed at Hill's request. Hill was sentenced on November 20, 1978, to imprisonment for a term of from 7 to 14 years on the charge.

Hill assigns four errors relating to the validity of the nolo contendere plea, contending generally that it was not voluntarily and intelligently made. The specific assignments of error are separately discussed later in this opinion.

The principles which govern in this case were set out by us in State v. Kluge, 198 Neb. 115, 251 N. W. 2d 737 (1977): "This court approved and adopted the

American Bar Association Standards Relating to Pleas of Guilty as minimum standards in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), and has adhered to those standards with reference to withdrawal of guilty pleas. State v. Evans, 194 Neb. 559, 234 N. W. 2d 199 (1975). Section 2.1 of those standards provides:

" '(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. * * *

" '(b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.' Section 2.1 also provides that withdrawal of the plea is necessary to correct a manifest injustice whenever the defendant proves that he was denied the effective assistance of counsel, that the plea was not entered or ratified by the defendant, that the plea was involuntary or unknowing, or that the prosecution has failed to abide by a plea agreement.

"This court has held on numerous occasions that a motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence. State v. Freeman, 193 Neb. 227, 226 N. W. 2d 351 (1975); State v. Daniels, 190 Neb. 602, 211 N. W. 2d 127 (1973); State v. Johnson, 187 Neb. 26, 187 N. W. 2d 99 (1971). When a plea of guilty or nolo contendere is made with full knowledge of the charge and the

consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Williams, 191 Neb. 57, 213 N. W. 2d 727 (1974); State v. Eutzy, 184 Neb. 755, 172 N. W. 2d 94 (1969)."

The comments to section 2.1 of the American Bar Association Standards Relating to Pleas of Guilty make it clear that the evidence required to prove a manifest injustice must be more than a mere failure to meet a procedural requirement. "For example, a defendant who alleged he was unaware of the charge to which he pleaded would find it extremely difficult to show grounds for withdrawal if the record established that the judge, as required by section 1.4, advised him of the charge. On the other hand, if the record indicated that the judge did not so advise the defendant, the *defendant would still have to put in additional evidence tending to show that he was not otherwise aware of the charge.*" (Emphasis supplied.) Comment, section 2.1 (a) (ii), ABA Standards Relating to Pleas of Guilty. Such comment makes it clear that the burden of proof on the question of manifest injustice rests upon the defendant. With the foregoing principles in mind, we now examine Hill's specific assignments of error.

Hill first contends that manifest injustice resulted when the trial court failed to advise him of the waiver of his constitutional right to a jury trial. The record is clear that the trial court did indeed fail to so advise Hill of that right at the time of his entry of the nolo contendere plea. However, such failure, in and of itself, does not require us to alter the decision of the trial court on Hill's motion. In fact, we reject this contention on two grounds. First, we believe Hill failed to meet the burden of proof which is required to show manifest injustice. The record is absolutely clear that Hill was aware of his right to a

jury trial at the time of his entry of the nolo contendere plea. As the comments to section 2.1, ABA Standards, *supra*, indicate, Hill has the burden of proving that he was unaware of the waiver of this right. We believe that Hill failed to prove by clear and convincing evidence that he was unaware of the waiver of his right to a jury trial. Having failed to meet his burden of proof, Hill failed to establish manifest injustice as to this issue. See, also, Bond, Plea Bargaining and Guilty Pleas, §§ 7.11 (4) and (5), p. 325 (1978).

We likewise reject this contention for a second reason. This court has never adopted a strict, ritualistic approach for trial courts to follow when reviewing a defendant's constitutional rights before accepting a guilty plea. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971); State v. Kluge, *supra*; State v. Fowler, 201 Neb. 647, 271 N. W. 2d 341 (1978); State v. Curnyn, 202 Neb. 135, 274 N. W. 2d 157 (1979). We have adopted the following standard with reference to guilty pleas: "Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty and the effect of his plea." State v. Turner, *supra*.

Hill contends that the ABA Standards Relating to Pleas of Guilty are the minimum standards which are controlling herein. With that we agree. Hill is likewise correct in his contention that the court must inform a defendant that entry of a plea of nolo contendere or guilty will waive a right to trial by jury, and that he was not informed in those exact words. However, as previously stated, such information need not be given in a strict, ritualistic manner. The record discloses that Hill was represented by competent counsel at all stages of the proceedings. It is clear Hill entered his nolo contendere plea pursuant to his plea bargain. His counsel stated at that time: "After hearing the plea bargain, he [Mr. Hill] feels

that it would be the best thing to do for him, to avoid a trial in this matter, * * *." The trial court likewise informed Hill that acceptance of the nolo contendere plea would operate as follows: "* * * you will be subjecting yourself to the penalty all to the same extent *as if you had been adjudged guilty by a jury or found guilty by a jury after a trial* or had entered a voluntary and intelligent plea of guilty." (Emphasis supplied.) While the affirmative waiver of a right to jury trial might not have been elicited in the most direct form possible, the substance of the proceedings indicates a waiver of such right was made by Hill, notwithstanding his claim to the contrary. We therefore reject Hill's first assignment of error.

Hill next contends that the failure of the trial court to inform him of the possibility of sexual sociopath proceedings being instituted against him amounted to manifest injustice. In particular, Hill relies on section 1.4 (c) (iii) of the ABA Standards, *supra*, which provides: "The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and * * * (c) informing him: * * * (iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment."

Such reliance is unfounded. The record clearly establishes that the sexual sociopath proceedings were both instituted and dismissed at Hill's request. We fail to see how Hill can contend that he was unaware of the possibility of additional punishment when those proceedings were initiated at his request. It is true that Hill testified he believed that the proceedings were initiated at the trial court's

request. However, on cross-examination Hill testified that he had expressed a desire to his counsel to proceed under the sexual sociopath law, who filed such a motion on Hill's behalf. Such testimony makes it clear that Hill had knowledge of the possibility of sexual sociopath proceedings being instituted against him, at least as of June 7, 1978, the original sentencing date. While it is true that knowledge of the additional punishment must be had on the date of the entry of the plea, the record in this case is unclear as to whether Hill had such knowledge. Hill did not show that he had no knowledge of these proceedings on April 24, 1978, the date of entry of the nolo contendere plea. Having failed to meet his burden of proof on the matter, we must affirm the trial court as to this claim.

We have a further reason for rejecting this contention of Hill. Even assuming that the record indicated that Hill did not have knowledge of the possibility of sexual sociopath proceedings being instituted against him, failure to so inform him as to this matter is at best harmless error in this case. In fact, the sexual sociopath proceedings were dismissed at Hill's insistence. No different or additional punishment was imposed upon Hill as a result of these proceedings. We point out that any possible error which might have been injected into this matter was done so by Hill. Even assuming that Hill lacked knowledge of this matter, we reject his contention, since any error which may have resulted was caused by Hill. In this connection, see United States v. Timmreck, 441 U. S. 780, 99 S. Ct. 2085, 60 L. Ed. 2d 634 (1979).

Hill next contends that the failure of the trial court to make a factual determination for the basis of the charge also amounted to manifest injustice. Again, we fail to find merit in Hill's position. "Although questioning the defendant as to the factual basis is not required where the defendant enters a plea of

nolo contendere, State v. Hyslop, 189 Neb. 331, 202 N. W. 2d 595, the court must satisfy itself that there is a factual basis for the charge." State v. Country, 202 Neb. 509, 276 N. W. 2d 110 (1979). "In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative." State v. Daniels, 190 Neb.602, 211 N. W. 2d 127 (1973). Although it is true that the trial judge did not have the presentence report concerning the defendant before him at the time of the entry of the nolo contendere plea, it is clear he had the report before him prior to the sentencing. We point out that section 1.6 of the ABA Standards, *supra*, provides: "Notwithstanding the acceptance of a plea of guilty, the court should not *enter a judgment upon such plea* without making such inquiry as may satisfy it that there is a factual basis for the plea." (Emphasis supplied.) As we stated in State v. Leger, 190 Neb. 352, 208 N. W. 2d 276 (1973): "Verification of the fact that the court was aware of the 'factual basis' for the pleas is found in the presentence reports which were before the court when sentences were pronounced." Our review of the record indicates that there was indeed a factual basis for the charge. We likewise reject defendant's contention in this regard.

Finally, Hill contends that manifest injustice occurred because of the trail court's failure to advise him with reference to certain constitutional rights, as set out in Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). We resolved this issue in State v. Fowler, 201 Neb. 647, 271 N. W. 2d 341 (1978), where we stated: "In 1971, this court filed its opinion in the case of State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, which case has been consistently followed in this state since it was filed and is the leading authority setting forth the tests to be observed in accepting pleas of guilty. In that case,

this court accepted the test enunciated in North Carolina v. Alford, [400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)], that the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. In the opinion we stated: 'This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of those cases.' The defendant in that case relied upon Boykin, as Boykin not only requires that a plea of guilty be intelligent and voluntary to be valid but that the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. * * * In its opinion in Turner, this court considered the requirements of Boykin, but specifically declined to require a ritualistic litany or item-by-item review of constitutional rights before accepting a guilty plea from a defendant." As previously indicated, a review of the record clearly establishes that the trial court took great pains to determine if Hill understood the nature of the charges, the penalties involved, and the effect of the plea. No more is required under the law in this state. In previous cases we have suggested the use of check lists in arraignments to avoid difficulties such as were present in the instant case. We do so again.

No reversible error appearing in the record, the judgment of the District Court must be affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

KRIVOSHA, C. J., not participating in this case.

WHITE, J., concurring in result.

I agree that the record is sufficient to enable a trier of fact to find that the defendant knew of his right to trial by jury and that by tendering a plea of no contest he was waiving that right.

Assuming, but not conceding, that the burden should properly be placed on a defendant to assert

and prove manifest injustice, as indicated in section 2.1, ABA Standards Relating to Pleas of Guilty, that burden is satisfied by the defendant simply pointing to a record silent as to the waiver of a constitutional right. Otherwise, the decision cannot be reconciled with the language of Mr. Justice Douglas in Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274: "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. * * * Second, is the right to trial by jury. Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 491. * * * *We cannot* presume a waiver of these three important federal rights from a silent record." (Emphasis supplied.)

McCOWN and HASTINGS, JJ., join in this concurrence.

THE OMAHA NATIONAL BANK, EXECUTOR OF THE ESTATE OF THEODORE N. GANAROS, DECEASED, APPELLANT, V. SAM KOLIOPOULOS, APPELLEE.

285 N. W. 2d 496

Filed November 20, 1979. No. 42351.

1. **Pleadings: Trial.** Amendment of petition is not a matter of right but is addressed to the sound discretion of the trial court and its decision will not be disturbed unless there has been an abuse of discretion.
2. _____: _____. It is not reversible error to refuse a plaintiff to amend his petition to conform to the proofs, where, had such amendment been made, the undisputed evidence would not have justified a verdict in his favor.
3. **Securities.** A delivery of a stock certificate without endorsement may be sufficient to effect a transfer between the parties.

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

Norman Denenberg, for appellant.

Martin A. Cannon of Matthews & Cannon, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, J.

This is a related case to our decision in Pflasterer v. Omaha Nat. Bank, 201 Neb. 427, 268 N. W. 2d 104. In that case plaintiff, a daughter of the decedent, Theodore N. Ganaros, successfully established her right to specific performance of a contract to make a will; and this court impressed a constructive trust on the assets of the estate. The contract to make a will and an actual will were drawn in 1971. The will admitted to probate bequeathed all shares owned by the decedent in a corporation known as Ted's Enterprises, Inc., to a nephew, Sam Koliopoulos. The nephew was not mentioned in the 1971 will.

In this action, the executor of the estate of Theodore N. Ganaros brought suit against Sam Koliopoulos to set aside a transfer of 255 shares of Ted's Enterprises, Inc., (all shares owned by Ganaros) from Ganaros to Koliopoulos. Marian G. Pflasterer, the daughter, was not a party to this action. In its petition, the executor alleged that Ganaros was not competent to transact business on the date of the transfer and that the transfer was for an insufficient consideration. The trial court found for the defendant, Sam Koliopoulos, and plaintiff bank appeals.

The plaintiff assigns two errors in the court's findings: That decedent Ganaros was competent to transfer the stock; and the refusal to permit plaintiff to amend its petition at the close of all the evidence to allege that decedent had never assigned or transferred the stock.

On consideration of the whole record, we agree with the trial court that Theodore N. Ganaros was competent at all times vital to this case and was, in fact, carrying out a long-held desire to see that his

nephew eventually owned all shares of Ted's Enterprises, Inc. Especially persuasive to us, as it was to the trial court, was the testimony of Frank Frost, the private attorney of Ganaros and his friend for many years, who testified unequivocally that Ganaros understood the transaction and willingly entered into it. No further discussion of the evidence in this case would be fruitful, such as nurses' notes, evidence of physical frailty, opinions of attendants, physicians, etc. It is sufficient to state that we consider the weight of the evidence sustains the trial court's holding.

The plaintiff next asserts that the trial court erred in refusing to allow amendment of its petition at the close of the case. Amendment is not a matter of right but is addressed to the sound discretion of the trial court and its decision will not be disturbed unless there has been an abuse of discretion. Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435 (1960); § 25-852, R. R. S. 1943.

From the inception of the action 15 months before trial until the defendant rested, the sole and only issue in the case was the competency of Theodore N. Ganaros. Clearly, the theory of the claim was substantially changed. The trial court did not abuse its discretion by denying the amendment. Johnson v. American Smelting & Refining Co., on rehearing, 80 Neb. 255, 116 N. W. 517 (1908).

In any event, even if the court had allowed the amendment, the relief prayed for could not properly have been granted. "It is not reversible error to refuse a plaintiff to amend his petition to conform to the proofs, where, had such amendment been made, the undisputed evidence would not have justified a verdict in his favor." Schlageck v. Widhalm, 59 Neb. 541, 81 N. W. 448, (1900). The plaintiff's sole assertion is that Ganaros did not endorse the certificate or authorize anyone else to do it for him.

However, a copy of the minutes of the meeting of the corporation's stockholders and directors signed by Ganaros, reciting the fact of the sale and transfer, was introduced in evidence.

No evidence was introduced that the certificate was not delivered to Koliopoulos. Indeed, the certificate contains a recitation to the contrary. A delivery of a stock certificate without endorsement may be sufficient to effect a transfer between the parties since, under section 8-307, U. C. C., endorsement is necessary only for the transferee to become a bona fide purchaser as against third parties. In re Estate of Jorgensen, 217 N. E. 2d 290 (Ill. App. 2d, 1966).

The transfer of the stock from Ganaros to Koliopoulos occurred in March 1976 after the 1971 contract between Pflasterer and Ganaros which we enforced in Pflasterer v. Omaha Nat. Bank, *supra*.

No issue being here presented as to any rights as between Pflasterer and Koliopoulos, none is decided.

AFFIRMED.

AURORA COOPERATIVE ELEVATOR COMPANY, A CORPORATION, APPELLEE, V. STEVEN C. LARSON ET AL., APPELLANTS.

285 N. W. 2d 498

Filed November 20, 1979. No. 42394.

1. **Judgments: Trial.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong.
2. _____: _____. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.
3. **Judgments: Trial: Evidence.** In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must

be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, Judge. Affirmed.

Thomas A. Wagoner, for appellants.

E. H. Powell, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

This is an action by the plaintiff, Aurora Cooperative Elevator Company, against the defendants, Steven C. and Linda L. Larson, to recover amounts allegedly due on an open account. Jury was waived and the matter was tried to the court. The District Court entered judgment in favor of the plaintiff in the sum of $13,516.62, plus interest and costs. The defendants have appealed.

The defendants were stockholder patrons of the plaintiff, and had purchased goods and services from plaintiff on a revolving open account agreement since March 6, 1975. On March 4, 1976, the defendants purchased 4,600 pounds of corn rootworm insecticide at a total price of $3,128. Defendants did not take delivery of the chemicals at the time of sale, since they were to be picked up later. A sale ticket was made out and a copy delivered to the defendants at the time of sale. The charge of $3,128 was included in the monthly statement of account sent to the defendants on March 25, 1976, together with a copy of the sale ticket. The defendants paid the March 25, 1976, statement of account, including the March 4 charge for chemicals, on April 12, 1976. Between April 1, 1976, and July 25, 1977, the defendants accumulated an open account balance of $13,516.62 for purchases during that period. On September 6, 1977, plaintiff filed this action for recovery of that amount, together with interest from July 25,

1977, as provided in the revolving account agreement.

The defendants' pleadings do not dispute any of the purchases from April 1, 1976, to July 25, 1977, but allege that they received only 2,300 pounds of the chemicals purchased on March 4, 1976, and, therefore, should receive credit for an overpayment of $1,564 made on April 12, 1976, and subsequent interest on it, as an adjustment to their account.

The defendants' evidence was that a nephew picked up 2,300 pounds of the chemicals for them in the middle of June 1976, and the remaining half of the 4,600 pounds of chemicals had never been picked up or received.

The plaintiff's evidence was that when a sale for later pickup is made, the sale ticket is made up, and at the same time a load-out order sheet is made out and taken to the counter salesman to be checked off as the customer picks up the purchases. Once the customer picks up all the purchases, the load-out sheet is either destroyed or given to the customer. The plaintiff does not require the customer to sign the load-out sheet. Although plaintiff's employees who testified had no independent recollection that delivery of defendants' chemicals had been either partially or fully made, there was no load-out order or sheet in the plaintiff's files.

Although defendants testified that they applied only 2,300 pounds of chemicals to their corn land, the evidence was conflicting as to the amount of chemicals required to treat the land at the recommended rate of applications, and as to whether 2,300 pounds would have been sufficient.

The trial court found that defendants were indebted to the plaintiff in the sum of $13,516.62 as of July 25, 1977, with interest thereon at the rate of 1½ percent per month on the first $300 of such amount and 1 percent per month on the balance of such judgment. Defendants have appealed.

Defendants contend that the evidence in this case is insufficient to sustain the judgment because evidence of delivery was circumstantial only. The argument is that there is no direct testimony to contradict the affirmative testimony of the defendants that they had received only one-half of the chemicals. The question of whether all the chemicals were delivered and received or only one-half of them was a factual issue to be determined by the trier of fact. Here a jury was waived and the fact finder was the trial court. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Hudson Foods, Inc. v. L & B Corp. & Estate of Clark, 202 Neb. 291, 275 N. W. 2d 70.

In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Fabricators, Inc. v. Farmers Elevator, Inc., 203 Neb. 150, 277 N. W. 2d 676. In the case now before us there is evidence to support the findings of fact, and the judgment of the trial court was not clearly wrong.

Defendants next contend that the claim was unliquidated and that no prejudgment interest should be allowed, and that interest on the judgment, if allowed, should be limited to the statutory 8 percent rate. We disagree.

The revolving charge agreement between the plaintiff and defendants fixed the finance charge at 1½ percent per month on the first $300 and 1 percent

per month on any amount over $300. Those rates are authorized for revolving charge agreements under the provisions of section 45-207, R. R. S. 1943. Section 45-103, R. R. S. 1943, sets the interest rate on judgments at 8 percent per annum, but specifically provides that if the judgment is founded upon any contract, either verbal or written, by the terms of which a greater rate of interest not exceeding the amount allowed by law has been agreed upon, the rate of interest on the judgment shall be that provided for by the terms of the contract. The judgment in this case provided for interest at the rate agreed upon in the revolving charge agreement.

Plaintiff's claim that attorney's fees should have been allowed cannot be considered in the absence of a cross-appeal.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

EVA J. POWERS, APPELLANT, V. GERALD E. CHIZEK, COMMISSIONER OF LABOR, AND BEATRICE STATE DEVELOPMENTAL CENTER, APPELLEES.

285 N. W. 2d 501

Filed November 20, 1979. No. 42425.

1. **Labor and Labor Relations: Courts: Appeal and Error.** An appeal from the decision of the Nebraska Appeal Tribunal on an unemployment compensation claim is considered de novo on the record of the hearing before the Nebraska Appeal Tribunal by both the District Court and this court.
2. **Labor and Labor Relations: Words and Phrases.** To "leave work voluntarily," as that term is used in the Employment Security Law, means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
3. **Trial: Appeal and Error.** Questions not presented to or passed upon by the trial court will not be considered on appeal.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded.

Brian J. Waid, for appellant.

James R. Jones and John W. Wynkoop, for appellee Chizek.

Heard before KRIVOSHA, C. J., MCCOWN, and BRODKEY, JJ., and BUCKLEY and L. W. KELLY, JR., District Judges.

BUCKLEY, District Judge.

Eva J. Powers filed a claim for unemployment compensation benefits under the Nebraska Employment Security Law. The claims deputy and, on appeal, the Nebraska Appeal Tribunal determined that the claimant voluntarily left her employment without good cause, the tribunal thereby assessing a 7-week disqualification against the claim. On appeal, the District Court affirmed the decision of the tribunal. She appeals here.

An appeal from the decision of the Nebraska Appeal Tribunal on an unemployment compensation claim is considered de novo on the record of the hearing before the Nebraska Appeal Tribunal by both the District Court and this court. §§ 48-639 and 48-640, R. R. S. 1943; A. Borchman Sons v. Carpenter, 166 Neb. 322, 89 N. W. 2d 123.

The record of the hearing before the Appeal Tribunal shows the following: Claimant was employed by the Beatrice State Developmental Center as a human resource candidate for approximately 6 years. On Thursday, May 11, 1978, claimant was counseled by her supervisor about excessive absenteeism and was reprimanded for falsifying a doctor's statement regarding an injury leave. Upset, claimant left the meeting and did not complete her work shift. She was not scheduled to work on May 12 and 13, 1978. She did not report for work as scheduled on Sunday, May 14, 1978. On the next

day, May 15, 1978, her employer mailed her a notice that her employment was terminated effective May 29, 1978, "* * * for leaving your work assignment on May 11, 1978 without notifying anyone; and for failure to report for work on May 14, 1978 or to notify your supervisor why you could not report." On the following day, May 16, 1978, claimant filed her claim for unemployment compensation benefits.

Section 48-628, R. R. S. 1943, provides in part: "An individual shall be disqualified for benefits: (a) For the week in which he has left work voluntarily without good cause, * * * and for not less than seven weeks nor more than ten weeks which immediately follow such week, * * * (b) For the week in which he has been discharged for misconduct connected with his work, * * * and for not less than seven weeks nor more than ten weeks which immediately follow such week, * * *."

Claimant appeals from the 7-week disqualification period, contending that she did not voluntarily leave her job without good cause but, instead, was fired. She testified that she was prepared to go to work as usual on her next scheduled day, Sunday, May 14, 1978, but Mrs. Berins, who usually gave claimant a ride to work on Sundays, did not appear. She tried unsuccessfully to call two other friends, as well as for a taxi. Later, her niece called and told her Mrs. Berins had been with her and told her that "they were going to fire you." From this, she concluded that she was fired. She claims she wanted to return to work but was told by another employee that her supervisor would not take her back.

Claimant did not attempt to call anyone in authority to tell them she could not report to work on Sunday, May 14, 1978, stating, because of her sister's illness, "* * * I was on the phone that day most of the day with my brother-in-law and calling the doctor there and talking to my sister."

Claimant's supervisor, Cheryl Gardner, testified

that while claimant was discharged after failing to report for work on Sunday, May 14, 1978, problems with claimant's attendance and use of sick and injury leave were circumstances that led up to it. The decision to fire her was made the following morning, before claimant was scheduled to report for work that afternoon. Thereafter, Mrs. Gardner was told by an employee that claimant wanted to return to work, but her response was, "I said that if Mrs. Powers would like to contact me that she could, but that I would not contact her myself."

The question is, did claimant leave work voluntarily without good cause or was she discharged? Since the defendant Commissioner of Labor concedes claimant was discharged, the question more precisely becomes, did claimant leave work voluntarily without good cause *before* she was discharged?

We conclude that claimant left her work before the end of her shift on May 11, 1978, and failed to report for work on May 14, 1978, both without good cause. But does this constitute "leaving work voluntarily" within the meaning of the Employment Security Law, sections 48-601 to 48-669, R. R. S. 1943? Nowhere in that act is the term defined, nor have we had prior occasion to determine its meaning.

A majority of the states in their unemployment compensation benefit laws assess some form of penalty or disqualification for "leaving work voluntarily." In MacFarland v. Unemploy. Comp. Bd., 45 A. 2d 423 (Pa. Super. Ct., 1946), the court stated, " 'When we say, "he left work voluntarily," we commonly mean, he left of his own motion; he was not discharged. It is the opposite of a discharge, dismissal, or lay-off by the employer or other action by the employer severing relations with his employes, to provide against which the act was mainly designed.' "

In Allen v. Core Target City Y. Prog., 275 Md. 69,

338 A. 2d 237, the court said: "As we see it, the phrase 'due to leaving work voluntarily' has a plain, definite and sensible meaning, free of ambiguity; it expresses a clear legislative intent that to disqualify a claimant from benefits the evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment. If an employee is discharged for any reason, other than perhaps for the commission of an act which the employee knowingly intended to result in his discharge, it cannot be said that his or her unemployment was due to 'leaving work voluntarily.' "

In Savastano v. State Board of Review, 240 A. 2d 172 (N. J., Super., 1968), an employee of a restaurant got into an argument with another employee and walked off the job. When he returned the next day, he found he was replaced. The employment compensation board found that the claimant had left the job without good cause and without notifying the employer, and therefore left the employer with no choice but to replace him immediately. It thereupon concluded that claimant had "left work voluntarily." The court, on appeal, remanded the case to the board for a full hearing on the question of whether claimant quit or was discharged, but in so doing stated: "It seems plain from a contrastive reading of subsections (a) and (b) [left work voluntarily and discharged for misconduct] that the Legislature, in adopting the language 'has left work' in the disqualification subsection (a), was undoubtedly mindful of a distinction between quitting employment and being discharged. Employees frequently leave work temporarily for some fleeting physical or mental irritation, or 'in a huff' occasioned by one or more of the frustrations attending commercial life, without intending to quit. Although such an individual may be said to have left work voluntarily and without good cause attributable to the work, thus en-

gaging in conduct which might justify a discharge by the employer, nevertheless such a party may not be said to have 'left work' in the meaning of having *severed his employment relationship with an intent not to return.*" (Emphasis supplied.)

We determine that to "leave work voluntarily," as that term is used in the Nebraska Employment Security Law, means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.

The record here shows that claimant worked for the Beatrice center for 6 years and had unexcused absentee problems before. She testified she intended to go to work on Sunday, May 14, 1978, but her ride didn't show up, and she would have gone to work on the following day if she had not been fired. Her supervisor and unit administrator considered whether her leaving the job on Thursday was grounds for dismissal, but decided to wait until Monday to see if she reported for work on Sunday. When she did not, she was discharged. The record is clear that the only reasons for her discharge were her leaving work before the end of her shift on Thursday, May 11, 1978, and not reporting for work the following Sunday. The record shows no evidence, direct or circumstantial, which would indicate that when she left the job or didn't report the following workday she had terminated her employment. Without such additional evidence, the length of claimant's absence from work was far too short a period to permit a finding that claimant, when she was dismissed, had already terminated her employment. Therefore, we conclude that claimant did not "leave work voluntarily" so as to subject her to the 7-week unemployment benefit disqualification.

The Commissioner of Labor asserts that even if this court finds that claimant did not leave work voluntarily, the record shows she was discharged for misconduct, and since the disqualification period is the

same, the result would be the same.

On appeal to the District Court the employer, Beatrice State Developmental Center, was made a party defendant, but it did not answer the petition for review and was adjudged in default. Claimant's petition for review and the answer of the Commissioner of Labor did not raise the issue of whether claimant was discharged for misconduct. The commissioner attempts to raise it for the first time in his brief in this court. Questions not presented to or passed upon by the trial court will not be considered on appeal. Ford v. County of Perkins, 190 Neb. 304, 207 N. W. 2d 694.

The judgment of the District Court is reversed and the cause is remanded.

REVERSED AND REMANDED.

VERNON L. CARLSON, APPELLANT, V. RAY E. NELSON, DOING BUSINESS AS RAY'S FARM SERVICE, APPELLEE.

285 N. W. 2d 505

Filed November 20, 1979. No. 42440.

1. **Uniform Commercial Code: Contracts: Damages.** Subject to the provisions of the Uniform Commercial Code with respect to proof of market price, section 2-723, the measure of damages for nondelivery of goods or repudiation by the seller of the contract for sale is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages as provided in section 2-715, U. C. C., but less expenses saved in consequence of the seller's breach. § 2-713 (1), U. C. C.
2. _____: _____: _____. "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, . . . then (a) if the loss is total the contract is avoided; and (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity

but without further right against the seller." § 2-613, U. C. C.

3. _____: _____: _____. The impact of the provisions of section 2-613, U. C. C., providing that the casualty must occur without fault of either buyer or seller, is that if the buyer is at fault, he will remain obligated to purchase, but if the seller is at fault, he will remain obligated to deliver and be liable for the appropriate damages if he does not.
4. **Uniform Commercial Code: Contracts: Damages: Proof.** A plaintiff buyer, under a contract for the sale of identified goods, suing for damages for delivery, who alleges that the goods were damaged while yet in the possession of the seller, has satisfied his burden of demonstrating the nonapplicability of section 2-613, U. C. C., insofar as the condition of absence of fault of the parties is concerned, if he proves the goods were not destroyed or damaged by his fault. Plaintiff buyer need not adduce evidence to show defendant seller was at fault.
5. **Uniform Commercial Code: Contracts: Damages: Proof: Pleadings.** A defendant seller who wishes to limit a plaintiff buyer's remedies and damages to those provided in section 2-613, U. C. C., ought to raise the issue by appropriate pleading. When the goods are in his possession when damaged, he has the burden of proving the goods were damaged without his fault.
6. **Statutes: Contracts.** Existing statutes and laws with reference to which a contract is made (assuming there are no valid contractual provisions providing otherwise) enter into and become part thereof.
7. **Trial: Judgments: Appeal and Error.** Absent either a specific finding on an issue or a general finding for a party by the trial court, this court cannot on appeal assume the issue was decided by the trial court.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Reversed and remanded for a new trial.

Robert M. Harris and Randall L. Lippstreu, for appellant.

Padley, Dudden, Schroeder & Schoon, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an action commenced in the county court

of Keith County by the plaintiff Carlson, purchaser, against the defendant Nelson, seller, for money damages for the alleged breach of a contract of sale of a certain 1963 John Deere combine, model 55. The plaintiff sought damages measured by the loss of the benefit of his bargain, i.e., the excess of market value over contract price at the time he learned of the alleged breach, all as provided by section 2-713, U. C. C. The county court rendered judgment for the plaintiff in the amount of $3,136.76.

Upon appeal to the District Court, where the cause was tried de novo on the record under the provisions of section 24-541, R. R. S. 1943, the judgment of the county court was vacated. The District Court entered judgment for the plaintiff in the sum of $500, the amount of the downpayment made by the plaintiff purchaser. The District Court held the purchaser's rights under the facts of the case were governed by the provisions of section 2-613, U. C. C., which prescribes the remedies of a buyer under the circumstances listed in the statute where the property has suffered casualty and is either destroyed or damaged. We reverse the judgment of the District Court and remand the cause for retrial in the District Court.

Section 2-713 (1), U. C. C., provides as follows: "Subject to the provisions of this article with respect to proof of market price (section 2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (section 2-715), but less expenses saved in consequence of the seller's breach." Section 2-613, U. C. C., is as follows: "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the

buyer, or in a proper case under a 'no arrival, no sale' term (section 2-324) then

"(a) if the loss is total the contract is avoided; and

"(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller."

In his appeal to this court, the plaintiff urges the District Court erred in placing the burden on him, the buyer, to prove the combine was damaged through fault of the seller; and in holding that, in the absence of evidence of that fault, section 2-613, U. C. C., is applicable.

A proper understanding of this case requires that we state the issues made by the pleadings below, summarize the evidence which in most part is undisputed, and then set forth the specific findings made by the District Court. The petition alleged that on February 26, 1974, at Grant, Nebraska, defendant sold to plaintiff the combine in question for the sum of $2,000, and for the additional sum of $100 agreed to deliver the combine to plaintiff at Minatare, Nebraska. On March 21, 1974, while an employee of defendant was in the process of delivering the combine, the vehicle carrying the machine hit a culvert, causing a chain restraining the machine to break. The combine upset and was badly damaged. The next day defendant's employee returned the combine to the defendant's place of business at Roscoe, Nebraska. The evidence established the above facts without dispute. The plaintiff further alleged that on August 15, 1974, defendant notified him that defendant planned to sell the combine to a third party. The plaintiff alleged that at that time the combine, or one in a similar condition before damage, was of

the market value of $5,500. The plaintiff pleaded his willingness and ability to perform, but that the defendant refused to deliver. Then followed a prayer for monetary damages.

The answer of defendant alleged plaintiff had rescinded the contract to purchase, the terms being that defendant would return the downpayment and the contract would be discharged. Defendant also pleaded the defense of waiver.

After trial de novo, the District Court found the contract of sale had been made as alleged and the accident and damage to the combine had occurred. Plaintiff inspected the combine the day following the accident and refused to accept delivery. The combine was taken back to defendant's place of business, but a new "head" for the combine could not be obtained by defendant. The latter sold the combine in August 1974 for salvage. The evidence shows without dispute that that sale was for $1,200. The District Court also found there was evidence that by August 1974, a combine of the type in question was worth between $4,500 and $5,000. It further found the evidence did not establish by whose fault the combine was damaged and under the provisions of section 2-509 (3), U. C. C., the risk of loss remained with the seller.

The court, in the memorandum opinion which it incorporated into the judgment, cited section 2-613, U. C. C., as the controlling law and stated further: "The first Comment under this section reads:

" '1. Where goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation but may at his option take the surviving goods at a fair adjustment. "Fault" is intended to include negligence and not merely wilful wrong. The buyer is expressly given the right to inspect the goods in order to determine whether he wishes to avoid the contract entirely or to take

the goods with a price adjustment.'

"It should be emphasized again that the plaintiff made no effort during the trial to establish fault, although William N. Hendrix, Nelson's driver who attempted delivery on March 21, was present and testified. Negligence of Hendrix would be imputable to Nelson, since Hendrix was an agent of Nelson. However, the Court cannot presume that the damage to the combine was due to the negligence of Hendrix. The burden of proof rests with the plaintiff to show those facts which would give him a right to recover.

"Therefore, since this section of the Uniform Commercial Code is applicable, a quotation from a recognized authority is helpful.

" 'Regardless of which option the buyer exercises he is limited thereto as his sole remedy. He cannot therefter assert any right against the seller.' 2 Anderson, Uniform Commercial Code, § 2-613:6, p. 290."

Plaintiff testified he had refused to take the combine in its damaged condition. He stated he had told defendant's driver he would take it if it were repaired by replacing the damaged header. The Uniform Commercial Code seems to contemplate that the seller shall have a right to timely cure a tendered delivery which is defective because the goods fail to conform. § 2-510 (1), U. C. C.

The evidence would support the following findings: A replacement header could not be obtained. The header could not be completely restored to its previous condition, but it had been straightened sufficiently to operate. On or about April 10, 1974, defendant returned plaintiff's $500 downpayment, which was refused by plaintiff. Defendant had at about that time made an agreement to sell the damaged combine to a neighbor and acquaintance of plaintiff, contingent upon plaintiff's refusal to take the combine. In April 1974, before return of the downpayment was tendered, defendant, under the

contingent contract, asked plaintiff if he intended to take the combine and was told he did not want the machine. The evidence indicates it was after this conversation that the contingent sale was consummated and return of the downpayment again tendered.

In the above state of the evidence, it must be determined whether the trial court was correct in its ruling that section 2-613, U. C. C., defined the rights of the parties and limited the purchaser to avoiding the contract, or accepting the combine in its damaged condition with due allowance from the contract price for deterioration, but without further right against the seller.

Before the provisions of section 2-613, U. C. C., come into play, four conditions must be satisfied: (1) The goods, i.e., the specific subject matter of the contract, must have been specifically identified when the contract was made, viz., the contract is to be fulfilled only by delivering certain identified goods and not merely by delivery of goods of similar or identical specifications. (2) The goods must suffer casualty. (3) The casualty must occur without the fault of either buyer or seller. (4) The casualty must occur before the risk of loss passes to the buyer. The inference from requirement (3) is that if the buyer is at fault, he will remain obligated to purchase, but if the seller is at fault, he will remain obligated to deliver and be liable for the appropriate damages if he does not. Nordstrom, Law of Sales, § 108, pp. 327 and 328.

When all of the conditions described in section 2-613, U. C. C., occur, the remedies of the buyer are limited. He may either (1) avoid the contract completely, or (2) accept the specified goods with due allowance on the purchase price for their diminution in value. If he chooses to avoid the contract, he is entitled to a refund of the money downpayment. No matter which option he chooses, he has no further

right against the seller, i.e., he is not entitled to damages for either loss of the bargain or consequential damages. 2 Anderson, Uniform Commercial Code, § 2-613:6, p. 289. The facts in this case and the court's finding show that without dispute conditions (1), (2), and (4) as we have listed them have been satisfied.

Section 2-613, U. C. C., deals with a situation, loss, or damage to the property which it is reasonable to assume the parties did not contemplate when they contracted. That section has no application if the risk of loss has passed to the buyer. Section 2-509, U. C. C., establishes when that risk passes. Under the particular facts in evidence of this case, subsection (3) of section 2-509, U. C. C., is the only applicable section. It provides: "In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery." In the case before us, the risk had not passed under either of the alternatives named. The seller was a merchant and there had been no delivery. Even if the seller had not been a merchant, there had been no tender of delivery.

Under the undisputed facts before us in this case, the only one of the conditions of section 2-613, U. C. C., in issue is the question of whether damage to the goods was caused by fault of a party. Must the buyer, who was plaintiff in this action, adduce evidence not only to show that he was not at fault, but also that the defendant was? The answer would seem to depend upon where the law places the burden of proof, a point the Uniform Commercial Code does not cover.

If section 2-613, U. C. C., is to be viewed as providing an affirmative defense to a defendant seller, then he would, under the normal rules, have the burden of proof. If that section constitutes merely a definition of the measure of damages of a plaintiff

buyer under the particular circumstances described in the statute, then it would seem if the buyer does not negative his own fault he cannot recover. The section, however, does more than either of these two things. It has the effect of total avoidance of the contract if the damage is without fault of either party and if the other conditions mentioned exist. In the case of partial destruction or damage, it gives the buyer the option to either avoid or to accept the goods with a diminution of purchase price. In the latter events it also affords certain benefits to the seller. If the buyer treats the contract as avoided, the seller need only return the downpayment. If the buyer elects to accept the goods, then his additional rights against the seller are limited to due allowance from the contract price.

What section 2-613, U. C. C., does, of course, is define the substantive rights of the parties just as does section 2-711, U. C. C. These statutes are a part of the contract, just as much as if embodied in a written contractual agreement. Existing statutes and laws with reference to which a contract is made (assuming there are no valid contractual provisions providing otherwise) enter into and become part thereof. Faught v. Platte Valley Public Power & Irrigation Dist., 155 Neb. 141, 51 N. W. 2d 253.

It is elemental law that the burden of proof is upon the plaintiff to prove those things which constitute the necessary elements of his cause of action and the defendant bears the burden of proving those things which constitute affirmative defenses. Another way of stating the principle is that he who has the burden of pleading a fact must prove it. Bishoff v. Pieper, 187 Neb. 783, 194 N. W. 2d 177.

Section 2-613, U. C. C., appears to be a codification with changes of particular aspects of the contract doctrine of excuse of performance and discharge of contract by reason of impossibility. Cf., Restatement, Contracts, §§ 460, 469. It is also an aspect of

failure of consideration understood in the broad generic sense of "where an exchange of values is to be made and the exchange does not take place, either because of the fault of a party or without his fault." Restatement, Contracts, § 274, p. 400, § 281. Nordstrom, *supra*, p. 328, says that section 2-613, U. C. C., is an example of excuse from performing a contractual promise. Supervening impossibility which the defendant had no reason to anticipate and to which his fault has not contributed is historically considered as a matter of affirmative defense which a defendant who relies thereon must plead and prove. Preston v. Farmers Irrigation District, 138 Neb. 504, 293 N. W. 343. We see no reason why, except as necessarily implied from the substantive changes made by section 2-613, U. C. C., the basic rules on burden of proof should not continue.

As we have already indicated, section 2-613, U. C. C., defines rights of both buyer and seller. How section 2-613, U. C. C., must be applied will depend upon who is plaintiff and which party is seeking benefit of the statutory provisions contained in that section. The only one of the several conditions of section 2-613, U. C. C., which is in dispute in this case is that of fault causing the damage.

Here the plaintiff buyer pled facts which, if proved, entitled him to damages under section 2-713, U. C. C., which prescribes the general rule of damages for unexcused failure to deliver. He also alleged the fact of damage to the property while in the defendant's possession. At trial he introduced evidence which, without dispute, showed the damage was not the consequence of any fault on his part. He pled and made proof of facts which showed nondelivery by the defendant seller. He offered proof of damages within the provisions of section 2-713, U. C. C. Did he also need to prove the seller was at fault? Stated in another way, in the absence of evidence on

the point is it to be presumed that a defendant seller in possession when the goods are damaged or destroyed is without fault?

The provision of section 2-613, U. C. C., "goods suffer casualty without fault of either party," is not very artfully drawn. However, we believe its purpose is that indicated by Nordstrom. It is possible to conjure many hypothetical situations in which complex problems on burden of proof may be raised in connection with that condition. We decide only the issue which the posture of this case and the evidence present.

It would defeat the implicit purpose of section 2-613, U. C. C., if it were construed to enable a defendant to take advantage of an absence of evidence as to his fault to limit damages for nonperformance. Yet this would be the practical effect of requiring the plaintiff buyer in this case to prove that the damage was not caused by the defendant's fault. Under the posture of the case before us, it was incumbent upon the defendant seller to prove the damage occurred without his fault if he wished to have the benefit of the damage limitation provision of section 2-613, U. C. C. We hold the trial court erred in placing the burden of proof on the plaintiff on that issue.

While the above error requires reversal, it is not dispositive of the entire case. The defendant, in his answer, tendered the defense of mutual rescission. The evidence tending to support that defense has been previously summarized. It was, if believed by the trier of fact, sufficient to establish that the parties agreed to return to the status quo. The District Court did not make any finding on that issue. Neither did it make any general finding for the defendant from which we might be able to infer that that issue was decided in the defendant's favor. A general finding that the judgment should be for a certain party warrants the conclusion the trial court found in his favor on all issuable facts. Henkle &

Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N. W. 2d 772; Burgess v. Curly Olney's, Inc., 198 Neb. 153, 251 N. W. 2d 888.

Absent either a specific finding on the issue or a general finding for the defendant, it is necessary that the issue be considered on the retrial. On this issue we call attention to the provisions of section 2-720, U. C. C., which are as follows: "Unless the contrary intention clearly appears, expressions of 'cancellation' or 'rescission' of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach."

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., concurs in result.

RITA ANN DANIELSON, APPELLEE, V. DAVID D. DANIELSON, APPELLANT.

285 N. W. 2d 494

Filed November 20, 1979. No. 42486.

1. **Appeal and Error: Evidence: Records.** Any assignment of error requiring an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.
2. **Divorce: Statutes: Child Support.** The filing of a financial statement under the provisions of section 42-359, R. R. S. 1943, is waived if the parties proceed without objection to hearing or trial without such filing.
3. **Divorce: Child Support: Minors.** The modification of child support payments requires proof of a material change in circumstances and when found to be in the best interests of the children, all subsequent to the entry of decree.

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

Robert G. Decker, for appellant.

Mitchell & Demerath, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and RIST and BARTU, District Judges.

RIST, District Judge.

This is an appeal by respondent, David D. Danielson, from an order of the District Court for Douglas County, Nebraska, modifying a decree of dissolution by increasing the amount of child support due from respondent to petitioner, Rita Ann Danielson, for the minor children of the parties.

The marriage of the parties was dissolved by decree on January 5, 1976, at which time petitioner was awarded custody of the three minor children of the parties and respondent was ordered to pay child support to petitioner in the amount of $100 per month per child, plus 30 percent of certain commission income earned.

On May 4, 1978, petitioner filed her application to modify the decree by raising the amount of child support for the children. Respondent answered, denying a material change existed in the circumstances of the parties, and prayed that the application be dismissed. Subsequently, respondent filed a motion for summary judgment against petitioner on her application, which was heard and denied by the trial court. Trial was had on the application to modify on November 14, 1978, and on that date the trial court entered its order of modification requiring respondent to pay child support in the sum of $35 per week per child. Respondent filed his motion for new trial, which was overruled, and he has perfected his appeal to this court, assigning as error that the trial court erred in not sustaining his motion for summary judgment, in failing to dismiss the application because of petitioner's failure to file her financial statement with the court, and in finding a material change in circumstances warranting the modification. Other specified assignments are essentially within the context of those noted above.

With respect to respondent's contention that the trial court erred in failing to sustain his motion for summary judgment, we note that none of the evidence submitted at the hearing thereon is included in the bill of exceptions; therefore, such evidence is not before us for consideration. Brown v. Shamberg, 190 Neb. 171, 206 N. W. 2d 846. An examination of the pleadings affords no basis on which to sustain the motion. On the record, therefore, the action of the trial court in denying summary judgment was correct.

Respondent asserts that petitioner's application should be dismissed for failure to file her financial statement pursuant to section 42-359, R. R. S. 1943. The record reflects that no such statement was filed by the petitioner incident to her application to modify. In this case, the record shows no timely objection was raised to such failure, the parties had recourse to discovery, and both were present at the hearing for examination and cross-examination concerning their financial conditions. This being the case, the failure to file such statement, if in fact it is required in this circumstance, was waived, such failure not rising to the level of being jurisdictional in nature. The trial court properly proceeded with the hearing.

The key issue on appeal is whether the record sustains the finding of a material change in the circumstances of the parties and the needs of the children subsequent to the entry of the original decree herein that would warrant the modification granted. Such a finding is the well-established requirement in this state. Tilden v. Tilden, 202 Neb. 226, 274 N. W. 2d 860; Breiner v. Breiner, 195 Neb. 143, 236 N. W. 2d 846. On appeal to this court the matter is considered de novo. The determination of the trial court will not ordinarily be disturbed, however, unless there is a clear abuse of discretion or it is clearly against the

weight of the evidence. Knight v. Knight, 196 Neb. 63, 241 N. W. 2d 360.

The evidence sustains findings of fact as hereinafter set forth. At the time of trial on January 5, 1976, respondent's net income for the previous year, 1975, was approximately $14,080.76. And while there is some question about it, his net income for 1976 was at least $21,183.20, and for 1977 at least $18,929. His projected net income for 1978 at the time of trial on the application to modify was at least $14,855.35. Petitioner's income at the time of the decree was $368 per month and at the time of trial on the application was $654.19 per month.

Some question exists as to the accuracy of respondent's income figures for the years subsequent to the decree, as he includes 30 percent of certain commissions therein as income in his computation thereof, but for the years 1976 and 1977 he reported the full amount of the commissions for income tax purposes.

At the time of the decree petitioner's estimated expenses for herself and the minor children were $962.29 per month, and at the time of hearing on the application, based upon her record of expenditures, her continuing expenses were estimated at $1,019.17. In considering the latter it is noted that she included a monthly budget for food for herself and the three children at $125 per month, whereas at the time of the decree this expenditure was estimated at $250 per month. Also noted are present expenditures of $40 per month for clothing for herself and the children, while at the time of the decree this was estimated at $75 per month. Petitioner has had to obtain additional money, some from respondent and some from borrowing, to purchase a refrigerator and to pay home fuel costs and other expenses.

Respondent's current estimated expenses for his own maintenance are $713.50 per month.

The record further reflects that since the decree

respondent has made substantial monetary gifts to his children. Respondent suggests possible future business problems for one of his employers and a possible reduction in income, but does not document or detail the same.

On this record, it is appropriate to conclude that while respondent's 1978 income is probably less than that in 1976 or 1977, it is more than his earning experience showed at the time of the decree. His projected expenses show a financial capability of paying the child support ordered by the trial court in its order of modification. More importantly, it is clear that while petitioner's income has risen substantially, her actual needs and those of the children are not being met by that income and the child support ordered in the decree. This is particularly evident in the areas of food and clothing, which are shown by petitioner's present budget expenditures to be drastically below any reasonable standard for herself and the children. It is not reasonable that petitioner should have to borrow additional money for such living expenses. In terms of the needs of the children a material change in circumstances is shown subsequent to the decree that justifies the increase in the child support ordered by the trial court.

We note that, in practical terms, respondent, under the decree, was paying $390 to $394 per month in child support. Under the court's order of modification he will pay $105 per week, or $5,460 per year, which is an increase of from $61 to $65 per month. Taking into account the apparent need to increase the food and clothing budget for the children, the amount of increase is conservative. We are also aware of petitioner's testimony that the portion of the decree providing for a percentage of respondent's commissions as a part of the child support made that amount uncertain, resulting in difficulties in budgeting. This court has previously criticized the payment of child support upon such contingent

arrangements. Breiner v. Breiner, *supra*. It is therefore proper that the child support be fixed in stated amounts as set forth in the order of modification.

Respondent's assignments of error not considered here were not argued and are without merit. The order of the trial court modifying the amount of child support is affirmed. Petitioner's attorney is allowed an attorney's fee for his services in this court of $500, which is assessed to respondent.

AFFIRMED.

LISSIE M. BLUE, APPELLEE, V. CHAMPION INTERNATIONAL CORPORATION, A CORPORATION, APPELLANT.

285 N. W. 2d 511

Filed November 20, 1979. No. 42504.

1. **Motions, Rules, and Orders: Trial: Evidence.** The allegation in a motion for a new trial that there occurred errors of law duly excepted to is sufficient to have reviewed the various rulings of the trial court on the admission or rejection of evidence.
2. **Summary Judgments.** The question presented on a motion for summary judgment is not whether the evidence was sufficient to support a finding by the fact finder in favor of the moving party, but whether there exists no genuine issue as to any material fact so that under those facts the moving party was entitled to a judgment as a matter of law.
3. _____. Where reasonable minds may differ as to whether an inference supporting the ultimate conclusion sought can be drawn, summary judgment should not be granted.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded.

John E. Hubbard of Kutak, Rock & Huie, for appellant.

John J. Higgins of Eisenstatt, Higgins, Kinnamon & Okun, P.C., for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

HASTINGS, J.

This is an appeal from an order of the District Court entered on October 3, 1978, which sustained plaintiff's motion for summary judgment and entered final judgment in her favor directing defendant to make long-term disability payments under the provisions of an employee benefit program. Defendant has appealed.

Plaintiff became employed by defendant in the latter's printing shop as a machine operator in 1968. In 1974 plaintiff began receiving temporary total disability payments under the defendant's long-term disability plan for its employees. Thereafter, she collected long-term disability benefits for 2 years, which are payable for that maximum term when the employee is prevented from performing the regular duties of her existing job. To qualify for payments beyond 2 years, it is necessary that the "disability prevents the Employee from engaging in any occupation or employment for which he is reasonably qualified by education, training or experience." It is the interpretation of this portion of the disability plan in light of the evidence presented that is the subject of this lawsuit.

In support of her claim, plaintiff offered medical reports in the form of letters from her physician, Dr. Tribulato, the most recent of which was dated September 20, 1977, and stated: "I do not think she could stand or sit for a prolonged period of time or do any significant bending, lifting or carrying. * * * I do not think she is suitable for work." She also offered a letter report from Dr. O'Neil dated June 13, 1977, in which he said: "At the present time, I would agree that she has a disability which would preclude her from carrying out work involving heavy lifting, bending, stooping or climbing." To

the offer of the foregoing reports, defendant's counsel objected in the following form: "Exhibits 5 through 9, which are all medical reports from Dr. Tribulato, and the one from Dr. O'Neil, there is no objection for purposes of this motion and there is no objection as long as those reports are being offered to show the exchange of correspondence that took place between the parties to this action. There would be an objection if he is offering those for substantive proof in support of his motion, because there would certainly be no proper and sufficient foundation for admitting that as proof of items contained in the reports. That should be done through deposition, I would think, or by testimony from the doctor. * * * The responses [to requests for admissions] that were made was that, 'Yes, the reports were received.' And, 'Yes, this is what the report says.' The only point I am trying to make is I don't want those reports to substitute for Dr. Tribulato's testimony for purposes of trial." The reports were received by the court, to be considered for the purpose of ruling on the motion.

Defendant's objection was not made in a very artful manner. However, it is obvious that his objection went to the hearsay quality of the evidence in view of the absence of a sworn statement by the physicians, and the objection should have been sustained.

Section 25-1334, R. R. S. 1943, provides in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Plaintiff's contention that defendant failed to assign as error in its motion for a new trial the granting of the motion by the court and the ruling on the admission of evidence is without merit. Paragraph (d) provided: "The court's decision * * * is not sustained by sufficient

evidence and is contrary to law;" and paragraph (e) provided: "Numerous errors of law occurring (sic) at the hearing on Plaintiff's motion for summary judgment duly excepted to by the Defendant." The allegation in a motion for a new trial that there occurred errors of law duly excepted to is sufficient to have reviewed the various rulings of the trial court on the admission or rejection of evidence. Albright v. Peters, 58 Neb. 534, 78 N. W. 1063 (1899).

The only other medical evidence submitted in regard to plaintiff's condition consisted of letters from Dr. Kratochvil dated March 5, 1976, July 20, 1978, and July 24, 1978, which were received without objection. These reports variously stated: "At this time, she is not able to do any bending or lifting, or perform any work which would require this type of activity. In this sense, she is totally disabled." Also, "It is my opinion that she has a 20 percent permanent partial disability as a result of her back condition."

In respect to summary judgments, section 25-1332, R. R. S. 1943, provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The question presented here is not whether the evidence, even including that mentioned above which should have been rejected, was sufficient to support a finding by the fact finder in favor of plaintiff, but whether there exists no genuine issue as to any material fact so that under those facts plaintiff was entitled to a judgment as a matter of law. Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152 (1973). Additionally, where the fact to be established is the existence of total disability, as is here involved, it will depend to a certain extent on the inferences to be drawn from the evidence.

Where reasonable minds may differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451 (1976).

We find that reasonable minds could differ as to the inferences to be drawn from the evidence in this case and, therefore, as to whether plaintiff is or is not totally disabled. Accordingly, the plaintiff is not entitled to summary judgment and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CORY BEHRENS, APPELLANT.

285 N. W. 2d 513

Filed November 20, 1979. No. 42661.

1. **Criminal Law: Statutes: Sentences: Probation.** Section 29-2262, R. R. S. 1943, authorizes confinement in the county jail for a period not to exceed 90 days as a condition of probation in cases of conviction of a misdemeanor as well as of a felony.
2. **Appeal and Error: Evidence: Records.** Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions.
3. **Criminal Law: Statutes: Probation: Assault and Battery.** A statute providing that as a condition to a sentence of probation the court may require a person convicted of assault to make reparation for the loss or damage caused by the crime empowers the trial court to impose a condition requiring a reasonable payment to the victim for "pain and suffering," in addition to medical expenses and lost wages. There is no abuse of discretion in imposing such condition.

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

Forrest F. Peetz, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant was charged in the District Court for Holt County, Nebraska, with the crime of assault with intent to inflict great bodily injury. He was tried by a jury and found guilty of the lesser offense of assault and battery. He received a sentence of 2 years probation, subject, among others, to the following conditions: (a) He shall be confined in the Holt County jail for 90 days with no credit for prior time in confinement. (b) He shall refrain from frequenting unlawful or disreputable places or consorting with disreputable persons, and he shall consume no alcohol in public or appear in public after consuming alcohol. Any peace officer or probation officer having reasonable cause to believe the defendant may have violated this provision shall forthwith bring him before the court for a hearing on said violation. (c) He shall make restitution of the fruits of his crime in the amount of $160.50 to Western Insurance Company for medical bills and the amount of $500 to Dr. Julian Pickens for pain and suffering, and court costs.

On appeal to this court, the defendant assigns and argues the following errors: (1) The sentence, including the 90-day jail term, is excessive and, in particular, the court abused its discretion in not giving credit for "prior jail time." (2) It was an abuse of discretion for the court to require that the defendant not be allowed to consume alcohol in public nor be allowed to appear in public after having consumed alcohol. (3) The court abused its discretion in requiring that, as a condition of probation, the defendant pay to the victim of the assault the sum of $500 as compensation for pain and suffering. We affirm.

In support of his first assignment, the defendant advances several arguments: (1) Jail time is not an authorized condition of probation in misdemeanor cases. (2) In cases where the maximum penalty for conviction of a misdemeanor is 90 days, the imposition of a 90-day jail term, together with probation, exceeds the maximum sentence authorized by law. (3) Under the holding of this court in State v. Nuss, 190 Neb. 755, 212 N. W. 2d 565, confinement may not be made a condition of probation. (4) If the defendant should violate the conditions of his probation, he could be sentenced to the maximum term of 6 months for assault and battery. In that event, the total jail time would exceed the maximum sentence authorized by law. (5) The sentence is excessive under the circumstances.

The defendant's first argument is ill-founded. It is apparent the statutes expressly contemplate that the authorized conditions for probation described in section 29-2262, R. R. S. 1943, are applicable to misdemeanor convictions. Section 29-2260 (2), R. R. S. 1943, provides in part: "Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony, the court may withhold sentence of imprisonment unless, ..." That statute, in subsection (4), then authorizes a sentence of probation in lieu of imprisonment. Section 29-2262, R. R. S. 1943, expressly authorizes jail time as a condition of probation. The two statutes are part of the same act and must be construed together. We hold that section 29-2262, R. R. S. 1943, authorizes confinement in the county jail as a condition of probation in the case of a conviction of a misdemeanor.

Arguments (2) and (4) above are hypothetical. The maximum jail sentence for assault and battery is 6 months. The jail time of 90 days, together with the sentence of probation, does not exceed the maximum authorized by law. The question posed by argument (4) will arise only if the defendant violates

the terms of his probation and then receives a sentence. The problem raised is simply not before us at this time. As to argument (3), our holding in State v. Nuss, *supra,* is not applicable. The 1975 amendment to section 29-2262, R. R. S. 1943, authorizing jail time as a condition of probation, was the specific legislative response to State v. Nuss, *supra.*

As to the defendant's fifth argument, we note there was no bill of exceptions filed in this case. We do not know the details and circumstances of the assault. Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions. Hanson v. Hanson, 198 Neb. 675, 254 N. W. 2d 699; State v. Griger, 190 Neb. 405, 208 N. W. 2d 672. However, the presentence investigation is in the record before us. An examination of that report, which includes information as to the defendant's past criminal record, clearly indicates the court did not abuse its discretion in imposing the sentence it did.

The defendant's claim that the court abused its discretion in restricting the defendant's use of alcohol is clearly unmeritorious. The presentence investigation indicates conclusively the abuse of alcohol is a major factor contributing to the defendant's unsocial conduct.

The contention that the court erred in requiring the defendant to pay to the victim of his assault the sum of $500 as compensation for pain and suffering is not sustainable. The imposition of such a condition comes within the terms of condition (j) of section 29-2262, R. R. S. 1943, which provides in part: ". . . to make such reparation as the court determines to be appropriate for the loss or damage caused" by the crime.

The Court of Appeals of the State of Washington, in answering a similar contention under a virtually identical statutory provision, held that a statute providing that, as a condition to suspension of sentence,

a court may require a convicted person to make restitution to any person or persons who have suffered loss or damage by reason of the commission of the crime in question, empowered the trial court, as a condition of suspending sentence upon a conviction of assault in the third degree, to require restitution to the victim for pain and suffering, in addition to medical expenses and lost wages, and there was no abuse of discretion in imposing such condition. State v. Morgan, 504 P. 2d 1195 (Wash. App., 1973). In the absence of a bill of exceptions we cannot, of course, make any judgment that the amount is excessive.

AFFIRMED.

McCOWN, J., concurring in part and dissenting in part.

I concur generally with the holdings of the majority opinion, but I dissent from that portion of the opinion which impliedly sanctions the disallowance of any credit for time spent in jail awaiting sentence against the maximum 90-day jail confinement time authorized to be imposed in a sentence of probation.

In this case the sentence of probation specifically provided, as a condition of probation, that the defendant was to be confined in the Holt County jail for a period of 90 days, "with no credit for past time spent in said Holt County Jail." The record reflects that the defendant had spent 43 days in the county jail before he was released on bail on the charges involved here. By denying any credit for jail time, the District Court has imposed a period of 133 days imprisonment in the county jail as a condition of probation.

There can be no doubt that, in the absence of statute, the court has no power to impose any period of imprisonment as a condition of probation. State v. Nuss, 190 Neb. 755, 212 N. W. 2d 565 (1973). A statute authorizing imprisonment as a condition of probation was adopted in Nebraska in 1975. Section 29-2262, R. R. S. 1943, provides that as a condition of

a sentence of probation in any case, the court may require the offender to be confined in the county jail for *"not to exceed 90 days."*

This court has held that where the maximum term of a sentence of imprisonment is the statutory maximum for the offense, credit for jail time previously served must be given. See State v. Blazek, 199 Neb. 466, 259 N. W. 2d 914. Under a sentence of probation for any offense, misdemeanor or felony, the statutory maximum period of confinement that may be imposed as a condition of probation is 90 days. Reasonable concepts of justice require that credit for jail time previously served must be given whenever the statutory maximum period of confinement is imposed as a condition on any sentence of probation.

In the case now before us, any defendant who had not been confined in jail for failure to furnish bail prior to trial and sentencing could not be required to serve more than 90 days in jail under any sentence of probation, including the one actually pronounced. The defendant here, however, will be required to serve 133 days in jail under the sentence now approved by this court simply because he could not raise bail for a period of 43 days. To require a defendant who is poor to spend more days, weeks, or months in jail than a rich defendant, who receives an identical sentence for the identical crime, simply because the defendant who is poor cannot raise the money for bail, constitutes rank injustice under any civilized standard of measurement. To sanction such sentencing is contrary to the fundamental concepts of even-handed justice. The sentence of probation here should be modified by granting credit of 43 days for time spent in jail awaiting sentencing.

MID-STATES EQUIPMENT COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. JOHN G. POEHLING, APPELLEE.

285 N. W. 2d 689

Filed November 27, 1979. No. 42228.

1. **Evidence: Appeal and Error.** When credible evidence on material questions of fact is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.
2. **Appeal and Error.** We review the record de novo on this appeal and reach an independent conclusion on such record without reference to the findings of the District Court.
3. **Equity: Interest.** Courts of equity, in decreeing or refusing interest, generally follow the law; interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law.

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

John W. Herdzina of Abrahams, Kaslow & Cassman, for appellant.

Michael J. Mooney of McCormack, Cooney, Mooney & Hillman, for appellee.

Heard before KRIVOSHA, C. J., CLINTON, and WHITE, JJ., and STANLEY and GITNICK, District Judges.

GITNICK, District Judge.

This is an action brought by the appellant seeking damages for breach of an oral joint venture agreement between the parties hereto and further seeking an accounting of materials, labor, and overhead expense which the appellant contends were wrongfully appropriated by the appellee. The District Court found that the parties were engaged in a joint venture and determined the amount due from appellee. We affirm the judgment of the District Court.

The facts are confusing. In summary and simply stated, the appellee, John G. Poehling, is a developer of a leased recreational lake area known as Woodcliff

owned by Woodcliff, Inc., a corporation. Appellant, Mid-States Equipment Company, is engaged in the general construction business. Poehling and Mid-States Equipment Company, by its president, Gordon Erickson, agreed to a joint venture known as Mid-States Recreation Company for building cabins at Woodcliff pursuant to an oral understanding made in 1966 under which (a) Mid-States would cover all construction costs for labor and materials and keep the books and records; (b) Poehling would serve as general manager of the project to build cabins and was to be paid a salary, an expense allowance, and a discretionary bonus; and (c) profits from the sale of cabins constructed by the joint venture were to be divided between Poehling and Mid-States, but there was no understanding that Poehling was to stand any portion of the losses.

The joint venture encountered difficulties and there were no profits. Approximately on Labor Day of 1969, appellee was advised by appellant that they should no longer continue constructing cabins under the joint venture.

From January 1, 1969, forward the appellant charged the losses of the joint venture to the appellee based upon appellant's claimed modification of the original joint venture agreement.

The accounting records maintained by the appellant and the accounting records kept by appellee do not agree and are in substantial dispute concerning labor and materials used by appellee on nonjoint venture cabins and on work done personally by appellee.

The parties further disagree on (a) the disposition of a model cabin completed after termination of the joint venture agreement; (b) whether appellee agreed to guarantee certain accounts receivable due the joint venture; (c) whether certain cabins built by appellee were in fact joint venture enterprises; and (d) whether the appellant is indebted to the

appellee for the ground rent for the lot upon which appellant's solely owned cabin stands.

The principal events involved in this litigation took place in the period of years from 1967 through 1971, except as to the claim for the model cabin which is now owned by the appellant. This litigation commenced in 1972 and did not reach trial until 1978. The trial court, at the close of appellant's evidence, granted a partial directed verdict finding that an oral joint venture existed to construct recreational cabins and to share profits; that the appellee was permitted to build cabins for his own account in addition to his responsibilities to the joint venture; that appellee agreed to pay losses incurred by the joint venture for the year 1969 and interest thereon; and that appellant failed to sustain its burden of proof that appellee was to pay for certain accounts receivable, or that the model cabin was to be assigned and credited to the appellant in consideration for credit against losses guaranteed by the appellee for 1969 and 1970, or that the cost of certain labor and materials used in the construction of cabins for appellee's personal account were not paid. The court further determined that the appellant was not indebted to the appellee for any ground rent for the lot upon which appellant's solely owned cabin stands.

The trial court then proceeded as upon an accounting action and determined that appellant was entitled to recover from the appellee for certain materials and labor, and for the losses of the joint venture for 1969 and 1970. Whereupon, the court directed the sale of the model cabin with the proceeds of sale to be divided in the proportion of 60 percent to appellant and 40 percent to appellee after payment to appellant of construction costs for the cabin, and after payment to appellant of the cost of materials and labor and operating losses for 1969 and 1970. Certain accounts receivable were assigned in the same proportions, provided that if the proceeds available for

distribution from the sale of the model cabin were insufficient to pay appellant as above set forth, then the appellee's interest in the accounts receivable, to the extent necessary, should be used to compensate appellant for any such deficiency; and in the event such interest of the appellee in the accounts receivable was insufficient, then a judgment against the appellee in the amount of any deficiency should be awarded the appellant.

The appellant appeals from the overruling of its motion for new trial and assigns as error that the trial court erred (a) in finding the model cabin not to have been transferred to the appellant in consideration of the reduction of the appellee's indebtedness for the construction cost of this cabin; (b) in finding that the model cabin was an asset of the joint venture and should be sold and the proceeds distributed as set forth in the court's order; (c) in failing to find that appellee used materials and labor paid for by appellant in cabins built by appellee for his personal account and not requiring the appellee to account to the joint venture for profits on such cabins; (d) in failing to find that appellee agreed to guarantee payment of all accounts receivable; and (e) in failing to award prejudgment interest on the amounts found to be due from the appellee.

The evidence adduced by the parties is essentially variant and confusing as the result of memories of the witnesses affected by the long delay between the commencement of this action in 1972 and the trial in 1978. It would do no good to set forth the testimony as presented. The determination of this case resolves itself into a decision of the weight and persuasiveness of the evidence presented by both parties. In determining the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Metropolitan Life Ins. Co. v. SID No. 222, *ante* p. 350, 281 N. W. 2d 922 (1979). Furthermore,

our review of the facts is subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Gasper v. Moss, *ante* p. 24, 281 N. W. 2d 213 (1979). As an equity case, we review the record de novo on this appeal and reach an independent conclusion on such record without reference to the findings of the District Court.

An examination of the record convinces us that the judgment of the trial court should be affirmed.

The appellant finally urges that the trial court was in error in not awarding prejudgment interest on the amounts found due from the appellee. A substantial dispute existed between the parties as to the amount owed, and the amounts found to be due were ascertainable only by the court from a complex and voluminous record.

The question of the allowance of interest in equity matters, such as actions for an accounting, are usually discretionary with the court based on presented equities. Cumming v. Cumming, 193 Neb. 601, 228 N. W. 2d 296 (1975). As stated in 47 C. J. S., Interest, § 3, pp. 13 and 14: "Courts of equity, in decreeing or refusing interest, generally follow the law; and, on the other hand, it has been said that courts of law are sometimes affected by equitable considerations in the allowance of interest. Nevertheless, interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law. These courts, it has been said, will, in their discretion, allow or withhold interest as, under all the circumstances of the case, seems equitable and just, except in cases where interest is recoverable as a matter of right."

In our view of this case, the trial court did not abuse its discretion in not allowing prejudgment in-

terest. While the trial court did not assign a reason for disallowing prejudgment interest, in our view, if for no other reason, the failure of the appellant in prosecuting the litigation filed by it and permitting the case to linger for 7 years, not calling up motions, and not promptly filing amended pleadings is grounds sufficient to justify the court's action. Furthermore, we are not unmindful of the substantial dispute which existed in this litigation as to the amount due which was ascertainable only by trial of the issues. We, therefore, are of the opinion that no prejudgment interest is due the appellant.

We conclude that the assignments of error made by the appellant and the arguments advanced thereunder are without sufficient persuasive effect, and the judgment of the District Court in all matters is amply sustained by the evidence and the law and is correct.

AFFIRMED.

DENNIS B. ANDERSEN, APPELLANT, V. LINDA M. ANDERSEN, APPELLEE.

285 N. W. 2d 692

Filed November 27, 1979. No. 42461.

1. **Divorce: Alimony: Property.** Expectations of income may be considered in an allowance of alimony but are not properly considered in the division of property.
2. **Divorce: Alimony.** In considering an award of alimony, the court should properly take into account the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed in part, and in part reversed and remanded with directions.

Hunter & Katz, for appellant.

Mitchell & Demerath, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and RIST and BARTU, District Judges.

WHITE, J.

This is an appeal from the District Court for Douglas County in a marriage dissolution action. Appellant, petitioner below, Dennis B. Andersen, appeals from the part of the decree of the court with respect to division of marital property, alimony, and child support. We affirm the judgment of the trial court in part, and in part reverse and remand.

The parties were married in 1962 and had, at the time of the marriage, a limited amount of property of approximately equal value consisting of stock owned by the appellant in Peter Kiewit & Sons and a savings account of appellee, Linda. Two children were born to the parties, Eric, now 16, and Amy, 11. The parties prospered financially. They had an interest in and owned property above obligations, according to the findings of the trial court, of approximately $240,000. Of that amount, the trial court, in its division of property, awarded the appellee approximately $118,000, and the appellant $123,000. It is the value of several of the individual items to which appellant's first assignments of error are addressed.

In its computation of the value of the investment property, Pivots, Ltd., the court concluded the net value was $16,300. The appellant points out that the true value is $6,300 and the larger figure is the result of a mathematical error by the trial court. The appellee admits this error. The total property subject to division should be reduced by that amount.

The second item complained of is the amount of $20,000 which the court treated as an accounts receivable due the appellant from certain clients of Andersen Development & Investment Company. The principal business of Andersen Development &

Investment Company is to act as consultant to various lending institutions, and to owners or developers of shopping centers and other complexes in their dealings with architects, contractors, engineers, etc. Dennis asserts, and Linda does not deny, that the $20,000 figure represents expected fees for work not performed as of the date of trial. The trial court does not point out, and we are unable to find, justification for this treatment. To us, it seems that the anticipated payment of a fee yet to be earned is in the same category as a salary expected to be paid and not yet earned. Dennis rightfully points out that the receipt of the payment is contingent on whether he is retained in the employ of his various clients and whether he actually accomplishes the work. While earning capacity or expectations of income may properly be considered in an allowance of alimony, they are not proper considerations in determining the appropriate division of property. Howard v. Howard, 196 Neb. 351, 242 N. W. 2d 884; Wheeler v. Wheeler, 193 Neb. 615, 228 N. W. 2d 594. The court was in error in considering the unearned income of the appellant as a property capable of being divided and considered in its property division.

The next error claimed is that the trial court, in its division of property, treated certain gifts of jewelry that were given from Dennis to Linda as gifts to her and therefore excludable from the total marital estate in compiling a division, and yet included in the property division gifts of jewelry from Linda to Dennis. It is apparent that gifts made to another party during the course of a long marriage such as this should appropriately be a part of the entire marital estate and the trial court abused its discretion in not so holding and in computing thereafter.

The appellant next asserts that the trial court erred in the amount of the alimony awarded the appellee, which was in the amount of $1,050 a month

for 121 months, and failed to take into account Linda's ability to earn and to engage in an occupation. The evidence is that Linda was in good health and had not worked in the marriage except occasionally as a hostess in a family restaurant on a part-time basis where her earnings were never in excess of $1,500 per year. She is not shown to have any other skills other than a degree in speech some years before. While we will confess some mystification, as did the trial court, as to the ability of the appellant to support himself and Linda in a rather gracious lifestyle, in view of the acknowledged expenditures, both his and hers, over a period of years, we hold that the trial court did not abuse its discretion. The evidence indicated that since the separation of the parties, some 15 months before the dissolution and for many years prior thereto, the appellant had been contributing to a separate bank account the identical sum of money, i.e., $1,800 per month, as the total of the child support and alimony payments now equals. In the alimony award, we do not find the trial court abused its discretion and did take into account the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. See, § 42-365, R. R. S. 1943; Weber v. Weber, 200 Neb. 659, 265 N. W. 2d 436.

We have considered other assignments of error and the same are without merit. The judgment is therefore affirmed in part, and in part reversed and the cause remanded with directions to the trial court to remove from its computation of the marital estate the amounts of $10,000 and $20,000 as not appropriate parts of the marital estate; to include within the total marital estate the value of gifts of jewelry made by appellant to appellee; and to apply to the new balance of the marital figure the same percentage as applied by the court initially, which appellant's computation suggests is 48.95 percent to

appellee and 51.04 percent to appellant.

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

JOANN K. FALCONE, APPELLEE, V. FRANK S. FALCONE, APPELLANT.

285 N. W. 2d 694

Filed November 27, 1979. No. 42467.

1. **Divorce: Alimony: Property.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.
2. **Divorce: Property.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
3. **Divorce: Property: Statutes.** Under section 42-365, R. R. S. 1943, property distributions which are punitive in nature may be subject to modification.

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

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

Robert V. Burkhard, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and ENDACOTT, District Judge.

BRODKEY, J.

Appellant herein, Frank S. Falcone, has appealed to this court from a decree entered by the District Court for Douglas County, Nebraska, dissolving the marriage of appellant and JoAnn K. Falcone, peti-

tioner-appellee. The sole assignment of error raised by appellant, whom we shall hereafter refer to as Frank, relates to whether a fair and equitable distribution of property was had.

Frank and appellee, hereafter referred to as JoAnn, were married on January 15, 1976. Both parties had been married prior to this union and brought children from these previous marriages into their home. One child, Matthew G., was born as issue of this marriage on April 25, 1977. The care and custody of Matthew was placed in JoAnn and is not in issue.

We herein are concerned solely with the property distribution, and whether the award of the trial court in this regard was equitable. The evidence adduced with regard to finances can be summarized as follows. Frank brought with him into the marriage only certain household furnishings and a 1969 Cutlass automobile. JoAnn's holdings were substantially greater. She had a house, subject to an encumbrance; a 1973 Plymouth automobile; a certificate of deposit (C.D.) in the amount of $2,500; a trust fund in the amount of $100,984.35; three $1,000 C.D.'s; and household goods. She was also receiving a social security check in the amount of $776 per month as surviving spouse benefits. She was likewise receiving these benefits at the time of trial. Shortly after their marriage, the parties purchased a 1975 Ford automobile, trading the 1969 Cutlass in on the Ford.

Frank was employed in the jewelry business prior to the marriage. In August of 1976, the parties formed a corporation, Falcone Jewelry, Inc., for the purpose of engaging in the jewelry business at the retail level. The idea for the business venture was Frank's; however, JoAnn agreed to it and thought it would be a good idea. The only stockholders of the corporation were Frank and JoAnn. A loan to the business in the amount of $35,000, which was also

personally guaranteed by JoAnn and Frank, was obtained on September 9, 1976, by the corporation. Security for the loan consisted of a security agreement in the fixtures and inventory of the store, as well as a $40,000 C.D. held in JoAnn's name. This C.D. was a part of the trust corpus which JoAnn caused to be terminated shortly after the marriage. Another portion of that corpus, in the amount of $11,000, was used to aid in the opening of the business, which occurred on September 20, 1976. A second loan in the amount of $20,000 was taken out by the corporation on January 11, 1978.

Frank did not contribute any money to the business. However, he did work at the store on a full-time basis and provided his expertise in the jewelry business, gained from working in the field for 5 years prior to the opening of the business. From the date of the opening of the business until the date of filing of this action in April of 1978, JoAnn either worked or was in attendance at the store on an average of 1 to 2 hours per day. Upon filing this action, the court determined that the house should be sold and the business liquidated. The sum of $18,949.41 was realized from the sale of the residence. Under a court order entered on May 12, 1978, Frank was ordered to liquidate the business. The inventory on hand as of April 17, 1978, was valued at $48,461.27 on a cost basis. Frank did not liquidate the business, as ordered, and the court thereafter ordered JoAnn to do so. She did so, and the amount received from said liquidation was $14,565.17.

Following the liquidation, JoAnn satisfied the various debts of the business, including the two loans to the bank, which were paid off on September 11, 1978, by turning over to the bank JoAnn's $40,000 C.D., used as security for the loans. The excess remaining from the C.D. after the loans had been satisfied was turned over to JoAnn. Further evidence was presented with regard to financial and other impro-

prieties of Frank; however, reiteration of such evidence would serve no useful purpose.

On the basis of the foregoing evidence, the trial court granted the petition of JoAnn and decreed that the marriage be dissolved. It also awarded the custody of the minor child of the parties to JoAnn, limited the visitation rights previously granted to Frank, and further ordered Frank to make payments of $40 per week as child support for Matthew, their minor child. The court also ordered Frank to pay alimony to JoAnn in the sum of $10 per year commencing January 1, 1979, for a period of 13 years, terminable upon the death of either party, but not upon the remarriage of JoAnn. The court divided the property of the parties as follows: It awarded all the proceeds resulting from the sale of the family residence in the sum of $18,949.41, plus accrued interest, to JoAnn; and also awarded her the 1973 Plymouth Fury III automobile; a certificate of deposit in the amount of $40,000; certain items of personal property currently in the possession of JoAnn; and other items consisting of appliances and other property in the possession of Frank, who was ordered to return them to JoAnn. Frank was awarded all other items of personal property currently in his possession, except those items previously ordered returned to JoAnn. It is clear from the above that of all the actual property in existence and owned by the parties at the time of the decree, JoAnn was awarded practically all of said property. However, in addition to the foregoing awards, the court found that JoAnn had lost the sum of $49,338.71 as a result of Frank's actions, and ordered Frank to repay JoAnn that sum as a property settlement, payable $4,000 forthwith and the remainder in installments of $300 per month, commencing November 1, 1978, and with a like sum to be paid on the 1st day of each month thereafter until that sum is paid in full. The court further ordered Frank to

hold JoAnn harmless from any debts unpaid as a result of the operation of Falcone Jewelry, Inc., which are asserted against JoAnn personally.

In its prior findings in the decree, the court found that from the assets acquired by JoAnn prior to her marriage to Frank, she had expended as a result of Frank's urging and direction, or as required by the guarantee she signed for loans by Frank for Falcone Jewelry, Inc., the total sum of $49,338.71, consisting of the following items: (1) A 1975 Ford station wagon titled in the name of Falcone Jewelry, Inc., and transferred by Frank to his brother, for the sum of $4,430; (2) the original investment by JoAnn in Falcone Jewelry, Inc., in the amount of $11,000; and (3) the repayment of loans personally guaranteed by JoAnn for Falcone Jewelry, Inc., in the amount of $33,908.71. The above items totaled $49,338.71, which the court felt should be repaid by Frank to JoAnn. It is clear from the court's decree that it treated the money and assets owned by JoAnn and invested in the business in the nature of a loan by her to Frank, which he should be required to repay by means of a so-called "property settlement" in this action. The question presented to us is whether the action of the trial court in this regard was equitable under the circumstances.

The distribution of property following a decree of dissolution is provided for in section 42-365, R. R. S. 1943: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property *as may be reasonable,* having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any

minor children in the custody of such party. * * *." (Emphasis supplied.) The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal. Phillips v. Phillips, 200 Neb. 253, 263 N. W. 2d 447 (1978); Schmer v. Schmer, 197 Neb. 800, 251 N. W. 2d 167 (1977). This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466 (1978); Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108 (1975).

A review of the record has convinced us that the property settlement in this case was not fair and reasonable. By its decree, it seems clear the trial court attempted to place JoAnn in the same financial position she was in at the start of the marriage. While it is true that the contributions of the parties are properly considered in the distribution of property on the dissolution of a marriage, it is also true that we have never adopted a position that such awards shall be punitive. See concurring opinion of White, C. Thomas, J., in Theye v. Theye, 200 Neb. 206, at p. 209, 263 N. W. 2d 92 (1978). We believe the award in this case was punitive. JoAnn, in effect, received all the marital property and, in addition, the sum of $49,338.71 for any losses sustained by her as a result of the marriage. Although it is true that JoAnn provided most of the financial wherewithal in connection with the establishment of Falcone Jewelry, Inc., the fact remains and the record is undisputed to the effect that the business itself, although corporate in form, was in fact a family business and joint enterprise, with the stock in the business being owned jointly by JoAnn and Frank; that Frank was the president and treasurer of the corporation and JoAnn was the vice president and secretary; and that there were no other shareholders. Although Frank invested little or no money in the enterprise,

the record reveals that he was an experienced jeweler, had the expertise to run a jewelry store, and spent full time at this occupation, whereas JoAnn was working in the business only on an average of an hour or 2 a day. As a joint business enterprise, it seems clear that the parties were entitled to share the profits, if any, on a 50-50 basis and, except for the corporate form of the business, would have been also required to share the losses equally. Although it is true that Frank failed to abide by the order of the court to liquidate the business, whereupon the court ordered JoAnn to do so, the fact also remains that with an inventory which, under normal circumstances, should have been sufficient to cover the outstanding indebtedness of the company on dissolution, she disposed of the inventory, furniture, and fixtures for the total sum of only $12,644.50. It is true that JoAnn was required to and did pay off the balance on the two loans to the bank in the amount of $33,908.71. She should not be required to sustain the entire loss in this regard; and as a matter of fairness and equity, Frank should be required to sustain at least one-half of that loss. However, we do not conclude that fairness and equity require that Frank reimburse her the sum of $11,000 originally invested by her in the family business or the sum of $4,430 for the Ford station wagon, which items were included in the court's decree in computing the total sum of the judgment awarded to JoAnn in the sum of $49,338.71.

We conclude, therefore, that the decree of the trial court should be modified to require Frank to reimburse JoAnn for one-half of the amount expended by her, which was $33,908.71, in paying off the balance owed by Falcone Jewelry, Inc., to the bank, and individually guaranteed by the parties, which share amounts to the sum of $16,954.35, together with interest thereon at the legal rate, said sum to be payable on the same terms and conditions as set forth in

the decree entered by the trial court.

As so modified, the decree of the District Court should be and hereby is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. WENDELL BIRD HEAD, APPELLANT.

285 N. W. 2d 698

Filed November 27, 1979. No. 42577.

1. **Criminal Law: Constitutional Law: Discrimination.** The mere fact that a law affects a greater proportion of one race than another does not make it invalid under the Equal Protection Clause.
2. **Criminal Law: Constitutional Law: Discrimination: Proof.** Mere selectivity in enforcement creates no constitutional defect. Before a claim of unlawful discrimination in the enforcement of criminal laws can be invoked, the defendant must allege and prove a deliberate selective process of enforcement based upon race.
3. **Criminal Law: Discrimination: Evidence: Proof.** To support a defense of selective or discriminatory prosecution, a defendant bears a heavy burden of establishing at least prima facie (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.
4. _____: _____: _____: _____. Once a prima facie case is made, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedure have produced the monochromatic result.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Charles Plantz and David J. Clegg, Western Nebraska Legal Services, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C. J.

The appellant, Wendell Bird Head, was charged in an information by the county attorney of Sheridan County, Nebraska, with the offenses of feloniously entering a building in violation of section 28-533, R. R. S. 1943, and robbery in violation of section 28-414, R. R. S. 1943. Bird Head had been convicted on at least two prior occasions with offenses resulting in prison sentences of not less than 1 year each and, accordingly, the county attorney filed a supplemental information charging Bird Head as a habitual criminal under the provisions of section 29-2221, R. R. S. 1943.

During the course of the trial, Bird Head alleged that the habitual criminal statute had been intentionally and selectively enforced against him and other Native Americans by the county attorney on the basis of race in violation of the Equal Protection Clause of both the Constitution of the United States and the Constitution of the State of Nebraska. After trial, a jury having been waived, the trial court found Bird Head not guilty of feloniously entering a building, guilty of robbery, and guilty of being a habitual criminal. Bird Head was sentenced by the trial court to a term of 15 years in the Nebraska Penal and Correctional Complex. On appeal to this court, Bird Head makes no objection to the trial court finding him guilty of robbery, but again asserts that the filing of the habitual criminal charge is a result of selective enforcement against him and other Native Americans by the county attorney in violation of their equal protection rights.

In overruling Bird Head's claim of racial discrimination, the trial court specifically found that the evidence produced by Bird Head was insufficient to make a prima facie case and insufficient to establish that the habitual criminal statute had in fact been

applied against Bird Head and other Native Americans in an unlawful discriminatory manner. In reviewing the record in this case, we concur with the conclusion of the trial court and affirm the judgment.

Section 29-2221, R. R. S. 1943, provides in part: "Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than ten nor more than sixty years * * *." Bird Head does not argue that he has not twice previously been convicted of a crime, sentenced, and committed to prison for a term of not less than 1 year each, and is not now convicted of a felony committed in this state. Rather, he maintains that the evidence adduced by him at trial establishes a prima facie case of selective or discriminatory prosecution with regard to the habitual criminal act, thereby shifting the burden to the county to rebut the presumption of unconstitutional action.

While the facts in this case may involve a complicated and serious matter, the legal principles applicable are fairly clear. The central purpose of the Fourteenth Amendment to the United States Constitution is the prevention of official conduct which is discriminating on the basis of race. Washington v. Davis, 426 U. S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597.

In Washington v. Davis, *supra*, however, it was made clear that the mere fact that a law affects a greater proportion of one race than another does not make it invalid under the Equal Protection Clause. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial dis-

crimination forbidden by the Constitution. Standing alone, it does not trigger the rule, * * * that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." See, also, McLaughlin v. Florida, 379 U. S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222.

The Supreme Court of the United States, in the case of Oyler v. Boles, 368 U. S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446, noted that mere selectivity in enforcement creates no constitutional defect. Before a claim of unlawful discrimination in the enforcement of criminal laws can be invoked, the defendant must allege and prove a deliberate selective process of enforcement based upon race. To support a defense of selective or discriminatory prosecution, a defendant bears a heavy burden of establishing at least prima facie (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution; and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination." See, United States v. Berrios, 501 F. 2d 1207 (2d Cir., 1974); United States v. Ojala, 544 F. 2d 940 (8th Cir., 1976); United States v. Johnson, 577 F. 2d 1304 (5th Cir., 1978).

It is within the discretion of the county attorney to decide whether a habitual criminal charge should be filed. State v. Reed, 187 Neb. 792, 194 N. W. 2d 179. The fact that the county attorney is permitted a certain discretion and does not use the habitual criminal act in every instance does not make the act itself or its application unconstitutional. State v. Gra-

ham, 192 Neb. 196, 219 N. W. 2d 723.

To be sure, statistical evidence may serve an extremely useful purpose in establishing the selective and discriminatory practices. Discrimination, often by its very nature, is done subtly and without clear overt acts. For that reason an invidious discriminatory purpose may be concluded from all the relevant facts, including the fact that it has been applied more often against one race than another. "The determination ultimately required demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available, * * *." Inmates of Nebraska Penal, Etc. v. Greenholtz, 567 F. 2d 1368 (8th Cir., 1977), cert. den., 99 S. Ct. 132.

The use of statistics in a disputed discrimination case does serve an important role. Teamsters v. United States, 431 U. S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396. Statistics showing racial or ethnic imbalance are probative, because such imbalance is often a telltale sign of purposeful discrimination. Castaneda v. Partida, 430 U. S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498. Nevertheless, before placing reliance upon statistics, we must be sure that the figures are sufficiently representative as to be reliable. Bird Heard argues that a prima facie case was established by him by proof sufficient to raise an inference of discriminatory prosecution, relying upon United States v. Steele, 461 F. 2d 1148 (9th Cir., 1972), and Inmates of Nebraska Penal, Etc. v. Greenholtz, *supra*. He maintains that, having made such a prima facie case, the burden shifted to the county to explain it away. The evidence upon which he relies to make his "prima facie case" was for the most part statistics provided by the county.

It is true that once a prima facie case is made, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedure have produced the monochromatic result.

Alexander v. Louisiana, 405 U. S. 625, 92 S. Ct. 1221, 31 L. Ed. 2d 536.

In this instance the prima facie case was not made. Contrary to Bird Head's claim, a prima facie case is not established merely by introducing some slight evidence which might give rise to an inference of discriminatory prosecution. The burden is upon the defendant claiming selective or discriminatory prosecution to meet a *two-fold test:* (1) He must prove that others similarly situated have not been similarly prosecuted, but that he has been *singled out* for prosecution; and (2) the government's discriminatory selection of him has been invidious or in bad faith. We believe an examination of the record in this case supports the trial court's finding that the appellant failed to meet his burden in establishing the two-fold test, and therefore, failed to make a prima facie case.

The evidence introduced by Bird Head disclosed that during the period from 1971 to 1977, 26 individuals were eligible to be charged with violations of the habitual criminal act. Of that number, 18 were Native Americans (69.2 percent) and 8 were Caucasian (30.8 percent). Of those 26 individuals, 8 were charged as habitual criminals. Seven were Native Americans (87.5 percent) and 1 was Caucasian (12.5 percent). On the basis of the figures introduced by Bird Head, 39 percent of the eligible Native Americans were charged as habitual criminals, but only 12.5 percent of the eligible Caucasians were charged. Bird Head therefore argues that, having shown this disproportionate number, he has made a prima facie case of discrimination and the burden now shifts to the county to rebut that presumption. We believe, however, that Bird Head is wrong both with regard to the law in this regard and the evidence as introduced.

The simple fact of the matter is that the statistical information relied on as Bird Head's sole evidence

of discrimination is simply too inconclusive to meet his burden. An inference of purposeful discrimination can arise from any probative evidentiary source, including but not limited to statistics, but as the significance of statistical disparities lessens, the quality and quantity of nonstatistical evidence required to raise the necessary inference become correspondingly greater. See Inmates of Nebraska Penal, Etc. v. Greenholtz, *supra*. In the instance case, had one Native American less been charged and one more eligible Caucasian been charged, virtually no disparity at all would have existed between the number eligible in each class and those actually charged. Such a result only points out the insignificance of the size of the group examined.

Likewise, the trial court, in analyzing the eligible persons over a 7-year period, noted that in 1972, there was only one Caucasian who was eligible to be charged and in fact was charged, while during the same period there were two Native Americans eligible to be charged, and neither were so charged. In 1973, there were seven persons eligible to be charged, three of whom were Native Americans, and four of whom were Caucasian. Of that number only one, a Native American, was charged. In 1974, there was only one person eligible to be charged. In 1975, while there were ten eligible to be charged, only one was Caucasian. Of the ten, only one, a Native American, was in fact charged.

The county attorney testified that there were a host of factors which were taken into account in deciding whether habitual criminal charges should be filed, including the nature of the crime in question and the previous crimes, whether there was the possibility of obtaining a plea bargain by reason of filing the habitual criminal charge, and the total record of the individual. There was no evidence offered by Bird Head other than the numerical figures in support of Bird Head's contention. For the reasons

discussed herein, we believe Bird Head failed to introduce evidence sufficient to establish the two-fold test required in such a case. Having failed to do so, the burden did not shift to the county to rebut the presumption, and the trial court was correct in finding against Bird Head on the issue of discrimination.

Using the habitual criminal statute for purposes of discriminating against a minority class would clearly violate the Equal Protection Clause of both the United States Constitution and the Constitution of the State of Nebraska. Where sufficient evidence is presented to support such a claim, a court should not hesitate for a moment to stop such a practice. No justification for such an action could be given even within a county attorney's broad discretion. The facts here simply do not make even a prima facie case of such discrimination and, therefore, the judgment and sentence must be affirmed. We have reviewed the other assignments of error and in view of our decision find them to be without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TONY D. MUNSON, APPELLANT.

285 N. W. 2d 703

Filed November 27, 1979. No. 42643.

1. **Criminal Law: New Trial: Time: Statutes: Evidence.** The general rule is that a motion for a new trial must be filed within 10 days after the verdict is rendered. § 29-2103, R. R. S. 1943. An exception to the above rule is that in any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict under which he was sentenced was rendered, the District Court may set aside the sentence and grant a new trial if such motion is

filed within a reasonable time after the discovery of the new evidence. § 29-2103, R. R. S. 1943.

2. **New Trial: Evidence.** New evidence tendered in support of a motion for a new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.

3. _____: _____. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Dennis G. Carlson, for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

Defendant below, Tony D. Munson, was charged and convicted by the court of driving with more than ten-hundredths of one percent of alcohol by weight in his body fluid, third offense. He was eventually sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a term of 1 year, with 20 days credit for time already served, and was ordered to pay the costs of the action. On January 11, 1979, defendant filed a motion for a new trial, supported by affidavits, pursuant to section 29-2101(5), R. R. S. 1943, which motion was overruled by the Lancaster County District Court. He has now appealed to this court from that order, alleging as his sole assignment of error that the trial court erred in failing to grant the motion for a new trial based on newly discovered evidence. We affirm.

By way of background, on October 18, 1977, Tony Munson (hereinafter referred to as Munson), was arrested for operating a motor vehicle while intoxi-

cated. He submitted to a chemical testing of his breath by the Lincoln police department and was found to have at least eighteen-hundredths of one percent by weight of alcohol in his body fluid. Trial to the court was held on February 27, 1978, and, as previously stated, the court found Munson guilty of the offense charged.

At the trial, the arresting officer testified that he had witnessed a vehicle driven by Munson in a northerly direction violate a stop sign, as a result of which the officer stopped the vehicle, observed Munson's actions and speech, concluded that he was intoxicated, and placed him under arrest. Munson did not testify at the trial, and the testimony of the arresting officer as to the events preceding the arrest was uncontroverted.

Sentencing was originally set by the court for July 25, 1978. However, Munson failed to appear for sentencing on that date, and the court thereafter issued a bench warrant for his arrest. Upon Munson's return to this state sentencing was had on December 27, 1978. In addition to sentencing Munson to a term of imprisonment of 1 year in the Nebraska Penal and Correctional Complex, as previously stated, the court also suspended his driving privileges for a period of 1 year from the date of his discharge from confinement.

In support of his motion for a new trial based upon newly discovered evidence, counsel for Munson submitted two affidavits, one from his client, Tony Munson, and the other from David Bruce, who was a passenger in the vehicle operated by Munson on the night of Munson's arrest. In fact, the automobile in question was owned by Bruce's parents. The statements contained in Bruce's affidavit, if true, would tend to contradict the testimony of the arresting officer. Both Bruce and Munson testified at the hearing on the motion for a new trial; and their testimony contradicted that of the arresting officer with

regard to the direction the vehicles were traveling, the location of the stop sign in question, and other facts relative to the alleged traffic violation relied upon by the arresting officer as probable cause for stopping Munson's vehicle. It was further adduced at the hearing on the motion for a new trial that Bruce had entered the Marine Corps subsequent to Munson's arrest on the evening in question, but prior to the trial itself. Bruce's whereabouts were purportedly unknown to Munson until shortly before sentencing. Munson testified, however, that he knew Bruce was entering the Marine Corps, that Bruce's parents and his brother resided in Lincoln, and that Bruce lived at home with his parents.

In denying Munson's motion for a new trial, the court stated as follows: "So the Court finds that the matter of the violation of the stop sign, that issue is not newly discovered evidence, material for the defendant which he could not, with reasonable diligence, have discovered and produced at the time of trial. He not only knew about it at the time of arrest, but he did not testify at the time of trial with regard to this issue. And he was present, of course, at the time of trial.

"Now, when we come to the matter of producing the testimony of the witness Bruce, the Court finds that, under the evidence, there was not due diligence and search made for him by which his deposition could have been taken at San Diego or to have him present at the time of trial, the defendant having testified that he knew that this was part of an issue in the case with reference to the stop sign.

"He learned from the brother of the defendant that he was at boot camp in San Diego, California, according to his testimony today; and that could readily have been obtained, his address. Probably the precise address could have been obtained from his parents. And he did not state that the brother could not have given him the address. So there was

not reasonable search and inquiry as to the witness Bruce."

We have carefully reviewed the record and find that it fully supports the findings and conclusions of the trial court, as set forth above. It is the general rule that a motion for a new trial under section 29-2103, R. R. S. 1943, must be filed within 10 days after the verdict is rendered. State v. Applegarth, 196 Neb. 773, 246 N. W. 2d 216 (1976); State v. Lacy, 195 Neb. 299, 237 N. W. 2d 650 (1976). However, section 29-2103, R. R. S. 1943, provides a limited exception to the above rule, and states: "In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with *reasonable diligence* have discovered and produced during the term within which the verdict under which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial; *Provided,* that such motion is filed within a reasonable time after the discovery of the new evidence; * * *." (Emphasis supplied.) "Reasonable diligence" required of a party seeking a new trial on ground of newly discovered evidence means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful. Levi v. Oklahoma City, 198 Okla. 414, 179 P. 2d 465 (1947).

It must be noted, however, that even if the evidence in this case were considered to have been produced with reasonable diligence, there are additional requirements before a new trial may be granted. The rule is well established that newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it *probably* would have produced a substantial difference in result. Such evidence must be relevant and credible,

and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. State v. Smith, 202 Neb. 501, 276 N. W. 2d 104 (1979); State v. French, 200 Neb. 137, 262 N. W. 2d 711 (1978); Finnern v. Bruner, 170 Neb. 170, 101 N. W. 2d 905 (1960). We have stated that new evidence tendered in support of a motion for a new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Seger, 191 Neb. 760, 217 N. W. 2d 828 (1974); State v. French, *supra*. The new evidence proffered by the defendant in support of his motion for a new trial does not, in our opinion, even approach the requisite strength and potency required; and, at the most, would only result in a conflict in evidence between the testimony of the arresting officer and the testimony of the witness Bruce. Clearly, such additional evidence would not necessitate a finding that a different verdict would "probably" result.

We conclude that, even assuming that the testimony of Munson's witness, David Bruce, with regard to the direction of travel on the night in question could be considered as "newly discovered evidence," it is clear that Munson could have with reasonable diligence discovered and produced this evidence at the trial. The main issue involved in the State's case against Munson was whether the alleged violation did in fact occur. Munson was present at the trial, but he did not dispute the testimony of the arresting officer. We completely agree with the conclusion of the trial judge that the evidence in question was not "newly discovered evidence."

We also believe it is clear that Munson failed to use reasonable diligence in ascertaining the whereabouts of his witness, Bruce. He knew that Bruce was entering the Marine Corps, that he lived with his parents, and that they resided in Lincoln. He

had been to their residence "a couple times" prior to his arrest, and yet he did not inquire of the parents at any time subsequent to the arrest as to Bruce's whereabouts. The most he did was to request Bruce's brother to "get hold of him [David Bruce] to see if he could get back for my trial." Apparently, he failed to pursue the matter further. We reject his contention that he used "reasonable diligence" under the circumstances.

The law is well established that a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69 (1966). There was clearly no abuse of discretion in the instant case.

In view of what we have stated above, the order of the trial court denying defendant's motion for a new trial was correct and must be affirmed.

AFFIRMED.

TOWN & COUNTRY REALTY OF KEARNEY, INC., A NEBRASKA CORPORATION, APPELLEE, V. RICHARD M. GLIDDEN AND CYNTHIA J. GLIDDEN, APPELLANTS.
285 N. W. 2d 828

Filed December 4, 1979. No. 42502.

1. **Contracts: Rescission.** The rescission of a contract by the parties as much requires the meeting of the minds as does the making of the contract.
2. **Agency: Brokers: Revocation.** Though an agency to sell real estate may be revoked at any time before the sale, such revocation must be in good faith, and will not obtain to appropriate the broker's services without compensation.

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

J. Marvin Weems, P.C., Law Offices L. W. Cronk,

Of Counsel, J. Marvin Weems and Curtis A. Sikyta, for appellants.

Ross, Schroeder & Fritzler, for appellee.

Heard before BOSLAUGH, CLINTON, and MCCOWN, JJ., and L. W. KELLY, JR., and COLWELL, District Judges.

COLWELL, District Judge.

Defendants, Richard M. Glidden and Cynthia J. Glidden, appeal from a judgment granting plaintiff a realtor's commission. Defendants sold their house themselves before the listing agreement expired.

The issues were first litigated in the county court of Buffalo County, Nebraska, upon plaintiff's petition and defendants' answer and cross-petition for damages. Defendants alleged unfair acts on the part of the plaintiff under section 59-1602, R. R. S. 1943. The county court dismissed both the petition and cross-petition. Both parties appealed to the District Court, pursuant to the provisions of section 24-541, R. R. S. 1943, where that court, on September 14, 1978, entered a $2,541 judgment in favor of plaintiff and dismissed defendants' cross-petition. Defendants appeal to this court, claiming error as follows: (1) Plaintiff breached its duty as a fiduciary; (2) the sale made by defendants was not within the terms of the listing contract; (3) the listing contract was mutually rescinded; and (4) plaintiff's acts and practices were deceptive and unfair, in violation of section 59-1602, R. R. S. 1943.

At the time the listing contract was executed, Richard was completing his undergraduate studies at Kearney State College and Cynthia had a degree in education and two years teaching experience.

There is conflict in the evidence on all of the issues presented; however, as to the following facts there is little dispute. In September 1976, defendants bought their house in Kearney, Nebraska, for $41,000.

Kay Downing, a salesperson for plaintiff, negotiated this sale. In the spring of 1977, defendants were intending to move from Kearney. They made an effort to sell the house on their own, originally asking $45,500. This asking price was later reduced, but they were unsuccessful in making a sale, and subsequent contacts were made between plaintiff and defendants. Defendants informed plaintiff that the minimum selling price would have to be $44,500, since they had to net $42,000 from the sale in order to break even. A written listing contract was executed by defendants on July 30, 1977, employing plaintiff as their agent to sell their house for $46,000. Kay Downing was to be the salesperson. It was an exclusive contract, expiring October 30, 1977, reciting, in part: "I (We) agree to pay you for professional services a cash fee of 6% of the gross sale price, * * * to be payable on the happening of any one or more of the following events, to wit: If a sale is made, or a purchaser found, who is ready, willing and able to purchase the property before the expiration of this listing, by you, myself, or any other person, at the above price and terms or for any other price and terms I (we) may agree to accept, or if this agreement is revoked or violated by me, * * * or if within 90 [days] after the expiration of this listing I (we) make a sale of said premises to anyone due to your efforts or advertising done under this listing." Within a few days plaintiff distributed the listing among other cooperating brokers in Kearney, placed newspaper advertisements, and conducted an open house for two hours on August 21, 1977, which was attended by Myron and Pamela Hensel. On July 29, 1977, defendants bought a house in Ord, Nebraska, paying $500 down. On August 23, 1977, the Hensels contacted defendants relative to renting the Kearney house, and defendants inquired as to the Hensels' interest in buying the property. The next day Cynthia arranged with Kay for the re-

moval of the agent's sign and lockbox from the premises, on the representation by Cynthia that they wanted to rent the house. The cooperating realtors were notified that the house could no longer be shown. Thereafter, on August 24, the Hensels again contacted defendants and, after brief negotiations, purchased the house on August 26, 1977, for $42,000. Defendants' warranty deed in favor of the Hensels was recorded October 19, 1977.

It is the obligation of the District Court upon an appeal de novo to reach an independent conclusion without reference to the decision of the county court, with the caveat that where evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying. Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50.

The review in this court of a law action is not de novo. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and it is not supported by the evidence. Stitt Constr. Co. v. Canine's Cupid, Inc., 199 Neb. 400, 259 N. W. 2d 29.

Defendants in their answer allege fraud and misrepresentation by plaintiff through its agents in influencing defendants to list their house for $46,000, claiming that this price was excessive and unrealistic.

There is no merit to this defense. The listing price was openly discussed between the parties, defendants concurred in that figure, and shortly before signing the contract defendants were asking only $500 less.

Defendants' answer also claims that plaintiff orally agreed that they could sell the house privately at any time without paying a commission, which condition was not in the executed listing. The evidence on this issue is in conflict, with only defendants' statements to support their claim.

The key issue here is whether or not the listing contract was mutually rescinded.

"The rescission of a contract by the parties as much requires the meeting of the minds as does the making of the contract." Utilities Ins. Co. v. Stuart, 134 Neb. 413, 278 N. W. 827. See, also, Davco Realty Co. v. Picnic Foods, Inc., 198 Neb. 193, 252 N. W. 2d 142; 17 Am. Jur. 2d, Contracts, § 490, p. 962.

"Though an agency to sell real estate may be revoked at any time before the sale, such revocation must be in good faith, and will not obtain to appropriate the broker's services without compensation." Dunn v. Snell, 124 Neb. 560, 247 N. W. 428. See, also, Annotation, 69 A. L. R. 3d 1270; Annotation, 88 A. L. R. 716.

From 17 Am. Jur. 2d, Contracts, § 492, p. 964, these rules are applicable: "* * * as a general rule * * * the parties to a written contract may rescind or cancel it orally, although evidence of rescission of a written contract by a subsequent parol agreement must be clear, positive, and above suspicion, * * *. An oral agreement rescinding a written contract must generally have the same elements of mutual consent and consideration as are necessary for the formation of other informal contracts." Section 494, p. 967, states: "A contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties."

In summary, defendants' evidence was that when Mr. Hensel contacted them on August 23rd he said that he would not discuss purchasing the home until defendants' listing contract with the plaintiff had been "nulled," since Mrs. Hensel was a licensed real estate salesperson; he told Cynthia to have the listing "nulled" and not "voided." The next day Cynthia went to plaintiff's office and talked to Kay,

advising her that they were renting the house, and "I told her that we had found someone who would rent it if it wasn't being shown and if it wasn't going to be shown, we wanted the contract *null.*" (Emphasis supplied.) Cynthia understood that Kay would remove the contract from the file. Significant here is the direct testimony of Kay: "Well, then I do recall her saying 'is there anything else we need to do' and I said no. I guess I just didn't think about it at all. They told me they wanted to rent it and I really didn't worry about anything other than that. And then I did take the sign off and the lockbox off." Kay also testified: "Q. Did you make any inquiry as to whether you would have a chance to list it in the future again at that time? A. I don't remember that I did. I may have. According to him they were going to rent it and I assumed or from what they said, they would rent it and possibly sell it again in the spring and maybe I did say we'd certainly like to have another chance at listing it." Defendants concede the listing agreement permitted them to rent the house during its term; further, that they planned to sell the house and not rent it, except for a short term.

Briefly, plaintiff's evidence was that defendants discussed with Kay the possibility of renting the house and Kay offered to help them rent it; that with a renter in the house it could be sold, but it would be more difficult to sell.

Defendants were pressed for time and funds to move to Ord and complete the purchase of a house there. They were aware of plaintiff's right to a commission under the terms of the listing agreement in the event they sold the house privately, and upon the suggestion of Myron Hensel they made an effort to protect themselves from such an obligation. It is clear defendants revoked plaintiff's authority to sell the house by their sale, leaving the fact question of rescission for the trial court. From a full review

of the record the trial court could find that there was no mutual rescission of the contract, either express, implied, or by parol; that the plaintiff acted in good faith, with reasonable care, skill, and diligence, as defendants' agent; that it performed its required fiduciary duties, including advertising, distribution of listing information, an open house, and showing the premises; and that defendants owed plaintiff the agreed commission.

Defendants suggest that the District Court failed to consider the opportunity of the county judge to observe the witnesses. There being nothing in the record to the contrary, we presume that the District Court did do so, and fully complied with the caveat of Phillippe v. Barbera, 195 Neb. 727, 240 N. W. 2d 50.

Defendants argue that the assessment of $877.88 in costs against the defendants was unfair, burdensome, and exorbitant. These fees include transcripts and court fees of $354.88, and deposition fees of $520. We cannot say that the District Court was wrong in the assessment of the costs.

It is not necessary to further discuss defendants' claim that the acts of plaintiff were in violation of section 59-1602, R. R. S. 1943. The dismissal of defendants' cross-petition was within the evidence and was correct.

The judgment of the District Court in favor of plaintiff was supported by competent evidence and it should be affirmed.

AFFIRMED.

DARRELL EMPFIELD ET AL., APPELLANTS, V. AINSWORTH IRRIGATION DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES.

286 N. W. 2d 94

Filed December 4, 1979. No. 42537.

1. **Motions, Rules, and Orders: Verdicts: Evidence.** A motion for a directed verdict made at the close of a plaintiff's case must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom.
2. **Juries: Evidence: Proof.** In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed.
3. **Contracts.** The general rule is where a contract is executed but its effectiveness or fulfillment is dependent upon the doing of an agreed-upon condition before it shall become a binding contract, such contract cannot be enforced unless the condition is performed.

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

Hutton & Garden, P.C., for appellants.

Rodney J. Palmer, for appellees.

Heard before KRIVOSHA, C. J., WHITE, BRODKEY, and HASTINGS, JJ., and HOWARD, District Judge.

HASTINGS, J.

This was an action brought by plaintiffs as owners of land within the defendant Ainsworth Irrigation District's (District) boundaries for damages to their crops caused by an alleged breach of contract to deliver irrigation water by the District and the individual defendants as directors of the District. The second cause of action alleges that the claimed acts constituting the breach by defendants were "* * * arbitrary and capricious and constituted unjust discrimination against the plaintiffs * * * contrary to

the Constitution * * *." As such, it states no additional grounds for recovery; and as will be shown later on, there was no evidence to support such allegations. At the conclusion of plaintiffs' evidence the District Court sustained defendants' motion to dismiss, made on the basis of a failure of the evidence to support a verdict in favor of plaintiffs. Plaintiffs have appealed.

Plaintiffs assign as error the rejection by the trial court of exhibits 7 and 42 offered by them and, generally, the trial court's failure to submit the case to the jury.

The evidence questions may be disposed of at the outset. Exhibit 7 was a letter dated July 22, 1967, from Robert and Genevieve Hopkins, the plaintiffs' predecessors in title to the farmland involved in this litigation, directed to the defendant Henry S. Miles as president of the District. It obviously had no bearing upon and was irrelevant to this action. Exhibit 42 was a copy of some 34 pages from what appears to be a textbook or reference book on the general subject of Federal Reclamation Law, according to the title appearing at the top of each page. It contains paraphrased excerpts from congressional acts on the subject, historical data, and comments by an unknown author. Although not artfully made, defendants' objections can be interpreted as relating to a lack of foundation and relevancy, and as such were properly sustained.

A motion for a directed verdict made at the close of a plaintiff's case must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Bohling v. Farm Bureau Ins. Co., 191 Neb. 141, 214 N. W. 2d 381 (1974). "In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is

literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed." Durrett v. Baxter Chrysler-Plymouth, Inc., 198 Neb. 392, 253 N. W. 2d 37 (1977).

The District is an irrigation district organized in Brown County, Nebraska, under the provisions of section 46-101 et seq., R. R. S. 1943. The District receives the water it disperses under contract with the United States Bureau of Reclamation. 43 U. S. C. A., § 423e, the so-called "excess acre law," requires in part that all contracts with irrigation districts shall provide that all irrigable land held in private ownership by any one owner in excess of 160 acres shall not receive water for such excess acres until compliance is had with certain requirements as may be prescribed by the Secretary of the Interior.

The plaintiffs own and farm approximately 705 acres of farmland located in Brown County, having acquired title from Mrs. Empfield's brother and his wife, Robert and Genevieve Hopkins, in 1972. According to Darrell Empfield, plaintiffs and the Hopkins had been farming the land as partners from 1966 until transfer of the title of the land to plaintiffs in 1972. With ownership spread among four partners, some 490 acres of the land had been certified to receive irrigation water from the District prior to 1972. On June 27, 1972, plaintiffs received a letter from the District to the following effect: "Your purchase of land from Robert W. Hopkins and wife will make you excess of the 160-acre limitation law. Before we can deliver water to any of your acres, it will be necessary for you to take care of these excess acres." At trial, Darrell Empfield stated he had been working around reclamation projects doing land leveling for a good many years and had been aware of the excess acre law for 20 or 25 years.

In 1972, Darrell Empfield desired to expand his irrigated acreage. On November 14th of that year, he

attended a meeting of the board of directors of the District. The minutes reflect the following official action: "Darrel Empfield requested to have approximately 80 acres of land being in the W½ NW¼ of Section 35, T31N R23W, the N½ and SW¼ of Section 34, T31N R23W, and the NE¼ of Section 8, T30N R23W rounded out and squared up to development and brought into the District. The Board approved this action providing he pays the back assessments and takes care of his excess acres. Final approval rests with the U.S.B.R." It can be said without fear of contradiction that the foregoing terms constitute the contract which forms the basis of plaintiffs' present action.

It is apparent from the action by the board of the District that two conditions were attached to the agreement to furnish water to plaintiffs' excess acres, i.e., payment of the back assessments and taking care of the excess acres. There is no question but what plaintiffs paid all back assessments. However, in spite of the District's repeated warnings, both oral and written, plaintiffs admit that their attempts to take care of the excess acres consisted of the creating of two corporations, owned solely by the Empfields, in order to spread out the ownership of the land, and the drafting of deeds covering part of the land, naming a hired man and an adult daughter of Mrs. Empfield as grantees, neither of which deeds was delivered or recorded. None of these actions were approved by the District.

Plaintiffs acknowledged that they had received both oral and written notice about their excess acres. They received exhibit 9, a letter dated March 14, 1973, from the District, which said in part: "Final approval has now been received from the Bureau of Reclamation on land changes you wish made * * *. * * * However, in order for you to receive water on any land in excess of 320 acres, you must clarify your excess acre standing. If this has

not been done prior to watering season, the Ainsworth Irrigation District will designate which 320 acres will be eligible to receive water and only those 320 acres can be watered. We are taking this action * * * as we feel we can choose 320 acres to be watered more in line with your thinking than can the Bureau." Plaintiffs received exhibit 10, a letter dated April 13, 1973, from the District: "The Board * * * has asked me to call to your attention again the fact that you are in excess of the 160-acre limitation law. This is the last notice you will receive. * * * Therefore, if we do not receive from you prior to April 23 any clarification of your excess standing, we will forward this to the Bureau of Reclamation and they will designate to bring you in compliance with the excess acre law. Those acres designated as excess will not be eligible to receive water." The District again wrote plaintiffs on July 30, 1973: "This is to inform you that you have until August 1, 1973 to designate which 320 acres you wish to receive water on, or to otherwise *complete* land area changes to clear your excess acre standing, or we will designate for you, and water to the remainder of your acreage will be discontinued. We hesitate to take this action; * * * and we must comply with our contract with the Bureau of Reclamation." Finally, the U. S. B. R. wrote a letter to plaintiffs dated August 9, 1973, recounting three of the previously ignored letters written to them by the District. The bureau then went on to designate 320 acres, by description, as being eligible to receive water, and the remaining 250.3 acres which would be ineligible to receive water until satisfactory ownership changes had been made. Finally, although the District had furnished water for three waterings during the summer, on August 11, 1973, it closed and padlocked the gates, preventing additional water for the 250 acres. As a result, according to plaintiffs, they raised only about 65 bushels per acre on those 250 acres rather

than the expected 135 bushels. It is this act of the District in cutting off additional irrigation water that the plaintiffs claim constituted a breach of contract.

Other than the attempts at incorporation and the nondelivered deeds previously mentioned, Darrell Empfield testified that Mr. Kutz of the McCook Bureau of Reclamation told him he had 10 years to comply with the excess acre law. However, this was pure hearsay and utterly without foundation. It was also contrary to the rejected exhibits which plaintiffs had offered.

Nothing further was done by the plaintiffs to comply with the excess acre requirements imposed by the United States Bureau of Reclamation on the District and as indicated by the District in its minutes of November 14, 1972.

Conceding the truth of all evidence offered by the plaintiffs, we are forced to the conclusion that plaintiffs utterly failed to prove the performance of the condition precedent incumbent upon them in order to entitle them to enforce the contract against the defendants. "The general rule is where a contract is executed but its effectiveness or fulfillment is dependent upon the doing of an agreed-upon condition before it shall become a binding contract, such contract cannot be enforced unless the condition is performed." Metschke v. Marxsen, 176 Neb. 240, 125 N. W. 2d 684 (1964).

Plaintiffs' claim that they were discriminated against, mentioned at the beginning of this opinion, is of no avail. It can be disposed of with the simple observation that, notwithstanding their allegations, there was no evidence that other owners of excess acres received water contrary to the excess acre law.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK ANTHONY SELMAN, APPELLANT.

285 N. W. 2d 832

Filed December 4, 1979. No. 42685.

Criminal Law: Courts: Jurisdiction. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial.

Appeal from the District Court of Hitchcock County: JACK H. HENDRIX, Judge. Affirmed.

Stephen A. Scherr, for appellant.

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

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

Upon a plea of nolo contendere to shooting with intent to kill, wound, or maim, the defendant, Mark Anthony Selman, was sentenced to imprisonment for 3 to 8 years. He has appealed and contends the trial court erred in not transferring the case to the juvenile court, in overruling his plea in abatement, and that the sentence imposed was excessive.

The defendant was 14 years of age at the time the offense was committed. The record shows that the defendant ran away from his home in Hastings, Nebraska, on November 15, 1978, taking his father's car and a shotgun. Later that same day he was discovered hiding in a culvert near Culbertson, Nebraska. The matter was reported to the chief of police of Culbertson who then went to the culvert area to apprehend the defendant.

After the chief of police had identified himself he approached the defendant. The defendant replied, "I am going to blow your head off." He then fired the shotgun at the chief of police, twice striking him

in the face. The chief of police returned the fire, shooting over the defendant's head and at his legs several times. The defendant shot at the chief of police several more times and then drove away in the chief's automobile.

A state patrolman located the defendant west of McCook, Nebraska, and followed the defendant west on county roads and then south on highway 17. A roadblock had been set up by a deputy sheriff on highway 17 approximately 6.4 miles north of the Kansas line. When the defendant approached the roadblock, the deputy sheriff motioned the defendant to stop. The defendant did not stop but fired 2 or 3 times at the deputy as he passed the roadblock.

At a point approximately 1 mile north of the Kansas line, the defendant fired at the state patrol vehicle which was following him. The defendant continued into Kansas where the car broke down and he was apprehended.

The defendant was originally charged with stealing the automobile owned by the chief of police and three counts of shooting with intent to kill, wound, or maim. Pursuant to a plea bargain the defendant pleaded "no contest" to the charge of shooting at the chief of police with intent to kill, wound, or maim, and the other counts were dismissed.

After the defendant had been arraigned in the District Court he moved to transfer the case to the juvenile court. Following an evidentiary hearing the motion was overruled.

It is unnecessary to discuss in detail the evidence which was received at this hearing. The record shows the defendant had been before the juvenile court on a number of occasions and had been committed to the Nebraska Center for Children and Youth in 1976 and the Youth Development Center-Kearney in 1977. The record shows compliance with the requirements of section 43-202.01, R. R. S. 1943, and does not support the defendant's contention that

his case should have been transferred to the juvenile court. The ruling on the motion to transfer was not erroneous.

The plea in abatement was based upon the fact that the defendant was surrendered to Nebraska authorities by the Kansas authorities without extradition. In this respect the record shows the defendant was not threatened, abused, or mistreated in any way. The defendant was brought to the state line by Kansas authorities and then voluntarily walked across the state line into Nebraska and surrendered to the sheriff of Hitchcock County, Nebraska.

The applicable rule was stated in State v. Costello, 199 Neb. 43, 256 N. W. 2d 97, as follows: "The 'power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the trial.' Maddox v. Sigler, 181 Neb. 690, 150 N. W. 2d 251 (1967)." The plea in abatement was properly overruled.

The defendant is now 15 years of age. He has been in various special education programs and institutions. The psychiatric evaluations which have been performed show that the defendant functions intellectually in the average to slightly below average range, and at about the 7th grade level. He is undisciplined and has little control of himself. He has a long history of impulsive, violent, and destructive behavior, but is not mentally ill in the sense that he is psychotic or amenable to treatment. He functions at about an age level of 4 emotionally. He is dangerous both to himself and other people and requires close supervision and constant monitoring.

The report from the last evaluation recommended placement in a confinement facility. The psychiatrist who testified at the hearing on the motion to transfer the proceeding to the juvenile court was unable to recommend any treatment program or existing institution in Nebraska as a place where the de-

fendant might be confined. He did not believe the defendant should be placed in a mental institution or the Youth Development Center-Kearney. He did not recommend placement in the men's reformatory because he believed the defendant would provoke retaliation from other inmates.

It is apparent from the record that the defendant in this case must be confined. The only appropriate and available place of confinement is the penal complex. The term of imprisonment imposed was not excessive in view of the violent nature of the offense and the defendant's past record. The recommendation of the trial court that the defendant be permitted to serve his sentence at the Youth Development Center-Kearney until he becomes 16 years of age and that at some time he be placed in an Arizona rehabilitation facility was advisory only.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, RELATOR, V. CHARLES THONE, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., RESPONDENTS.

286 N. W. 2d 249

Filed December 4, 1979. No. 42863.

1. **Constitutional Law.** Article XIII, section 1, of the Nebraska Constitution, forbids, except as otherwise provided in that section, the state to contract debt or incur indebtedness in excess of $100,000.
2. **Constitutional Law: Statutes.** The constitutional validity of an act of the Legislature is to be tested and determined by what the statute authorizes under and by virtue of its provisions.
3. **Constitutional Law: Statutes: Bonds: Municipal Corporations.** Section 8 of L.B. 571, Laws 1979, purports to authorize the state to guarantee, in unlimited amount, bonds issued by municipalities under section 9 of the act for the purpose of constructing alcohol plants and facilities. Even though the obligation of the state on such bonds may be secondary or contingent, the obligation is a debt

within the meaning of Article XIII, section 1, of the Nebraska Constitution.

4. **Constitutional Law: Legislature: Revenue.** One purpose of the constitutional limitation on state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue received in future fiscal periods. Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision.
5. **Constitutional Law: Legislature: Appropriation of Public Money.** A declaration by the Legislature of the purpose for which money will or may be expended in the future does not constitute an appropriation within the meaning of Article III, section 22, of the Nebraska Constitution.
6. **Constitutional Law: Statutes.** A severance clause in a legislative act creates a presumption that, eliminating the invalid parts, the Legislature would have been satisfied with what remains. Such a clause, however, is merely an aid to interpretation and not an inexorable command.
7. _____: _____. When the invalid portions of a statute are so interwoven with the rest of the act so that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the entire act ordinarily fails.
8. **Legislature: Public Purpose: Taxation.** It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.
9. **Legislature: Public Purpose: Public Funds: Police Power.** What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.

Original action. Judgment for the relator in accordance with this opinion.

Paul L. Douglas, Attorney General, Robert F. Bartle & Paul E. Hofmeister, for relator.

Nelson & Harding, Brian K. Ridenour, Steven P.

Denton & John H. Heen, and Carl T. Curtis, Richard N. Thompson & Loel D. Brooks, for respondents.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

This is an original action commenced by the State of Nebraska on the relation of the Attorney General, against Charles Thone, Governor of the State of Nebraska, and Larry Bare, Director of the Department of Economic Development of the State of Nebraska, the purpose of which is to enjoin the Governor and Director from attempting to implement the provisions of L.B. 571, Laws 1979, which became operative June 1, 1979. L.B. 571 authorizes a plan for the development of alcohol plants and facilities in the State of Nebraska. The petition alleges the act is unconstitutional in several respects and that the respondents, unless enjoined from so doing, will implement the act. The parties have agreed to a stipulation of facts which demonstrates that a justiciable issue exists.

This court, on July 20, 1979, entered an order temporarily enjoining the Governor from entering into any agreement with any party for the construction of an alcohol plant and from expending or authorizing the expenditure of revenue or public funds collected under the provisions of L.B. 571 for the purpose of constructing or guaranteeing the construction of alcohol plants. That order did not enjoin the collection of additional gasoline tax as provided for in L.B. 571, nor did it enjoin the Governor's preparation and adoption of guidelines and criteria for applications to construct, acquire, and operate plants and facilities.

The purpose and proposed operation of L.B. 571 may be described as follows. L.B. 571 contains a plan for the construction of plants and facilities for the manufacture of alcohol. Although L.B. 571 does

not specifically so state, it is evident from other legislation adopted at the same legislative session, to wit, L.B. 74, and from the stipulated facts that the manufacture of "agricultural ethyl alcohol" is contemplated. The purpose is the promotion of the use of "gasohol," a motor fuel consisting of a blend of gasoline with 10 percent ethyl alcohol, 190 proof, produced in Nebraska. § 66-821, R. S. Supp., 1979.

The act authorizes the state to enter into agreements with counties and municipalities, or any combination thereof (hereinafter municipality), to build or otherwise provide for and operate such plants. The statute contemplates that the agreement between the state and the municipality will include a lease of the plant to the state for a term not to exceed 50 years, for rental periods of 12 months or less. Section 6 of the act provides in part: "All such leases shall be subject to the condition that there is in effect a yearly appropriation for the payment of any rentals and other sums due and payable on the first day of each rental period, and in the event that there is no yearly appropriation the lease terminates." § 66-826, R. S. Supp., 1979. When all payments called for by the agreement have been made, the state may exercise "any option to purchase" contained in the agreement. § 66-829, R. S. Supp., 1979. The state may sublease the plant, or the state and the municipality may enter into a management service contract with any person for the operation of the plant.

All profits, as defined by the act, from the operation of the plant are required to be paid into an "Alcohol Plant Fund," hereinafter APF. This fund will be described in more detail later in this opinion.

To provide funds for the construction or other acquisition of the plant and facilities and to provide working capital, a municipality, which is a party to an agreement with the state, is authorized to issue and sell bonds and to pledge the revenue "of any

such municipality or county" for those purposes. § 66-829, R. S. Supp., 1979. Revenue is not defined by the act. The term might be construed to not be limited to operational profits, for the latter are required to be paid into the APF, which is a state fund. However, it is not necessary for us to decide that question.

The act also grants to the municipality for the purpose of carrying out the purposes of the act the powers described in section 72-1403, R. R. S. 1943, a part of the state office building act. The powers so granted include the issuance of ". . . its general obligation bonds in the manner and pursuant to the procedures as are otherwise provided by law, or in anticipation of the receipt by such municipality of any payments to be made by the state to such municipality for the supplying by the municipality to the state of such building or facility, or portions thereof, or in anticipation of the receipt of any other revenue with respect to the building or facility, including donations, to issue its revenue bonds in the manner and pursuant to the procedures as are otherwise provided by law and to secure such revenue bonds by a pledge of any or all of the revenue or other money to be derived by the municipality from its ownership or operation of such building or facility, including any payments to be made to such municipality by the state for the use by the state of such building or facility, ..."

Section 72-1403, R. R. S. 1943, provides that such bonds are not obligations of the state and provides that each bond "shall recite therein in substance that such bond is solely the obligation of the municipality issuing the same and is not an obligation of the State of Nebraska nor a debt of the State of Nebraska within the meaning of any constitutional or statutory limitation upon the creation of indebtedness of the State of Nebraska and that the State of Nebraska is not, and in no event shall be, liable for

the payment thereof or interest thereon."

Section 8 of the act describes the APF. That fund comes from three sources: First, as already noted, profits, if any, from the operation of the plant. Second, a 1-cent per gallon increase in gasoline tax.[1] Third, such funds as may be appropriated by the Legislature. Section 8 further provides: "The Alcohol Plant Fund shall be used to make lease payments, if necessary, in an amount sufficient to pay the principal of, interest on, and premium, if any, on the bonds issued pursuant to this act to finance alcohol plants and to maintain amounts in any bond and bond reserve funds." § 66-828, R. S. Supp., 1979. The money derived from the increase in gasoline tax is placed in the APF "only when calls or demands are made on such fund pursuant to lease agreements entered into under this act." § 39-2215, R. S. Supp., 1979. The Governor is authorized to use any amounts in the APF not utilized to make lease payments to retire by purchase bonds issued by the municipality under the act. § 39-2215, R. S. Supp., 1979.

Section 20 of the act provides that the powers conferred upon the municipality "shall be in addition and supplemental to the powers conferred by any other law and shall be independent of and in addition to any other provision of the laws of the State of Nebraska with reference to the matters covered by this act." § 66-840, R. S. Supp., 1979.

We find it necessary to address only three of the issues raised by the parties. They are: (1) Whether the act authorizes the expenditure of public funds for other than a public purpose purportedly in violation of Article XIII, section 3, and Article III, section 18, of the Nebraska Constitution. (2) Whether im-

[1] See § 2 of the act which amends § 39-2215, R. R. S. 1943; § 3 which amends § 66-410, R. S. Supp., 1978; § 4 which amends § 66-428, R. S. Supp., 1978; and § 5 which amends § 66-605, R. S. Supp., 1978.

plementation of the bond financing provisions of the act authorizes the state to incur a debt in excess of the amount permitted by Article XIII, section 1, of the Nebraska Constitution. Related to issue (2) is the contention of the respondents that there is no debt because funds to be placed in the APF are presently appropriated. (3) Whether, if the act is unconstitutional, the provision for the addition of a 1-cent per gallon gasoline tax is severable and valid even though the balance of the act is void.

We find: (1) The purposes of the act are public and not in violation of any constitutional provision. (2) The act in effect authorizes the state to guarantee payment of the bonds authorized to be issued by section 9 of the act and violates Article XIII, section 1, of the Nebraska Constitution. (3) The act evidences a legislative intention that the added 1-cent gasoline tax is severable and may stand alone.

PUBLIC PURPOSE

The arguments of the relator that the act authorizes expenditures of public funds for private purposes is founded upon the premises: (1) The act contains no declaration of public purpose. (2) The act authorizes the expenditure of tax funds for development of a particular industry which traditionally has been one engaged in only by private enterprise. (3) It enables the state to become a competitor of private enterprise. (4) It authorizes public funds to be used for the aid of private corporations and individuals, to wit, those who might be engaged as operators of the plants and facilities for compensation.

The relator recognizes that the Constitution of Nebraska contains no express provision against expending funds for essentially private purposes, but rather is grounded on "the fundamental concepts of our constitutional system." State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269; Oxnard Beet Sugar Co. v. State, 73 Neb. 66, 105 N. W. 716.

Relator also cites Chase v. County of Douglas, 195 Neb. 838, 241 N. W. 2d 334.

The principles which must guide this court in the determination of whether the act contemplates a public purpose are these: "It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind." Chase v. County of Douglas, *supra*.

"What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare." State ex rel. Douglas v. Nebraska Mortgage Finance Fund, *ante* p. 445, 283 N. W. 2d 12.

"It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature." State ex rel. Douglas v. Nebraska Mortgage Finance Fund, *supra*.

Additional guidance on what may or may not be considered a public purpose is to be found in the opinions of this court extending over a long period of time where the question has been considered. Ex-

amples of improper expenditure of public funds for private purpose include the following: Oxnard Beet Sugar Co. v. State, *supra* (bounty paid directly to growers of sugar beets); State ex rel. Beck v. City of York, *supra* (the financing of specific private enterprises with public funds).

Examples of expenditures for public purposes include: State v. Cornell, 53 Neb. 556, 74 N. W. 59 (issuance of bonds to enable counties to participate in state expositions and fairs); Fisher v. Board of Regents, 108 Neb. 666, 189 N. W. 161 (scientific research to aid in the protection and preservation of food, including the manufacture and sale of hog cholera serum); Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N. W. 172 (provision in city home rule charter allowing city to engage in the business of selling gasoline, held, under conditions then existing, not to violate the Nebraska Constitution as not being a public purpose); Chase v. County of Douglas, *supra* (expenditures for publicity and advertising to promote the general growth and industry even where the expenditures are made through the chamber of commerce); State ex rel. Douglas v. Nebraska Mortgage Finance Fund, *supra* (creation of a corporation to raise money through the sale of revenue bonds, proceeds of which are to be used to loan money to lending institutions and to purchase mortgages from them, all for the purpose of encouraging low-cost housing).

In the case before us, the legislative history of the act as well as the stipulated facts indicate the public purpose appears to be founded upon the current energy shortage and a need to promote the use of agricultural products by converting them to alcohol. The Legislature appears also to have found that private industry has not evidenced any intention of meeting the public need as perceived by the Legislature.

We have been cited no authority which holds that

any legislative act calling for the expenditure of public funds need contain an express declaration of public purpose. We hold there is no such requirement.

An examination of the cases which we have earlier cited seems to dispel the relator's other contentions. Competition with private industry does not in and of itself make the expenditure one for a private purpose. The fact that the plants and facilities may be managed by private corporations or individuals under management contracts does not make the purpose private. This is clearly a case in which the court cannot say the legislative determination of public purpose is incorrect.

THE CONSTITUTIONAL LIMITATION ON DEBT

Article XIII, section 1, of the Nebraska Constitution, provides in part: "The state may, to meet casual deficits, or failures in the revenue, contract debts never to exceed in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except . . . ." The exceptions need not be enumerated since none are applicable to the question before us.

It is stipulated by the parties to this litigation that implementation of a project contemplated by the act will require, in one or more instances, the issuance of bonds in an amount in excess of $100,000, under section 9 of the act.

The constitutional validity of an act of the Legislature is to be tested and determined, not necessarily by what has been done or possibly may be done under it, but by what the statute authorizes to be done under and by virtue of its provisions. United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576; State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N. W. 2d 726.

The issue is whether the provision of section 8 of the act earlier quoted and repeated here authorizes the contraction of debt or the incurrence of an in-

debtedness within the meaning of Article XIII, section 1, of the Nebraska Constitution. "The Alcohol Plant Fund shall be used to make lease payments, if necessary, in an amount sufficient to pay the principal of, interest on, and premium, if any, on the bonds issued pursuant to this act to finance alcohol plants and to maintain amounts in any bond and bond reserve funds." § 66-828, R. S. Supp., 1979.

The plain and evident purpose of the quoted portion of section 8 is to assure that if profits from the operation of the plants and facilities are insufficient to pay the bonds, the state will pay them either from the 1-cent gasoline tax, or from other future appropriations made by the Legislature, or from both such sources. The respondents concede the object of that provision is to commit the state to guaranteeing payment of the bonds. We quote from their brief: "The second tier of the financing mechanism involves the establishment of a fund to assure the payment of the bonds. As a back-up to the revenues generated from operation of the alcohol plants and related facilities financed by the issuance of bonds, the Act authorizes the collection of certain moneys to in effect guarantee such bonds." The obvious reason for such guarantee is to assure the marketability of the bonds. No underwriter or investor would be likely to buy the bonds if required to rely solely upon the profitability of a particular venture and a lien upon the physical assets.

The state is not to be the primary obligor on the bonds. However, previous opinions of this court, as well as the opinions of other courts which have had occasion to consider the question, make it very clear that even though the obligation of the state may be secondary or contingent, the obligation is nonetheless a debt within the meaning of Article XIII, section 1, Nebraska Constitution. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N. W. 2d 88; Ruge v. State, 201 Neb. 391, 267 N. W. 2d 748; Rochlin v.

State, 112 Ariz. 171, 540 P. 2d 643. See, also, Austin v. Healy, 376 Ill. 633, 35 N. E. 2d 78; Hubbell v. Herring, 216 Iowa 728, 249 N. W. 430.

In State ex rel. Meyer v. Duxbury, *supra*, the Legislature created a commission to issue bonds, the proceeds of which were then to be loaned to cities to finance waste water treatment facilities. The cities in turn were to issue to the commission their own bonds, payable from anticipated revenue. This court, in holding the financing plan created a state debt in violation of the Constitution, said: "But the act involved here authorizes a pledge of more than municipal bonds to secure the payment of the bonds issued by the commission. The act provides that the commission may pledge all or any part of the fees and charges to be received by the commission and all or any part of the assets of the commission as security for the payment of the bonds and notes issued by the commission. The act also provides that the commission may establish debt service reserve funds, to secure the payment of its bonds, and that the Legislature may appropriate supplemental funds from the general revenue fund of the state to supply any deficiency so that the debt service reserve funds may be maintained at the full amount prescribed in the act. The act further provides that: 'It shall be the policy of the state and it does hereby pledge and agree that, to the extent appropriations may be made from state funds for the limited purposes herein indicated, the provisions hereof are intended as compensation to the commission as an agent of the state for the accomplishment of a state governmental purpose.' "

In Ruge v. State, *supra*, the court held constitutional the principal parts of a financing plan for the acquisition of a state office building in Omaha, to be built by the city and financed in part through means of a lease by the city to the state. In that case, the lease was cancelable at the will of the Legislature,

and the act expressly provided the state had no binding obligation beyond the current year's rent.

In the same case, however, we held unconstitutional a provision of the lease authorizing the state to pay liquidated damages upon termination of the lease, saying that such provision contravened the debt provision of the Constitution. We there said: "In Section 28 of the lease the lessee agrees to pay to the lessor, upon termination of the lease, as liquidated damages for the default by the lessee: '* * * the reasonable costs incurred by Lessor in reletting the Land and the Public Facility and the reasonable costs of alterations incurred by Lessor in reletting the same, or the reasonable costs to Lessor necessary to place the Land and the Public Facility, or either of them, in condition for reletting, which costs shall be paid by Lessee to Lessor upon notice to Lessee that such reletting has been accomplished or such alterations have been completed, as the case may be, and of the amount of the costs thereof.' Under this provision the state assumes a liability of an undetermined amount, for which no appropriation has been made, and which will be payable, if at all, at some undetermined time in the future." Ruge v. State, *supra*.

In Rochlin v. State, *supra*, the Supreme Court of Arizona had occasion to succinctly point out that secondary or contingent liabilities are debt. It said: "Under Section 5 of Article 9, a debt can be either direct or contingent. A direct debt occurs when the State borrows money, pledging its credit as the sole source of payment. A contingent or secondary debt occurs when the governmental unit guarantees payment of revenue bonds, pledging its credit in the event that the revenues derived from the funded project prove inadequate to meet the bond obligations." Article 9, section 5, of the Arizona Constitution is, apart from the exceptions, substantially

the same as Article XIII, section 1, of the Nebraska Constitution.

In State ex rel. Meyer v. Steen, 183 Neb. 297, 160 N. W. 2d 164, we said: "One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future fiscal periods. Art. XIII, § 1, Constitution of Nebraska. . . . Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision." See, also, Ruge v. State, *supra*; State ex rel. Meyer v. Duxbury, *supra*.

Even though the special fund doctrine might be said to be applicable to the portion of the APF coming from profits, that fact does not obviate the debt limitation problem. In this state the special fund doctrine is not applicable to obligations payable from excise taxes or other revenue subject to the control of the Legislature and available for any legal use. State ex rel. Meyer v. Steen, *supra*.

It is clear the act purports to permit the state to guarantee unlimited payment of the bonds from excise taxes and other revenue subject to the control of the Legislature and available for any legal use. What the Legislature sought to do by the legislation found unconstitutional in Duxbury and in Ruge cannot in principle be distinguished from the case before us. The principles announced in those cases govern this one. L.B. 571 violates both the letter and the spirit of Article XIII, section 1, of the Nebraska Constitution, and is therefore in part, at least, unconstitutional and void.

As will be noted from our previous summary of the act, it provides two separate avenues for the issuance of bonds, one being section 9 and the other that which incorporates the provisions of section 72-1403, R. R. S. 1943. In the latter case, the statute contains an express provision that: ". . . the State

of Nebraska is not, and in no event shall be, liable for the payment thereof or interest thereon." There is no such limitation pertaining to bonds issued under section 9. The two methods are clearly alternatives. See section 20 of the act.

However, this does not solve the constitutional problem so far as the incorporation of section 72-1403, R. R. S. 1943, is concerned. If the bonds are issued under section 9, it is clear that section 8 commits the state to pay the bonds if the municipality does not. It is not absolutely clear from the terms of the act that such obligation exists if the bonds are issued under section 72-1403, R. R. S. 1943.

The act can be read as incorporating only the provisions of section 72-1403, R. R. S. 1943, which grant powers, and not incorporating the restrictions negativing the state obligation. If read in this way, then the same constitutional objections exist in the case of bonds issued under section 9. It seems absolutely clear, however, that the powers under section 72-1403, R. R. S. 1943, would not have been granted without the guarantee under section 8. For the reasons later discussed in the immediately following section of this opinion titled Severability, the provisions incorporating section 72-1403, R. R. S. 1943, must therefore fall if section 8 does.

We must briefly take note of the respondent's contention that the act does not violate the debt limitation provision because the APF has already been appropriated. The contention is patently frivolous. Respondents simply want to change the definition of the term, presently appropriated. The general rule is that an obligation for which an appropriation is made at the time of its creation from funds already in existence, or for which definite provision has been made, is not within the operation of a limitation of indebtedness provision. 72 Am. Jur. 2d, States, Etc., § 81, p. 474. However, a declaration of the Legislature of the purpose for which money will or may

in the future be expended is not an appropriation. Stahmer v. State, 192 Neb. 63, 218 N. W. 2d 893; Ruge v. State, 201 Neb. 391, 267 N. W. 2d 748. No amounts are designated in the act. Even the amount of the prospective obligations are not known since they have not yet been incurred or even estimated. They cannot be known until bonds are issued. There are no profits subject to appropriation for there is no certainty there will be any profits.

One of the elements of the APF is "such funds as *may be* appropriated by the Legislature." (Emphasis supplied.) § 66-828, R. S. Supp., 1979. With reference to the part of the fund to come from the 1-cent gasoline tax, it is to be noted that it remains in the Highway Trust Fund until "calls or demands are made on such fund pursuant to lease agreements entered into under this act." § 39-2215, R. S. Supp., 1979. That section also provides that any part not used either for the APF or to pay highway bonds is to be transferred monthly to the "Highway Allocation Fund, established by section 39-2401, for such use as may be provided by law." It is plain there is no present appropriation or any appropriation at all in the sense in which that term is used in Article III, section 22, of the Nebraska Constitution.

SEVERABILITY

The act contains the following severability clause: "If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof." L.B. 571, Laws 1979, § 22.

The rules are: A severance clause creates a presumption that, eliminating the invalid parts, the Legislature would have been satisfied with what remains. Such a clause, however, is merely an aid to interpretation and not an inexorable command. Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N. W. 551. When the invalid portions of a statute

are so interwoven with the rest of the act so that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the entire act fails. City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74.

The declaration of severability cannot, with the exception dealt with later in this opinion, save the act. It is apparent from the act itself as well as its legislative history that the provisions guaranteeing bond payments through the utilization of state revenues are the very heart of the plan. Without this guarantee it is doubtful the act would have passed.

THE ONE-CENT GASOLINE TAX PROVISION

Can the amendments to sections 66-428 and 66-605, R. S. Supp., 1978, increasing the fuels excise tax 1 cent, stand even though the balance of the act is unconstitutional? This, to our mind, presents a very close question. Plausible arguments can be advanced to support both affirmative and negative answers. Those arguments supporting the negative are analogous to those already discussed.

The arguments supporting severance are these. The fuel tax is a revenue-producing measure which existed wholly apart from L.B. 571. The increase in tax provided by L.B. 571 is initially placed in the Highway Trust Fund, along with the remainder of the tax, and is to be transferred to the APF only if necessary to make lease payments. Further, L.B. 571 contemplates, by the express terms of section 39-2215, R. R. S. 1943, that any part of the increase unused shall be transferred monthly to the Highway Allocation Fund. Section 39-2215, R. R. S. 1943, also provides that it may be used for any other lawful purpose.

Such uses are wholly independent and separate from the objectives of L.B. 571. It is also significant that the Legislature contemplated there be sources

other than the excise tax to guarantee bond payments, viz., such other funds as may be appropriated by the Legislature. Under these circumstances, the legislative expression of severability is entitled to considerable weight. We think the doubt should be resolved in favor of severance. On the purely pragmatic level, it is to be observed that, if we have mistaken the legislative intent on this item, the Legislature may simply repeal the increase.

JUDGMENT FOR THE RELATOR IN ACCORDANCE WITH THIS OPINION.

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Accord and Satisfaction.

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Adverse Possession.

1. Under the law of adverse possession, the intent with which the claimant first took possession of a disputed tract is not ordinarily of too much significance. When the possession of the land of another, no matter what the intention may have been in making the first entry, amounts to that which the law deems as adverse to the true owner and such possession continues for the statutory period of limitations of 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary. Svoboda v. Johnson 57
2. Intent may be either actual or implied, or inferred from the circumstances. In most cases it is inferred from the circumstances. Actual assertion of claim of ownership is not necessary. Svoboda v. Johnson 57
3. Although land may be unenclosed, where there is a well-defined roadway or path thereon, the rule as to a prescription of adverse use applies, and places the burden on the landowner to establish that the use by the claimant of the prescriptive right was permissive.

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4. Where one by mistake as to the true boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession. Hendrickson v. Glaser 492
5. It is established law of this state that when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Hendrickson v. Glaser 492
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3. The division of property and the issue of alimony may be considered together and they are to be determined upon the consideration of all the facts and circumstances. Ragains v. Ragains 50
4. The award of alimony and the division of property are determined by the circumstances of the parties at the time of the dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children. No case has said that the granting, denial, or reduction of alimony nor the division of property are to be considered punitive, and no such provision should be engrafted on the law of this state. Ragains v. Ragains 50
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order is necessary to make sure the payment of alimony and child support as decreed. Casselman v. Casselman 565

8. It is not the court's prerogative to determine what method or means should be used in placing security. It is the court's obligation, however, that once security is offered, to determine whether or not in its opinion it is adequate to secure the payment of the child support and alimony, and, if it deems it is not adequate, require the party to file additional or substitute security. Casselman v. Casselman 565

9. Where the parties by their agreement in writing, or the court by its decree, provide that a specific amount of alimony shall be paid for a specific period of time, and shall terminate only upon the occurring of a specific event set out in the agreement or decree and otherwise shall not be subject to amendment or revision, the payment of such alimony shall terminate only upon the happening of the event set out in the agreement or decree. Under such circumstances the remarriage of a party receiving alimony shall not cause the alimony to terminate, absent a specific provision in the agreement or decree to such effect, and the use of the word "remarriage" is not necessary. Watters v. Foreman 670

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11. In considering an award of alimony, the court should properly take into account the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. Andersen v. Andersen 796

12. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Falcone v. Falcone 800

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16. On an appeal from an equity trial, in determining the weight to be given the evidence, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying. Metropolitan Life Ins. Co. v. SID No. 222 350

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18. Where review in this court is de novo and a correct judgment or order was made by the trial court, it will not be reversed because the trial court may have applied an incorrect standard of proof. State v. Hamilton 537

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36. Questions not presented to or passed upon by the trial court will not be considered on appeal. Powers v. Chizek 759
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40. We review the record de novo on this appeal and reach an independent conclusion on such record without reference to the findings of the District Court. Mid-States Equipment Co. v. Poehling 791

Appropriation of Public Money.

A declaration by the Legislature of the purpose for which money will or may be expended in the future does not constitute an appropriation within the meaning of Article III, section 22, of the Nebraska Constitution. State ex rel. Douglas v. Thone 836

Appropriations.

It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

Arrest.

1. Under section 60-430.07, R. S. Supp., 1978, an attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required. State v. Clifford 41

2. Probable cause justifying a search and/or an arrest exists where the facts and circumstances within the police officer's knowledge and those of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Anderson 186

Assault and Battery.

A statute providing that as a condition to a sentence of probation the court may require a person convicted of assault to make reparation for the loss or damage caused by the crime empowers the trial court to impose a condition requiring a reasonable payment to the victim for "pain and suffering," in addition to medical expenses and lost wages. There is no abuse of discre-

tion in imposing such condition. State v. Behrens 785

Attorneys at Law.

1. In a proceeding for the disbarment of an attorney-at-law the presumption of innocence applies, and the charge made against him must be established by a preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Erickson 692
2. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. Erickson 692
3. To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Erickson 692

Attorney's Fees.

1. The award of an attorney's fee is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of the property, the alimony awarded, the earning capacity of the parties, and the general equities of the situation. Ragains v. Ragains 50
2. In proceedings under section 72-240.02 et seq., R. R. S. 1943, the trial court is without authority to fix appraiser fees and attorney's fees to be taxed against the Board of Educational Lands and Funds. Pettijohn v. State .. 271
3. This court has jurisdiction to include the award of attorney's fees, which is discretionary with the trial court. Casselman v. Casselman 565
4. An award of attorney's fees in an action for dissolution of marriage involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Rinderknecht v. Rinderknecht 648

Bills and Notes.

1. The taking of a new note for an existing note is a re-

newal of the old indebtedness, and not a payment of the debt unless there is a specific agreement between the parties that the new note shall extinguish the original debt. First West Side Bank v. Herzog 356
2. In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place. First West Side Bank v. Herzog 356

Blood, Breath, and Urine Tests.
1. In a proceeding before the Director of Motor Vehicles under the implied consent law, where the evidence shows that a test was in fact performed which established a blood alcohol content in excess of that prescribed by statute, the sanction prescribed by the statute for refusal to consent to the test should not be imposed. Sedlacek v. Pearson 625
2. A preliminary refusal followed by a consent to submit to a test for blood alcohol content does not furnish a basis for imposition of the sanction prescribed by the statute if a test was in fact performed and the State was not prejudiced by the delay in performing the test. Sedlacek v. Pearson 625
3. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Wohlgemuth v. Pearson 687
4. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. Wohlgemuth v. Pearson 687
5. To constitute a refusal to submit to a chemical test requested under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. Wohlgemuth v. Pearson 687

Board of Regents.
The Board of Regents of the University of Nebraska is a "state agency" within the meaning of section 81-8,209

et seq., R. R. S. 1943, and tort claims against it must be brought under the authority of the Tort Claims Act. Catania v. The University of Nebraska 304

Bond.

An order determining child custody may not be superseded as a matter of right by filing a bond pursuant to section 25-1916, R. R. S. 1943. Friedenbach v. Friedenbach 586

Bonds.

Section 8 of L.B. 571, Laws 1979, purports to authorize the state to guarantee, in unlimited amount, bonds issued by municipalities under section 9 of the act for the purpose of constructing alcohol plants and facilities. Even though the obligation of the state on such bonds may be secondary or contingent, the obligation is a debt within the meaning of Article XIII, section 1, of the Nebraska Constitution. State ex rel. Douglas v. Thone 836

Brokers.

Though an agency to sell real estate may be revoked at any time before the sale, such revocation must be in good faith, and will not obtain to appropriate the broker's services without compensation. Town & Country Realty of Kearney, Inc. v. Glidden 820

Burden of Proof.

1. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. Svoboda v. Johnson 57
2. In a workmen's compensation case the burden of proof on the defense of intoxication or intentional willful negligence is on the employer. Hilt Truck Lines, Inc. v. Jones 115
3. The Court of Industrial Relations cannot, in a section 48-818, R. R. S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions. General Drivers and Helpers Union v. City of West Point 238
4. The fundamental principle of the law of evidence is to

the effect the burden of proof in any cause rests upon the party who asserts the matter. Hancock v. Paccar, Inc. 468
5. Assumption of risk, when imposed to defeat recovery, is an affirmative defense and the burden is upon the defendant to establish such defense. Hancock v. Paccar, Inc. 468

Child Support.
1. The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion. Boroff v. Boroff 217
2. The court may in any case, if it finds it necessary, order a person required to make payment under sections 42-347 to 42-379, R. R. S. 1943, to post sufficient security with the clerk to insure payment. Upon failure to comply with the order, the court may appoint a receiver to take charge of the debtor's property to insure payment. Payments included under this section are payments for child support and alimony. § 42-371 (5), R. R. S. 1943. Casselman v. Casselman 565
3. An order requiring security to be given and appointing a receiver are somewhat extraordinary and drastic measures. The order requiring security should be made only when it appears to the court that such an order is necessary to make sure the payment of alimony and child support as decreed. Casselman v. Casselman 565
4. It is not the court's prerogative to determine what method or means should be used in placing security. It is the court's obligation, however, that once security is offered, to determine whether or not in its opinion it is adequate to secure the payment of the child support and alimony, and, if it deems it is not adequate, require the party to file additional or substitute security. Casselman v. Casselman 565
5. The obligation to support minor children falls upon each parent, both of whose earning capacities shall be considered by the court in fixing the amount of support. Heldt v. Chapman 607
6. In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on appeal. Heldt v. Chapman 607
7. In the absence of evidence that a person ordered to pay child support was materially prejudiced, subsequent remarriage of the parties will not operate to bar enforcement of the order. Scheibel v. Scheibel 653

8. The filing of a financial statement under the provisions of section 42-359, R. R. S. 1943, is waived if the parties proceed without objection to hearing or trial without such filing. Danielson v. Danielson 776
9. The modification of child support payments requires proof of a material change in circumstances and when found to be in the best interests of the children, all subsequent to the entry of decree. Danielson v. Danielson 776

Collateral Attack.

1. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
2. A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316

Collective Bargaining.

In order to warrant the setting aside of an election held under the order and auspices of the Court of Industrial Relations by employees to decide who shall represent them in collective bargaining proceedings, the burden is upon those objecting to and moving to set aside the election to prove by a preponderance of the evidence that material misrepresentations of relevant facts were made in the campaign statements in question and that such misrepresentations had a substantial impact on the outcome of the election. Nebraska Assn. of Public Employees v. State 165

Colleges and Universities.

1. A teacher employed by the governing board of a state technical community college has a property interest in the renewal of his contract and is entitled to the protection of procedural due process. Cross v. Board of Governors 383
2. Under section 79-2644, R. S. Supp., 1978, the board of governors of a technical community college is charged with the power, duty, and responsibility of establishing curriculum and employing members of the faculty. Cross v. Board of Governors 383

Confessions.

1. Where the evidence as to what occurred immediately

prior to and at the time of making a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducement or threats, the confession is voluntary and may be received in evidence. State v. Bennett 28
2. Voluntary statements made to a police officer during preliminary questioning that preceded the actual performance of a polygraph test are not a part of the polygraph test, nor are they rendered inadmissible under the polygraph exclusion. State v. Clermont 611

Constitutional Law.
1. A criminal statute is not constitutionally deficient merely because it applies only to inmates of penal institutions. State v. Maez 129
2. A criminal statute applying only to inmates of prisons is not unconstitutional merely because the inmate might have been prosecuted under another statute applicable to everyone and prohibiting the same acts. State v. Maez 129
3. When Congress has unmistakably entered a field and has enacted regulations to govern a field, state laws regulating that aspect of commerce must fall. This result is required whether Congress specifically directs such a result in the legislation or such a result is required by reason of the purpose of the act. ATS Mobile Telephone, Inc. v. General Communications Co., Inc. 141
4. The integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed by the Constitution of the United States. State v. Logan 204
5. The constitutional right of family integrity and the parental rights of custody and control create a duty of care and support. State v. Logan 204
6. The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Article VIII, section 1, of the Constitution of the State of Nebraska. Gates v. Howell 256
7. Intentional indifference to the medical needs of a prisoner is proscribed by the Eighth Amendment to the United States Constitution as being cruel and unusual punishment. Lutheran Medical Center v. City of Omaha 292
8. In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality. State ex rel. Douglas v. Nebraska Mortgage Finance

Fund 445
9. If a law affects equally all persons who come within its operation it cannot be local or special within the meaning of the Constitution of the State of Nebraska. A law is not local or special in a constitutional sense that operates in the same manner upon all persons in like circumstances. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
10. General laws are those which relate to or bind all within the jurisdiction of the lawmaking power, and if a law is general and operates uniformly and equally upon all brought within the relation and circumstance for which it provides, it is not a local or special law in the constitutional sense. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
11. The rule that the benefits to the public must be direct and not remote and that the past course or usage of government is to be resorted to for guidance must in each case be considered in the light of the principle that the Legislature has a very wide discretion to determine what constitutes a public purpose, and that courts will not interfere unless the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
12. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
13. Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where they operate uniformly on all within a class which is reasonable. This is so even if a statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
14. Section 43-209 (6), R. R. S. 1943, is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. State v. Souza-Spittler 503
15. The mere fact that a law affects a greater proportion

of one race than another does not make it invalid under the Equal Protection Clause. State v. Bird Head 807
16. Mere selectivity in enforcement creates no constitutional defect. Before a claim of unlawful discrimination in the enforcement of criminal laws can be invoked, the defendant must allege and prove a deliberate selective process of enforcement based upon race. State v. Bird Head 807
17. Article XIII, section 1, of the Nebraska Constitution, forbids, except as otherwise provided in that section, the state to contract debt or incur indebtedness in excess of $100,000. State ex rel. Douglas v. Thone 836
18. The constitutional validity of an act of the Legislature is to be tested and determined by what the statute authorizes under and by virtue of its provisions. State ex rel. Douglas v. Thone 836
19. Section 8 of L.B. 571, Laws 1979, purports to authorize the state to guarantee, in unlimited amount, bonds issued by municipalities under section 9 of the act for the purpose of constructing alcohol plants and facilities. Even though the obligation of the state on such bonds may be secondary or contingent, the obligation is a debt within the meaning of Article XIII, section 1, of the Nebraska Constitution. State ex rel. Douglas v. Thone 836
20. One purpose of the constitutional limitation on state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue received in future fiscal periods. Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision. State ex rel. Douglas v. Thone 836
21. A declaration by the Legislature of the purpose for which money will or may be expended in the future does not constitute an appropriation within the meaning of Article III, section 22, of the Nebraska Constitution. State ex rel. Douglas v. Thone 836
22. A severance clause in a legislative act creates a presumption that, eliminating the invalid parts, the Legislature would have been satisfied with what remains. Such a clause, however, is merely an aid to interpretation and not an inexorable command. State ex rel. Douglas v. Thone 836
23. When the invalid portions of a statute are so interwoven with the rest of the act so that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage

of the act, the entire act ordinarily fails. State ex rel. Douglas v. Thone 836

Contracts.

1. In an action for a liquidated sum which represents a downpayment on a contract voided or terminated by mutual agreement, the amount claimed does not become an unliquidated claim merely because of the assertion of a counterclaim, and if the trier of fact finds against the defendant on the counterclaim, prejudgment interest should be awarded on the plaintiff's claim. King v. Sky Harbor Air Service, Inc. 4
2. Except as otherwise provided in section 2-201, U. C. C., a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under section 2-201 (1), U. C. C., beyond the quantity of goods shown in such writing. Jessen v. Ashland Recreation Assn. 19
3. Under section 2-201, U. C. C., the only term which must appear in the required writing is the quantity term, which need not be accurately stated, but recovery is limited to the amount stated. Jessen v. Ashland Recreation Assn. 19
4. Under section 2-201, U. C. C., "partial performance" as a substitute for the required writing can validate the oral contract only for the goods which have been accepted or for which payment has been made and accepted. Jessen v. Ashland Recreation Assn. 19
5. In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms. Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co. 156
6. An interpretation of a written instrument should be made which will effect the true intention of the parties as expressed in the writing. Standard Meat Co. v. Feerhusen 325
7. Where a contract is ambiguous, the court must determine the intention of the parties and the ambiguity must be resolved so as to give effect to that intent. Standard Meat Co. v. Feerhusen 325

8. Canons of construction are useful only insofar as they are an aid in determining the intentions of the parties to the contract. Standard Meat Co. v. Feerhusen 325
9. Contractual promises with respect to the use of land, which under the rules of equity are specifically enforceable against the promisor, are effective against the successors in title or possession if the successor has actual or constructive notice of the promise. Under such circumstances, the promise subjects the land to an equitable servitude. Standard Meat Co. v. Feerhusen 325
10. Subject to any agreement between the partners, the rights and duties of the partners in relation to the partnership are governed by the provisions of the Uniform Partnership Act. Conklin v. Randolph 332
11. Under the Uniform Partnership Act, a partnership may be dissolved by the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking, without violating the agreement between them. Conklin v. Randolph 332
12. Under the Uniform Partnership Act, and subject to any agreement between the partners, a partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance. Conklin v. Randolph 332
13. It is the general rule that a partner who carries on business in his own name for his own benefit and who uses partnership property therefor is chargeable on an accounting with reasonable rent for the use of the partnership property for the time during which he used it as his own, unless a contrary agreement existed between the partners. Conklin v. Randolph 332
14. Under the Uniform Partnership Act, and subject to any agreement between the partners, the partners must contribute toward the losses of the partnership, whether of capital or otherwise, sustained by the partnership according to their respective shares in the profits. Conklin v. Randolph 332
15. The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt unless there is a specific agreement between the parties that the new note shall extinguish the original debt. First West Side Bank v. Herzog 356
16. A written agreement will be strictly construed against the party preparing the same to resolve any doubt in

its meaning. First West Side Bank v. Herzog 356
17. A teacher employed by the governing board of a state technical community college has a property interest in the renewal of his contract and is entitled to the protection of procedural due process. Cross v. Board of Governors 383
18. In the absence of fraud or mistake, an agreement or stipulation by the parties that the judgment of a third person shall be relied upon in determining a fact is binding upon the parties. Knigge v. Knigge 421
19. The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached. Moser v. Board of Education 561
20. Subject to the provisions of the Uniform Commercial Code with respect to proof of market price, section 2-723, the measure of damages for nondelivery of goods or repudiation by the seller of the contract for sale is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages as provided in section 2-715, U. C. C., but less expenses saved in consequence of the seller's breach. § 2-713 (1), U. C. C. Carlson v. Nelson 765
21. "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, . . . then (a) if the loss is total the contract is avoided; and (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller." § 2-613, U. C. C. Carlson v. Nelson 765
22. The impact of the provisions of section 2-613, U. C. C., providing that the casualty must occur without fault of either buyer or seller, is that if the buyer is at fault, he will remain obligated to purchase, but if the seller is at fault, he will remain obligated to deliver and be liable for the appropriate damages if he does not. Carlson v. Nelson 765
23. A plaintiff buyer, under a contract for the sale of identified goods, suing for damages for delivery, who alleges that the goods were damaged while yet in the

possession of the seller, has satisfied his burden of demonstrating the nonapplicability of section 2-613, U. C. C., insofar as the condition of absence of fault of the parties is concerned, if he proves the goods were not destroyed or damaged by his fault. Plaintiff buyer need not adduce evidence to show defendant seller was at fault. Carlson v. Nelson 765

24. A defendant seller who wishes to limit a plaintiff buyer's remedies and damages to those provided in section 2-613, U. C. C., ought to raise the issue by appropriate pleading. When the goods are in his possession when damaged, he has the burden of proving the goods were damaged without his fault. Carlson v. Nelson ... 765
25. Existing statutes and laws with reference to which a contract is made (assuming there are no valid contractual provisions providing otherwise) enter into and become part thereof. Carlson v. Nelson 765
26. The rescission of a contract by the parties as much requires the meeting of the minds as does the making of the contract. Town & Country Realty of Kearney, Inc. v. Glidden 820
27. The general rule is where a contract is executed but its effectiveness or fulfillment is dependent upon the doing of an agreed-upon condition before it shall become a binding contract, such contract cannot be enforced unless the condition is performed. Empfield v. Ainsworth Irr. Dist. 827

Corporations.

1. A corporation will be looked upon as a separate legal entity until sufficient reason to the contrary appears. The corporate fiction may be disregarded when its retention would produce injustice and inequitable consequences. Scribner Grain & Lumber Co. v. Wortman 92
2. The corporate fiction of a legal entity may be removed when the notion of legal entity is used to justify wrong, protect fraud, or defend crime. Scribner Grain & Lumber Co. v. Wortman 92
3. A resident stockholder and officer of a closely-held family corporation, who was familiar with the characteristics of property owned by the corporation, its actual and potential uses, and who had several years experience in dealing with the property, is competent to testify as to the value of the property without further foundation. Johnson's Apco Oil Co. v. City of Lincoln 397

Counterclaim.

A counterclaim must allege facts sufficient to support

an independent cause of action in favor of the defendant and against the plaintiff and must be more than a mere defense to the plaintiff's cause of action or in reduction of plaintiff's damages. State ex rel. Douglas v. Ledwith 6

Counties.

1. The determination by a county board that an "unforeseen emergency" exists within the meaning of the Nebraska Budget Act will not be disturbed in the absence of a showing of abuse of discretion by the board. § 23-928, R. R. S. 1943. Meyer v. Colin 96
2. A county board, in exercising its power to approve the salaries or reduce budget requests, may not unreasonably interfere with the operation of the office of an elected official, but the exercise of those powers by the board shall not be disturbed in the absence of an abuse of discretion. § 23-1111, R. R. S. 1943; § 23-908, R. R. S. 1943. Meyer v. Colin 96
3. Authority of a county board to transfer funds from one budget account to another in case of "unforeseen emergencies" does not relieve the county board of duty to make accurate estimates of the anticipated expenditures of each department. Meyer v. Colin 96

Court of Industrial Relations.

1. In order to warrant the setting aside of an election held under the order and auspices of the Court of Industrial Relations by employees to decide who shall represent them in collective bargaining proceedings, the burden is upon those objecting to and moving to set aside the election to prove by a preponderance of the evidence that material misrepresentations of relevant facts were made in the campaign statements in question and that such misrepresentations had a substantial impact on the outcome of the election. Nebraska Assn. of Public Employees v. State 165
2. The scope of review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Nebraska Assn. of Public Employees v. State 165
3. The Court of Industrial Relations cannot, in a section 48-818, R. R. S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima

facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions. General Drivers and Helpers Union v. City of West Point .. 238
4. Findings made by the Court of Industrial Relations not supported by substantial evidence do not justify the entry of an order which therefore must be said to be arbitrary, capricious, and unreasonable. General Drivers and Helpers Union v. City of West Point 238

Courts.
1. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Peterson v. The Nebraska Nat. Gas Co. 136
2. The proper method of determining whether a trial court abused its discretion must be based on facts in the record and not from extrinsic criteria. Boroff v. Boroff 217
3. A District Court has no power to vacate or modify its judgment after term on the ground that an error of law had been committed by it in rendering such judgment. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
4. 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. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
5. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
6. The trial court is under a duty on its own motion to correctly instruct on the law and this court may take cognizance of plain error indicative of a probable mis-

carriage of justice. Silvey & Co., Inc. v. Engel 633
7. An appeal from the order of a county court sitting as a juvenile court to the District Court and to this court requires that we review the adjudication de novo on the record and reach an independent conclusion on disputed issues of fact. State v. Rice 732
8. An appeal from the decision of the Nebraska Appeal Tribunal on an unemployment compensation claim is considered de novo on the record of the hearing before the Nebraska Appeal Tribunal by both the District Court and this court. Powers v. Chizek 759
9. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial. State v. Selman 833

Criminal Law.

1. A motion for directed verdict will be denied unless there is a total failure of competent proof in a criminal case to support a material allegation in the information or where the testimony adduced is of so weak or doubtful character that a conviction based thereon could not be sustained. State v. Bennett 28
2. Where the evidence as to what occurred immediately prior to and at the time of making a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducement or threats, the confession is voluntary and may be received in evidence. State v. Bennett 28
3. A mistrial may be declared and a new trial granted in a criminal case where there is a manifest necessity to do so in order to serve the ends of public justice. State v. Clifford 41
4. Where the trial court discovers, after trial has commenced, that a juror is disqualified by reason of bias, and that fact was not disclosed on voir dire examination, the court may declare a mistrial without prejudice, and the subsequent retrial of the defendant does not constitute double jeopardy. State v. Clifford 41
5. Under section 60-430.07, R. S. Supp., 1978, an attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required. State v. Clifford 41
6. Whether, at the time of taking an automobile, the defendant had the intent of permanently depriving the owner of its use or whether he intended to return it

is a question of fact. State v. King 47
7. A criminal statute is not constitutionally deficient merely because it applies only to inmates of penal institutions. State v. Maez 129
8. Section 28-743, R. R. S. 1943, applies only to situations where either the means used to compel or induce the performance of an act or where the end to be accomplished by such means, the performance of the act itself, are of a nature which the Legislature might prohibit under a reasonable exercise of its police power. State v. Maez 129
9. A criminal statute applying only to inmates of prisons is not unconstitutional merely because the inmate might have been prosecuted under another statute applicable to everyone and prohibiting the same acts. State v. Maez 129
10. When information concerning a crime is furnished by the victim or witnesses to a crime, proof of veracity or reliability of the information is not generally required. State v. Anderson 186
11. Even where probable cause sufficient to justify a formal arrest does not yet exist, in appropriate circumstances a police officer may informally detain a person in an appropriate manner in order to investigate possible criminal behavior or to maintain the status quo while obtaining more information, and the officer may conduct a limited protective search for concealed weapons when he has reason to believe the suspect is armed. State v. Anderson 186
12. The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved. State v. Anderson 186
13. Probable cause justifying a search and/or an arrest exists where the facts and circumstances within the police officer's knowledge and those of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Anderson 186
14. In considering whether probable cause exists, the collective knowledge of the law enforcement agency for which the officer acts may be added to the personal knowledge of the officer making the search and seizure provided there has been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making

the search and seizure. State v. Anderson 186
15. Criminal prosecution cannot be grounded on nebulous definitions of crime. All crimes are statutory in this state. The validity of a statute purporting to define a crime cannot be based on an indefinite, uncertain, and obscure basis of validity. PPG Industries Canada Ltd. v. Kreuscher 220
16. An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense and also be able to plead the judgment rendered as a bar to a later prosecution for the same offense. State v. Dreifurst 378
17. The word "abuse" in section 28-729, R. R. S. 1943, may include verbal injury as well as physical. State v. Dreifurst 378
18. Verbal abuse under section 28-729, R. R. S. 1943, includes only "fighting words," namely, words which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. State v. Dreifurst 378
19. Whether any particular use of abusive language constitutes "fighting words" depends not only upon the words used but also upon the circumstances in which they are used. State v. Dreifurst 378
20. A motion for new trial for newly discovered evidence will not be granted unless the evidence in support thereof is so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Pierce 433
21. A violation of section 39-669.07, R. R. S. 1943, is either a misdemeanor or a felony and is not a traffic infraction within the meaning of section 39-602(106), R. R. S. 1943. State v. Karel 573
22. A defendant charged under section 39-669.07, R. R. S. 1943, is entitled to a jury trial under the provisions of section 24-536, R. R. S. 1943. State v. Karel 573
23. The trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion. State v. Apker 577
24. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified it is immaterial in how many or in whose hands it has been. State v. Apker 577

25. Important to the determination of the admissibility of demonstrative evidence is the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. State v. Apker 577
26. It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. State v. Reitenbaugh 583
27. Acceptance or rejection of a plea of guilty to a lesser offense included in the offense charged rests in the discretion of the court. State v. Clermont 611
28. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, and to establish malice or intent. State v. Clermont ... 611
29. Voluntary statements made to a police officer during preliminary questioning that preceded the actual performance of a polygraph test are not a part of the polygraph test, nor are they rendered inadmissible under the polygraph exclusion. State v. Clermont 611
30. Malice and intent may be inferred from the evidence relating to the circumstances of the criminal act. State v. Clermont 611
31. The verdict of the fact finder in a criminal case must be sustained if, taking the view most favorable to the State, there is sufficient competent evidence to support it. State v. Clermont 611
32. Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence. State v. Klutts 616
33. Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Klutts 616
34. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. Any fact or circumstance reasonably susceptible to two interpre-

tations must be resolved most favorably to the accused. State v. Klutts 616
35. A conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. State v. Klutts 616
36. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. Mere presence at a place where a narcotic drug is found is not sufficient. State v. Klutts 616
37. Where, in a criminal case, there is a total failure of competent proof to support a material allegation in the information or where the testimony added is of so weak or doubtful character that a conviction based thereon cannot be sustained, a motion for directed verdict should be granted. State v. Klutts 616
38. An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. Addison v. Parratt 656
39. There is nothing in the justification for the use of force act which appears designed to change the ancient common law rule that, in order to justify the defense of self-defense, the belief that the use of force is necessary must be reasonable and in good faith. State v. Cowan 708
40. There is no rule of law which requires the trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact. State v. Cowan 708
41. In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Cowan ... 708
42. Section 29-2261 (1), R. R. S. 1943, authorizes but does not require a presentence investigation in the case of a conviction of a misdemeanor. State v. Cowan 708
43. It is only in those cases where, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater, but not the lesser, offense that the lesser-included offense instruction must be given. State v.

Knaff 712
44. Where the evidence is uncontroverted on an essential element of the crime, mere speculation that the jury may disbelieve it does not entitle the defendant to such an instruction. State v. Knaff 712
45. Alleged nondisclosed police report examined and found to contain no conflicts in information regarding this case, as shown by the various witnesses. State v. Knaff 712
46. A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence. State v. Hill 743
47. Before accepting a guilty plea a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. State v. Hill 743
48. Although questioning the defendant as to the factual basis is not required where the defendant enters a plea of nolo contendere, the court must satisfy itself that there is a factual basis for the charge. State v. Hill ... 743
49. Section 29-2262, R. R. S. 1943, authorizes confinement in the county jail for a period not to exceed 90 days as a condition of probation in cases of conviction of a misdemeanor as well as of a felony. State v. Behrens . 785
50. A statute providing that as a condition to a sentence of probation the court may require a person convicted of assault to make reparation for the loss or damage caused by the crime empowers the trial court to impose a condition requiring a reasonable payment to the victim for "pain and suffering," in addition to medical expenses and lost wages. There is no abuse of discretion in imposing such condition. State v. Behrens 785
51. The mere fact that a law affects a greater proportion of one race than another does not make it invalid under the Equal Protection Clause. State v. Bird Head .. 807
52. Mere selectivity in enforcement creates no constitutional defect. Before a claim of unlawful discrimination in the enforcement of criminal laws can be invoked, the defendant must allege and prove a deliberate selective process of enforcement based upon race. State v. Bird Head 807
53. To support a defense of selective or discriminatory prosecution, a defendant bears a heavy burden of establishing at least prima facie (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the

basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. State v. Bird Head 807

54. Once a prima facie case is made, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedure have produced the monochromatic result. State v. Bird Head 807

55. The general rule is that a motion for a new trial must be filed within 10 days after the verdict is rendered. § 29-2103, R. R. S. 1943. An exception to the above rule is that in any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict under which he was sentenced was rendered, the District Court may set aside the sentence and grant a new trial if such motion is filed within a reasonable time after the discovery of the new evidence. § 29-2103, R. R. S. 1943. State v. Munson 814

56. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial. State v. Selman 833

Custody.

1. The constitutional right of family integrity and the parental rights of custody and control create a duty of care and support. State v. Logan 204

2. An application for modification of a dissolution decree with respect to the care, custody, and control of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Kuhn v. Kuhn 363

3. The paramount consideration for the court in a custody hearing is the welfare of the children based upon their best interests, general health, welfare, and social behavior. Kuhn v. Kuhn 363

4. The discretion of the trial court with respect to changing the custody of minor children of a broken marriage will not ordinarily be disturbed unless there is a clear

abuse of judicial discretion or it is clearly against the weight of the evidence. Kuhn v. Kuhn 363
5. It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion. Kuhn v. Kuhn 363
6. The best interests of the children is the paramount consideration in determining issues of custody. Fleharty v. Fleharty 419
7. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Fleharty v. Fleharty 419
8. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence. Fleharty v. Fleharty 419
9. Generally, divided custody arrangements are not favored. Friedenbach v. Friedenbach 586
10. Ordinarily, a determination of custody by the trial court will not be disturbed on appeal unless it is clear that the evidence does not support the findings. Friedenbach v. Friedenbach 586
11. An order determining child custody may not be superseded as a matter of right by filing a bond pursuant to section 25-1916, R. R. S. 1943. Friedenbach v. Friedenbach 586
12. Ordinarily, an order relating to visitation rights may be enforced by the District Court even though an appeal from the judgment of the District Court is pending in this court. Friedenbach v. Friedenbach 586
13. In a child custody action, a social worker's report may be received in evidence for the consideration of that part properly admissible when the social worker is sworn, subject to cross-examination, and the parties are permitted to call other witnesses to contradict any parts of the report. Bengtson v. Bengtson 602
14. The appropriateness of a hypothetical question to an expert witness is a matter largely for the trial court's discretion, and its rulings will not be disturbed unless there has been an abuse of that discretion. Bengtson v. Bengtson 602
15. In cases involving questions of child custody, the find-

ings of the trial court, both as to an evaluation of the evidence and as a matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Bengtson v. Bengtson 602

16. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child. Jafari v. Jafari 622

17. The disposition of minor children and provision for their support in an action where a dissolution is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it. Jafari v. Jafari 622

18. The best interests of the minor children is the paramount consideration in determining custodial issues. Buchele v. Tuel 641

19. The judicial focus in matters relating to the modification of custody is on what the trial court actually knew at the time of the entry of the custody decree and not on what the parties knew or should have known which was not produced at the time of trial. Buchele v. Tuel 641

20. The relationship between a minor child and a woman living in the same household is a factor to be considered in a determination of the best interests of the child in matters relating to custody. Buchele v. Tuel 641

21. In cases involving questions of child custody, the findings of the trial court will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Campbell v. Campbell 704

Damages.

1. In an action for a liquidated sum which represents a downpayment on a contract voided or terminated by mutual agreement, the amount claimed does not become an unliquidated claim merely because of the assertion of a counterclaim, and if the trier of fact finds against the defendant on the counterclaim, prejudgment interest should be awarded on the plaintiff's claim. King v. Sky Harbor Air Service, Inc. 4

2. Loss of profits from a business may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248

3. Although in many instances lost profits from a new business are too speculative and conjectural to permit

recovery of damages, where the evidence is available to furnish a reasonable certain factual basis for computation of probable losses, recovery cannot be denied even though a new business venture is involved. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248

4. To state a cause of action in tort it is necessary to allege facts from which a conclusion can be drawn that the defendant was guilty of one or more acts of negligence, that such negligence was a proximately contributing cause of the accident, and that as a proximate result thereof the plaintiff was damaged. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414

5. The measure of damages for injuries to a motor vehicle which is not used solely for business or commercial purposes, when that vehicle can be repaired so that, when repaired, it will be in as good condition as it was before the injury, is the reasonable cost of repair plus the reasonable value of the use of the motor vehicle while being repaired with ordinary diligence, not exceeding the value of the motor vehicle immediately before the injury. Husebo v. Ambrosia, Ltd. 499

6. Reasonable value of the use of a motor vehicle injured through the negligence of another party is that amount which does not exceed either the fair rental value of a vehicle of like or similar nature and performance for a reasonable length of time, or the amount actually paid, whichever is the least, and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499

7. Normal costs of operation of a leased vehicle while in the possession of the lessee are not allowable as damages under rules providing for the recovery of loss of use damages. Husebo v. Ambrosia, Ltd. 499

8. Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

9. One who takes a calculated risk by pursuing a course of action after being advised of the possibility of harm resulting therefrom may not claim that the resulting damage was accidental. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

10. Subject to the provisions of the Uniform Commercial Code with respect to proof of market price, section 2-723, the measure of damages for nondelivery of goods or repudiation by the seller of the contract for sale is the difference between the market price at the

time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages as provided in section 2-715, U. C. C., but less expenses saved in consequence of the seller's breach. § 2-713 (1), U. C. C. Carlson v. Nelson .. 765

11. "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, . . . then (a) if the loss is total the contract is avoided; and (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller." § 2-613, U. C. C. Carlson v. Nelson 765

12. The impact of the provisions of section 2-613, U. C. C., providing that the casualty must occur without fault of either buyer or seller, is that if the buyer is at fault, he will remain obligated to purchase, but if the seller is at fault, he will remain obligated to deliver and be liable for the appropriate damages if he does not. Carlson v. Nelson 765

13. A plaintiff buyer, under a contract for the sale of identified goods, suing for damages for delivery, who alleges that the goods were damaged while yet in the possession of the seller, has satisfied his burden of demonstrating the nonapplicability of section 2-613, U. C. C., insofar as the condition of absence of fault of the parties is concerned, if he proves the goods were not destroyed or damaged by his fault. Plaintiff buyer need not adduce evidence to show defendant seller was at fault. Carlson v. Nelson 765

14. A defendant seller who wishes to limit a plaintiff buyer's remedies and damages to those provided in section 2-613, U. C. C., ought to raise the issue by appropriate pleading. When the goods are in his possession when damaged, he has the burden of proving the goods were damaged without his fault. Carlson v. Nelson ... 765

Decrees.

Where the parties by their agreement in writing, or the court by its decree, provide that a specific amount of alimony shall be paid for a specific period of time, and shall terminate only upon the occurring of a specific event set out in the agreement or decree and otherwise

shall not be subject to amendment or revision, the payment of such alimony shall terminate only upon the happening of the event set out in the agreement or decree. Under such circumstances the remarriage of a party receiving alimony shall not cause the alimony to terminate, absent a specific provision in the agreement or decree to such effect, and the use of the word "remarriage" is not necessary. Watters v. Foreman 670

Deeds.

1. Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. The doctrine of merger, however, applies only in situations where the parties to the deed and to the prior agreements are the same. City of Papillion v. Schram 110
2. A deed executed pursuant to a judicial sale, absent mistake or fraud, conveys only that property that lies within its calls. It conveys no greater title than the order of sale on which it is based. Hendrickson v. Glaser 492
3. Reformation of a deed for mistake will be granted where the mistake is mutual to both parties. Cunningham v. Covalt 512
4. Evidence of such mutual mistake must be clear, convincing, and satisfactory. Cunningham v. Covalt 512
5. The fact that one party denies such mistake does not preclude reformation. Cunningham v. Covalt 512

Demurrer.

A petition which fails to plead actionable facts is vulnerable to a general demurrer. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414

Disciplinary Proceedings.

1. In a proceeding for the disbarment of an attorney-at-law the presumption of innocence applies, and the charge made against him must be established by a preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Erickson 692
2. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline

should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. Erickson 692

3. To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Erickson 692

Discrimination.

1. The mere fact that a law affects a greater proportion of one race than another does not make it invalid under the Equal Protection Clause. State v. Bird Head .. 807
2. Mere selectivity in enforcement creates no constitutional defect. Before a claim of unlawful discrimination in the enforcement of criminal laws can be invoked, the defendant must allege and prove a deliberate selective process of enforcement based upon race. State v. Bird Head 807
3. To support a defense of selective or discriminatory prosecution, a defendant bears a heavy burden of establishing at least prima facie (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. State v. Bird Head 807
4. Once a prima facie case is made, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedure have produced the monochromatic result. State v. Bird Head 807

Divorce.

1. The general rule is that the fixing of alimony and distribution of property rest in the sound discretion of the District Court and in the absence of abuse of discretion will not be disturbed on appeal. Ragains v. Ragains 50
2. The rule for determining alimony or division of property in divorce actions provides no mathematical

formula by which such an award can be exactly determined. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances of the particular case. Ragains v. Ragains 50

3. The division of property and the issue of alimony may be considered together and they are to be determined upon the consideration of all the facts and circumstances. Ragains v. Ragains 50

4. Although this court would generally prefer that there be a complete division of the property in dissolution actions, when the proper situation presents itself the trial court does not abuse its discretion in having the parties own an undivided one-half interest in the property. Ragains v. Ragains 50

5. The award of alimony and the division of property are determined by the circumstances of the parties at the time of the dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children. No case has said that the granting, denial, or reduction of alimony nor the division of property are to be considered punitive, and no such provision should be engrafted on the law of this state. Ragains v. Ragains 50

6. The award of an attorney's fee is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of the property, the alimony awarded, the earning capacity of the parties, and the general equities of the situation. Ragains v. Ragains 50

7. The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion. Boroff v. Boroff 217

8. An application for modification of a dissolution decree with respect to the care, custody, and control of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Kuhn v. Kuhn 363

9. The paramount consideration for the court in a custody hearing is the welfare of the children based upon their best interests, general health, welfare, and social behavior. Kuhn v. Kuhn 363

10. The discretion of the trial court with respect to changing the custody of minor children of a broken marriage will not ordinarily be disturbed unless there is a clear abuse of judicial discretion or it is clearly against the

weight of the evidence. Kuhn v. Kuhn 363
11. It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion. Kuhn v. Kuhn 363
12. The best interests of the children is the paramount consideration in determining issues of custody. Fleharty v. Fleharty 419
13. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Fleharty v. Fleharty 419
14. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence. Fleharty v. Fleharty 419
15. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Knigge v. Knigge 421
Rinderknecht v. Rinderknecht 648
16. Generally, an award from one-third to one-half of the property involved in a marriage of long duration, and where the parties were the parents of all children involved, does not constitute an abuse of discretion. Knigge v. Knigge 421
17. The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Knigge v. Knigge 421
18. The court may in any case, if it finds it necessary, order a person required to make payment under sections 42-347 to 42-379, R. R. S. 1943, to post sufficient security with the clerk to insure payment. Upon failure to comply with the order, the court may appoint a receiver to take charge of the debtor's property to insure payment. Payments included under this section are payments for child support and alimony. § 42-371(5), R. R. S. 1943. Casselman v. Casselman 565
19. An order requiring security to be given and appointing a receiver are somewhat extraordinary and drastic

measures. The order requiring security should be made only when it appears to the court that such an order is necessary to make sure the payment of alimony and child support as decreed. Casselman v. Casselman 565

20. It is not the court's prerogative to determine what method or means should be used in placing security. It is the court's obligation, however, that once security is offered, to determine whether or not in its opinion it is adequate to secure the payment of the child support and alimony, and, if it deems it is not adequate, require the party to file additional or substitute security. Casselman v. Casselman 565
21. Generally, divided custody arrangements are not favored. Friedenbach v. Friedenbach 586
22. Ordinarily, a determination of custody by the trial court will not be disturbed on appeal unless it is clear that the evidence does not support the findings. Friedenbach v. Friedenbach 586
23. An order determining child custody may not be superseded as a matter of right by filing a bond pursuant to section 25-1916, R. R. S. 1943. Friedenbach v. Friedenbach 586
24. Ordinarily, an order relating to visitation rights may be enforced by the District Court even though an appeal from the judgment of the District Court is pending in this court. Friedenbach v. Friedenbach 586
25. In a child custody action, a social worker's report may be received in evidence for the consideration of that part properly admissible when the social worker is sworn, subject to cross-examination, and the parties are permitted to call other witnesses to contradict any parts of the report. Bengtson v. Bengtson 602
26. In cases involving questions of child custody, the findings of the trial court, both as to an evaluation of the evidence and as a matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Bengtson v. Bengtson 602
27. The obligation to support minor children falls upon each parent, both of whose earning capacities shall be considered by the court in fixing the amount of support. Heldt v. Chapman 607
28. In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on appeal. Heldt v. Chapman 607
29. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court.

However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child. Jafari v. Jafari 622

30. The disposition of minor children and provision for their support in an action where a dissolution is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it. Jafari v. Jafari 622

31. The best interests of the minor children is the paramount consideration in determining custodial issues. Buchele v. Tuel 641

32. The judicial focus in matters relating to the modification of custody is on what the trial court actually knew at the time of the entry of the custody decree and not on what the parties knew or should have known which was not produced at the time of trial. Buchele v. Tuel 641

33. The relationship between a minor child and a woman living in the same household is a factor to be considered in a determination of the best interests of the child in matters relating to custody. Buchele v. Tuel 641

34. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Rinderknecht v. Rinderknecht 648
Falcone v. Falcone 800

35. An award of attorney's fees in an action for dissolution of marriage involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Rinderknecht v. Rinderknecht 648

36. In the absence of evidence that a person ordered to pay child support was materially prejudiced, subsequent remarriage of the parties will not operate to bar enforcement of the order. Scheibel v. Scheibel 653

37. Where the parties by their agreement in writing, or the court by its decree, provide that a specific amount of alimony shall be paid for a specific period of time, and shall terminate only upon the occurring of a specific event set out in the agreement or decree and otherwise shall not be subject to amendment or revision, the payment of such alimony shall terminate only upon the happening of the event set out in the agreement or decree. Under such circumstances the remarriage of a party receiving alimony shall not cause the ali-

mony to terminate, absent a specific provision in the agreement or decree to such effect, and the use of the word "remarriage" is not necessary. Watters v. Foreman 670

38. In cases involving questions of child custody, the findings of the trial court will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Campbell v. Campbell 704

39. The filing of a financial statement under the provisions of section 42-359, R. R. S. 1943, is waived if the parties proceed without objection to hearing or trial without such filing. Danielson v. Danielson 776

40. The modification of child support payments requires proof of a material change in circumstances and when found to be in the best interests of the children, all subsequent to the entry of decree. Danielson v. Danielson 776

41. Expectations of income may be considered in an allowance of alimony but are not properly considered in the division of property. Andersen v. Andersen 796

42. In considering an award of alimony, the court should properly take into account the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. Andersen v. Andersen 796

43. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Falcone v. Falcone 800

44. Under section 42-365, R. R. S. 1943, property distributions which are punitive in nature may be subject to modification. Falcone v. Falcone 800

Double Jeopardy.

Where the trial court discovers, after trial has commenced, that a juror is disqualified by reason of bias, and that fact was not disclosed on voir dire examination, the court may declare a mistrial without prejudice, and the subsequent retrial of the defendant does not constitute double jeopardy. State v. Clifford 41

Due Process.

1. A teacher employed by the governing board of a state technical community college has a property interest in the renewal of his contract and is entitled to the protection of procedural due process. Cross v. Board of Governors 383
2. Where a public employee has a property interest in continued employment he cannot be deprived of that interest without a due process hearing. However, whether or not such a property interest exists is determined by state law. Weeks v. State Board of Education 659

Easements.

1. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. Svoboda v. Johnson 57
2. The use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and continuous for the full prescriptive period. Svoboda v. Johnson 57
3. To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence. Svoboda v. Johnson 57
4. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. Svoboda v. Johnson 57
5. The term "exclusive use" does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others. Svoboda v. Johnson 57
6. The term "claim of right" means nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. This "claim of right" means no more than "hostile" and if possession is hostile it is "under a claim of right." Svoboda v. Johnson 57
7. Although land may be unenclosed, where there is a well-

defined roadway or path thereon, the rule as to a prescription of adverse use applies, and places the burden on the landowner to establish that the use by the claimant of the prescriptive right was permissive. Svoboda v. Johnson 57

8. "Acquiescence" means passive assent or submission, quiescence, or consent by silence. Svoboda v. Johnson 57
9. If the use of an easement has been for the requisite time, notorious, adverse, visible, and under a claim of right, the owner of the servient tenement is charged with knowledge of such use and his acquiescence in it is implied. Svoboda v. Johnson 57
10. An easement is in gross when it is not created to benefit or when it does not benefit the possessor of any tract of land in his use of it as such possessor. City of Papillion v. Schram 110
11. An easement in gross belongs to the owner of it independently of his ownership or possession of any specific land. City of Papillion v. Schram 110
12. If an easement, however it may have been created, is specific in its terms, it is decisive of the limits of the easement. If an easement is not specifically defined, the rule is that the easement is such as is reasonably necessary and convenient for the purpose for which it was created. Thomas v. Weller 298
13. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period. Gartner v. Wilson Concrete Co. 557

Elections.

In order to warrant the setting aside of an election held under the order and auspices of the Court of Industrial Relations by employees to decide who shall represent them in collective bargaining proceedings, the burden is upon those objecting to and moving to set aside the election to prove by a preponderance of the evidence that material misrepresentations of relevant facts were made in the campaign statements in question and that such misrepresentations had a substantial impact on the outcome of the election. Nebraska Assn. of Public Employees v. State 165

Eminent Domain.

1. A resident owner who is familiar with his property and knows its worth may testify as to its value without further foundation. Johnson's Apco Oil Co. v. City of Lincoln 397
2. A resident stockholder and officer of a closely-held family corporation, who was familiar with the characteristics of property owned by the corporation, its actual and potential uses, and who had several years experience in dealing with the property, is competent to testify as to the value of the property without further foundation. Johnson's Apco Oil Co. v. City of Lincoln 397

Employer and Employee.

1. False statements made at the time employment was secured are ordinarily insufficient to terminate the relation of master and servant existing at the time of the injury, even though they may constitute grounds for rescinding the contract of employment, at least where there is no causal connection between the injury and the misrepresentation. Hilt Truck Lines, Inc. v. Jones 115
2. Three factors must be present before a false statement in an employment application will bar workmen's compensation benefits: (1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury. Hilt Truck Lines, Inc. v. Jones 115
3. In a workmen's compensation case the burden of proof on the defense of intoxication or intentional willful negligence is on the employer. Hilt Truck Lines, Inc. v. Jones 115
4. In the absence of any agreement between employer and employee to the contrary, the general rule is that an employee, after his term of service has expired, is entitled to compete in business with his former employer. Accordingly, if an employee does not bind himself by contract to refrain from entering the services of a competitor after termination of the employment, the employee violates no duty to his former employer in so doing. Garner Tool & Die v. Laux 717
5. Unless restricted by some agreement with his former employer, an employee's right to compete in business with such former employer is the same as that of a

stranger to the contract of employment, subject to the qualification that a former employee is precluded from using for his own advantage, and to the detriment of his former employer, information or trade secrets acquired by or imparted to him in the course of his employment. Garner Tool & Die v. Laux 717

Equity.

1. Equity cases are heard de novo in this court with consideration given to the fact that the trial court observed the witnesses and their manner of testifying. State ex rel. Douglas v. Ledwith 6
2. On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Gasper v. Moss 24
3. While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the District Court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict thereon on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. Svoboda v. Johnson 57
4. Contractual promises with respect to the use of land, which under the rules of equity are specifically enforceable against the promisor, are effective against the successors in title or possession if the successor has actual or constructive notice of the promise. Under such circumstances, the promise subjects the land to an equitable servitude. Standard Meat Co. v. Feerhusen 325
5. On an appeal from an equity trial, in determining the weight to be given the evidence, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying. Metropolitan Life Ins. Co. v. SID No. 222 350
6. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Gartner v. Wilson Concrete Co. 557
7. Courts of equity, in decreeing or refusing interest, generally follow the law; interest is sometimes allowed

by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law. Mid-States Equipment Co. v. Poehling 791

Estates.

1. The right of a surviving spouse to widow's allowance, homestead allowance, exempt property, or any of them, is purely a personal right which the surviving spouse alone can exercise and enjoy. When the surviving spouse dies, the right terminates. Jacobson v. Nemesio 180
2. Even though one may have died prior to January 1, 1977, if no letters testamentary were issued before January 1, 1977, the estate is governed by the provisions of the Nebraska Probate Code which became effective on January 1, 1977. Jacobson v. Nemesio 180

Estoppel.

1. Mutuality of estoppel is no longer considered to be a requirement for the application of collateral estoppel. Peterson v. The Nebraska Nat. Gas Co. 136
2. Collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. Peterson v. The Nebraska Nat. Gas Co. 136
3. The trial court has some discretion as to whether collateral estoppel may be invoked in a particular case. Peterson v. The Nebraska Nat. Gas Co. 136
4. Before a person can sustain the plea of estoppel against another, he must have relied upon and been injured by the facts as pleaded. Metropolitan Life Ins. Co. v. SID No. 222 350

Evidence.

1. On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Gasper v. Moss 24
2. A motion for directed verdict will be denied unless there is a total failure of competent proof in a criminal case to support a material allegation in the information or where the testimony adduced is of so weak or doubtful character that a conviction based thereon could not be sustained. State v. Bennett 28

3. Where the evidence as to what occurred immediately prior to and at the time of making a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducement or threats, the confession is voluntary and may be received in evidence. State v. Bennett 28
4. To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence. Svoboda v. Johnson 57
5. While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the District Court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict thereon on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. Svoboda v. Johnson 57
6. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom. Kirshenbaum v. Dettman-Figueroa 70
7. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Kirshenbaum v. Dettman-Figueroa 70
8. Post accident changes in warnings and instructions generally are not admissible as implied admissions of negligence if their prejudicial nature outweighs their relevance. Hammond v. The Nebraska Nat. Gas Co. 80
9. In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Miles v. School Dist. No. 138 105
10. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Hilt Truck Lines, Inc. v. Jones 115
Nalley v. Consolidated Freightways, Inc. 370
11. Error cannot be predicated upon a ruling which excludes evidence where the substance of the evidence was neither made known to the judge by an offer of

proof nor was apparent from the context within which questions were asked. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
12. In a trial to the court, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
13. The Court of Industrial Relations cannot, in a section 48-818, R. R. S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions. General Drivers and Helpers Union v. City of West Point 238
14. Findings made by the Court of Industrial Relations not supported by substantial evidence do not justify the entry of an order which therefore must be said to be arbitrary, capricious, and unreasonable. General Drivers and Helpers Union v. City of West Point 238
15. Loss of profits from a business may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248
16. Although in many instances lost profits from a new business are too speculative and conjectural to permit recovery of damages, where the evidence is available to furnish a reasonable certain factual basis for computation of probable losses, recovery cannot be denied even though a new business venture is involved. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248
17. On an appeal from an equity trial, in determining the weight to be given the evidence, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying. Metropolitan Life Ins. Co. v. SID No. 222 350
18. It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion. Kuhn v. Kuhn 363
19. In a workmen's compensation case, the burden of proof on the defense of intoxication is on the employer. Nalley v. Consolidated Freightways, Inc. 370
20. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation

Court after rehearing have the same force and effect as a jury verdict in a civil case. Nalley v. Consolidated Freightways, Inc. 370

21. When findings as to issues of causation are made by the Nebraska Workmen's Compensation Court on rehearing, the sufficiency of such findings are to be tested in the same manner as other fact determinations. Nalley v. Consolidated Freightways, Inc. 370

22. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom. Riley v. City of Lincoln 386

23. Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law. Even where there are no conflicting evidentiary facts, a summary judgment is not appropriate if the ultimate inferences to be drawn from those facts are not clear. In considering such a motion, the trial judge must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. McDowell v. Rural Water Dist. No. 2 401

24. In the absence of fraud or mistake, an agreement or stipulation by the parties that the judgment of a third person shall be relied upon in determining a fact is binding upon the parties. Knigge v. Knigge 421

25. Unless otherwise agreed, the issues to be determined in a contested hearing before the Nebraska Liquor Control Commission are limited to those stated in the notice of the hearing. Jetter v. Nebraska Liquor Control Commission 431

26. A motion for new trial for newly discovered evidence will not be granted unless the evidence in support thereof is so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Pierce 433

27. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in his favor and he must have the benefit of inferences as reasonably deducible from it. Hancock

v. Paccar, Inc. 468
28. While the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively the state of the art. The inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined. Whether the design represents the state of the art is still a question of fact to be determined by the jury. Hancock v. Paccar, Inc. 468
29. The fundamental principle of the law of evidence is to the effect the burden of proof in any cause rests upon the party who asserts the matter. Hancock v. Paccar, Inc. 468
30. A trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case. Hancock v. Paccar, Inc. 468
31. Fair rental value as used in this instance is a question of fact to be determined at the time of trial from evidence relating to prevailing community or area standards. Husebo v. Ambrosia, Ltd. 499
32. Reasonable length of time as used in this instance presumes ordinary diligence on the part of the injured party and those performing the repair work and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499
33. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Souza-Spittler 503
34. Evidence of such mutual mistake must be clear, convincing, and satisfactory. Cunningham v. Covalt 512
35. An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence. State v. Hamilton 537
36. A juvenile court may exercise its sound discretion in determining the relevancy, competency, and admissibility of evidence to be considered in a dispositional hearing during proceedings involving minor dependent and neglected children. State v. Duran 546
37. The trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion. State v. Apker 577
38. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be iden-

tified it is immaterial in how many or in whose hands it has been. State v. Apker 577
39. Important to the determination of the admissibility of demonstrative evidence is the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. State v. Apker 577
40. In a child custody action, a social worker's report may be received in evidence for the consideration of that part properly admissible when the social worker is sworn, subject to cross-examination, and the parties are permitted to call other witnesses to contradict any parts of the report. Bengtson v. Bengtson 602
41. The appropriateness of a hypothetical question to an expert witness is a matter largely for the trial court's discretion, and its rulings will not be disturbed unless there has been an abuse of that discretion. Bengtson v. Bengtson 602
42. In cases involving questions of child custody, the findings of the trial court, both as to an evaluation of the evidence and as a matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Bengtson v. Bengtson 602
43. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, and to establish malice or intent. State v. Clermont ... 611
44. Voluntary statements made to a police officer during preliminary questioning that preceded the actual performance of a polygraph test are not a part of the polygraph test, nor are they rendered inadmissible under the polygraph exclusion. State v. Clermont 611
45. Malice and intent may be inferred from the evidence relating to the circumstances of the criminal act. State v. Clermont 611
46. The verdict of the fact finder in a criminal case must be sustained if, taking the view most favorable to the State, there is sufficient competent evidence to support it. State v. Clermont 611
47. Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence. State v. Klutts .. 616
48. Where circumstantial evidence is relied upon, the cir-

cumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Klutts 616

49. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. State v. Klutts 616

50. A conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. State v. Klutts 616

51. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. Mere presence at a place where a narcotic drug is found is not sufficient. State v. Klutts 616

52. Where, in a criminal case, there is a total failure of competent proof to support a material allegation in the information or where the testimony added is of so weak or doubtful character that a conviction based thereon cannot be sustained, a motion for directed verdict should be granted. State v. Klutts 616

53. The admissions by a party to an action upon a material matter are admissible against him as original evidence. Silvey & Co., Inc. v. Engel 633

54. Evidence which does not appear in the record cannot be considered by this court on appeal. Weeks v. State Board of Education 659

55. In a proceeding for the disbarment of an attorney-at-law the presumption of innocence applies, and the charge made against him must be established by a preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Erickson 692

56. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. Erickson 692

57. To determine whether and to what extent discipline

should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Erickson 692

58. There is no rule of law which requires the trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact. State v. Cowan 708

59. In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Cowan ... 708

60. It is only in those cases where, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater, but not the lesser, offense that the lesser-included offense instruction must be given. State v. Knaff 712

61. Where the evidence is uncontroverted on an essential element of the crime, mere speculation that the jury may disbelieve it does not entitle the defendant to such an instruction. State v. Knaff 712

62. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Pokorski v. McAdams 725

63. Whether a parent has neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2)(c), R. R. S. 1943, is a question of fact, and each case must be determined on its own facts. State v. Rice 732

64. The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case, and will not be set aside on appeal unless clearly wrong. Baliulis v. Campbell Soup Company 739

65. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted

by direct evidence. Baliulis v. Campbell Soup Company 739
66. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Aurora Cooperative Elevator Co. v. Larson 755
67. Any assignment of error requiring an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. Danielson v. Danielson 776
State v. Behrens 785
68. The allegation in a motion for a new trial that there occurred errors of law duly excepted to is sufficient to have reviewed the various rulings of the trial court on the admission or rejection of evidence. Blue v. Champion International Corp. 781
69. When credible evidence on material questions of fact is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Mid-States Equipment Co. v. Poehling 791
70. To support a defense of selective or discriminatory prosecution, a defendant bears a heavy burden of establishing at least prima facie (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. State v. Bird Head 807
71. Once a prima facie case is made, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedure have produced the monochromatic result. State v. Bird Head 807
72. The general rule is that a motion for a new trial must be filed within 10 days after the verdict is rendered. § 29-2103, R. R. S. 1943. An exception to the above rule is that in any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testi-

mony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict under which he was sentenced was rendered, the District Court may set aside the sentence and grant a new trial if such motion is filed within a reasonable time after the discovery of the new evidence. § 29-2103, R. R. S. 1943. State v. Munson 814

73. New evidence tendered in support of a motion for a new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Munson 814

74. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Munson 814

75. A motion for a directed verdict made at the close of a plaintiff's case must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Empfield v. Ainsworth Irr. Dist. 827

76. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Empfield v. Ainsworth Irr. Dist. 827

Execution.

1. A lien on personal property is acquired at the time it is seized in execution. Credit Bureau of Broken Bow, Inc. v. Moninger 679

2. A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that he in express terms asserts his dominion over it by virtue of such writ. Credit Bureau of Broken Bow, Inc. v. Moninger 679

3. Notice of a purported interest claimed by a third party given by a debtor to a sheriff when he was proceeding to attach or to levy upon property is not notice to the creditor for whom the levy is made. Credit Bureau of Broken Bow, Inc. v. Moninger 679

Federal Laws.

1. When Congress has unmistakably entered a field and has enacted regulations to govern a field, state laws regulating that aspect of commerce must fall. This result is required whether Congress specifically directs such a result in the legislation or such a result is required by reason of the purpose of the act. ATS Mobile Telephone, Inc. v. General Communications Co., Inc. 141
2. No state law can hinder or obstruct the free use of a license granted under an act of Congress. ATS Mobile Telephone, Inc. v. General Communications Co., Inc. 141
3. It is well-settled law that all federal regulations done in pursuance of one of Congress' delegated powers are capable of preempting any state legislation or regulation on the same subject. ATS Mobile Telephone, Inc. v. General Communications Co., Inc. 141

Governmental Subdivisions.

1. In order to sue the State of Nebraska or one of its agencies under the Tort Claims Act, the petition must be filed in the District Court for the county in which the alleged wrongful act or omission took place, and in the absence of specific legislative authority, that jurisdictional requirement may not be waived. Catania v. The University of Nebraska 304
2. A rural water district is not a municipal corporation within the purview of the City, Village and Municipal Corporation Ground Water Permit Act. McDowell v. Rural Water Dist. No. 2 401

Guarantor-Guarantee.

Under an absolute guarantee of payment there is no condition as to demand and notice of default. First West Side Bank v. Herzog 356

Guilty Pleas.

1. A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence. State v. Hill 743
2. Before accepting a guilty plea a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. State v. Hill 743
3. Although questioning the defendant as to the factual basis is not required where the defendant enters a plea of nolo contendere, the court must satisfy itself that

there is a factual basis for the charge. State v. Rice .. 743

Habeas Corpus.

An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. Addison v. Parratt 656

Habitual Criminals.

In order for the enhancement provisions of section 29-2221, R. R. S. 1943, to apply to an offense, it makes no difference whether the two prior sentences were to be served consecutively or concurrently, nor is it required that there be a time interval between conviction and commitment for the first offense and commission of the second offense. State v. Pierce 433

Highways.

Sections 39-1320 to 39-1320.11, R. R. S. 1943, making it unlawful to erect or maintain certain advertising signs along the Interstate and other highways, constitute a reasonable and valid exercise of the police power which bears a substantial relation to the public health, safety, and general welfare, and those statutes are constitutional. State v. Mayhew Products Corp. 266

Homicide.

In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, and to establish malice or intent. State v. Clermont ... 611

Implied Consent Law.

1. On appeal from a revocation of a motor vehicle operator's license under the implied consent statute, this court reviews the finding of the trial court de novo. Wohlgemuth v. Pearson 687
2. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license under the implied consent statute, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. Wohlgemuth v. Pearson 687
3. A conditional or qualified refusal to take a test to determine the alcohol content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the

meaning of the act. Wohlgemuth v. Pearson 687
4. A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting officer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it. Wohlgemuth v. Pearson 687
5. To constitute a refusal to submit to a chemical test requested under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. It is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasoned judgment as to what course of action to take. Wohlgemuth v. Pearson 687

Indictments and Informations.

An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense and also be able to plead the judgment rendered as a bar to a later prosecution for the same offense. State v. Dreifurst 378

Injunctions.

1. Where there is a final judgment against the party enjoined, the temporary injunction merges into the final decree and any questions concerning the propriety of the issuance of the temporary injunction become moot. State ex rel. Douglas v. Ledwith 6
2. An injunction is a remedy designed to control future behavior, and whether that behavior is occurring at the time of the decree granting the injunction is generally irrelevant to the propriety of its issuance. State ex rel. Douglas v. Ledwith 6
3. Injunction will not be granted in the absence of proof of injury, or threatened injury. Meyer v. Colin 96
4. Concerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. Thomas v. Weller 298

Instructions.

1. Where instructions correctly state the law, it is not

error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Kirshenbaum v. Dettman-Figueroa 70
2. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence and a failure to do so is prejudicial error. Pfizer Genetics, Inc. v. Williams Management Co. 151
3. A trial court is not required to give a proffered instruction which unduly emphasizes a part of the evidence in the case. Hancock v. Paccar, Inc. 468
4. It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. State v. Reitenbaugh 583
5. The trial court is under a duty on its own motion to correctly instruct on the law and this court may take cognizance of plain error indicative of a probable miscarriage of justice. Silvey & Co., Inc. v. Engel 633
6. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence. High-Plains Cooperative Assn. v. Stevens 664
7. Where the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form. High-Plains Cooperative Assn. v. Stevens .. 664
8. It is only in those cases where, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater, but not the lesser, offense that the lesser-included offense instruction must be given. State v. Knaff 712
9. Where the evidence is uncontroverted on an essential element of the crime, mere speculation that the jury may disbelieve it does not entitle the defendant to such an instruction. State v. Knaff 712

Insurance.

1. Insurance companies have the same right as individuals to limit their liability. Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co. 156
2. In construing a contract, the instrument must be read as a whole, giving force and effect to all its provisions to determine whether or not any ambiguity exists and whether, if such ambiguity does exist, the contract is confusing and uncertain in its terms. Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co. 156
3. The right of an insurance company to recover against a wrongdoer, whose negligence has subjected the insur-

ance company to a liability, is traced through the insured; that is, no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414

4. Direct actions against liability insurance carriers because of the negligence of their insureds are not permitted in Nebraska. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
5. An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
6. A petition alleging a nuisance does not, by itself, allege an accident. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
7. Under a liability policy issued by an insurance company to its insured obligating it to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage "caused by an occurrence," and to defend any suit against the insured seeking damages on account of such bodily injury or property damage, and defining "occurrence" as meaning an "accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured," the insurance company is not obligated to defend its insured in an action brought against it by a third party based upon "nuisance" nor to pay any sums which the insured shall become legally obligated to pay by virtue of said action. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
8. Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

Intent.

1. Sums remaining on deposit at time of death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account was created. Gasper v. Moss 24
2. The term "claim of right" means nothing more than the intention of the disseisor to appropriate and use the

land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. This "claim of right" means no more than "hostile" and if possession is hostile it is "under a claim of right." Svoboda v. Johnson 57

3. Under the law of adverse possession, the intent with which the claimant first took possession of a disputed tract is not ordinarily of too much significance. When the possession of the land of another, no matter what the intention may have been in making the first entry, amounts to that which the law deems as adverse to the true owner and such possession continues for the statutory period of limitations of 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary. Svoboda v. Johnson 57
4. Intent may be either actual or implied, or inferred from the circumstances. In most cases it is inferred from the circumstances. Actual assertion of claim of ownership is not necessary. Svoboda v. Johnson 57
5. Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement, all prior negotiations and agreements are deemed merged therein in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. The doctrine of merger, however, applies only in situations where the parties to the deed and to the prior agreements are the same. City of Papillion v. Schram 110
6. A statutory construction which leads to absurd, unjust, or unconscionable results will be avoided. A literal meaning which would have the effect of defeating the legislative intent will not be placed upon a statute when a sensible construction which will effectuate the object of the legislation is possible. State v. Maez 129
7. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers. PPG Industries Canada Ltd. v. Kreuscher 220
8. The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. PPG Industries Canada Ltd. v. Kreuscher 220
9. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine

the legislative intention. PPG Industries Canada Ltd. v. Kreuscher 220
10. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. PPG Industries Canada Ltd. v. Kreuscher 220
11. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. PPG Industries Canada Ltd. v. Kreuscher 220
12. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. PPG Industries Canada Ltd. v. Kreuscher 220
13. Statutes in derogation of sovereignty should be strictly construed in favor of the state, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed. Catania v. The University of Nebraska 304
14. An interpretation of a written instrument should be made which will effect the true intention of the parties as expressed in the writing. Standard Meat Co. v. Feerhusen 325
15. Where a contract is ambiguous, the court must determine the intention of the parties and the ambiguity must be resolved so as to give effect to that intent. Standard Meat Co. v. Feerhusen 325
16. Canons of construction are useful only insofar as they are an aid in determining the intentions of the parties to the contract. Standard Meat Co. v. Feerhusen 325
17. The lack of intent to do harm on the part of the actor does not by itself compel a conclusion that the result was caused by accident. The element of forseeability cannot be ignored. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
18. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, and to establish malice or intent. State v. Clermont 611
19. Malice and intent may be inferred from the evidence relating to the circumstances of the criminal act. State

v. Clermont 611

Interest.

1. In an action for a liquidated sum which represents a downpayment on a contract voided or terminated by mutual agreement, the amount claimed does not become an unliquidated claim merely because of the assertion of a counterclaim, and if the trier of fact finds against the defendant on the counterclaim, prejudgment interest should be awarded on the plaintiff's claim. King v. Sky Harbor Air Service, Inc. 4
2. Under the Uniform Partnership Act, and subject to any agreement between the partners, a partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance. Conklin v. Randolph 332
3. Courts of equity, in decreeing or refusing interest, generally follow the law; interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law. Mid-States Equipment Co. v. Poehling 791

Intoxicating Liquors.

1. The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for licenses for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion. Flame Bar, Inc. v. Nebraska Liquor Control Commission 76
2. Unless otherwise agreed, the issues to be determined in a contested hearing before the Nebraska Liquor Control Commission are limited to those stated in the notice of the hearing. Jetter v. Nebraska Liquor Control Commission 431
3. In the absence of a violation of a statute or valid regulation of the Nebraska Liquor Control Commission, it has no authority to cancel a liquor license. Jetter v. Nebraska Liquor Control Commission 431

Joint Tenancy.

1. Sums remaining on deposit at time of death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account was created. Gasper v. Moss 24

2. A right of survivorship in a joint account arising from the express terms of the account or under section 30-2704, R. R. S. 1943, cannot be changed by will. Gasper v. Moss 24

Judgments.

1. Where there is a final judgment against the party enjoined, the temporary injunction merges into the final decree and any questions concerning the propriety of the issuance of the temporary injunction become moot. State ex rel. Douglas v. Ledwith 6
2. To support a suit thereon, a foreign judgment must be a valid, final, personal adjudication; it must create a definite and absolute indebtedness. Cockle v. Cockle .. 88
3. An offer to confess judgment, and its acceptance pursuant to section 25-901, R. R. S. 1943, requires the entry of a judgment according to the offer and acceptance. Jaixen v. Turner 123
4. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. Peterson v. The Nebraska Nat. Gas Co. 136
5. In a trial to the court, the findings and judgment of the trial court on the facts have the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
6. The proper method of determining whether a trial court abused its discretion must be based on facts in the record and not from extrinsic criteria. Boroff v. Boroff 217
7. The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion. Boroff v. Boroff 217
8. Findings made by the Court of Industrial Relations not supported by substantial evidence do not justify the entry of an order which therefore must be said to be arbitrary, capricious, and unreasonable. General Drivers and Helpers Union v. City of West Point 238
9. In a law action tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248

10. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Lutheran Medical Center v. City of Omaha ... 292
Aurora Cooperative Elevator Co. v. Larson 755
11. It is a fundamental principle of jurisprudence that material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action. Thomas v. Weller 298
12. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. Thomas v. Weller 298
13. A judgment which is not void may only be set aside after the term at which it was entered as authorized in section 25-2001, R. R. S. 1943. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
14. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
15. A District Court has no power to vacate or modify its judgment after term on the ground that an error of law had been committed by it in rendering such judgment. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
16. A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
17. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do

not support the order or award. § 48-185, R. R. S. 1943. Riley v. City of Lincoln 386
18. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in his favor and he must have the benefit of inferences as reasonably deducible from it. Hancock v. Paccar, Inc. 468
19. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proven by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. State v. Klutts 616
20. A conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. State v. Klutts 616
21. The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case, and will not be set aside on appeal unless clearly wrong. Baliulis v. Campbell Soup Company 739
22. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Aurora Cooperative Elevator Co. v. Larson 755
23. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Aurora Cooperative Elevator Co. v. Larson 755
24. Absent either a specific finding on an issue or a general finding for a party by the trial court, this court cannot on appeal assume the issue was decided by the trial court. Carlson v. Nelson 765

Juries.

1. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the degree thereof, the issues must be submitted to the jury. Kirshenbaum v. Dettman-Figueroa 70
2. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Kirshenbaum v. Dettman-Figueroa 70
3. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Kirshenbaum v. Dettman-Figueroa 70
4. While the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively the state of the art. The inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined. Whether the design represents the state of the art is still a question of fact to be determined by the jury. Hancock v. Paccar, Inc. 468
5. A defendant charged under section 39-669.07, R. R. S. 1943, is entitled to a jury trial under the provisions of section 24-536, R. R. S. 1943. State v. Karel 573
6. It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. State v. Reitenbaugh 583
7. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Empfield v. Ainsworth Irr. Dist. 827

Jurisdiction.

1. In order to sue the State of Nebraska or one of its agencies under the Tort Claims Act, the petition must be filed in the District Court for the county in which the alleged wrongful act or omission took place, and in the absence of specific legislative authority, that jurisdictional requirement may not be waived. Catania v. The University of Nebraska 304
2. Want of jurisdiction of the subject matter of an action requires the court to proceed by dismissal or other appropriate action. Catania v. The University of Nebraska 304

3. The power of a court to try an accused is not impaired by the fact that officers used unlawful force or deception to bring him from another jurisdiction to the place of trial. State v. Selman 833

Juvenile Courts.

1. An appeal of a juvenile case is heard in this court by trial de novo upon the record; notwithstanding, findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses, and those findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. State v. Logan 204
   State v. Duran 546
2. A juvenile court may exercise its sound discretion in determining the relevancy, competency, and admissibility of evidence to be considered in a dispositional hearing during proceedings involving minor dependent and neglected children. State v. Duran 546

Juveniles.

An appeal from the order of a county court sitting as a juvenile court to the District Court and to this court requires that we review the adjudication de novo on the record and reach an independent conclusion on disputed issues of fact. State v. Rice 732

Labor and Labor Relations.

1. An appeal from proceedings under section 48-601 et seq., R. R. S. 1943, the Employment Security Law, must be considered by this court de novo. Glionna v. Chizek 37
2. If an employee accepts employment in good faith and through no fault or deficiency on his or her part the workload becomes an increasingly unreasonable burden so as to affect the health or sense of well-being of the employee, voluntary termination does have some justifiably reasonable connection with or relation to conditions of employment and may be deemed for "good cause" under section 48-628 (a), R. S. Supp., 1976. Glionna v. Chizek 37
3. In order to warrant the setting aside of an election held under the order and auspices of the Court of Industrial Relations by employees to decide who shall represent them in collective bargaining proceedings, the burden is upon those objecting to and moving to set aside the election to prove by a preponderance of the evidence

that material misrepresentations of relevant facts were made in the campaign statements in question and that such misrepresentations had a substantial impact on the outcome of the election. Nebraska Assn. of Public Employees v. State 165
4. An appeal from the decision of the Nebraska Appeal Tribunal on an unemployment compensation claim is considered de novo on the record of the hearing before the Nebraska Appeal Tribunal by both the District Court and this court. Powers v. Chizek 759
5. To "leave work voluntarily," as that term is used in the Employment Security Law, means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment. Powers v. Chizek 759

Leases.

1. The measure of lessee's compensable interest in the improvements should be determined as follows: First, determine the fair market value of the school land with only the improvements whose values are disputed. Then, determine the fair market value of the school land without any improvements owned by the lessee. The difference (remainder) between these two values is the value to the land of the lessee's compensable interest in the disputed improvements. Insofar as this rule is contrary to State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769, that case is overruled. Pettijohn v. State 271
2. Normal costs of operation of a leased vehicle while in the possession of the lessee are not allowable as damages under rules providing for the recovery of loss of use damages. Husebo v. Ambrosia, Ltd. 499

Legislature.

1. Section 28-743, R. R. S. 1943, applies only to situations where either the means used to compel or induce the performance of an act or where the end to be accomplished by such means, the performance of the act itself, are of a nature which the Legislature might prohibit under a reasonable exercise of its police power. State v. Maez 129
2. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. PPG Industries Canada Ltd. v. Kreuscher 220
3. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers.

PPG Industries Canada Ltd. v. Kreuscher 220
4. The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. PPG Industries Canada Ltd. v. Kreuscher 220
5. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. PPG Industries Canada Ltd. v. Kreuscher 220
6. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. PPG Industries Canada Ltd. v. Kreuscher 220
7. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. PPG Industries Canada Ltd. v. Kreuscher 220
8. The Legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, and the constitutional rule of uniformity requires that all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law. Gates v. Howell 256
9. The Legislature may, in the exercise of its police power, prescribe reasonable regulations for the ownership of personal property, including the manner in which it is titled. Gates v. Howell 256
10. Statutes in derogation of sovereignty should be strictly construed in favor of the state, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed. Catania v. The University of Nebraska 304
11. In the absence of constitutional restrictions, the Legislature may authorize the formation of two municipal corporations in the same territory at the same time for different purposes, and municipal corporations organized for different purposes may include the same territory. The identity of the territorial limits of separate public corporations is immaterial if such entities have separate and distinct governmental purposes. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316

12. In construing an act of the Legislature all reasonable doubts must be resolved in favor of its constitutionality. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
13. An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the Legislature has a basis in reason, and is not purely arbitrary. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
14. The findings of the Legislature, while not absolutely controlling, are entitled to great weight. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
15. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
State ex rel. Douglas v. Thone 836
16. It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
17. The rule that the benefits to the public must be direct and not remote and that the past course or usage of government is to be resorted to for guidance must in each case be considered in the light of the principle that the Legislature has a very wide discretion to determine what constitutes a public purpose, and that courts will not interfere unless the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
18. The question of how far the Legislature should go in fill-

ing 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. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

19. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

20. One purpose of the constitutional limitation on state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue received in future fiscal periods. Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision. State ex rel. Douglas v. Thone 836

21. A declaration by the Legislature of the purpose for which money will or may be expended in the future does not constitute an appropriation within the meaning of Article III, section 22, of the Nebraska Constitution. State ex rel. Douglas v. Thone 836

22. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. State ex rel. Douglas v. Thone 836

Lesser-Included Offenses.

Acceptance or rejection of a plea of guilty to a lesser offense included in the offense charged rests in the discretion of the court. State v. Clermont 611

Liability.

1. Subject to any agreement to the contrary between the partners, under the Uniform Partnership Act, in settling accounts between the partners after dissolution,

the liabilities of the partnership shall rank in order of payment as follows: (I) Those owing to creditors other than partners, (II) Those owing to partners other than for capital and profit, (III) Those owing to partners in respect of capital, and (IV) Those owing to partners in respect of profits. Conklin v. Randolph 332

2. Under the Uniform Partnership Act, and subject to any agreement between the partners, the partners must contribute toward the losses of the partnership, whether of capital or otherwise, sustained by the partnership according to their respective shares in the profits. Conklin v. Randolph 332

3. Under a liability policy issued by an insurance company to its insured obligating it to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage "caused by an occurrence," and to defend any suit against the insured seeking damages on account of such bodily injury or property damage, and defining "occurrence" as meaning an "accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured," the insurance company is not obligated to defend its insured in an action brought against it by a third party based upon "nuisance" nor to pay any sums which the insured shall become legally obligated to pay by virtue of said action. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

4. Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

5. The lack of intent to do harm on the part of the actor does not by itself compel a conclusion that the result was caused by accident. The element of foreseeability cannot be ignored. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

6. An effect which is the natural and probable consequence of an intentional act or of a course of action is not an accident. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

Licenses and Permits.

1. The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for licenses for the sale of liquor will be granted or de-

nied, and the courts are without authority to interfere unless there is an abuse of that discretion. Flame Bar, Inc. v. Nebraska Liquor Control Commission 76
2. No state law can hinder or obstruct the free use of a license granted under an act of Congress. ATS Mobile Telephone, Inc. v. General Communications Co., Inc. .. 141
3. The Rural Water District Act, sections 46-1001 to 46-1026, R. R. S. 1943, contains no specific requirement that such district must first obtain a permit to construct, install, maintain, and operate wells and other facilities for the storage, transportation, or utilization of water, which are necessary to carry out the purposes of its organization. McDowell v. Rural Water Dist. No. 2 401
4. In the absence of a violation of a statute or valid regulation of the Nebraska Liquor Control Commission, it has no authority to cancel a liquor license. Jetter v. Nebraska Liquor Control Commission 431
5. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license under the implied consent statute, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. Wohlgemuth v. Pearson 687

Liens.

1. An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest and before it is perfected. Credit Bureau of Broken Bow, Inc. v. Moninger 679
2. A lien on personal property is acquired at the time it is seized in execution. Credit Bureau of Broken Bow, Inc. v. Moninger 679
3. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles. Credit Bureau of Broken Bow, Inc. v. Moninger 679

Medical Services.

1. A city of the metropolitan class is liable for the emergency medical treatment required by a criminal suspect in policy custody who is wounded by the police in the process of apprehension. Lutheran Medical Center v. City of Omaha 292
2. Intentional indifference to the medical needs of a prisoner is proscribed by the Eighth Amendment to the

United States Constitution as being cruel and unusual punishment. Lutheran Medical Center v. City of Omaha 292

Mental Health.

It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. State v. Reitenbaugh 583

Mineral Interests.

Valuation of mineral interests by capitalizing prior income does not reflect the market value and is an improper method of valuation because production of minerals is based on a declining asset and production is of an indefinite duration. Knigge v. Knigge 421

Minors.

1. The integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed by the Constitution of the United States. State v. Logan 204
2. The constitutional right of family integrity and the parental rights of custody and control create a duty of care and support. State v. Logan 204
3. An application for modification of a dissolution decree with respect to the care, custody, and control of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Kuhn v. Kuhn 363
4. The paramount consideration for the court in a custody hearing is the welfare of the children based upon their best interests, general health, welfare, and social behavior. Kuhn v. Kuhn 363
5. The discretion of the trial court with respect to changing the custody of minor children of a broken marriage will not ordinarily be disturbed unless there is a clear abuse of judicial discretion or it is clearly against the weight of the evidence. Kuhn v. Kuhn 363
6. It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion. Kuhn v. Kuhn 363
7. The best interests of the children is the paramount consideration in determining issues of custody. Fleharty

v. Fleharty 419
8. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Fleharty v. Fleharty 419
9. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence. Fleharty v. Fleharty 419
10. Section 43-209 (6), R. R. S. 1943, is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. State v. Souza-Spittler 503
11. A juvenile court may exercise its sound discretion in determining the relevancy, competency, and admissibility of evidence to be considered in a dispositional hearing during proceedings involving minor dependent and neglected children. State v. Duran 546
12. The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children. State v. Duran 546
13. Generally, divided custody arrangements are not favored. Friedenbach v. Friedenbach 586
14. Ordinarily, a determination of custody by the trial court will not be disturbed on appeal unless it is clear that the evidence does not support the findings. Friedenbach v. Friedenbach 586
15. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child. Jafari v. Jafari 622
16. The disposition of minor children and provision for their support in an action where a dissolution is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it. Jafari v. Jafari 622
17. The best interests of the minor children is the paramount consideration in determining custodial issues. Buchele v. Tuel 641
18. The judicial focus in matters relating to the modification of custody is on what the trial court actually knew at the time of the entry of the custody decree and not on what the parties knew or should have known which was

not produced at the time of trial. Buchele v. Tuel 641
19. The relationship between a minor child and a woman living in the same household is a factor to be considered in a determination of the best interests of the child in matters relating to custody. Buchele v. Tuel 641
20. Whether a parent has neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is a question of fact, and each case must be determined on its own facts. State v. Rice 732
21. Neglect of a parent to provide proper or necessary education for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is not proved by simply establishing that the compulsory school attendance law, section 79-201, R. R. S. 1943, has been violated. State v. Rice 732
22. The modification of child support payments requires proof of a material change in circumstances and when found to be in the best interests of the children, all subsequent to the entry of decree. Danielson v. Danielson 776

Mistrial.

1. A mistrial may be declared and a new trial granted in a criminal case where there is a manifest necessity to do so in order to serve the ends of public justice. State v. Clifford 41
2. Where the trial court discovers, after trial has commenced, that a juror is disqualified by reason of bias, and that fact was not disclosed on voir dire examination, the court may declare a mistrial without prejudice, and the subsequent retrial of the defendant does not constitute double jeopardy. State v. Clifford 41

Moot Question.

As a general rule, appellate courts do not sit to give opinions in cases or controversies which have become moot. An appeal or error proceeding will be dismissed where no actual controversy still exists between the parties at the time of the hearing. This general rule, however, does not apply to appeals involving matters of public interest. Meyer v. Colin 96

Mortgages.

A mortgagor cannot, without the consent of the mortgagee, make a dedication of the mortgaged premises so as to adversely affect the interest of the mortgagee. Metropolitan Life Ins. Co. v. SID No. 222 350

Motions, Rules, and Orders.

1. A motion for new trial for newly discovered evidence will not be granted unless the evidence in support thereof is so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Pierce 433
2. A ruling upon a motion for severance will not be disturbed in the absence of an abuse of discretion. State v. Hernandez 582
3. Where, in a criminal case, there is a total failure of competent proof to support a material allegation in the information or where the testimony added is of so weak or doubtful character that a conviction based thereon cannot be sustained, a motion for directed verdict should be granted. State v. Klutts 616
4. A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence. State v. Hill 743
5. The allegation in a motion for a new trial that there occurred errors of law duly excepted to is sufficient to have reviewed the various rulings of the trial court on the admission or rejection of evidence. Blue v. Champion International Corp. 781
6. A motion for a directed verdict made at the close of a plaintiff's case must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Empfield v. Ainsworth Irr. Dist. 827

Motor Vehicles.

1. The right-of-way which the driver of the vehicle on the left is required to yield to the vehicle on the right is the right to proceed in a lawful manner in preference to the vehicle on the left. Muirhead v. Gunst 1
2. When the negligence of the party seeking to invoke the last clear chance doctrine is active and continuous as a contributing factor up to the time of the injury, the doctrine has no application. Muirhead v. Gunst 1
3. Whether, at the time of taking an automobile, the defendant had the intent of permanently depriving the owner of its use or whether he intended to return it is a question of fact. State v. King 47
4. A manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the

goods are being used for their intended purpose or any purpose which could be reasonably expected. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect. Hancock v. Paccar, Inc. 468

5. One who is inured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance, the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks. Hancock v. Paccar, Inc. 468

6. The measure of damages for injuries to a motor vehicle which is not used solely for business or commercial purposes, when that vehicle can be repaired so that, when repaired, it will be in as good condition as it was before the injury, is the reasonable cost of repair plus the reasonable value of the use of the motor vehicle while being repaired with ordinary diligence, not exceeding the value of the motor vehicle immediately before the injury. Husebo v. Ambrosia, Ltd. 499

7. Reasonable value of the use of a motor vehicle injured through the negligence of another party is that amount which does not exceed either the fair rental value of a vehicle of like or similar nature and performance for a reasonable length of time, or the amount actually paid, whichever is the least, and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499

8. Normal costs of operation of a leased vehicle while in the possession of the lessee are not allowable as damages under rules providing for the recovery of loss of use damages. Husebo v. Ambrosia, Ltd. 499

9. In a proceeding before the Director of Motor Vehicles under the implied consent law, where the evidence shows that a test was in fact performed which established a blood alcohol content in excess of that pre-

scribed by statute, the sanction prescribed by the statute for refusal to consent to the test should not be imposed. Sedlacek v. Pearson 625
10. A preliminary refusal followed by a consent to submit to a test for blood alcohol content does not furnish a basis for imposition of the sanction prescribed by the statute if a test was in fact performed and the State was not prejudiced by the delay in performing the test. Sedlacek v. Pearson 625
11. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles. Credit Bureau of Broken Bow, Inc. v. Moninger 679

Municipal Corporations.

1. A city of the metropolitan class is liable for the emergency medical treatment required by a criminal suspect in police custody who is wounded by the police in the process of apprehension. Lutheran Medical Center v. City of Omaha 292
2. Before two municipal corporations occupying the same boundaries are incompatible, it must be established that the powers and privileges conferred on the separate governmental agencies are substantially coextensive in scope and objective. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
3. Section 8 of L.B. 571, Laws 1979, purports to authorize the state to guarantee, in unlimited amount, bonds issued by municipalities under section 9 of the act for the purpose of constructing alcohol plants and facilities. Even though the obligation of the state on such bonds may be secondary or contingent, the obligation is a debt within the meaning of Article XIII, section 1, of the Nebraska Constitution. State ex rel. Douglas v. Thone 836

Negligence.

1. When the negligence of the party seeking to invoke the last clear chance doctrine is active and continuous as a contributing factor up to the time of the injury, the doctrine has no application. Muirhead v. Gunst 1
2. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the degree thereof, the issues must be submitted to the jury. Kirshenbaum v. Dettman-Figueroa 70

3. Natural gas is a dangerous commodity and a distributor of natural gas is required to exercise a high degree of care and diligence to prevent injury and damage to the public from the escape of gas from its lines. A distributor of natural gas is required to exercise a degree of care commensurate to the danger involved in the transaction of its business. Hammond v. The Nebraska Nat. Gas. Co. 80
4. The duty to use due care which a distributor of natural gas owes to the public is a continuing one and one which can not be delegated to another. Hammond v. The Nebraska Nat. Gas Co. 80
5. The opportunity to acquire knowledge by the use of reasonable diligence is equivalent to knowledge, and where the duty to use due care requires knowledge, voluntary ignorance is not a defense. Hammond v. The Nebraska Nat. Gas Co. 80
6. Post accident changes in warnings and instructions generally are not admissible as implied admissions of negligence if their prejudicial nature outweighs their relevance. Hammond v. The Nebraska Nat. Gas Co. 80
7. Negligence must be measured against the particular set of facts and circumstances which are present in each case. Miles v. School Dist. No. 138 105
8. In a workmen's compensation case the burden of proof on the defense of intoxication or intentional willful negligence is on the employer. Hilt Truck Lines, Inc. v. Jones 115
9. The right of an insurance company to recover against a wrongdoer, whose negligence has subjected the insurance company to a liability, is traced through the insured; that is, no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
10. To state a cause of action in tort it is necessary to allege facts from which a conclusion can be drawn that the defendant was guilty of one or more acts of negligence, that such negligence was a proximately contributing cause of the accident, and that as a proximate result thereof the plaintiff was damaged. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
11. Direct actions against liability insurance carriers because of the negligence of their insureds are not permitted in Nebraska. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
12. A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully

made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured. Hancock v. Paccar, Inc. 468

13. In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach of the contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety. Hancock v. Paccar, Inc. 468

14. A manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect. Hancock v. Paccar, Inc. 468

15. One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance, the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since colli-

sions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks. Hancock v. Paccar, Inc. 468
16. Contributory negligence, in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort. Assumption of risk and misuse of the product are. Hancock v. Paccar, Inc. 468
17. Assumption of risk, when imposed to defeat recovery, is an affirmative defense and the burden is upon the defendant to establish such defense. Hancock v. Paccar, Inc. 468
18. The measure of damages for injuries to a motor vehicle which is not used solely for business or commercial purposes, when that vehicle can be repaired so that, when repaired, it will be in as good condition as it was before the injury, is the reasonable cost of repair plus the reasonable value of the use of the motor vehicle while being repaired with ordinary diligence, not exceeding the value of the motor vehicle immediately before the injury. Husebo v. Ambrosia, Ltd. 499
19. Reasonable value of the use of a motor vehicle injured through the negligence of another party is that amount which does not exceed either the fair rental value of a vehicle of like or similar nature and performance for a reasonable length of time, or the amount actually paid, whichever is the least, and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499
20. Reasonable length of time as used in this instance presumes ordinary diligence on the part of the injured party and those performing the repair work, and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499

Negotiable Instruments.

The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt unless there is a specific agreement between the parties that the new note shall extinguish the original debt. First West Side Bank v. Herzog 356

New Trial.

1. A mistrial may be declared and a new trial granted in a criminal case where there is a manifest necessity to do so in order to serve the ends of public justice. State v. Clifford 41
2. Where the trial court discovers, after trial has commenced, that a juror is disqualified by reason of bias,

and that fact was not disclosed on voir dire examination, the court may declare a mistrial without prejudice, and the subsequent retrial of the defendant does not constitute double jeopardy. State v. Clifford 41

3. In the absence of a violation of a statute or valid regulation of the Nebraska Liquor Control Commission, it has no authority to cancel a liquor license. State v. Pierce 433

4. The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. By its terms this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, for example, each of which in itself might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in this case. County of Hall ex rel. Wisely v. McDermott 589

5. This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable grounds existed therefor. County of Hall ex rel. Wisely v. McDermott 589

6. The general rule is that a motion for a new trial must be filed within 10 days after the verdict is rendered. § 29-2103, R. R. S. 1943. An exception to the above rule is that in any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict under which he was sentenced was rendered, the District Court may set aside the sentence and grant a new trial if such motion is filed within a reasonable time after the discovery of the new evidence. § 29-2103, R. R. S. 1943. State v. Munson 814

7. New evidence tendered in support of a motion for a new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Munson 814

8. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Munson 814

Notice.

1. If the use of an easement has been for the requisite time, notorious, adverse, visible, and under a claim of right, the owner of the servient tenement is charged with knowledge of such use and his acquiescence in it is implied. Svoboda v. Johnson 57
2. Contractual promises with respect to the use of land, which under the rules of equity are specifically enforceable against the promisor, are effective against the successors in title or possession if the successor has actual or constructive notice of the promise. Under such circumstances, the promise subjects the land to an equitable servitude. Standard Meat Co. v. Feerhusen 325
3. Unless otherwise agreed, the issues to be determined in a contested hearing before the Nebraska Liquor Control Commission are limited to those stated in the notice of the hearing. Jetter v. Nebraska Liquor Control Commission 431
4. Notice of a purported interest claimed by a third party given by a debtor to a sheriff when he was proceeding to attach or to levy upon property is not notice to the creditor for whom the levy is made. Credit Bureau of Broken Bow, Inc. v. Moninger 679

Novation.

In order for a novation to occur, the existing liability must be completely extinguished and a new one substituted in its place. First West Side Bank v. Herzog 356

Offer and Acceptance.

An offer to confess judgment, and its acceptance pursuant to section 25-901, R. R. S. 1943, requires the entry of a judgment according to the offer and acceptance. Jaixen v. Turner 123

Offer of Proof.

Error cannot be predicated upon a ruling which excludes evidence where the substance of the evidence was neither made known to the judge by an offer of proof nor was apparent from the context within which questions were asked. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209

Parent and Child.

1. The integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed

by the Constitution of the United States. State v. Logan 204
2. The constitutional right of family integrity and the parental rights of custody and control create a duty of care and support. State v. Logan 204
3. An application for modification of a dissolution decree with respect to the care, custody, and control of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Kuhn v. Kuhn 363
4. The paramount consideration for the court in a custody hearing is the welfare of the children based upon their best interests, general health, welfare, and social behavior. Kuhn v. Kuhn 363
5. The discretion of the trial court with respect to changing the custody of minor children of a broken marriage will not ordinarily be disturbed unless there is a clear abuse of judicial discretion or it is clearly against the weight of the evidence. Kuhn v. Kuhn 363
6. It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion. Kuhn v. Kuhn 363
7. Section 43-209 (6), R. R. S. 1943, is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. State v. Souza-Spittler 503
8. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Souza-Spittler 503
9. In a case terminating parental rights, review in the Supreme Court is made de novo on the record. Where a correct judgment or order has been made, it will not be reversed for the reason that it may have been arrived at under an incorrect standard of proof. State v. Souza-Spittler 503
10. An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence. State v. Hamilton 537
11. Where review in this court is de novo and a correct judgment or order was made by the trial court, it will not be reversed because the trial court may have applied an incorrect standard of proof. State v. Hamilton 537
12. The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of

children. State v. Duran 546
13. Whether a parent has neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is a question of fact, and each case must be determined on its own facts. State v. Rice 732
14. Neglect of a parent to provide proper or necessary education for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is not proved by simply establishing that the compulsory school attendance law, section 79-201, R. R. S. 1943, has been violated. State v. Rice 732

Parties.

The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Knigge v. Knigge 421

Partition.

1. A confirmation of a partition sale disposes of all the interests of everyone in the suit to the purchaser from the moment the confirmation is pronounced by relation back to the date of the sale of the referee. Hendrickson v. Glaser 492
2. A deed executed pursuant to a judicial sale, absent mistake or fraud, conveys only that property that lies within its calls. It conveys no greater title than the order of sale on which it is based. Hendrickson v. Glaser 492

Partnerships.

1. Subject to any agreement between the partners, the rights and duties of the partners in relation to the partnership are governed by the provisions of the Uniform Partnership Act. Conklin v. Randolph 332
2. Under the Uniform Partnership Act, a partnership may be dissolved by the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking, without violating the agreement between them. Conklin v. Randolph 332
3. Subject to any agreement to the contrary between the partners, under the Uniform Partnership Act, in settling accounts between the partners after dissolution,

the liabilities of the partnership shall rank in order of payment as follows: (I) Those owing to creditors other than partners, (II) Those owing to partners other than for capital and profit, (III) Those owing to partners in respect of capital, and (IV) Those owing to partners in respect of profits. Conklin v. Randolph 332

4. Under the Uniform Partnership Act, and subject to any agreement between the partners, a partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance. Conklin v. Randolph 332
5. It is the general rule that a partner who carries on business in his own name for his own benefit and who uses partnership property therefor is chargeable on an accounting with reasonable rent for the use of the partnership property for the time during which he used it as his own, unless a contrary agreement existed between the partners. Conklin v. Randolph 332
6. Under the Uniform Partnership Act, and subject to any agreement between the partners, the partners must contribute toward the losses of the partnership, whether of capital or otherwise, sustained by the partnership according to their respective shares in the profits. Conklin v. Randolph 332

Pleadings.

1. A counterclaim must allege facts sufficient to support an independent cause of action in favor of the defendant and against the plaintiff and must be more than a mere defense to the plaintiff's cause of action or in reduction of plaintiff's damages. State ex rel. Douglas v. Ledwith 6
2. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Kirshenbaum v. Dettman-Figueroa 70
3. In the furtherance of justice the trial court may exercise its discretion in granting an amendment to the pleading at any stage of the proceedings. Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co. 156
4. A petition which fails to plead actionable facts is vulnerable to a general demurrer. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
5. A plaintiff in a strict tort liability case is not required to plead and prove he was unaware of the defect. Hancock v. Paccar, Inc. 468
6. An insurer's duty to defend an action against the insured must, in the first instance, be measured by the

allegations of the petition against the insured. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
7. A petition alleging a nuisance does not, by itself, allege an accident. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
8. Amendment of petition is not a matter of right but is addressed to the sound discretion of the trial court and its decision will not be disturbed unless there has been an abuse of discretion. Omaha Nat. Bank v. Koliopoulos 752
9. It is not reversible error to refuse a plaintiff to amend his petition to conform to the proofs, where, had such amendment been made, the undisputed evidence would not have justified a verdict in his favor. Omaha Nat. Bank v. Koliopoulos 752
10. A defendant seller who wishes to limit a plaintiff buyer's remedies and damages to those provided in section 2-613, U. C. C., ought to raise the issue by appropriate pleading. When the goods are in his possession when damaged, he has the burden of proving the goods were damages without his fault. Carlson v. Nelson 765

Pleas.

Acceptance or rejection of a plea of guilty to a lesser offense included in the offense charged rests in the discretion of the court. State v. Clermont 611

Police Officers and Sheriffs.

1. Even where probable cause sufficient to justify a formal arrest does not yet exist, in appropriate circumstances a police officer may informally detain a person in an appropriate manner in order to investigate possible criminal behavior or to maintain the status quo while obtaining more information, and the officer may conduct a limited protective search for concealed weapons when he has reason to believe the suspect is armed. State v. Anderson 186
2. The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved. State v. Anderson 186
3. In considering whether probable cause exists, the collective knowledge of the law enforcement agency for which the officer acts may be added to the personal knowledge of the officer making the search and seizure provided there has been some communication of knowledge to or direction to act from the department or offi-

cer having that knowledge to the officer making the search and seizure. State v. Anderson 186
4. Alleged nondisclosed police report examined and found to contain no conflicts in information regarding this case, as shown by the various witnesses. State v. Knaff 712

Police Power.

1. The Legislature may, in the exercise of its police power, prescribe reasonable regulations for the ownership of personal property, including the manner in which it is titled. Gates v. Howell 256
2. Sections 39-1320 to 39-1320.11, R. R. S. 1943, making it unlawful to erect or maintain certain advertising signs along the Interstate and other highways, constitute a reasonable and valid exercise of the police power which bears a substantial relation to the public health, safety, and general welfare, and those statutes are constitutional. State v. Mayhew Products Corp. 266
3. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
State ex rel. Douglas v. Thone 836
4. Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where they operate uniformly on all within a class which is reasonable. This is so even if a statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

Political Subdivisions.

1. The determination by a county board that an "unforeseen emergency" exists within the meaning of the Nebraska Budget Act will not be disturbed in the absence of a showing of abuse of discretion by the board. § 23-928, R. R. S. 1943. Meyer v. Colin 96

2. A county board, in exercising its power to approve the salaries or reduce budget requests, may not unreasonably interfere with the operation of the office of an elected official, but the exercise of those powers by the board shall not be disturbed in the absence of an abuse of discretion. § 23-1111, R. R. S. 1943; § 23-908, R. R. S. 1943. Meyer v. Colin 96
3. Authority of a county board to transfer funds from one budget account to another in case of "unforeseen emergencies" does not relieve the county board of duty to make accurate estimates of the anticipated expenditures of each department. Meyer v. Colin 96
4. Under section 23-2406, R. R. S. 1943, of the Political Subdivisions Tort Claims Act, the findings of the District Court under the act will not be disturbed on appeal unless they are clearly wrong. Miles v. School Dist. No. 138 105

Presentence Reports.

Section 29-2261 (1), R. R. S. 1943, authorizes but does not require a presentence investigation in the case of a conviction of a misdemeanor. State v. Cowan 708

Prisoners.

1. A criminal statute is not constitutionally deficient merely because it applies only to inmates of penal institutions. State v. Maez 129
2. A criminal statute applying only to inmates of prisons is not unconstitutional merely because the inmate might have been prosecuted under another statute applicable to everyone and prohibiting the same acts. State v. Maez 129
3. A city of the metropolitan class is liable for the emergency medical treatment required by a criminal suspect in police custody who is wounded by the police in the process of apprehension. Lutheran Medical Center v. City of Omaha 292
4. Intentional indifference to the medical needs of a prisoner is proscribed by the Eighth Amendment to the United States Constitution as being cruel and unusual punishment. Lutheran Medical Center v. City of Omaha 292
5. An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. Addison v. Parratt 656

Probable Cause.

1. The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved. State v. Anderson 186
2. Probable cause justifying a search and/or an arrest exists where the facts and circumstances within the police officer's knowledge and those of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Anderson 186
3. In considering whether probable cause exists, the collective knowledge of the law enforcement agency for which the officer acts may be added to the personal knowledge of the officer making the search and seizure provided there has been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure. State v. Anderson 186

Probation.

1. Section 29-2262, R. R. S. 1943, authorizes confinement in the county jail for a period not to exceed 90 days as a condition of probation in cases of conviction of a misdemeanor as well as of a felony. State v. Behrens 785
2. A statute providing that as a condition to a sentence of probation the court may require a person convicted of assault to make reparation for the loss or damage caused by the crime empowers the trial court to impose a condition requiring a reasonable payment to the victim for "pain and suffering," in addition to medical expenses and lost wages. There is no abuse of discretion in imposing such condition. State v. Behrens 785

Proof.

1. The requirement in section 87-303.05 (1), R. R. S. 1943, that the Attorney General must have cause to believe that deceptive trade practices exist or have existed before instituting an action is not an essential element of the action which must be proved at trial. State ex rel. Douglas v. Ledwith 6
2. A motion for directed verdict will be denied unless there is a total failure of competent proof in a criminal case to support a material allegation in the information or where the testimony adduced is of so weak or doubtful character that a conviction based thereon could not

be sustained. State v. Bennett 28
3. Under section 60-430.07, R. S. Supp., 1978, an attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required. State v. Clifford 41
4. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Souza-Spittler 503
5. In a case terminating parental rights, review in the Supreme Court is made de novo on the record. Where a correct judgment or order has been made, it will not be reversed for the reason that it may have been arrived at under an incorrect standard of proof. State v. Souza-Spittler 503
6. Where review in this court is de novo and a correct judgment or order was made by the trial court, it will not be reversed because the trial court may have applied an incorrect standard of proof. State v. Hamilton 537
7. Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. State v. Klutts 616
8. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. Mere presence at a place where a narcotic drug is found is not sufficient. State v. Klutts 616
9. Where, in a criminal case, there is a total failure of competent proof to support a material allegation in the information or where the testimony added is of so weak or doubtful character that a conviction based thereon cannot be sustained, a motion for directed verdict should be granted. State v. Klutts 616
10. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license under the implied consent statute, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. Wohlgemuth v Pearson 687
11. In a proceeding for the disbarment of an attorney-at-law the presumption of innocence applies, and the charge made against him must be established by a preponderance of the evidence. State ex rel. Nebraska

State Bar Assn. v. Erickson 692
12. A plaintiff buyer, under a contract for the sale of identified goods, suing for damages for delivery, who alleges that the goods were damaged while yet in the possession of the seller, has satisfied his burden of demonstrating the nonapplicability of section 2-613, U. C. C., insofar as the condition of absence of fault of the parties is concerned, if he proves the goods were not destroyed or damaged by his fault. Plaintiff buyer need not adduce evidence to show defendant seller was at fault. Carlson v. Nelson 765
13. A defendant seller who wishes to limit a plaintiff buyer's remedies and damages to those provided in section 2-613, U. C. C., ought to raise the issue by appropriate pleading. When the goods are in his possession when damaged he has the burden of proving the goods were damaged without his fault. Carlson v. Nelson 765
14. Mere selectivity in enforcement creates no constitutional defect. Before a claim of unlawful discrimination in the enforcement of criminal laws can be invoked, the defendant must allege and prove a deliberate selective process of enforcement based upon race. State v. Bird Head 807
15. To support a defense of selective or discriminatory prosecution, a defendant bears a heavy burden of establishing at least prima facie (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. State v. Bird Head 807
16. Once a prima facie case is made, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedure have produced the monochromatic result. State v. Bird Head 807
17. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Empfield v. Ainsworth Irr. Dist. 827

Property.

1. The general rule is that the fixing of alimony and distribution of property rest in the sound discretion of the District Court and in the absence of abuse of discretion will not be disturbed on appeal. Ragains v. Ragains .. 50
2. The rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances of the particular case. Ragains v. Ragains 50
3. The division of property and the issue of alimony may be considered together and they are to be determined upon the consideration of all the facts and circumstances. Ragains v. Ragains 50
4. Although this court would generally prefer that there be a complete division of the property in dissolution actions, when the proper situation presents itself the trial court does not abuse its discretion in having the parties own an undivided one-half interest in the property. Ragains v. Ragains 50
5. The award of alimony and the division of property are determined by the circumstances of the parties at the time of the dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children. No case has said that the granting, denial, or reduction of alimony nor the division of property are to be considered punitive, and no such provision should be engrafted on the law of this state. Ragains v. Ragains 50
6. The Legislature may, in the exercise of its police power, prescribe reasonable regulations for the ownership of personal property, including the manner in which it is titled. Gates v. Howell 256
7. Concerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. Thomas v. Weller 298
8. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Knigge v. Knigge 421
   Rinderknecht v. Rinderknecht 648
9. Generally, an award from one-third to one-half of the

property involved in a marriage of long duration, and where the parties were the parents of all children involved, does not constitute an abuse of discretion. Knigge v. Knigge 421

10. The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Knigge v. Knigge 421

11. Where one by mistake as to the true boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession. Hendrickson v. Glaser 492

12. It is established law of this state that when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Hendrickson v. Glaser 492

13. After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. Hendrickson v. Glaser 492

14. A confirmation of a partition sale disposes of all the interests of everyone in the suit to the purchaser from the moment the confirmation is pronounced by relation back to the date of the sale of the referee. Hendrickson v. Glaser 492

15. A deed executed pursuant to a judicial sale, absent mistake or fraud, conveys only that property that lies within its calls. It conveys no greater title than the order of sale on which it is based. Hendrickson v. Glaser 492

16. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Burlington Northern, Inc. v. City of McCook 543

17. Special assessments are charges imposed by law on land to defray the expenses of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general.

Burlington Northern, Inc. v. City of McCook 543
18. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period. Gartner v. Wilson Concrete Co. 557
19. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Rinderknecht v. Rinderknecht 648
Falcone v. Falcone 800
20. Where a public employee has a property interest in continued employment he cannot be deprived of that interest without a due process hearing. However, whether or not such a property interest exists is determined by state law. Weeks v. State Board of Education 659
21. A lien on personal property is acquired at the time it is seized in execution. Credit Bureau of Broken Bow, Inc. v. Moninger 679
22. A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that he in express terms asserts his dominion over it by virtue of such writ. Credit Bureau of Broken Bow, Inc. v. Moninger 679
23. Notice of a purported interest claimed by a third party given by a debtor to a sheriff when he was proceeding to attach or to levy upon property is not notice to the creditor for whom the levy is made. Credit Bureau of Broken Bow, Inc. v. Moninger 679
24. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Pokorski v. McAdams 725
25. A claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description. Pokorski v. McAdams 725
26. Expectations of income may be considered in an allowance of alimony but are not properly considered in the division of property. Andersen v. Andersen 796

27. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Falcone v. Falcone 800
28. Under section 42-365, R. R. S. 1943, property distributions which are punitive in nature may be subject to modification. Falcone v. Falcone 800

Public Corporations.

1. The Rural Water District Act, sections 46-1001 to 46-1026, R. R. S. 1943, contains no specific requirement that such district must first obtain a permit to construct, install, maintain, and operate wells and other facilities for the storage, transportation, or utilization of water, which are necessary to carry out the purposes of its organization. McDowell v. Rural Water Dist. No. 2 401
2. A rural water district is not a municipal corporation within the purview of the City, Village and Municipal Corporation Ground Water Permit Act. McDowell v. Rural Water Dist. No. 2 401

Public Funds.

What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. State ex rel. Douglas v. Thone 836

Public Lands.

1. The Board of Educational Lands and Funds, as a trustee, acts in a representative capacity and persons dealing with it are bound to be cognizant of its powers. Pettijohn v. State 271

2. The value to the land means that amount of money that the improvement enhances, contributes, increases, or adds to the value of the land. Pettijohn v. State 271
3. In arriving at the value to the land of an improvement, consideration should be given to its functional use, location on the land, utility, obsolescence, overbuilding or want of use, state of repair, cost to the lessee less depreciation, adaptability, and all other facts and circumstances shown by the evidence that are not speculative that relate to any purpose for which the improvement is reasonably useful to the unimproved land at the time of determination, or which will become so useful in the near future. Pettijohn v. State 271
4. The measure of lessee's compensable interest in the improvements should be determined as follows: First, determine the fair market value of the school land with only the improvements whose values are disputed. Then, determine the fair market value of the school land without any improvements owned by the lessee. The difference (remainder) between these two values is the value to the land of the lessee's compensable interest in the disputed improvements. Insofar as this rule is contrary to State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769, that case is overruled. Pettijohn v. State 271
5. In proceedings under section 72-240.02 et seq., R. R. S. 1943, the trial court is without authority to fix appraiser fees and attorney's fees to be taxed against the Board of Educational Lands and Funds. Pettijohn v. State .. 271

Public Officers and Employees.

1. The determination by a county board that an "unforeseen emergency" exists within the meaning of the Nebraska Budget Act will not be disturbed in the absence of a showing of abuse of discretion by the board. § 23-928, R. R. S. 1943. Meyer v. Colin 96
2. A county board, in exercising its power to approve the salaries or reduce budget requests, may not unreasonably interfere with the operation of the office of an elected official, but the exercise of those powers by the board shall not be disturbed in the absence of an abuse of discretion. § 23-1111, R. R. S. 1943; § 23-908, R. R. S. 1943. Meyer v. Colin 96
3. Authority of a county board to transfer funds from one budget account to another in case of "unforeseen emergencies" does not relieve the county board of duty to make accurate estimates of the anticipated expenditures of each department. Meyer v. Colin 96

Public Policy.

1. As a general rule, appellate courts do not sit to give opinions in cases or controversies which have become moot. An appeal or error proceeding will be dismissed where no actual controversy still exists between the parties at the time of the hearing. This general rule, however, does not apply to appeals involving matters of public interest. Meyer v. Colin 96
2. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
3. It is the province of the Legislature to determine matters of policy and appropriate the public funds. If there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is essentially held that the matter is for the Legislature. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
4. The rule that the benefits to the public must be direct and not remote and that the past course or usage of government is to be resorted to for guidance must in each case be considered in the light of the principle that the Legislature has a very wide discretion to determine what constitutes a public purpose, and that courts will not interfere unless the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
5. A law may serve the public interest although it benefits certain individuals or classes more than others. State ex rel. Douglas v. Nebraska Mortgage Finance Fund .. 445
6. 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 discre-

tion. 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. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

Public Purpose.

1. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. State ex rel. Douglas v. Thone 836
2. What is a public purpose is primarily for the Legislature to determine. A public purpose has for its objective the promotion of the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants. No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. State ex rel. Douglas v. Thone 836

Public Utilities.

1. Natural gas is a dangerous commodity and a distributor of natural gas is required to exercise a high degree of care and diligence to prevent injury and damage to the public from the escape of gas from its lines. A distributor of natural gas is required to exercise a degree of care commensurate to the danger involved in the transaction of its business. Hammond v. The Nebraska Nat. Gas Co. 80
2. A distributor of natural gas is required to have employees efficient in their line of work and to install pipes and fittings of good material and workmanship and maintain them in a reasonably safe condition. Hammond v. The Nebraska Nat. Gas Co. 80
3. The duty to use due care which a distributor of natural gas owes to the public is a continuing one and one which can not be delegated to another. Hammond v. The Nebraska Nat. Gas Co. 80
4. A gas pipeline must be designed and installed so that

each joint will sustain the longitudinal pull-out or thrust forces caused by contraction or expansion of the piping or by anticipated external or internal loading. In plastic pipe each joint must be at least as strong as the pipe being joined. Hammond v. The Nebraska Nat. Gas Co. 80

Records.

1. Where any fact issue is presented on appeal, in the absence of a bill of exceptions it is presumed the trial court's finding is correct. State ex rel. Douglas v. Ledwith 6
2. Any assignment of error requiring an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. Danielson v. Danielson 776
3. Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions. State v. Behrens 785

Reformation.

1. Reformation of a deed for mistake will be granted where the mistake is mutual to both parties. Cunningham v. Covalt 512
2. Evidence of such mutual mistake must be clear, convincing, and satisfactory. Cunningham v. Covalt 512
3. The fact that one party denies such mistake does not preclude reformation. Cunningham v. Covalt 512

Rent.

It is the general rule that a partner who carries on business in his own name for his own benefit and who uses partnership property therefor is chargeable on an accounting with reasonable rent for the use of the partnership property for the time during which he used it as his own, unless a contrary agreement existed between the partners. Conklin v. Randolph 332

Reports.

Alleged nondisclosed police report examined and found to contain no conflicts in information regarding this case, as shown by the various witnesses. State v. Knaff 712

Res Judicata.

1. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of

its own proceedings and judgment in the prior action. Peterson v. The Nebraska Nat. Gas Co. 136
2. It is a fundamental principle of jurisprudence that material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action. Thomas v. Weller 298
3. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. Thomas v. Weller 298

Rescission.

The rescission of a contract by the parties as much requires the meeting of the minds as does the making of the contract. Town & Country Realty of Kearney, Inc. v. Glidden 820

Restitution.

Placing a party found to have been engaging in deceptive trace practices under the supervision of the Attorney General for a fixed period of time and retaining jurisdiction to order restitution should future violations occur is within the power granted to the court by section 87-303.05 (1), R. R. S. 1943. State ex rel. Douglas v. Ledwith 6

Revenue.

One purpose of the constitutional limitation on state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue received in future fiscal periods. Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision. State ex rel. Douglas v. Thone 836

Revocation.

1. Under section 2-608, U. C. C., the buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Countryside Mobile Homes of Lincoln, Inc.

v. Schade 209
2. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
3. Though an agency to sell real estate may be revoked at any time before the sale, such revocation must be in good faith, and will not obtain to appropriate the broker's services without compensation. Town & Country Realty of Kearney, Inc. v. Glidden 820

Sales.

1. The sale of growing sod is a sale of goods under section 2-107, U. C. C. Jessen v. Ashland Recreation Assn. 19
2. Except as otherwise provided in section 2-201, U. C. C., a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under section 2-201 (1), U. C. C., beyond the quantity of goods shown in such writing. Jessen v. Ashland Recreation Assn. 19
3. Although in many instances lost profits from a new business are too speculative and conjectural to permit recovery of damages, where the evidence is available to furnish a reasonable certain factual basis for computation of probable losses, recovery cannot be denied even though a new business venture is involved. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248

Sanitary and Improvement Districts.

In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. Metropolitan Life Ins. Co. v. SID No. 222 350

Schools and School Districts.

1. The clear intent of the tenured teacher act is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) Discharge for cause; and (2) reduction in teaching force. Moser v. Board of Education 561
2. The standard of review in an error proceeding from an

order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached. Moser v. Board of Education 561

3. If a tenured teacher and a probationary teacher are subject to termination due to a surplus of staff, the tenured teacher must be retained so long as he has the required certification in the area. Moser v. Board of Education 561

4. Neglect of a parent to provide proper or necessary education for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is not proved by simply establishing that the compulsory school attendance law, section 79-201, R. R. S. 1943, has been violated. State v. Rice 732

Searches and Seizures.

1. Even where probable cause sufficient to justify a formal arrest does not yet exist, in appropriate circumstances a police officer may informally detain a person in an appropriate manner in order to investigate possible criminal behavior or to maintain the status quo while obtaining more information, and the officer may conduct a limited protective search for concealed weapons when he has reason to believe the suspect is armed. State v. Anderson 186

2. Probable cause justifying a search and/or an arrest exists where the facts and circumstances within the police officer's knowledge and those of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Anderson 186

3. In considering whether probable cause exists, the collective knowledge of the law enforcement agency for which the officer acts may be added to the personal knowledge of the officer making the search and seizure provided there has been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure. State v. Anderson 186

Security Interest.

An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest and before it is perfected. Credit Bureau of Broken Bow, Inc. v. Moninger 679

Securities.

A delivery of a stock certificate without endorsement may be sufficient to effect a transfer between the parties. Omaha Nat. Bank v. Koliopoulos 752

Self-Defense.

There is nothing in the justification for the use of force act which appears designed to change the ancient common law rule that, in order to justify the defense of self-defense, the belief that the use of force is necessary must be reasonable and in good faith. State v. Cowan 708

Sentences.

Section 29-2262, R. R. S. 1943, authorizes confinement in the county jail for a period not to exceed 90 days as a condition of probation in cases of conviction of a misdemeanor as well as of a felony. State v. Behrens 785

Special Assessments.

1. In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. Metropolitan Life Ins. Co. v. SID No. 222 ... 350
2. A property owner may collaterally attack a special assessment only for fraud, actual or constructive, a fundamental defect, or a want of jurisdiction. Burlington Northern, Inc. v. City of McCook 543
3. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Burlington Northern, Inc. v. City of McCook 543
4. Special assessments are charges imposed by law on land to defray the expenses of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general. Burlington Northern, Inc. v. City of McCook 543
5. Where the physical facts are such that the property was not and could not have benefited to any extent approaching the amount of the assessment, the levy of assessment is then arbitrary and constructively fraudulent and therefore void. Burlington Northern, Inc. v. City of McCook 543

States Rights.

1. When Congress has unmistakably entered a field and has enacted regulations to govern a field, state laws regulating that aspect of commerce must fall. This result is required whether Congress specifically directs

such a result in the legislation or such a result is required by reason of the purpose of the act. ATS Mobile Telephone, Inc. v. General Communications Co., Inc. 141
2. It is well-settled law that all federal regulations done in pursuance of one of Congress' delegated powers are capable of preempting any state legislation or regulation on the same subject. ATS Mobile Telephone, Inc. v. General Communications Co., Inc. 141

Statutes.

1. Section 87-303.05 (1), R. R. S. 1943, authorizes the Attorney General to institute proceedings to prevent deceptive trade practices as defined in section 87-302 or 87-303.01, R. R. S. 1943. State ex rel. Douglas v. Ledwith 6
2. Placing a party found to have been engaging in deceptive trade practices under the supervision of the Attorney General for a fixed period of time and retaining jurisdiction to order restitution should future violations occur is within the power granted to the court by section 87-303.05 (1), R. R. S. 1943. State ex rel. Douglas v. Ledwith 6
3. Proceedings brought by the Attorney General under section 87-303.05 (1), R. R. S. 1943, are civil in nature. State ex rel. Douglas v. Ledwith 6
4. The requirement in section 87-303.05 (1), R. R. S. 1943, that the Attorney General must have cause to believe that deceptive trade practices exist or have existed before instituting an action is not an essential element of the action which must be proved at trial. State ex rel. Douglas v. Ledwith 6
5. A right of survivorship in a joint account arising from the express terms of the account or under section 30-2704, R. R. S. 1943, cannot be changed by will. Gasper v. Moss 24
6. An appeal from proceedings under section 48-601 et seq., R. R. S. 1943, the Employment Security Law, must be considered by this court de novo. Glionna v. Chizek 37
7. If an employee accepts employment in good faith and through no fault or deficiency on his or her part the workload becomes an increasingly unreasonable burden so as to affect the health or sense of well-being of the employee, voluntary termination does have some justifiably reasonable connection with or relation to conditions of employment and may be deemed for "good cause" under section 48-628 (a), R. S. Supp., 1976. Glionna v. Chizek 37
8. Under section 60-430.07, R. S. Supp., 1978, an attempt to

arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required. State v. Clifford 41

9. Under section 25-1919, R. R. S. 1943, and Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1977, consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. Cockle v. Cockle 88

10. The determination by a county board that an "unforeseen emergency" exists within the meaning of the Nebraska Budget Act will not be disturbed in the absence of a showing of abuse of discretion by the board. § 23-928, R. R. S. 1943. Meyer v. Colin 96

11. A county board, in exercising its power to approve the salaries or reduce budget requests, may not unreasonably interfere with the operation of the office of an elected official, but the exercise of those powers by the board shall not be disturbed in the absence of an abuse of discretion. § 23-1111, R. R. S. 1943; § 23-908, R. R. S. 1943. Meyer v. Colin 96

12. An offer to confess judgment, and its acceptance pursuant to section 25-901, R. R. S. 1943, requires the entry of a judgment according to the offer and acceptance. Jaixen v. Turner 123

13. A statutory construction which leads to absurd, unjust, or unconscionable results will be avoided. A literal meaning which would have the effect of defeating the legislative intent will not be placed upon a statute when a sensible construction which will effectuate the object of the legislation is possible. State v. Maez 129

14. Section 28-743, R. R. S. 1943, applies only to situations where either the means used to compel or induce the performance of an act or where the end to be accomplished by such means, the performance of the act itself, are of a nature which the Legislature might prohibit under a reasonable exercise of its police power. State v. Maez 129

15. Criminal prosecution cannot be grounded on nebulous definitions of crime. All crimes are statutory in this state. The validity of a statute purporting to define a crime cannot be based on an indefinite, uncertain, and obscure basis of validity. PPG Industries Canada Ltd. v. Kreuscher 220

16. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. PPG Industries Canada Ltd. v. Kreuscher 220

17. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of lawmakers. PPG Industries Canada Ltd. v. Kreuscher 220
18. The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. PPG Industries Canada Ltd. v. Kreuscher 220
19. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. PPG Industries Canada Ltd. v. Kreuscher 220
20. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. PPG Industries Canada Ltd. v. Kreuscher 220
21. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. PPG Industries Canada Ltd. v. Kreuscher 220
22. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. PPG Industries Canada Ltd. v. Kreuscher 220
23. Section 39-1320 to 39-1320.11, R. R. S. 1943, making it unlawful to erect or maintain certain advertising signs along the Interstate and other highways, constitute a reasonable and valid exercise of the police power which bears a substantial relation to the public health, safety, and general welfare, and those statutes are constitutional. State v. Mayhew Products Corp. 266
24. In proceedings under section 72-240.02 et seq., R. R. S. 1943, the trial court is without authority to fix appraiser fees and attorney's fees to be taxed against the Board of Educational Lands and Funds. Pettijohn v. State .. 271
25. The Board of Regents of the University of Nebraska is a "state agency" within the meaning of section 81-8,209 et seq., R. R. S. 1943, and tort claims against it must be brought under the authority of the Tort Claims Act. Catania v. The University of Nebraska 304
26. The requirements of section 81-8,214, R. R. S. 1943, prescribe the venue for suits brought under the state Tort Claims Act without modification or liberalization occasioned by the general venue statutes. Catania v. The

University of Nebraska 304
27. Statutes in derogation of sovereignty should be strictly construed in favor of the state, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed. Catania v. The University of Nebraska 304
28. Where the statutes provide an exclusive remedy against the state and a particular forum for judicial trial, these requirements must be followed. Catania v. The University of Nebraska 304
29. A judgment which is not void may only be set aside after the term at which it was entered as authorized in section 25-2001, R. R. S. 1943. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
30. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Nalley v. Consolidated Freightways, Inc. 370
31. The word "abuse" in section 28-729, R. R. S. 1943, may include verbal injury as well as physical. State v. Dreifurst 378
32. Verbal abuse under section 28-729, R. R. S. 1943, includes only "fighting words," namely, words which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. State v. Dreifurst 378
33. Under section 79-2644, R. S. Supp., 1978, the board of governors of a technical community college is charged with the power, duty, and responsibility of establishing curriculum and employing members of the faculty. Cross v. Board of Governors 383
34. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award. § 48-185, R. R. S. 1943. Riley v. City of Lincoln 386
35. The Rural Water District Act, sections 46-1001 to 46-1026, R. R. S. 1943, contains no specific requirement

that such district must first obtain a permit to construct, install, maintain, and operate wells and other facilities for the storage, transportation, or utilization of water, which are necessary to carry out the purposes of its organization. McDowell v. Rural Water Dist. No. 2 401

36. In order for the enhancement provisions of section 29-2221, R. R. S. 1943, to apply to an offense, it makes no difference whether the two prior sentences were to be served consecutively or concurrently, nor is it required that there be a time interval between conviction and commitment for the first offense and commission of the second offense. State v. Pierce 433

37. An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the Legislature has a basis in reason, and is not purely arbitrary. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

38. If a law affects equally all persons who come within its operation it cannot be local or special within the meaning of the Constitution of the State of Nebraska. A law is not local or special in a constitutional sense that operates in the same manner upon all persons in like circumstances. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

39. General laws are those which relate to or bind all within the jurisdiction of the lawmaking power, and if a law is general and operates uniformly and equally upon all brought within the relation and circumstance for which it provides, it is not a local or special law in the constitutional sense. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

40. A law may serve the public interest although it benefits certain individuals or classes more than others. State ex rel. Douglas v. Nebraska Mortgage Finance Fund .. 445

41. A statute may not operate retroactively where it would impair the obligation of a contract or interfere with a vested right. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

42. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445

43. Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where they operate uniformly on all within a class which is reasonable. This is so even if a statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest. State ex rel. Douglas v. Nebraska Mortgage Finance Fund 445
44. Section 43-209 (6), R. R. S. 1943, is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness. State v. Souza-Spittler 503
45. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Souza-Spittler 503
46. An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence. State v. Hamilton 537
47. The court may in any case, if it finds it necessary, order a person required to make payment under sections 42-347 to 42-379, R. R. S. 1943, to post sufficient security with the clerk to insure payment. Upon failure to comply with the order, the court may appoint a receiver to take charge of the debtor's property to insure payment. Payments included under this section are payments for child support and alimony. § 42-371 (5), R. R. S. 1943. Casselman v. Casselman 565
48. Changes made by the Revisor of Statutes in preparing supplements and reissued or replacement volumes of the Revised Statutes, under the provisions of section 49-705, R. R. S. 1943, cannot change the substantive meaning of any statute as enacted by the Legislature. State v. Karel 573
49. A violation of section 39-669.07, R. R. S. 1943, is either a misdemeanor or a felony and is not a traffic infraction within the meaning of section 39-602(106), R. R. S. 1943. State v. Karel 573
50. A defendant charged under section 39-669.07, R. R. S. 1943, is entitled to a jury trial under the provisions of section 24-536, R. R. S. 1943. State v. Karel 573
51. Administrative rules and regulations as defined by section 84-901 (2), R. R. S. 1943, of an administrative agency are not effective until promulgated, approved, and filed as required by statute. Weeks v. State Board of Education 659
52. Contested case means a proceeding before an agency in which the legal rights, duties, or privileges of specific

parties are required by law or constitutional right to be determined after an agency hearing. § 84-901 (3), R. R. S. 1943. Weeks v. State Board of Education 659
53. The availability of an appeal under the provisions of section 84-917 (1), R. R. S. 1943, does not prevent resort to other means of review, redress, or relief provided by law. Weeks v. State Board of Education 659
54. There is nothing in the justification for the use of force act which appears designed to change the ancient common law rule that, in order to justify the defense of self-defense, the belief that the use of force is necessary must be reasonable and in good faith. State v. Cowan 708
55. Section 29-2261 (1), R. R. S. 1943, authorizes but does not require a presentence investigation in the case of a conviction of a misdemeanor. State v. Cowan 708
56. Whether a parent has neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is a question of fact, and each case must be determined on its own facts. State v. Rice 732
57. Neglect of a parent to provide proper or necessary education for the health, morals, or well-being of a minor child under the provisions of section 43-202 (2) (c), R. R. S. 1943, is not proved by simply establishing that the compulsory school attendance law, section 79-201, R. R. S. 1943, has been violated. State v. Rice 732
58. Existing statutes and laws with reference to which a contract is made (assuming there are no valid contractual provisions providing otherwise) enter into and become part thereof. Carlson v. Nelson 765
59. The filing of a financial statement under the provisions of section 42-359, R. R. S. 1943, is waived if the parties proceed without objection to hearing or trial without such filing. Danielson v. Danielson 776
60. Section 29-2262, R. R. S. 1943, authorizes confinement in the county jail for a period not to exceed 90 days as a condition of probation in cases of conviction of a misdemeanor as well as of a felony. State v. Behrens 785
61. A statute providing that as a condition to a sentence of probation the court may require a person convicted of assault to make reparation for the loss or damage caused by the crime empowers the trial court to impose a condition requiring a reasonable payment to the victim for "pain and suffering," in addition to medical expenses and lost wages. There is no abuse of discretion in imposing such condition. State v. Behrens 785
62. Under section 42-365, R. R. S. 1943, property distribu-

tions which are punitive in nature may be subject to modification. Falcone v. Falcone 800

63. The general rule is that a motion for a new trial must be filed within 10 days after the verdict is rendered. § 29-2103, R. R. S. 1943. An exception to the above rule is that in any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict under which he was sentenced was rendered, the District Court may set aside the sentence and grant a new trial if such motion is filed within a reasonable time after the discovery of the new evidence. § 29-2103, R. R. S. 1943. State v. Munson 814

64. The constitutional validity of an act of the Legislature is to be tested and determined by what the statute authorizes under and by virtue of its provisions. State ex rel. Douglas v. Thone 836

65. Section 8 of L.B. 571, Laws 1979, purports to authorize the state to guarantee, in unlimited amount, bonds issued by municipalities under section 9 of the act for the purpose of constructing alcohol plants and facilities. Even though the obligation of the state on such bonds may be secondary or contingent, the obligation is a debt within the meaning of Article XIII, section 1, of the Nebraska Constitution. State ex rel. Douglas v. Thone 836

66. A severance clause in a legislative act creates a presumption that, eliminating the invalid parts, the Legislature would have been satisfied with what remains. Such a clause, however, is merely an aid to interpretation and not an inexorable command. State ex rel. Douglas v. Thone 836

67. When the invalid portions of a statute are so interwoven with the rest of the act so that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the entire act ordinarily fails. State ex rel. Douglas v. Thone 836

Stipulations.

In the absence of fraud or mistake, an agreement or stipulation by the parties that the judgment of a third person shall be relied upon in determining a fact is binding upon the parties. Knigge v. Knigge 421

Streets and Alleys.

1. In order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. Metropolitan Life Ins. Co. v. SID No. 222 ... 350
2. A mortgagor cannot, without the consent of the mortgagee, make a dedication of the mortgaged premises so as to adversely affect the interest of the mortgagee. Metropolitan Life Ins. Co. v. SID No. 222 350

Strict Liability.

1. A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured. Hancock v. Paccar, Inc. 468
2. In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach of the contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety. Hancock v. Paccar, Inc. 468
3. A manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect. Hancock v. Paccar, Inc. 468
4. One who is injured as a result of a mechanical defect in

a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance, the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks. Hancock v. Paccar, Inc. 468

5. In a strict liability case "unreasonably dangerous" means that the product had a propensity for causing physicial harm beyond that which could be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. Hancock v. Paccar, Inc. 468
6. A plaintiff in a strict tort liability case is not required to plead and prove he was unaware of the defect. Hancock v. Paccar, Inc. 468
7. In a strict tort liability case it is not incumbent upon a plaintiff to discover a defect. Hancock v. Paccar, Inc. 468

Subrogation.

1. Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
2. The right of an insurance company to recover against a wrongdoer, whose negligence has subjected the insurance company to a liability, is traced through the insured; that is, no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414

Summary Judgments.

1. Before a motion for summary judgment can be granted, two requirements must be met: (1) There must be no genuine issue as to any material fact; and (2) the

moving party must be entitled to judgment as a matter of law. Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276 316
2. Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law. Even where there are no conflicting evidentiary facts, a summary judgment is not appropriate if the ultimate inferences to be drawn from those facts are not clear. In considering such a motion, the trial judge must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. McDowell v. Rural Water Dist. No. 2 401
3. Where there exists no genuine issue of a material fact and a litigant is entitled to judgment as a matter of law, it is error for the trial court to overrule the litigant's motion for summary judgment. Watters v. Foreman 670
4. The question presented on a motion for summary judgment is not whether the evidence was sufficient to support a finding by the fact finder in favor of the moving party, but whether there exists no genuine issue as to any material fact so that under those facts the moving party was entitled to a judgment as a matter of law. Blue v. Champion International Corp. 781
5. Where reasonable minds may differ as to whether an inference supporting the ultimate conclusion sought can be drawn, summary judgment should not be granted. Blue v. Champion International Corp. 781

Supreme Court.

1. It is not within the province of the Supreme Court to determine moot questions. State ex rel. Douglas v. Ledwith 6
2. On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Gasper v. Moss 24
3. In a case terminating parental rights, review in the Supreme Court is made de novo on the record. Where a correct judgment or order has been made, it will not be reversed for the reason that it may have been arrived at under an incorrect standard of proof. State v.

Souza-Spittler 503

Taxation.

1. The Legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, and the constitutional rule of uniformity requires that all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law. Gates v. Howell 256
2. Taxes on all tangible personal property are to be levied by valuation uniformly and proportionately except as otherwise specifically exempted. Gates v. Howell 256
3. The establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Article VIII, section 1, of the Constitution of the State of Nebraska. Gates v. Howell 256
4. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. State ex rel. Douglas v. Thone 836

Tenure.

1. The clear intent of the tenured teacher act is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) Discharge for cause; and (2) reduction in teaching force. Moser v. Board of Education 561
2. If a tenured teacher and a probationary teacher are subject to termination due to a surplus of staff, the tenured teacher must be retained so long as he has the required certification in the area. Moser v. Board of Education 561

Theft.

Whether, at the time of taking an automobile, the defendant had the intent of permanently depriving the owner of its use or whether he intended to return it is a question of fact. State v. King 47

Time.

1. An injunction is a remedy designed to control future behavior, and whether that behavior is occurring at the

time of the decree granting the injunction is generally irrelevant to the propriety of its issuance. State ex rel. Douglas v. Ledwith 6
2. The use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and continuous for the full prescriptive period. Svoboda v. Johnson 57
3. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. Svoboda v. Johnson 57
4. Under the law of adverse possession, the intent with which the claimant first took possession of a disputed tract is not ordinarily of too much significance. When the possession of the land of another, no matter what the intention may have been in making the first entry, amounts to that which the law deems as adverse to the true owner and such possession continues for the statutory period of limitations of 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary. Svoboda v. Johnson 57
5. If the use of an easement has been for the requisite time, notorious, adverse, visible, and under a claim of right, the owner of the servient tenement is charged with knowledge of such use and his acquiescence in it is implied. Svoboda v. Johnson 57
6. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
7. If the buyer has before rejection taken physical possession of goods, the buyer is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
8. It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of

discretion. Kuhn v. Kuhn 363
9. In order for the enhancement provisions of section 29-2221, R. R. S. 1943, to apply to an offense, it makes no difference whether the two prior sentences were to be served consecutively or concurrently, nor is it required that there be a time interval between conviction and commitment for the first offense and commission of the second offense. State v. Pierce 433
10. Reasonable value of the use of a motor vehicle injured through the negligence of another party is that amount which does not exceed either the fair rental value of a vehicle of like or similar nature and performance for a reasonable length of time, or the amount actually paid, whichever is the least, and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499
11. Fair rental value as used in this instance is a question of fact to be determined at the time of trial from evidence relating to prevailing community or area standards. Husebo v. Ambrosia, Ltd. 499
12. Reasonable length of time as used in this instance presumes ordinary diligence on the part of the injured party and those performing the repair work, and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499
13. The general rule is that a motion for a new trial must be filed within 10 days after the verdict is rendered. § 29-2103, R. R. S. 1943. An exception to the above rule is that in any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict under which he was sentenced was rendered, the District Court may set aside the sentence and grant a new trial if such motion is filed within a reasonable time after the discovery of the new evidence. § 29-2103, R. R. S. 1943. State v. Munson 814

Torts.

1. Under section 23-2406, R. R. S. 1943, of the Political Subdivisions Tort Claims Act, the findings of the District Court under the act will not be disturbed on appeal unless they are clearly wrong. Miles v. School Dist. No. 138 105
2. The Board of Regents of the University of Nebraska is a "state agency" within the meaning of section 81-8,209

et seq., R. R. S. 1943, and tort claims against it must be brought under the authority of the Tort Claims Act. Catania v. The University of Nebraska 304
3. The requirements of section 81-8,214, R. R. S. 1943, prescribe the venue for suits brought under the state Tort Claims Act without modification or liberalization occasioned by the general venue statutes. Catania v. The University of Nebraska 304
4. In order to sue the State of Nebraska or one of its agencies under the Tort Claims Act, the petition must be filed in the District Court for the county in which the alleged wrongful act or omission took place, and in the absence of specific legislative authority, that jurisdictional requirement may not be waived. Catania v. The University of Nebraska 304
5. The right of an insurance company to recover against a wrongdoer, whose negligence has subjected the insurance company to a liability, is traced through the insured; that is, no cause of action can exist on behalf of the insurer, unless it existed in favor of the insured. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
6. To state a cause of action in tort it is necessary to allege facts from which a conclusion can be drawn that the defendant was guilty of one or more acts of negligence, that such negligence was a proximately contributing cause of the accident, and that as a proximate result thereof the plaintiff was damaged. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
7. Direct actions against liability insurance carriers because of the negligence of their insureds are not permitted in Nebraska. State Auto. & Cas. Underwriters v. Farmers Ins. Exchange 414
8. A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured. Hancock v. Paccar, Inc. 468
9. In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in

a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach of the contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety. Hancock v. Paccar, Inc. 468

10. A manufacturer of goods has a duty to use reasonable care in the design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect. Hancock v. Paccar, Inc. 468

11. One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance, the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks. Hancock v. Paccar, Inc. 468

12. Contributory negligence, in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort. Assumption of risk and misuse of the product are. Hancock v. Paccar, Inc. 468

13. A plaintiff in a strict tort liability case is not required to plead and prove he was unaware of the defect. Hancock v. Paccar, Inc. 468

14. In a strict tort liability case it is not incumbent upon a plaintiff to discover a defect. Hancock v. Paccar, Inc. 468

15. The lack of intent to do harm on the part of the actor

does not by itself compel a conclusion that the result was caused by accident. The element of foreseeability cannot be ignored. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

16. An effect which is the natural and probable consequence of an intentional act or of a course of action is not an accident. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

17. One who takes a calculated risk by pursuing a course of action after being advised of the possibility of harm resulting therefrom may not claim that the resulting damage was accidental. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518

Trade Secrets and Unfair Competition.

1. The elements of a cause of action for misappropriation of a trade secret are: (1) The existence of a trade secret or secret manufacturing process; (2) the value and importance of the trade secret to the employer in the conduct of his business; (3) the employer's right by reason of discovery or ownership to the use and enjoyment of the secret; and (4) the communication of the secret to the employee while he was employed in a position of trust and confidence and under circumstances making it inequitable and unjust for him to disclose it to others or to use it himself to the employer's prejudice. Garner Tool & Die v. Laux 717

2. A trade secret must be a particular secret of the complaining employer and not the general secrets of the trade in which he is engaged. Garner Tool & Die v. Laux 717

3. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Garner Tool & Die v. Laux 717

4. In the absence of any agreement between employer and employee to the contrary, the general rule is that an employee, after his term of service has expired, is entitled to compete in business with his former employer. Accordingly, if an employee does not bind him-

self by contract to refrain from entering the services of a competitor after termination of the employment, the employee violates no duty to his former employer in so doing. Garner Tool & Die v. Laux 717

5. Unless restricted by some agreement with his former employer, an employee's right to compete in business with such former employer is the same as that of a stranger to the contract of employment, subject to the qualification that a former employee is precluded from using for his own advantage, and to the detriment of his former employer, information or trade secrets acquired by or imparted to him in the course of his employment. Garner Tool & Die v. Laux 717

Trespass.

Concerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. Thomas v. Weller 298

Trial.

1. In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Miles v. School Dist. No. 138 105
2. The rule that the trial court, as well as this court, is bound by a legal principle once determined in a case does not apply to decisions rendered on questions of fact. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248
3. Triers of fact are not required to accept as absolute verity every statement of witnesses not contradicted by direct evidence, and the persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Also, triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which the conclusion can properly be drawn that parol testimony is not true. Riley v. City of Lincoln 386
4. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error

in the proceedings by which it was secured. County of Hall ex rel. Wisely v. McDermott 589
5. The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. By its terms this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, for example, each of which in itself might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in this case. County of Hall ex rel. Wisely v. McDermott 589
6. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence. High-Plains Cooperative Assn. v. Stevens 664
7. Where the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form. High-Plains Cooperative Assn. v. Stevens 664
8. Where there exists no genuine issue of a material fact and a litigant is entitled to judgment as a matter of law, it is error for the trial court to overrule the litigant's motion for summary judgment. Watters v. Foreman 670
9. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license under the implied consent statute, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. Wohlgemuth v. Pearson 687
10. There is no rule of law which requires the trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact. State v. Cowan 708
11. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. Baliulis v. Campbell Soup Company 739
12. Amendment of petition is not a matter of right but is addressed to the sound discretion of the trial court and its decision will not be disturbed unless there has been an abuse of discretion. Omaha Nat. Bank v. Koliopoulos 752
13. It is not reversible error to refuse a plaintiff to amend his petition to conform to the proofs, where, had such amendment been made, the undisputed evidence would not have justified a verdict in his favor. Omaha Nat. Bank v. Koliopoulos 752
14. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict

and it will not be set aside on appeal unless clearly wrong. Aurora Cooperative Elevator Co. v. Larson ... 755

15. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Aurora Cooperative Elevator Co. v. Larson 755
16. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Aurora Cooperative Elevator Co. v. Larson 755
17. Questions not presented to or passed upon by the trial court will not be considered on appeal. Powers v. Chizek 759
18. Absent either a specific finding on an issue or a general finding for a party by the trial court, this court cannot on appeal assume the issue was decided by the trial court. Carlson v. Nelson 765
19. The allegation in a motion for a new trial that there occurred errors of law duly excepted to is sufficient to have reviewed the various rulings of the trial court on the admission or rejection of evidence. Blue v. Champion International Corp. 781

Trusts.

The Board of Educational Lands and Funds, as a trustee, acts in a representative capacity and persons dealing with it are bound to be cognizant of its powers. Pettijohn v. State 271

Uniform Commercial Code.

1. The sale of growing sod is a sale of goods under section 2-107, U. C. C. Jessen v. Ashland Recreation Assn. 19
2. Except as otherwise provided in section 2-201, U. C. C., a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under section 2-201 (1), U. C. C., beyond the quantity of goods shown in such writing. Jessen v. Ashland Rec-

reation Assn. 19
3. Under section 2-201, U. C. C., the only term which must appear in the required writing is the quantity term, which need not be accurately stated, but recovery is limited to the amount stated. Jessen v. Ashland Recreation Assn. 19
4. Under section 2-201, U. C. C., "partial performance" as a substitute for the required writing can validate the oral contract only for the goods which have been accepted or for which payment has been made and accepted. Jessen v. Ashland Recreation Assn. 19
5. Under section 2-608, U. C. C., the buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
6. If the buyer has before rejection taken physical possession of goods, the buyer is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. Countryside Mobile Homes of Lincoln, Inc. v. Schade 209
7. Lost profits proximately caused by a seller's breach of warranty are consequential damages which may be recovered under section 2-715, U. C. C., if proof of such loss is sufficient. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248
8. Subject to the provisions of the Uniform Commercial Code with respect to proof of market price, section 2-723, the measure of damages for nondelivery of goods or repudiation by the seller of the contract for sale is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages as provided in section 2-715, U. C. C., but less expenses saved in consequence of the seller's breach. § 2-713 (1), U. C. C. Carlson v. Nelson 765
9. "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, . . . then (a) if the loss is total the contract is avoided; and (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due al-

lowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller." § 2-613, U. C. C. Carlson v. Nelson 765

10. The impact of the provisions of section 2-613, U. C. C., providing that the casualty must occur without fault of either buyer or seller, is that if the buyer is at fault, he will remain obligated to purchase, but if the seller is at fault, he will remain obligated to deliver and be liable for the appropriate damages if he does not. Carlson v. Nelson 765

11. A plaintiff buyer, under a contract for the sale of identified goods, suing for damages for delivery, who alleges that the goods were damaged while yet in the possession of the seller, has satisfied his burden of demonstrating the nonapplicability of section 2-613, U. C. C., insofar as the condition of absence of fault of the parties is concerned, if he proves the goods were not destroyed or damaged by his fault. Plaintiff buyer need not adduce evidence to show defendant seller was at fault. Carlson v. Nelson 765

12. A defendant seller who wishes to limit a plaintiff buyer's remedies and damages to those provided in section 2-613, U. C. C., ought to raise the issue by appropriate pleading. When the goods are in his possession when damaged, he has the burden of proving the goods were damaged without his fault. Carlson v. Nelson ... 765

Valuation.

Valuation of mineral interests by capitalizing prior income does not reflect the market value and is an improper method of valuation because production of minerals is based on a declining asset and production is of an indefinite duration. Knigge v. Knigge 421

Venue.

The requirements of section 81-8,214, R. R. S. 1943, prescribe the venue for suits brought under the state Tort Claims Act without modification or liberalization occasioned by the general venue statutes. Catania v. The University of Nebraska 304

Verdicts.

1. A motion for directed verdict will be denied unless there is a total failure of competent proof in a criminal case to support a material allegation in the information or where the testimony adduced is of so weak or doubtful character that a conviction based thereon could not be sustained. State v. Bennett 28

2. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom. Kirshenbaum v. Dettman-Figueroa 70
3. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award. § 48-185, R. R. S. 1943. Riley v. City of Lincoln 386
4. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. County of Hall ex rel. Wisely v. McDermott 589
5. The verdict of the fact finder in a criminal case must be sustained if, taking the view most favorable to the State, there is sufficient competent evidence to support it. State v. Clermont 611
6. In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Cowan ... 708
7. A motion for a directed verdict made at the close of a plaintiff's case must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Empfield v. Ainsworth Irr. Dist. 827

Warranties.

1. Disclaimers of warranty made on or after delivery of the goods by means of an invoice, receipt, or similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction. Pfizer

Genetics, Inc. v. Williams Management Co. 151
2. Lost profits proximately caused by a seller's breach of warranty are consequential damages which may be recovered under section 2-715, U. C. C., if proof of such loss is sufficient. Alliance Tractor & Implement Co. v. Lukens Tool & Die Co. 248

Waters.

1. The Rural Water District Act, sections 46-1001 to 46-1026, R. R. S. 1943, contains no specific requirement that such district must first obtain a permit to construct, install, maintain, and operate wells and other facilities for the storage, transportation, or utilization of water, which are necessary to carry out the purposes of its organization. McDowell v. Rural Water Dist. No. 2 401
2. A rural water district is not a municipal corporation within the purview of the City, Village and Municipal Corporation Ground Water Permit Act. McDowell v. Rural Water Dist. No. 2 401

Wills.

1. A right of survivorship in a joint account arising from the express terms of the account or under section 30-2704, R. R. S. 1943, cannot be changed by will. Gasper v. Moss 24
2. The right of a surviving spouse to widow's allowance, homestead allowance, exempt property, or any of them, is purely a personal right which the surviving spouse alone can exercise and enjoy. When the surviving spouse dies, the right terminates. Jacobson v. Nemesio 180

Witnesses.

1. When information concerning a crime is furnished by the victim or witnesses to a crime, proof of veracity or reliability of the information is not generally required. State v. Anderson 186
2. Triers of fact are not required to accept as absolute verity every statement of witnesses not contradicted by direct evidence, and the persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Also, triers of fact have the right to test the credibility of witnesses by their self-interests and to weigh undisputed parol testimony against facts and circumstances in evidence from which the conclusion can properly be drawn that parol testimony is not true. Riley v. City of Lincoln 386

3. A resident owner who is familiar with his property and knows its worth may testify as to its value without further foundation. Johnson's Apco Oil Co. v. City of Lincoln 397
4. A resident stockholder and officer of a closely-held family corporation, who was familiar with the characteristics of property owned by the corporation, its actual and potential uses, and who had several years experience in dealing with the property, is competent to testify as to the value of the property without further foundation. Johnson's Apco Oil Co. v. City of Lincoln . 397
5. In the absence of fraud or mistake, an agreement or stipulation by the parties that the judgment of a third person shall be relied upon in determining a fact is binding upon the parties. Knigge v. Knigge 421
6. In a child custody action, a social worker's report may be received in evidence for the consideration of that part properly admissible when the social worker is sworn, subject to cross-examination, and the parties are permitted to call other witnesses to contradict any parts of the report. Bengtson v. Bengtson 602
7. The appropriateness of a hypothetical question to an expert witness is a matter largely for the trial court's discretion, and its rulings will not be disturbed unless there has been an abuse of that discretion. Bengtson v. Bengtson 602
8. The admissions by a party to an action upon a material matter are admissible against him as original evidence. Silvey & Co., Inc. v. Engel 633

Words and Phrases.

1. Section 87-303.05 (1), R. R. S. 1943, authorizes the Attorney General to institute proceedings to prevent deceptive trade practices as defined in section 87-302 or 87-303.01, R. R. S. 1943. State ex rel. Douglas v. Ledwith 6
2. Placing a party found to have been engaging in deceptive trade practices under the supervision of the Attorney General for a fixed period of time and retaining jurisdiction to order restitution should future violations occur is within the power granted to the court by section 87-303.05 (1), R. R. S. 1943. State ex rel. Douglas v. Ledwith 6
3. The requirement in section 87-303.05 (1), R. R. S. 1943, that the Attorney General must have cause to believe that deceptive trade practices exist or have existed before instituting an action is not an essential element of the action which must be proved at trial. State ex rel. Douglas v. Ledwith 6

4. If an employee accepts employment in good faith and through no fault or deficiency on his or her part the workload becomes an increasingly unreasonable burden so as to affect the health or sense of well-being of the employee, voluntary termination does have some justifiably reasonable connection with or relation to conditions of employment and may be deemed for "good cause" under section 48-628 (a), R. S. Supp., 1976. Glionna v. Chizek 37
5. "Acquiescence" means passive assent or submission, quiescence, or consent by silence. Svoboda v. Johnson 57
6. The value to the land means that amount of money that the improvement enhances, contributes, increases, or adds to the value of the land. Pettijohn v. State 271
7. In arriving at the value to the land of an improvement, consideration should be given to its functional use, location on the land, utility, obsolescence, overbuilding or want of use, state of repair, cost to the lessee less depreciation, adaptability, and all other facts and circumstances shown by the evidence that are not speculative that relate to any purpose for which the improvement is reasonably useful to the unimproved land at the time of determination, or which will become so useful in the near future. Pettijohn v. State 271
8. The measure of lessee's compensable interest in the improvements should be determined as follows: First, determine the fair market value of the school land with only the improvements whose values are disputed. Then, determine the fair market value of the school land without any improvements owned by the lessee. The difference (remainder) between these two values is the value to the land of the lessee's compensable interest in the disputed improvements. Insofar as this rule is contrary to State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769, that case is overruled. Pettijohn v. State 271
9. The word "abuse" in section 28-729, R. R. S. 1943, may include verbal injury as well as physical. State v. Dreifurst 378
10. Verbal abuse under section 28-729, R. R. S. 1943, includes only "fighting words," namely, words which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. State v. Dreifurst 378
11. Whether any particular use of abusive language constitutes "fighting words" depends not only upon the words used but also upon the circumstances in which they are used. State v. Dreifurst 378

12. In a strict liability case "unreasonably dangerous" means that the product had a propensity for causing physical harm beyond that which could be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. Hancock v. Paccar, Inc. 468
13. Fair rental value as used in this instance is a question of fact to be determined at the time of trial from evidence relating to prevailing community or area standards. Husebo v. Ambrosia, Ltd. 499
14. Reasonable length of time as used in this instance presumes ordinary diligence on the part of the injured party and those performing the repair work, and is a question of fact to be determined at the time of trial. Husebo v. Ambrosia, Ltd. 499
15. A petition alleging a nuisance does not, by itself, allege an accident. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
16. Under a liability policy issued by an insurance company to its insured obligating it to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage "caused by an occurrence," and to defend any suit against the insured seeking damages on account of such bodily injury or property damage, and defining "occurrence" as meaning an "accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured," the insurance company is not obligated to defend its insured in an action brought against it by a third party based upon "nuisance" nor to pay any sums which the insured shall become legally obligated to pay by virtue of said action. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
17. Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
18. The lack of intent to do harm on the part of the actor does not by itself compel a conclusion that the result was caused by accident. The element of foreseeability cannot be ignored. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
19. An effect which is the natural and probable consequence of an intentional act or of a course of action is

not an accident. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
20. One who takes a calculated risk by pursuing a course of action after being advised of the possibility of harm resulting therefrom may not claim that the resulting damage was accidental. Millard Warehouse, Inc. v. Hartford Fire Ins. Co. 518
21. An accord and satisfaction is an agreement to discharge an existing indebtedness by the rendering of some performance different from that which was claimed due. High-Plains Cooperative Assn. v. Stevens 664
22. An executed compromise settlement of a good faith controversy is an accord and satisfaction. High-Plains Cooperative Assn. v. Stevens 664
23. To "leave work voluntarily," as that term is used in the Employment Security Law, means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment. Powers v. Chizek 759

Workmen's Compensation.

1. False statements made at the time employment was secured are ordinarily insufficient to terminate the relation of master and servant existing at the time of the injury, even though they may constitute grounds for rescinding the contract of employment, at least where there is no causal connection between the injury and the misrepresentation. Hilt Truck Lines, Inc. v. Jones 115
2. Three factors must be present before a false statement in an employment application will bar workmen's compensation benefits: (1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury. Hilt Truck Lines, Inc. v. Jones 115
3. In a workmen's compensation case the burden of proof on the defense of intoxication or intentional willful negligence is on the employer. Hilt Truck Lines, Inc. v. Jones 115
4. The findings of fact made by the Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Hilt Truck Lines, Inc. v. Jones 115
5. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation

Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Hilt Truck Lines, Inc. v. Jones 115
6. The general rule is that an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment. Butt v. City Wide Rock Exc. Co. 126
7. Where transportation to the place of work is furnished by the employer and the injury occurs while the workman is being transported in a vehicle under the control of the employer, the injury may arise out of and in the course of the employment. Butt v. City Wide Rock Exc. Co. 126
8. In a workmen's compensation case, the burden of proof on the defense of intoxication is on the employer. Nalley v. Consolidated Freightways, Inc. 370
9. Under section 48-185, R. S. Supp., 1976, the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Nalley v. Consolidated Freightways, Inc. 370
10. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Nalley v. Consolidated Freightways, Inc. 370
11. When findings as to issues of causation are made by the Nebraska Workmen's Compensation Court on rehearing, the sufficiency of such findings are to be tested in the same manner as other fact determinations. Nalley v. Consolidated Freightways, Inc. 370
12. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award. § 48-185, R. R. S. 1943. Riley v. City of Lincoln 386
13. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the suc-

cessful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom. Riley v. City of Lincoln 386

14. The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case, and will not be set aside on appeal unless clearly wrong. Baliulis v. Campbell Soup Company 739