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THE CORNHUSKER BANK OF OMAHA, A BANKING CORPORATION, APPELLEE, V. ALBERT MCNAMARA, DOING BUSINESS AS MAC'S CHEVROLET-OLDSMOBILE, APPELLANT.

288 N. W. 2d 287

Filed February 12, 1980. No. 42591.

1. **Motor Vehicles: Certificates of Title Act.** 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.
2. **Motor Vehicles: Certificates of Title Act: Statutes.** No court shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless there is substantial compliance by such claimant with the provisions of section 60-105, R. R. S. 1943.
3. **Replevin.** The plaintiff in a replevin action has the burden of proof and must recover on the strength of its or his right in or to the property, and not upon any weakness of the interest of the defendant therein.

Appeal from the District Court for Saline County: ORVILLE L. COADY, JUDGE. Reversed and dismissed.

Ben L. Anderson of Anderson, Stock & Anderson, for appellant.

Michael L. Schleich of Morsman, Fike, Davis & Schumacher, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and WOLF, District Judge.

WOLF, District Judge.

This is an appeal by the defendant from the judgment of the District Court in favor of the plaintiff upon plaintiff's action in replevin and ordering that plaintiff recover possession from the defendant of a 1976 Corvette automobile.

The facts are not in dispute. On December 23, 1975, Robert R. Blank purchased the 1976 Chevrolet Corvette two-door coupe from John Craft Chevrolet, Inc., of Omaha, and received possession of the auto-

mobile and the manufacturer's statement of origin, which was completed with an assignment by the licensed dealer executed to Robert R. Blank. At the time of such purchase, Mr. Blank was the executive vice president of the plaintiff, The Cornhusker Bank of Omaha; however, the purchase of the automobile was made by Mr. Blank for his personal use. Mr. Blank did not obtain a Nebraska certificate of title, but retained possession of the manufacturer's statement of origin and kept the vehicle in his garage. On April 9, 1976, Mr. Blank sold the vehicle to Michael Daugherty for approximately $8,600. Mr. Daugherty obtained the funds to make the purchse by borrowing $8,600 from The Cornhusker Bank of Omaha. Daugherty executed a note and a security agreement on the 1976 Corvette. Apparently, at the same time, Robert R. Blank executed and acknowledged the second assignment on the manufacturer's statement of origin in Blank, and it was delivered to The Cornhusker Bank of Omaha and retained by the plaintiff with the Daugherty note and security agreement. No Nebraska motor vehicle title was obtained nor was the security agreement filed.

Michael Daugherty's note to The Cornhusker Bank of Omaha was due 91 days after April 9, 1976, with interest at 11 percent per annum. This note was apparently paid with the proceeds of a new note from Daugherty to The Cornhusker Bank of Omaha dated October 11, 1976, in the sum of $10,135.80, which new note required monthly payments of $281.55, commencing November 10, 1976. The note indicated on its face that the 1976 Corvette was collateral, but there is no evidence of any new security agreement or of any filing of the claimed lien. No payments were made by Mr. Daugherty on the new note.

On October 21, 1976, the defendant, Albert McNamara, a licensed automobile dealer, purchased the Corvette from Michael Daugherty by giving Daugherty a check for $8,300 and taking possession of the

vehicle. No certificate of title or manufacturer's statement of origin was delivered to Mr. McNamara. Mr. Daugherty promised Mr. McNamara that he would send McNamara the title the first of the week. On Monday or Tuesday McNamara called the Douglas County clerk and determined that there was no lien filed against the vehicle. Later, having discovered that the plaintiff had actual possession of the manufacturer's statement of origin, the defendant made demand upon the plaintiff for the statement, which was apparently refused. Subsequently, Robert R. Blank obtained possession of the manufacturer's statement of origin and had a Nebraska certificate of title issued to the vehicle in his own name and immediately assigned the title to The Cornhusker Bank of Omaha, who, on July 12, 1977, obtained the Nebraska certificate of title in its own name. The title did not show any endorsement of lien.

On August 15, 1977, the plaintiff filed the replevin action. By judgment entered December 14, 1978, the defendant was ordered to deliver possession of the vehicle to the plaintiff and upon the overruling of the defendant's motion for new trial, the defendant has appealed to this court.

The plaintiff in a replevin action has the burden of proof and must recover on the strength of its or his right in or to the property, and not upon any weakness of the interest of the defendant therein. First Nat. Bank v. Provident Finance Co., 176 Neb. 45, 125 N. W. 2d 78.

It is the burden of the plaintiff in a replevin action to show either ownership of the property with the right to immediate possession or a special ownership or interest therein with the right to immediate possession. Section 60-105, R. R. S. 1943, reads in part: "(1) No person * * * acquiring a motor vehicle * * * from the owner thereof * * * shall acquire any right, title, claim, or interest in or to such motor

vehicle * * * until he shall have had delivered to him physical possession of such motor vehicle * * * and a certificate of title or a manufacturer's or importer's certificate duly executed in accordance with the provisions of this act, and with such assignments thereon as may be necessary to show title in the purchaser thereof * * *." The same subsection further provides: "No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle * * * sold or disposed of, or mortgaged or encumbered, unless there is compliance with this section."

The plaintiff never received physical possession of the motor vehicle. Neither was the manufacturer's certificate executed in accordance with the provisions of the act because only a licensed dealer is authorized to make an assignment of the manufacturer's statement. The certificate of title to the motor vehicle in the name of the plaintiff was not obtained by negotiation with or transfer from the plaintiff's debtor, Michael Daugherty, such as would amount to a voluntary surrender of the collateral under the unrecorded security agreement. A strict interpretation of the Nebraska Certificate of Title Act would necessarily result in the conclusion that the plaintiff acquired neither legal title nor lien upon the motor vehicle.

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. First Nat. Bank v. Provident Finance Co., *supra*. The facts disclose that the plaintiff, with the assistance of Mr. Blank and Mr. Daugherty, caused the possession of the motor vehicle to be transferred from Blank to Daugherty, without taking the proper steps under the statute to protect its lien and to give notice to subsequent purchasers. Having failed to

protect its security interest by a proper notation on the title, the plaintiff cannot substitute title in its name by certificate of title without substantial compliance with section 60-105, R. R. S. 1943, which requires concurrent possession of the vehicle in the titleholder.

This is not to indicate that this court finds the defendant to be an innocent purchaser. An innocent purchaser would be protected where he receives possession of the motor vehicle together with a properly executed and assigned title certificate upon which no lien is endorsed.

The Legislature has mandated that no court shall recognize the right, title, claim, or any interest of any person in or to any motor vehicle unless there is compliance with section 60-105, R. R. S. 1943. It is clear to this court that the plaintiff has made no good faith effort to comply with the statutory requirements. This court, therefore, refuses to recognize any claim of lien or any claim of legal title by the plaintiff and holds that the plaintiff may not be successful against the defendant upon an action in replevin.

We conclude, for the reasons given in this opinion, that the judgment of the trial court should be reversed and the plaintiff's action dismissed.

REVERSED AND DISMISSED.

JOSEPH C. SCAMPERINO, APPELLEE, V. FEDERAL ENVELOPE COMPANY, APPELLANT.

288 N. W. 2d 477

Filed February 12, 1980. No. 42654.

1. **Workmen's Compensation: Statutes.** An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. R. S. 1943, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to

the other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial.

2. **Workmen's Compensation.** Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact.
3. **Workmen's Compensation: Judgments: Verdicts.** 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.
4. **Workmen's Compensation: Judgments: Appeal and Error.** 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.
5. **Workmen's Compensation: Judgments: Evidence.** In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.
6. **Workmen's Compensation: Statutes.** Under either subdivision (1) or (2) of section 48-121, R. R. S. 1943, a determination must be made as to the employee's loss of employability or earning capacity, and loss of bodily function is not an issue.

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

John R. Timmermier and Schmid, Ford, Mooney & Frederick, for appellant.

Joseph P. Inserra and John P. Inserra of Inserra, Petersen, Burkhard & Buchan, for appellee.

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

BRODKEY, J.

Defendant below, Federal Envelope Company (Federal), appeals to this court from an award on rehearing made by the Nebraska Workmen's Compensation Court on February 22, 1979, in favor of the

plaintiff and appellee herein, Joseph C. Scamperino, for benefits due under the Nebraska Workmen's Compensation Law as the result of an accident which occurred on December 17, 1974. It appears that on that date Scamperino was employed by Federal as a sheeter and forklift operator, and, while engaged in the duties of his employment, suffered an injury to the femur of his right leg, described as an intertrochanteric fracture. It further appears that while Scamperino was running a sheeter machine, he missed a step on a ladder, fell approximately 3 feet to the concrete floor, and suffered the above-described injuries. Federal paid Scamperino workmen's compensation benefits for the statutory period required by section 48-121 (3), R. R. S. 1943, and refused to pay further benefits thereafter, on the ground that the injury suffered was a schedule member injury under said section. Scamperino contended that he was entitled to recover benefits on the basis of an injury to the body as a whole, under section 48-121 (1) and (2), R. R. S. 1943, and this action followed.

In its award on rehearing, the Workmen's Compensation Court affirmed the award of the single judge, Paul E. LeClair, in the original hearing. In its award on rehearing, the Workmen's Compensation Court made the following finding: "In this case, the plaintiff's injury was not to the ball and socket of the hip joint but to the femur which would normally be a 48-212 (3) [sic] schedule injury, however, when the fractured femur healed, * * * it did so with deformity and such deformity effected [sic] the hip and the rest of the body; hence, the Court finds that although plaintiff sustained a schedule injury, it comes within the exception to the general rule in that unusual and extraordinary conditions developed which affected other parts of the body and is therefore compensable under 48-121 (1) and (2) rather than Subdivision 3, and that plaintiff therefore is entitled

to temporary total disability benefits in the amounts and for the periods of time hereinafter set forth." The court also found: "* * * that plaintiff's fracture healed but with deformity including residual edema, pain in his hip, swelling in the lower leg; that lack of muscle action impairs plaintiff's circulation causing swelling, phlebitis, and knock-knees; that plaintiff's hip is affected by the bone displacement as is the rest of his body and that he is unable to return to his former job which requires considerable heavy work. The parties admit that plaintiff has attempted to return to work for the defendant on at least three separate occasions and was unable to perform his job." The court thereupon ordered that the plaintiff have and recover from the defendant the sum of $89 per week for temporary total disability for the period set forth in paragraph IV of the award, and further provided: "That when the plaintiff's total disability ceases, if thereafter the parties cannot agree on the extent of the plaintiff's disability, if any, or on the reasonableness of any medical or hopsital [sic] charges, then a further hearing may be had herein after a showing has been made that the plaintiff's total disability has ceased, or a further hearing may be had herein under the provisions of section 48-141 of the Nebraska Workmen's Compensation Act."

In its appeal to this court Federal assigned as error necessitating a reversal of the award of the Workmen's Compensation Court on rehearing, that the court erred: (1) In determining plaintiff's fracture resulted in a deformity which affected the hip and body of plaintiff, thus resulting in an unusual and extraordinary condition, and therefore was compensable under section 48-121 (1) and (2), rather than subdivision (3) of said section; and (2) in allowing testimony as to assessments of the degree of loss of earning power and capacity and disability ratings to the body as a whole, rather than limiting testi-

mony to loss of function of the injured member.

The evidence in the record sustains the findings of the Workmen's Compensation Court that Scamperino, while engaged in the duties of his employment on December 17, 1974, fell from a platform connected to the sheeter machine he was operating, to the concrete floor below, a distance of approximately 3 feet, which fall caused a fracture of his right leg, or more specifically, of the trochanteric area of the right femur, which is an area located between the neck and shaft portions of the femur. Although the fracture healed solidly, some deformity resulted therefrom, specifically a malrotation of the hip, and thrombophlebitis also developed. Three doctors who had treated Scamperino at different times following the injury indicated he had incurred a permanent disability to his leg, two estimating that the disability was 50 percent, while the other doctor estimated disability at 100 percent. The two doctors who rated the disability to the leg at 50 percent indicated that such rating was equivalent to a rating of 20 percent loss of use of the body as a whole. According to the testimony of one of the doctors: "* * * when a person has a disability of an extremity, a leg, or an arm, it affects the body as a whole." Conversely, the doctor who rated Scamperino's disability as 100 percent disability of his right leg testified on direct examination that no other parts of the body were affected by the injury.

Notwithstanding the diversity in the testimony of the doctors, they were in agreement that Scamperino could not return to the type of work which he had previously done. Scamperino himself testified that he continued to suffer pain; that he could not sleep for more than 4 hours at a time; and that he would be unable to work at custodial or production line jobs as a result of his injury. His efforts to continue working after his injury were unsuccessful because of the excessive pain involved. He declined to

avail himself of rehabilitation services to which he was entitled under the terms of the award of the Workmen's Compensation Court.

The law is well established in this state that an employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. R. S. 1943, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to the other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial. Jeffers v. Pappas Trucking, Inc., 198 Neb. 379, 253 N. W. 2d 30 (1977); Broderson v. Federal Chemical Co., 199 Neb. 278, 258 N. W. 2d 137 (1977).

Federal contends that on rehearing the Workmen's Compensation Court erred in finding the injury to Scamperino was one which resulted in an unusual or extraordinary condition that affected other parts of Scamperino's body and was therefore compensable under section 48-121 (1) and (2), R. R. S. 1943. Whether an injury results in an unusual or extraordinary condition affecting other parts of the body presents a question of fact. In Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186 (1964), we stated: "Where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result thereof, which condition affects some other member or the body itself, an increased award is proper and should be made to cover such additional disability. We adhere to this rule and we are now confronted with the *factual question* as to whether or not other members, or the body as a whole, were affected by some unusual and extraordinary condition that would require application of the rule." (Emphasis supplied.) It is only where the facts are undisputed that the matter becomes a question of law. See Jeffers v. Pappas Trucking, Inc., *supra*.

The scope of review in this court on appeals from the Nebraska Workmen's Compensation Court was changed by statute in 1975, and the statute now provides: "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. The above statute has been frequently interpreted, and it is now well established law in this state that the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong; and that in testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92 (1977); Hilt Truck Lines, Inc. v. Jones, 204 Neb. 115, 281 N. W. 2d 399 (1979); Newbanks v. Foursome Package & Bar, Inc., 201 Neb. 818, 272 N. W. 2d 372 (1978); Boults v. Church, 200 Neb. 319, 263 N. W. 2d 478 (1978).

In this case, we cannot conclude that the findings made by the Workmen's Compensation Court were clearly wrong. There is evidence in the record clearly indicating that the fracture of the femur suffered by Scamperino also affected his right hip, which is neither a part of the leg (see Jeffers v. Pap-

pas Trucking, Inc., *supra*) nor a schedule injury within the provisions of section 48-121 (3), R. R. S. 1943. This evidence clearly supports the findings of the Workmen's Compensation Court; and examining this evidence in the light most favorable to Scamperino, as we must, we are unable to conclude that the findings of the Workmen's Compensation Court were clearly wrong. We therefore reject Federal's first assignment of error as being without merit.

Federal also contends that the Workmen's Compensation Court erred in receiving testimony with reference to the presence of an industrial disability. However, as previously indicated, the Workmen's Compensation Court found that the injury fell within the exception to section 48-121 (3), R. R. S. 1943, and that Scamperino was entitled to benefits under section 48-121 (1) and (2), R. R. S. 1943. "The presence or absence of industrial disability is immaterial in cases falling under subdivision (3) [of section 48-121, R. R. S. 1943]. If the injury falls under either subdivision (1) or (2) [of section 48-121, R. R. S. 1943], however, a determination must be made as to the employee's loss of employability or earning capacity, and loss of bodily function is not an issue." Jeffers v. Pappas Trucking, Inc., 198 Neb. 379, 253 N. W. 2d 30 (1977). In this case, since the injury was one which was compensable under subdivisions (1) and (2), section 48-121, R. R. S. 1943, the evidence relating to the presence of an industrial disability was properly admitted; and we reject Federal's claim to the contrary.

In view of what we have stated above, we conclude that we must affirm the award entered by the Workmen's Compensation Court in all respects; and under section 48-125, R. R. S. 1943, we also allow plaintiff an additional attorney's fee in the sum of $750 for services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TARA ENTERPRISES, INC., APPELLANT.

288 N. W. 2d 290

Filed February 12, 1980. No. 42662.

1. **Criminal Law: Searches and Seizures: Evidence.** In the ordinary case, the seizure of some items beyond those specified in a search warrant does not result in the suppression of those items which were validly seized. Where items unspecified in the warrant are seized in a valid search, the fact that they are not admissible in evidence does not require suppression of property seized in accordance with the warrant.
2. **Criminal Law: Jurors.** A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a reasonable person in other areas of the law.
3. **Criminal Law: Statutes: Obscenity.** The Nebraska obscenity statutes are not an impermissible infringement upon freedom of speech.

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

J. Steven Beckett of Reno, O'Bryne & Kepley and Of Counsel, Douglas L. Kluender of Healey, Brown, Wieland & Kluender, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

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

BRODKEY, J.

Defendant below, Tara Enterprises, Inc., was charged in the Lancaster County court with multiple violations of the Nebraska obscenity statutes, section 28-926.11 et seq., R. R. S. 1943, and after a jury trial in that court was found guilty on 22 counts of exhibiting obscene materials under the above statutes. Defendant was sentenced to pay a fine of $200 for each of the 22 counts, or a total of $4,400 in fines. The case was appealed to the Lancaster County Dis-

trict Court, which court, after a hearing, affirmed the convictions on the 22 counts of obscenity and also the sentences imposed by the county court of Lancaster County. Defendant then filed a motion requesting that the District Court enter a judgment of acquittal, order a new trial, or grant a rehearing. That motion was overruled and the defendant appeals to this court from the overruling of that motion. We affirm.

On December 22, 1977, Lincoln police officers conducted an investigation of the Adult Book & Cinema operated by defendant at 921 O Street, Lincoln, Nebraska, based on complaints received concerning that establishment. The investigating officers' attentions were devoted primarily to the arcade portion of the store where 20 individual viewing booths were located. Each booth contained two 8-millimeter projection units which were used for viewing separate films. On the date of the investigation, only 31 of the 40 projection units were in working condition. The investigating officers viewed the films on the 31 operating projection units and dictated detailed reports on the contents of the films viewed. One officer, who viewed seven of the aforementioned films, experienced difficulty in preparing written reports of the films and gave an oral report, based on notes he had taken during the showings, to the officer in charge of the investigation, one Detective Cook. On the basis of the oral and written reports, Detective Cook applied to the court for a search warrant for the seizure of the films which the officers had viewed. In support of his application Detective Cook submitted an affidavit summarizing the oral report of the officer who experienced difficulty in preparing a written report, and also attached to the affidavit the written reports of the other investigating officers.

On the basis of this affidavit a search warrant was issued on December 23, 1977, directing Detective

Cook to search the premises of the Adult Book & Cinema for the films described in the affidavit and attached reports, the advertising placards for such films, and "any other item or items which constitute evidence of unlawful exhibition of the motion pictures described in the affidavit of Joe Cook * * *." The search warrant was executed that same date, and the police officers seized all 40 of the projection units and films attached thereto, the advertising placards for the films, and three 16-millimeter films which were presumably then being exhibited in the theatre portion of the establishment. A complaint was filed on January 11, 1978, charging defendant with 31 counts of publishing, promoting, or exhibiting obscene material in violation of section 28-926.17, R. R. S. 1943. Motions to dismiss and to quash the warrant and suppress the evidence seized thereunder were made by defendant.

Defendant's motion to dismiss was denied, as was also that portion of the motion to quash the search warrant. However, the court ordered seven of the films seized under the search warrant suppressed, these being the seven films viewed by the officer who experienced difficulty in preparing written reports on their contents. Although Detective Cook had summarized the contents of the films, he had described only six of the seven films in his summary, and the titles were not included. The court concluded that all seven of the films in question must be suppressed as there was no method in which to determine which of the seven films were those described by Detective Cook in his affidavit. Thereafter, the State filed an amended complaint charging the defendant with 23 counts of exhibiting, publishing, or promoting obscene material in violation of section 28-926.17, R. R. S. 1943.

Trial was had in the Lancaster County court before a six-member jury. Evidence was adduced by the State which related to defendant's exhibition of

the films and the seizure of the same by the officers. The films were then shown to the jury, after which the State rested its case. The court then dismissed one of the counts because the film involved did not fall within the statutory requirements of obscenity, since the contents did not involve sexual conduct as defined by section 28-926.11 (14), R. R. S. 1943.

The defendant presented its evidence. An expert witness for defendant testified that, as a result of a poll conducted by him, he concluded there was no consensus regarding community standards as to obscenity in the State of Nebraska. Another witness testified that the films had potential value as educational tools.

As stated, the jury returned verdicts of guilty on each count, and the court imposed a fine of $200 on each count. The District Court, on appeal, affirmed the convictions and fines.

In its appeal to this court, defendant assigns three errors which it contends justify a reversal. It is first contended that the trial court erred in failing to quash the search warrant and in failing to suppress the evidence seized thereunder. In specific terms, the defendant asks this court to modify or overturn the rule we recently announced in State v. Tara Enterprises, Inc. and Zachary Productions, Ltd., 202 Neb. 260, 274 N. W. 2d 875 (1979) (hereafter referred to as Tara I). The rule announced therein was that " '[I]n the ordinary case, the seizure of some items beyond those specified in a search warrant does not result in the suppression of those items which were validly seized.' Where items unspecified in the warrant are seized in a valid search, the fact that they are not admissible in evidence does not require suppression of property seized in accordance with the warrant."

Defendant contends that we created a "per se" rule which stands for the proposition that even if the entire search and seizure is unreasonable, so long as

the introduction of evidence is limited to items particularly described in a search warrant affidavit and search warrant, the defendant cannot object on Fourth Amendment grounds to the search and seizure process. We believe defendant has read our decision in Tara I too broadly.

In Tara I we held that the seizure of unnamed items under the authority of a search warrant and affidavits in support thereof, which were specific in nature, would not automatically require the suppression of the specific items seized by authority of the search warrant. We did not say that the sufficiency of the affidavit setting forth the particular facts necessary to establish probable cause for the issuance of a search warrant was not subject to judicial review or scrutiny. See, for example, State v. Bernth, 196 Neb. 813, 246 N. W. 2d 600 (1976), cert. den., 430 U. S. 948, 97 S. Ct. 1587, 51 L. Ed. 2d 797 (1977); State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85 (1971).

In the instant matter the police reports attached to the affidavit for search warrant, totalling 55 pages, described the films viewed by the investigating officers in minute detail. The descriptions were specific, vivid, and graphically particular. The search warrant authorized the seizure of the films named in the affidavit and attached reports. It is true that the police officers in executing the search warrant did, indeed, seize more films than were authorized by the warrant. However, it is likewise true that each of the films for which convictions were obtained was described in the reports and was seized under the authority of a specific provision of the warrant. The search warrant was not a "general" warrant. Defendant has failed to show any valid reason for suppressing the films. The rule we announced was correct, and we reaffirm it. Defendant's first claim of error is therefore rejected.

Defendant next contends that the trial court erred in failing to find that the State had a burden to ad-

duce evidence with reference to community standards on obscenity. The rule in this regard is well established. "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. Stone v. New York, C. & St. L. R. Co., 344 U. S. 407, 409 [97 L. Ed. 441, 73 S. Ct. 358] (1953); Schulz v. Pennsylvania R. Co., 350 U. S. 523, 525-526 [100 L. Ed. 668, 76 S. Ct. 608] (1956)." Hamling v. United States, 418 U. S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); Smith v. United States, 431 U. S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977). See, also, State v. Tara Enterprises, Inc. and Zachary Productions, Ltd., *supra*. Defendant's position in this regard is likewise without merit.

Finally, defendant contends that the Nebraska obscenity statutes are unconstitutional as being an impermissible infringement upon freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution. The same argument was presented to us in Tara I, where we rejected the argument as without merit on the basis of Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Nothing has occurred since we entered our decision in Tara I which has persuaded us to change our position on these issues. We therefore believe this claim is also without merit.

No other errors appearing, we affirm the judgment and sentences of the District Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD G. PAYNE, APPELLANT.

289 N. W. 2d 173

Filed February 12, 1980. No. 42691.

1. **Criminal Law: Trial: Witnesses: Juries.** Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness.
2. **Criminal Law: Homicide: Intent.** Murder in the second degree is distinguished from murder in the first degree only in the absence of the requirement of deliberation and premeditation; but malice and the purpose to kill are the essential elements of murder in the second degree.
3. **Criminal Law: Evidence.** Circumstances capable of an innocent construction may be interpreted in the light of the defendant's admissions, and the fact under investigation be thus given a criminal aspect.
4. **Criminal Law: Evidence: Intent: Words and Phrases.** An essential element of a crime, including deliberation and premeditation in a first degree murder case, may be proven circumstantially. Circumstantial evidence may also be used to establish the *corpus delicti* of the crime.
5. **Criminal Law: Evidence.** When circumstantial evidence is used to convict a defendant in a criminal case, it must be of such weight and character as to establish proof of guilt beyond a reasonable doubt.
6. **Criminal Law: Homicide: Words and Phrases.** The *corpus delicti* is the body or substance of the crime, the fact that the crime has been committed without regard to the identity of the person committing it, and is not established until it is proved that a human being is dead, and that the death occurred as the result of the criminal agency of another.
7. **Criminal Law: Homicide: Evidence: Lesser-Included Offenses.** Where murder in the first degree is charged, the court is required to charge without request on such lesser degrees of homicide as the evidence could support. In order for the rule to be applicable, the record must contain some evidence which would tend to show that the crime was of a lesser degree than the homicide charged.
8. **Criminal Law: Homicide: Evidence: Lesser-Included Offenses: Juries.** Where the evidence is sufficient to justify the submission to the jury of instructions on more than one degree of homicide, the jury is not required to convict the defendant of the higher offense, even if warranted by the evidence.
9. **Criminal Law: Trial: Instructions.** The trial court may properly

refuse a requested instruction where the substance of the request is covered in the instructions given.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

William G. Line of Kerrigan, Line, Martin & Hanson, 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.

BRODKEY, J.

Ronald G. Payne appeals to this court from his conviction by the jury of first degree murder of Franklin L. Bowersox, Jr., and from his sentence to life imprisonment following his conviction. He alleges as grounds for reversal (1) that the evidence is insufficient to sustain his conviction for first degree murder; (2) that the trial court erred in failing to sustain defendant's motion for a new trial; (3) that the trial court erred in failing to give defendant's requested instruction with reference to the testimony of persons granted immunity from prosecution for the same crime; and (4) that the court erred in failing to instruct on its own motion on the lesser-included offenses of murder in the second degree and manslaughter. We reverse and remand for a new trial.

Some of the evidence in this case is disputed while other evidence is undisputed. Likewise, while some of the evidence adduced at the trial was direct evidence, a considerable amount of the evidence was circumstantial in nature. Also, while the defendant himself did not testify in his trial, testimony as to certain admissions made by the defendant were testified to by other witnesses.

We first review the facts of this case as revealed

by the record, and the testimony of the witnesses who testified at the trial. The testimony is undisputed that Gerald F. Ranslem (Ranslem) and the victim, Bowersox, were the occupants of a trailer house located in a trailer court near Fremont, Nebraska. Ranslem had moved into the trailer on April 4, 1976, the day preceding the death of Bowersox. Ranslem's testimony was in essence as follows. He and Bowersox retired to their respective bedrooms in the trailer at about 11:30 p.m., on April 4, 1976. Because of the fact that Bowersox had been engaged in the purchase and sale of drugs, it was his custom to lock the doors to the trailer at night as a security precaution. That evening Bowersox took extra precautions, loading "every gun in the house." Defendant Payne lived in the same trailer court and had a key to the trailer, as he had been engaged by Bowersox as a "security guard." Ranslem testified that although he was a very heavy sleeper, he was awakened by a noise during the night, but thought it was just the furnace kicking on or off. He also heard his dog growl.

Ranslem testified he was awakened shortly before 7 the next morning, April 5, by a telephone call from Payne, who told him that he was looking for some books and wanted Ranslem to wake up Bowersox to see if they could find them. Ranslem yelled at Bowersox from the hallway of the trailer but received no response. He returned to the telephone and told Payne that Bowersox wouldn't get up. Ranslem then went back to bed but was again awakened approximately 15 minutes later, this time by someone pounding at the front door. He got up, went to the door, and found Payne outside. Payne was still looking for the books he had called about earlier. Ranslem let him in, and both of them began to search for the books. After looking through other parts of the trailer, Ranslem went down the hallway toward Bowersox' bedroom, followed by Payne.

Ranslem went into the bedroom and began looking on the floor around the bed. While Ranslem was thus engaged, Payne, who was standing in the doorway, said "Frank's [Bowersox] been shot." Ranslem testified that he did not believe Payne could have seen the wound or blood on Bowersox from Payne's position in the doorway. When Ranslem first discovered Bowersox' body in the bed, "the covers were pulled up right to his neck. They covered his hands and everything." There was blood on the pillow, which was not visible to Ranslem when he walked into the room because of the positioning of the covers. Ranslem pulled down the covers and saw the blood about Bowersox' face for the first time, and then checked his arm for a pulse. At that time Payne called an ambulance and then went to his own trailer to inform his wife as to what occurred, but returned before the arrival of the rescue squad. In answer to a question put to him, Ranslem testified he did not kill Frank Bowersox, nor did he participate in any plan to do so.

The body of Bowersox was examined by a pathologist, Dr. Jerry W. Jones. He testified that in his opinion Bowersox had died as a result of a gunshot wound to the head, the gun having been discharged from within 2 feet of his face. The bullet, which eventually lodged in Bowersox' brain and was recovered by Dr. Jones, entered through the nose. He testified that the path of the bullet was in an upward direction from front to back and the bullet itself penetrated the front part of the skull. He testified that once a bullet has penetrated the skull itself it can ricochet and go from one aspect to another so the slug itself is just in the brain substance.

The weapon which fired the fatal bullet was never identified or found. A police investigator performed a nitrate swab test on the defendant Payne; and he understood the results were negative and did not indicate that Payne had fired a gun, although the offi-

cer had not seen the official report himself. However, Payne told the investigator that he had washed his hands before the test was given, which could have affected the results of the test. The investigator further testified that although the bedroom in which Bowersox was found was extremely cluttered, he observed no evidence of a struggle.

Another witness for the State, Jimmy Price, testified that he and Bowersox had been good friends and had dealt in drugs together and, in fact, he had previously lived with Bowersox in the trailer in which Bowersox was living at the time he died. He was asked: "Q- Did you ever know of any problem between Ron Payne or ill feeling between Ron Payne and Franklin Bowersox? A- Yes. Q.- Describe that for us, please? A- Well, he - Ron Payne told me that he was more or less upset with Frank and didn't want him around any more. Q- Do you know why that was? A- No, not for sure." Price further testified that Ron Payne had called him on the telephone a few days before Bowersox' body was found, during which conversation Payne told Price that he had taken from Bowersox' trailer a record book of drug sales and some money which was kept in a box in the vent in the bedroom. Price testified that at that time he told Payne to "put them back, that Frank was going to find out and that he was going to get really mad." He further testified that Payne called him again on the telephone at about 3 or 4 o'clock in the morning on Monday, April 5, 1976, which was the morning that Bowersox' body was found, and said, "it is done." Price then asked Payne whether he had put the book back, but received no response. Price then asked Payne: "[I]s Frank [Bowersox] dead?" Payne answered: "Uh-huh." Price then asked Payne: "[W]hat about Jerry [Ranslem]?" and Payne replied: "[H]e never stirred." Price further testified as to the conclusion of the conversation at that time as follows: "The content of the

conversation he said that I didn't know anything. That I shouldn't say anything if I wanted things to be the way that they were. If I didn't want anything to happen to my fiancee, I didn't want to get arrested for selling drugs, this type of thing." Price also testified that he did not kill Bowersox, nor was he involved in any conspiracy with anyone to do so. Payne also told Price not to take a polygraph test that Price was scheduled to take in connection with Bowersox' death, and Price testified as follows: "He said that if I liked my wife the way that she was, if I liked the things the way that they were and I didn't know enough to convict anybody or anything. * * * That is the content, I knew what he meant." Payne told him at that time he (Payne) wouldn't be convicted anyway and that if he was convicted he wouldn't go to jail; that he had a mental problem of some kind and he would just be committed to some place for observation or help or something. Price admitted that Payne had never told him he killed or planned to kill Bowersox but that he (Price) had gotten that impression, and his delay in telling his story was because he was afraid that if he told it something would happen to himself or to his wife.

Price also testified that his (Price's) Arizona connection for the purchase of drugs was in Lincoln the day they found Bowersox' body, but that Bowersox was not involved in the Arizona drug deal.

Special comment must be made with reference to the testimony given by the State's witness, Michael A. Fetters, of Des Moines, Iowa. He testified that Payne had moved into the apartment next to his in April 1978 and the two became friends. Fetters had given a statement to the Dodge County sheriff's department on January 23, 1979, with reference to certain conversations Payne had had with him with reference to the Bowersox matter; he also had given a deposition with reference thereto, in the presence of the attorneys for both the State and the defendant,

on February 27, 1979. In his testimony given at the trial, Fetters was examined at great length with reference to those statements by the attorney for the State, and was also cross-examined by the attorney for the defense in great detail. The statement and deposition in question do not appear in the record of this case; however, in the examination of Fetters, frequent references occur with regard to statements and testimony allegedly made by Fetters in both of those documents. Some of the statements allegedly made by Fetters were denied by him at the trial, or denied and subsequently reaffirmed. Other statements were uncontested. On appeal to this court, counsel for defendant seeks to limit the degree of consideration of Fetters' evidence under the rule established in Wilson v. State, 170 Neb. 494, 103 N. W. 2d 258 (1960), to the effect that proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. The same rule was reaffirmed in State v. Price, 202 Neb. 308, 275 N. W. 2d 82 (1979), in connection with section 27-607, R. R. S. 1943, the new Nebraska Evidence Rules. We point out, however, that in instructing the jury the trial court stated: "You have heard testimony concerning statements allegedly made by witnesses prior to this trial which may be inconsistent with their testimony at this trial. This testimony has been admitted solely for impeachment purposes to aid you in estimating the credibility of the witnesses and to determine the weight to be given to their testimony. You may consider it for that limited purpose only and not as evidence of the facts declared in the prior statements."

In any event, it appears that in his statement to the police and deposition, given prior to trial, Fetters had testified that Payne had talked to him about the Fremont matter and had told him that he had

found a body in a trailer court, and basically that "it was just drug related." Payne had told him that the story he had given the police, that he had gone into the bedroom and found Bowersox dead, didn't happen that way; that Frank (Bowersox) said he was a distributor and had something that Ron (Payne) wanted; that Payne had told him he had "chucked" the gun after the shooting; and that Frank Bowersox "had it coming." In his statements Fetters also apparently stated that Payne had told him he had planned or had done the intelligence work on the Bowersox murder and had "bragged that he planned most of it when Carolyn was present," that he had made sure she was there to listen to it, and that this occurred in the kitchen at the table. As a result of examination by the attorney for the State during the trial and cross-examination by attorney for the defendant, it is clear that at least some of Fetters' testimony is contradictory and inconsistent, and subject to retractions and explanations on the part of Fetters. In addition, Fetters admitted on cross-examination that Payne never told him that he had killed anybody or that he had planned any killing. At the conclusion of his direct testimony, he was asked: "I understand that. But when refreshed with the statements of January 23, 1979 and when they are read back do you recall those questions and those answers?" Fetters replied: "Yes, sir, I do." He was then asked if those were substantially the questions and answers that were taken from him and whether they represented the truth to the best of his knowledge. He replied: "To the best of my knowledge." In effect, this was a blanket reaffirmance of the matters contained in his statement to the sheriff's office and his deposition, notwithstanding he had denied under oath that some of his alleged statements were true and had questioned the acccuracy of others. In any event, the jury heard the testimony of Fetters at the trial and, as in-

structed by the trial court, presumably considered his testimony only for the purpose of determining his credibility, and not as substantive evidence of the crime itself.

The defendant was charged and convicted by the jury of the offense of murder in the first degree. The instructions of the court, after hearing the evidence outlined above, covered murder in the first degree only, and did not include murder in the second degree or manslaughter, which are lesser-included offenses under a murder in the first degree homicide charge. The statutes in effect at the time of the events involved in this case, which were prior to January 1, 1979, the effective date of the new Criminal Code, provided: "Whoever shall purposely and of deliberate and premeditated malice * * * kill another * * * shall be deemed guilty of murder in the first degree, * * *." § 28-401, R. R. S. 1943. Murder in the second degree is defined in those statutes as follows: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another * * * shall be deemed guilty of murder in the second degree; * * *." § 28-402, R. R. S. 1943. Manslaughter is defined in the following terms: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; * * *." § 28-403, R. R. S. 1943. It is clear that under the foregoing statutes, a person commits murder in the first degree if he kills another person purposely and with deliberate and premeditated malice (ignoring for the moment certain felony homicides provided for in the statute). Murder in the second degree is distinguished from murder in the first degree only in the absence of the requirement of deliberation and premeditation; but malice and the purpose to kill are the essential elements of murder in the second degree. The lowest degree of homicide, to

wit, manslaughter, is committed by the killing of another without malice, either upon a sudden quarrel or an unintentional killing while the slayer is in the commission of some unlawful act. The principal questions involved in this appeal are whether the evidence, as set out above, was sufficient to support the conviction of the defendant of first degree murder and also whether it was of such a nature as to require the submission to the jury of the lesser-included offenses of murder in the second degree and manslaughter, or either of them. This determination necessarily involves a consideration of our rulings with reference to the sufficiency of circumstantial evidence to sustain a conviction in homicide cases, particularly in view of the fact that a substantial amount of the evidence of this case is circumstantial in nature. We also keep in mind our frequently announced rule that circumstances capable of an innocent construction may be interpreted in the light of the defendant's admissions, and the fact under investigation be thus given a criminal aspect. Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761 (1953); Egbert v. State, 113 Neb. 790, 205 N. W. 252 (1925).

Although there is more than circumstantial evidence present in this case, the law is well settled that a person charged with a crime may be convicted on circumstantial evidence only. State v. Meadows, 203 Neb. 197, 277 N. W. 2d 707 (1979); State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265 (1965). We have also held that an essential element of a crime may be proved solely by circumstantial evidence. State v. Addison, 196 Neb. 768, 246 N. W. 2d 213 (1976). In this connection we have held that deliberation and premeditation in a first degree murder case may be proven circumstantially. State v. Beers, 201 Neb. 714, 271 N. W. 2d 842 (1978). In State v. Casper, 192 Neb. 120, 219 N. W. 2d 226 (1974), we held that in a prosecution for homicide the State may show by circumstantial evidence the cause of

death was a criminal act of the defendant. Circumstantial evidence may also be used to establish the *corpus delicti* of the crime. In Morris v. State, 109 Neb. 412, 191 N. W. 717 (1922), we held that when on a trial for murder the fact of death is established and the State has proved a chain of circumstances sufficient to convince the jury beyond a reasonable doubt that the death resulted from the criminal acts or agency of defendant, the *corpus delicti* has been sufficiently proved. See, also, Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539 (1949).

We next consider the question of the test to be applied in determining the sufficiency of circumstantial evidence in a criminal prosecution. We have stated the rule in various ways. Our most frequent statement of the rule is that 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.*" (Emphasis supplied.) See, for example, State v. Klutts, 204 Neb. 616, 284 N. W. 2d 415 (1979); State v. Journey, 201 Neb. 607, 271 N. W. 2d 320 (1978); State v. Peery, 199 Neb. 656, 261 N. W. 2d 95 (1977); Reyes v. State, *supra*; NJI 14.50. However, we have also stated the rule to be that the test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a *moral certainty* every rational hypothesis except that of guilt. (Emphasis supplied.) See, for example, State v. Costanzo, 203 Neb. 586, 279 N. W. 2d 404 (1979); State v. Classen, 202 Neb. 324, 275 N. W. 2d 91 (1979); State v. Whitney, 202 Neb. 149, 274 N. W. 2d 165 (1979); State v. Bartlett, 194 Neb.

502, 233 N. W. 2d 904 (1975). In Black's Law Dictionary (5th Ed., 1979), the term "moral certainty" is defined as follows: "That degree of assurance which induces a man of sound mind to act, without doubt, upon the conclusions to which it leads. A high degree of impression of the truth of a fact, falling short of absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case. Such signifies a probability sufficiently strong to justify action on it; a very high degree of probability, although not demonstrable, as a certainty. It has also been used as indicating a conclusion of the mind established beyond a reasonable doubt." We have also stated the rule to be that a conviction may rest upon circumstantial evidence if it is substantial. See, for example, State v. Morosin, 200 Neb. 62, 262 N. W. 2d 194 (1978); State v. Davis, 198 Neb. 823, 255 N. W. 2d 434 (1977); State v. Von Suggs, 196 Neb. 757, 246 N. W. 2d 206 (1976).

Notwithstanding the various ways in which this court has stated the rule with reference to the use of circumstantial evidence in criminal prosecutions, we believe they are substantially similar and, in fact, amount to a requirement that the conviction be beyond a reasonable doubt. In State v. Shook, 224 N. C. 728, 32 S. E. 2d 329 (1944), the Supreme Court of North Carolina stated: "Obviously, however apt the expression may be as applied to circumstantial evidence, the exclusion of every reasonable hypothesis of innocence is the equivalent of conviction beyond a reasonable doubt, involves the same mental processes, and results in the same psychological state to which we sometimes refer as satisfaction to a moral certainty." Likewise, in the very ancient case of Commonwealth v. Costley, 118 Mass. 1 (1875), the Supreme Judicial Court of Massachusetts held that "moral certainty" and "proof beyond a reasonable doubt" are synonymous terms, signifying such proof as precludes every reasonable hy-

pothesis except that in support of which the evidence is offered; and no exception lies in a capital case to a refusal to use the term "moral certainty," if an equivalent expression is used. We therefore conclude that if circumstantial evidence is used to convict a defendant in a criminal case, it must be of such weight and character as to establish proof of guilt beyond a reasonable doubt. See, also, United States v. Cortez, 521 F. 2d 1 (5th Cir., 1975).

We first consider defendant's contention that the evidence in this case was insufficient to establish the *corpus delicti* of the crime. We disagree. The *corpus delicti* of the crime of homicide is not established until it is proved that a human being is dead, and that the death occurred as the result of the criminal agency of another. The *corpus delicti* is the body or substance of the crime, the fact that the crime has been committed without regard to the identity of the person committing it. See, Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539 (1949); Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1 (1950). In Cryderman v. State, 101 Neb. 85, 161 N. W. 1045 (1917), we held that if the evidence other than an extrajudicial confession of the defendant establishes that the human being alleged has been killed by violence not self-inflicted, the *corpus delicti* is proved. It is clear from the evidence in the record that the victim, Bowersox, was killed by a bullet shot from a gun into his nose and found in his brain. The murder weapon was not found, but his position in the bed with his arms crossed and the covers drawn up to his neck would seem to rule out the possibility of accident or suicide. At least the jury could so find from the evidence.

Likewise, even disregarding the testimony of the witness Fetters, we believe there is clearly sufficient evidence in the record from which the jury could find beyond a reasonable doubt that Payne was guilty of murder in the first degree. Without

reviewing in detail all the testimony previously recited, the evidence reveals there was ill feeling between Payne and Bowersox, and that Payne had a key to Bowersox' trailer. Payne told Price that he had taken a record book of drug sales and some money from Bowersox' trailer and was advised by Price to put them back. At a subsequent conversation on the telephone, at 4 o'clock in the morning of the day Bowersox' body was found, Payne told Price "it is done" and when Price asked the defendant whether Bowersox was dead, Payne said "uh-huh". Price then asked Payne about Ranslem, the occupant of the other bedroom in the trailer, and Payne replied "he never stirred." Payne also threatened Price with harm to himself and his fiancee if he said anything about the matter. The above evidence clearly indicates that Payne knew Bowersox was dead as early as 4 o'clock in the morning. He called Ranslem on the telephone shortly before 7 o'clock that morning and told him to wake up Bowersox. He did not tell Ranslem, so far as the record reveals, that he knew Bowersox was dead at that time. Approximately 15 minutes later, he personally came to the trailer for the avowed purpose of searching for certain books he had previously told Ranslem about over the telephone, but he did not mention at that time that he knew Bowersox was dead. When Ranslem entered Bowersox' bedroom, purportedly to continue the search for the books in question, Payne announced to Ranslem that "Frank's been shot," from a position in the doorway from which, according to the testimony of Ranslem, it was unlikely Payne could have seen the wound or blood on Bowersox. While not conclusive of first degree murder, the evidence in the record, both direct and circumstantial, was clearly sufficient to justify the jury in finding beyond a reasonable doubt that Payne killed Bowersox and that the killing was done with deliberate and premeditated malice, even disre-

garding the testimony of the witness Fetters.

The more serious question in this case, however, is whether the jury should have had the opportunity to consider the evidence, under proper instructions, as to the lesser degrees of homicide, to wit, murder in the second degree and manslaughter, or one of them. The court did not instruct the jury on these lesser degrees, and, so far as the record discloses, the jurors may not have even known there were lesser degrees of homicide. The defendant contends that the trial court had the duty to instruct upon these lesser degrees of homicide, even though not requested so to do by him. We now examine that contention.

The applicable statute is section 29-2027, R. R. S. 1943, which provides as follows: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; * * *." Our most recent statement of the rule, however, is found in State v. Beers, 201 Neb. 714, 271 N. W. 2d 842 (1978), in which we stated as follows: "It is the majority rule and the rule in this jurisdiction that, where murder in the first degree is charged, the court is required to charge *without request* on such lesser degrees of homicide as the evidence could support. Kraus v. State, 102 Neb. 690, 169 N. W. 3; Bourne v. State, 116 Neb. 141, 216 N. W. 173; State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849." (Emphasis supplied.) In that case we also held that in order for the rule to be applicable the record must contain some evidence which would tend to show that the crime was of a lesser degree than the homicide charged.

With the above rules in mind, we now examine the record to determine whether the facts and circumstances testified to were such as to require the submission to the jury of one or both of the lesser-

included offenses of homicide. We first examine the lesser-included degree of manslaughter. Under the statute, previously quoted, to constitute manslaughter, the killing must have been done either upon a sudden quarrel or unintentionally while the slayer was in the commission of some unlawful act. A review of the evidence convinces us that a charge upon the crime of manslaughter was not required. The testimony in the record given by the pathologist, and which was uncontroverted, establishes clearly that the killing was done by a slug or bullet fired at close range into the nose of the victim. The placement of the shot would clearly indicate that the killing was intentional. Likewise, there is no evidence of any sudden quarrel. A peace officer testified that he saw no evidence of a struggle. Likewise, Ranslem, who occupied the other bedroom in the trailer, would have undoubtedly heard a struggle, had there been one, as the record discloses he heard his dog growl and also apparently heard the furnace kicking on and off. Similarly, there is no affirmative evidence in the record indicating that the killing was done as the result of an unlawful act. That being so, the crime of manslaughter was not committed, and the court was not required to instruct on the elements of that offense.

The question of the duty of the court to instruct on murder in the second degree, however, presents a different problem. The crime of murder in the second degree is distinguished from murder in the first degree by the absence of deliberation and premeditation. See, § 28-402, R. R. S. 1943; State v. Johnson, 200 Neb. 760, 266 N. W. 2d 193 (1978); State v. Partee, 199 Neb. 305, 258 N. W. 2d 634 (1977). In this case, had the jury been instructed on the elements of murder in the second degree, upon a consideration of the evidence in this case, they may well have found that there was a lack of deliberation and premeditation. While the defendant was convicted of murder in the

first degree, it was not required that the jury convict him of this higher offense, even if warranted by the evidence, had they also been properly instructed upon the elements of murder in the second degree. In Russell v. State, 66 Neb. 497, 92 N. W. 751 (1902), there was evidence upon which there might have been a conviction of murder in the first degree, but the jury convicted the defendant of murder in the second degree. In that case the court held that upon the trial of an offense consisting of different degrees, the jury may acquit the defendant of the degree charged and convict him of any of the inferior degrees. In this case, the element of deliberation and premeditation was established largely through the use of circumstantial evidence. We think the evidence in the record is also susceptible of interpretation that the killing was done without premeditation and malice on the part of Payne. For example, the evidence reflects that Payne told Price that he (Payne) had taken records of dope transactions and money from Bowersox' trailer. Price told Payne that he had better put them back as Bowersox would be angry if he found out. At a subsequent telephone conversation, Payne told Price "it is done," which expression is susceptible to interpretation, either that Payne had killed Bowersox or that Payne had replaced the records and money. As a factual statement it was for the jury to decide which interpretation they wished to place upon it. In any event, the jury might have concluded that Payne was surprised by Bowersox while replacing the records and had killed Bowersox at that time without premeditation or planning in advance. We conclude that under the aforementioned rules of law and the evidence and circumstances revealed in the record, the trial court should have instructed the jury on both first and second degree murder, and that its failure to do so was reversible error, necessitating a remand for a new trial.

We also wish to briefly comment on defendant's claim that the court erred in failing to give an instruction requested by defendant that testimony of persons granted immunity from prosecution for the same crime for which defendant was being tried should be received with care and caution. The record reveals that both Ranslem and Price were granted immunity from prosecution for the same crime in return for their testimony at the trial. Both parties so testified at the beginning of their testimony in response to questions by the attorney for the State. We have approved an instruction similar to that requested by the defendant, being NJI 14.58, to the effect: "The state has adduced testimony from a claimed accomplice. His testimony should be closely scrutinized for any possible motives for falsification, * * *." The defendant also relies on two cases in support of his argument with reference to the refused instruction. The first, Neiden v. State, 120 Neb. 619, 234 N. W. 563 (1931), involved a conviction for receiving stolen goods, in which the primary evidence against the defendant was provided by two parties who had already been convicted for stealing the goods in question. The court found that their testimony, as "confessed aiders in his [defendant's] buying of the stolen goods" was such that the jury might have inferred that the defendant had induced them to steal the goods; and based upon these facts and the definition of an accomplice as a "person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime," the court found the refusal to instruct the jury as to the weight to be given the testimony of the accomplices constituted reversible error. The instant case is clearly distinguishable from that case for the reason that we do not believe the evidence is sufficient to establish that Ranslem and Price were accomplices in this case, and for the further reason that in Neiden the

decision of the court was based partly upon its finding that the trial court had given no cautionary instruction as to the testimony of the witnesses. In the instant case, the trial court did instruct: "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witness is entitled to receive you should consider: * * * 9. The fact that the witness was compelled to testify and granted immunity from prosecution; * * *." The above instruction was, clearly, an equivalent instruction to that requested by the defendant. We have held that the trial court may properly refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Booth, 202 Neb. 692, 276 N. W. 2d 673 (1979).

The defendant also relies upon Steinmark v. Parratt, 427 F. Supp. 931 (D. C. Neb., 1977). That case, however, involved the use of a professional informer paid by the authorities, and hence is distinguishable from the instant case.

In view of what we have stated above, we conclude that the judgment and conviction of the defendant below must be set aside, and the case remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., dissenting.

I dissent for the reason that in my judgment the record discloses no evidence which would require inclusion in the jury charge the crime of murder in the second degree. The evidence justified only a verdict of guilty of murder in the first degree or acquittal. I would affirm the jury verdict.

MARVIN E. SIDEL, SR., APPELLEE, V. TRAVELERS INSURANCE CO. ET AL., APPELLANTS.

288 N. W. 2d 482

Filed February 12, 1980. No. 42753.

1. **Workmen's Compensation: Statutes.** Workmen's compensation awards for disability under the provisions of section 48-121 (2), R. R. S. 1943, are not measured by loss of bodily function, but by reduction in earning power or employability.
2. **Workmen's Compensation: Statutes: Words and Phrases.** "Earning power," as used in subsection (2) of section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired.
3. _____: _____: _____. Subsections (3) and (6) of section 48-162.01, R. R. S. 1943, when read together mean that the statute authorizes vocational rehabilitation training not only under the circumstances specifically described in subsection (3), but also where the Nebraska Workmen's Compensation Court finds that the employee has suffered a reduction in earning power on account of a compensable injury and also finds that vocational rehabilitation will increase that earning capacity.

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

T. J. Stouffer of Cassem, Tierney, Adams, Gotch & Douglas, for appellants.

Hal Bauer of Bauer, Galter, Geier, Flowers & Thomson, for appellee.

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

CLINTON, J.

Defendant, Spencer Foods, Inc., and its workmen's compensation insurance carrier, Travelers Insurance Co., appeal from an award of the Nebraska Workmen's Compensation Court to employee,

Marvin E. Sidel, Sr., for injuries suffered on April 4, 1977. The defendants assign and argue that the Workmen's Compensation Court erred in the following respects: (1) No competent evidence supports the lower court's finding that the injury, arising out of and in the course of employment, resulted in a 20 percent permanent partial disability; that this figure reflects the cumulative effect of employment-related and nonemployment-related injuries. (2) In holding the claimant is entitled to rehabilitative services under the provisions of section 48-162.01 (3), R. S. Supp., 1978. (3) In allowing an award of attorney's fees for the service of the plaintiff's attorney on rehearing before the three-judge Workmen's Compensation Court. We affirm.

A recital of the evidence, including medical, and a description of the two awards in the Workmen's Compensation Court are necessary for a proper perspective of this case. Plaintiff, who at the time of trial was 41 years of age, began work for Spencer Foods on September 7, 1976, as a janitor on the killing floor of its packing plant. His work involved picking up scraps and discard and washing the floor and keeping it clean. On April 4, 1977, while dumping a tub of udders into an auger, he suffered a back injury. As a consequence, he had a lumbar laminectomy performed on April 14, 1977. This is the injury for which the single workmen's compensation judge, on December 26, 1978, made an award for a 10 percent reduction in earning capacity under the provisions of section 48-121 (2), R. R. S. 1943. The three-judge court on April 16, 1979, raised this to a 20 percent reduction in earning capacity due to this injury.

Plaintiff had returned to work on June 13, 1977. On or about March 6, 1978, he underwent a cervical fusion for an old neck problem which it was admitted antedated the injury of April 4, 1977, and was unrelated to his employment. Following that sur-

gery he returned to work on June 5, 1978, doing the same job as before, although he testified that he could not lift as much and was doing somewhat easier work.

On July 11, 1978, while at his place of employment and during a coffee break, plaintiff suffered a severe low back pain while arising from a sitting position. This incident was reported to the employer that same evening. Plaintiff came back to work the following day and continued working until he went on vacation about August 21, 1978. The incident of July 11, 1978, was included in his claim before the Workmen's Compensation Court. The single judge found that the July 1978 incident was a recurrence of the April 1977 injury. The medical report with reference thereto recited: ". . . it would be difficult to establish whether this is a recurrence of the old disc problem or another disc at a different level." The three-judge court found that plaintiff had not sustained his burden of proof as to the July 11, 1978, alleged injury.

On August 28, 1978, plaintiff was unable to get out of bed. He was absent from his employment thereafter. His employer stated the medical reports were unacceptable as an excuse for his absence. Although plaintiff was fired on September 8, 1978, there is evidence that he was later reinstated pursuant to a grievance procedure.

Most of the difficulties in this case are related to the medical evidence which consists of reports of the treating surgeon. Following the lumbar laminectomy, the surgeon reported: "The above is released to return to work May 23, 1977. He should avoid heavy weight lifting and prolonged bending. He may return to full duty on June 13, 1977." On May 31, 1978, following the cervical fusion, the surgeon reported: "The above is released to return to work June 5, 1978." On September 7, 1978, the surgeon elaborated: "This patient had a lumbar laminec-

tomy and a cervical fusion due to disc degeneration and has been seen recently for a back ache again. There was a possibility of recurrence of lumbar disc herniation. In view of back problem and cervical fusion, I believe he should not do a job which involves heavy lifting, stooping, twisting. I therefore believe he may change his present job and elect to do a job which does not strain his neck and back repeatedly. Regarding permanent impairment, 10 percent permanent impairment following lumbar laminectomy which he had in April of 1977 should be allowed for lumbar spine."

On September 14, 1978, a further report was received. It recited that the doctor had seen plaintiff on August 18, 1978, for a complaint of back pain. It further recited that plaintiff had called on August 28, 1978, and stated that the pain was not better. The report then recited that the pain had started about 5 weeks earlier (we note this roughly coincides with the July 11, 1978, incident) and it flared up again on August 28, 1978. The report concluded, referring to an office visit on August 31, 1978: "As stated earlier, he has about 10 percent of permanent impairment in loss of physical function due to his lower back problem. However, he had a cervical fusion also which involves further 10 to 15 percent of permanent impairment. The total impairment would amount to about 20 to 25 percent permanent impairment in loss of physical function of the body." A report on October 12, 1978, contains the recital which we earlier mentioned, to wit, ". . . it would be difficult to establish whether this is a recurrence of the old disc problem or another disc at a different level." On October 30, 1978, the surgeon recommended that plaintiff "be employed in a job which does not require heavy lifting, stooping or twisting of his back which could be in the present company, if such a job is available."

The evidence shows that plaintiff is a high school

graduate. Most of his employment history has been doing manual labor similar to that while employed with Spencer Foods. However, he has also done some work as a mechanic in garages, although not specifically trained in that area. He testified that after the lumbar laminectomy his ability to lift was reduced and he was given lighter work. At the time of trial, he had elected vocational rehabilitation pursuant to the option contained in the order of the Workmen's Compensation Court.

The awards of the single judge and of the three-judge courts each contained the following provision: "There is a reasonable probability that with appropriate training, rehabilitation or education, the plaintiff may be rehabilitated to the extent that he can significantly increase his earning capacity; if the plaintiff desires to be evaluated as to his suitability for rehabilitation services, including job placement, he should contact the Rehabilitation Specialist of the Nebraska Workmen's Compensation Court . . . ."

With reference to the first assignment, the defendants state their contention as follows: "The Appellants respectfully submit that the court's ultimate finding with respect to extent of disability renders [the] appearance of compliance with controlling precedent illusory. It is the Appellants' contention the court's finding of a 20 percent loss of earning power undermines the credibility of its declaration of intent to restrict the scope of its considerations: this figure could only be arrived at if the cumulative effect of all three injuries are thrown into the balance."

Awards under the provisions of section 48-121 (2), R. R. S. 1943, are not measured by loss of bodily function, but by reduction in earning power or employability. Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492; Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700; Thinnes v. Kearney Pack-

ing Co., 173 Neb. 123, 112 N. W. 2d 732. We have also said: " 'Earning power,' as used in subdivision (2), section 48-121, R. S. Supp., 1955, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. . . . If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired." Frederick v. Cargill, Inc., 165 Neb. 589, 86 N. W. 2d 575. See, also, Micek v. Omaha Steel Works, 136 Neb. 843, 287 N. W. 645.

As is clear from an examination of the above opinions, a workman may have a loss of bodily function without impairment of earning capacity. He may, on the other hand, be earning a greater wage after the injury than before, but because of the loss of bodily function, his earning capacity may be impaired and thus he would be entitled to compensation under section 48-121 (2), R. R. S. 1943. In Micek v. Omaha Steel Works, *supra*, we said: "The test, under subdivision 2 of section 48-121, *supra,* is whether any element of plaintiff's earning power has been impaired. The term wages is not a complete synonym for earning power. The ability to earn wages in one's employment is, obviously, a primary base in the admeasurement of earning power, but several other component factors are also involved. These include eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work in which engaged. If any one or more of these four elements of earning power are affected and only partially impaired, as the result of an accident arising out of and in the course of employment, and the disability is not one covered by subdivision 3 of section 48-121, Comp. St. 1929, the

right to compensation is governed by subdivision 2 of such section. The right in such cases rests, as we have indicated, upon the fact that some preexisting element of earning capacity has been impaired."

The result necessarily depends upon the facts in the particular case. In Frederick v. Cargill, Inc., *supra,* there was a loss of bodily function without loss of earning power. In Micek v. Omaha Steel Works, *supra,* there was a loss of earning power despite the fact that the employee was making greater wages in a different occupation after the injury.

In this case, the Workmen's Compensation Court was entitled to take into consideration not only the 10 percent loss of bodily function because of the lumbar laminectomy, but also the facts that the plaintiff was engaged in common labor and that that was his primary skill. His ability to lift was impaired and his employability was thus reduced.

The court specifically found that the injury of July 11, 1978, was not compensable. We have no reason to believe the court considered that or the noncompensable cervical impairment in any way in its determination. 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. § 48-185, R. R. S. 1943.

The defendants contend that the provision for vocational rehabilitation in the order of the Workmen's Compensation Court was unauthorized by law, and point to the provisions of section 48-162.01 (3), R. R. S. 1943, as follows: "An employee who has suffered an injury covered by sections 48-101 to 48-151 shall be entitled to prompt medical and physical rehabilitation services. *When as a result of the injury he is unable to perform work for which he has previous training or experience,* he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment . . . ."

(Emphasis supplied.)

The defendants argue that the order for rehabilitation training so "that he can significantly increase his earning capacity" is not included within the provisions of the cited statute, for, by its terms, it applies only where the employee, as a result of the injury, is unable to perform work for which he has previous training or experience. The defendants, however, have overlooked the provisions of section 48-162.01 (6), R. R. S. 1943, which states: "Whenever the court or judge thereof determines that there is a reasonable probability that with appropriate training, rehabilitation, or education a person who is entitled to compensation for . . . partial disability which is or is likely to be permanent may be rehabilitated to the extent that . . . he can . . . increase his earning capacity and that it is for the best interests of such person to undertake such training, rehabilitation, or education, if the injured employee without reasonable cause refuses to undertake the rehabilitation, training, or educational program determined by the court or judge thereof to be suitable for him or refuses to be evaluated under the provisions of subsection (3) of this section, the court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under sections 48-101 to 48-151."

Although it is to be observed that what the literal language of subsection (6) of section 48-162.01, R. R. S. 1943, authorizes is the suspension, reduction, or limitation of compensation if the employee refuses rehabilitation without reasonable cause, or refuses to be evaluated under subsection (3), it is the plain implication of subsection (6) that the court may require the employee to undertake rehabilitation training in order to increase earning capacity. It would be anomalous to say that the Legislature intended to authorize suspension or reduction of benefits because the employee refuses to take advantage of

training which the court was not authorized by statute to offer or order. Therefore, subsections (3) and (6) together must mean that the statute authorizes vocational rehabilitation training not only under the circumstances outlined in subsection (3), but also where the Workmen's Compensation Court finds that the employee has suffered a reduction in earning power on account of a compensable injury and also finds that vocational rehabilitation will increase that earning capacity. We now expressly so hold. See Camp v. Blount Bros. Corp., 195 Neb. 459, 238 N. W. 2d 634.

The contention that the plaintiff was not entitled to an attorney's fee under the provisions of section 48-125, R. R. S. 1943, because on rehearing the injury of July 11, 1978, was found to be noncompensable and medical expense in connection therewith was disallowed, is not meritorious. The plaintiff did receive a net increase in compensation on rehearing.

The plaintiff is awarded the sum of $750 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE K. COMER, APPELLANT.

Filed February 12, 1980. No. 42814.

288 N. W. 2d 487

1. **Criminal Law: Miranda Rights.** Once an accused is arrested and informed of his Miranda rights, there is no requirement that rewarnings be given each time he is questioned about a crime or crimes different from that for which he was arrested.
2. **Criminal Law: Attorney and Client.** Counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and should conscientiously protect the interests of his client.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Paul E. Hofmeister, for appellee.

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

HASTINGS, J.

Defendant has appealed from an order of the District Court denying his motion for post conviction relief. We affirm.

Defendant was convicted of first degree sexual assault and incest involving an incident occurring on October 16, 1976, with his 12-year-old daughter. The direct appeal found at 199 Neb. 762, 261 N. W. 2d 374, involved the questions of whether first degree sexual assault was a lesser-included offense of incest and the excessiveness of the sentence. We affirmed the conviction. Some of the facts are contained in that opinion. Others will be recited herein.

In this appeal seeking post conviction relief, the defendant assigns one error, violation of his constitutional rights. Specifically, in his brief, defendant attacks the reception into evidence of an admission made by defendant to a police officer, in violation of his constitutional rights, and ineffective assistance of counsel in that his trial attorneys failed to take appropriate action to block that evidence.

Following a complaint by the victim's grandmother, defendant was arrested in Grand Island by Investigator Preble of the Nebraska State Patrol by authority of a warrant charging the defendant with possession of a stolen Winchester rifle. There was also a question as to a stolen .410 shotgun, and particularly, the officer wanted to search the defendant's apartment for a towel which the victim said had been used and possibly stained in the sexual in-

cident. Accordingly, the officer, after making the arrest, advised defendant of his Miranda rights and then asked him and secured his permission to search the apartment for the shotgun. Defendant and the officer then immediately went over to defendant's apartment.

It should be pointed out at this time that during the preliminary hearing Investigator Preble testified that the primary purpose of his going to defendant's apartment was to look for a towel claimed by the victim to have been used and possibly stained during the course of the sexual assault. Defendant knew nothing of this intention until the towel was found in plain sight, and defendant was then questioned about the assault. However, the testimony at the trial itself disclosed nothing in this regard. As a matter of fact, Officer Preble testified that shortly after arriving at the apartment he asked the defendant if he had been involved with his daughter, to which defendant answered "no." In response to a question by Preble, defendant did admit that he had taken his daughter to a movie entitled "Future World" on Saturday, October 16th, and that after the movie they had returned to the apartment where they discussed the daughter's change of school plans. The significance of this testimony was that it did corroborate the victim's testimony to the extent that she and her father had gone to a picture show and had been together at the apartment on that particular date, all in accordance with her testimony.

Defendant's contention as to the violation of his Miranda rights is that although he was read such rights within a short time before making the admissions, the warnings were given only in regard to an arrest for possession of stolen property and no mention had been made of pending sexual assault charges. Also, although no reference was ever made to the towel during the course of the trial, defendant nevertheless contends that because volun-

tary permission to enter the defendant's premises had been obtained under a mistaken understanding on the part of the defendant as to the officer's purpose in going there, somehow defendant had been tricked into waiving his Miranda rights.

It is apparently defendant's position that in questioning a suspect in custody, it is necessary to announce each alleged crime and secure a specific waiver as to interrogation on each subject. In State v. Wilbur, 186 Neb. 306, 182 N. W. 2d 906 (1971), we said a "statement made by the defendant was not inadmissible because he was not advised as to what charge might be filed against him." Admittedly, in that case the circumstances suggested but one subject for inquiry. A somewhat analogous case is State v. Russell, 261 N. W. 2d 490, (Iowa, 1978). There, following a fire in a business establishment, the defendant was found nearby in a badly burned condition, was arrested for breaking and entering, and given his Miranda warnings. Three days later he was again interrogated in his hospital room, at which time the law enforcement officer merely asked defendant if he remembered having been arrested for breaking and entering and having been given his "rights," to which defendant answered in the affirmative. He was then questioned concerning certain facts which led to his prosecution and conviction for arson. In rejecting a contention similar to that made by the defendant Comer, the Iowa court said: "As defendant acknowledges in his brief, we previously have rejected the argument that it is essential in every instance for investigating officers to advise him of his full complement of rights as announced in *Miranda* prior to each and every investigation."

Finally, in United States ex rel. Henne v. Fike, 563 F. 2d 809 (7th Cir., 1977), cert. den., 434 U. S. 1072, 98 S. Ct. 1257, 55 L. Ed. 2d 776, defendant was arrested for driving while intoxicated and was informed of

his Miranda rights while inebriated. Sometime later, without further reference to the Miranda rights, defendant was interrogated by other law enforcement officers about an escape from jail and a murder. In holding that Miranda does not require that rewarnings be given each time an individual is questioned for a different crime, the court, after stating the defendant's claim that the circumstances of his detention had materially changed since the original warnings, said: "However, no authority has been advanced, and we find none, holding Detective Bales was constitutionally compelled to administer new warnings before questioning Henne even assuming that he then suspected Henne of having murdered Cretney." There is no merit to the defendant Comer's claim of error in this respect.

In view of the fact that we have found the admissions complained of were properly obtained, there is no substance to defendant's claim that he had ineffective assistance of counsel because they failed to take steps to prevent the reception of this evidence at the time of trial. Quite apart from that, the record discloses that defendant's counsel vigorously prosecuted the defense of the accused, by the filing of pretrial motions to elect, to quash, and to discover and by conducting a more than adequate cross-examination. It was only at the last minute that defendant would permit the cross-examination of his daughter. The defendant, after being fully informed of his rights, declined to testify so that counsel were somewhat restrained in their efforts to present an adequate defense. "Counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and should conscientiously protect the interests of his client." State v. Mays, 203 Neb. 487, 279 N. W. 2d 146 (1979). Counsel in this case measured up favorably to that standard.

There is no merit to the defendant's conten-

tions, and the judgment of the District Court is affirmed.

AFFIRMED.

JAMES R. MCGREEVY, ADMINISTRATOR OF THE ESTATE OF AMY R. RICH, APPELLEE, V. RALPH R. BREMERS, APPELLANT, IMPLEADED WITH GENERAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE.

288 N. W. 2d 490

Filed February 20, 1980. No. 42518.

Summary Judgments: Motions, Rules, and Orders: Pleadings. When the allegations of the pleadings and the evidence offered at the hearing on a motion for summary judgment show there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained and summary judgment should be granted.

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

Clayton H. Shrout of Shrout, Christian, Krieger, Mori & Merwald, for appellant.

Harold L. Hadland of Cassem, Tierney, Adams, Gotch & Douglas, for appellee General Insurance.

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

MCCOWN, J.

This case arises on a motion for summary judgment on a cross-claim by General Insurance Company of America against Ralph R. Bremers seeking indemnification from Bremers under a written indemnity agreement executed in connection with the issuance of a guardian's bond. The District Court entered judgment in favor of General in the sum of $38,966.07, plus interest and costs. Bremers has appealed.

This case began as an action by the administrator of the estate of Amy R. Rich, deceased, against Ralph R. Bremers, guardian of the estate of Amy R. Rich, and General Insurance Company, the surety on the guardian's bond, to recover a surcharge against Bremers entered by the county court of Douglas County on final accounting in the guardianship proceedings. General filed a cross-claim against Bremers seeking indemnification from Bremers under a written indemnity agreement for any judgment entered against General on the guardian's bond, and for any additional costs, attorney's fees, and expenses incurred by General as a consequence of issuing the surety bond.

After a trial to the court of the administrator's cause of action, judgment was entered in favor of the administrator and against Bremers and General Insurance Company. That judgment was affirmed on appeal to this court. See McGreevy v. Bremers, 199 Neb. 448, 259 N. W. 2d 477.

Following the return of the case to the District Court, General filed a motion for summary judgment on its cross-claim against Bremers. The record establishes that the application for the guardian's bond executed by Bremers provided: "In consideration of the execution by the GENERAL INSURANCE COMPANY OF AMERICA of the bond herein applied for, I hereby agree: * * * Second, to indemnify the Company against all loss, liability, costs, damages, attorneys fees and expenses whatever, which the Company may sustain or incur by reason or in consequence of having executed said bond * * *."

The certificate of the clerk of the District Court established that on January 12, 1978, General paid the sum of $30,459.46 in satisfaction of the McGreevy judgment, plus costs and interest.

The affidavit of the regional surety claims manager for General shows that in consequence of hav-

ing issued and executed the guardian's bond, General incurred and paid attorney's fees, costs, and expenses in the sum of $8,506.61 in addition to the $30,459.46 paid in satisfaction of the judgment, a total sum of $38,966.07.

The counteraffidavit of Bremers asserted that Safeco Insurance Company and not General had been billed and apparently paid some of the costs, expenses, and attorney's fees listed and itemized in the affidavit of General's regional manager, and Safeco was not a party.

Hearing was had on the motion for summary judgment and the matter taken under advisement by the court. On motion and hearing, General was granted permission to file an additional affidavit and the case continued under advisement.

The affidavit of a managing agent and adjuster in charge of General shows that General is a wholly-owned subsidiary of Safeco Insurance Company; that General is in the business of issuing surety bonds; and that the bills for attorney's fees and expenses rendered with respect to a surety bond issued by General are directed to Safeco for processing and, when paid, are charged to General. His affidavit also shows that the attorney's fees, costs, and expenses incurred and paid by General, in his opinion, were fair and reasonable.

On November 7, 1978, the District Court entered its order sustaining the motion for summary judgment, and entered judgment against Bremers in the total sum of $38,966.07. Bremers has appealed.

On appeal, Bremers contends that there was a genuine issue as to several material facts, and that the insurance company was not entitled to summary judgment. He also contends that the District Court erroneously refused to allow him to submit an additional counteraffidavit after judgment had been entered.

On the record here there can be no doubt that the

sum of $30,459.46 paid on the McGreevy judgment was established by the mandate of this court on the former appeal and is res judicata. The only remaining material factual issues are whether the $8,506.61 of attorney's fees, costs, and expenses were incurred in consequence of the issuance of the guardian's bond, and whether or not those costs were reasonable.

Bremers' affidavits, even the rejected one, do not directly dispute the fact that all the costs and expenses were incurred in consequence of the issuance of the guardian's bond. Neither does Bremers assert that any of the fees or costs were unreasonable. He only challenges the foundational qualifications of the affiant, who stated the fees and costs were reasonable. It should be noted here also that the affidavits were received in evidence without objection.

The District Court was fully justified in refusing to reopen the matter to receive Bremers' additional affidavit. That affidavit, however, raised no material issue of fact, nor could it have changed the result.

When the allegations of the pleadings and the evidence offered at the hearing on a motion for summary judgment show there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained and summary judgment should be granted. Gerdes v. Spetman, 197 Neb. 406, 249 N. W. 2d 210.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

DALE NEAL, APPELLANT, V. SCHOOL DISTRICT OF YORK, IN THE COUNTY OF YORK, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

288 N. W. 2d 725

Filed February 20, 1980. No. 42556.

Schools and School Districts: Contracts: Statutes. A contract to coach is not a contract subject to the procedural and substantive requirements of section 79-1254, R. R. S. 1943.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

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

Larry R. Baumann and Fillman & Baumann, for appellee.

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

WHITE, J.

This is an appeal from a breach of contract action brought by plaintiff-appellant, Dale Neal, against the School District of York, Nebraska. At issue is the appellant's contract for the 1976-77 school year. The matter was tried to the District Court for York County, at the conclusion of which the court entered judgment for the defendant. We affirm.

Dale Neal held a teaching-employment contract with the School District of York for the school years 1973-74, 1974-75, and 1975-76. The contracts for teaching included coaching duties for added compensation. On March 19, 1976, the School District notified Neal the 1976-77 teaching contract would be amended to separate the coaching assignment or to terminate it. That letter set forth reasons supporting the amendment and further advised the plaintiff that he had a right to request a hearing before the board of education of the defendant School District.

At the hearing before the defendant School Dis-

trict, the board voted to amend the plaintiff's contract by offering a separate contract for the basketball coaching assignment. Two separate contracts were presented to the plaintiff, one for teaching and one for the basketball coaching assignment. The plaintiff signed and returned the contract for teaching employment but returned unsigned the other contract for employment. The plaintiff objected to language in the coaching contract which provided: "The continuing contractual provision in Nebraska School Law 79-1254 shall not apply and this provision is expressly waived. This one (1) year Contract in noway establishes any future expectations for coaching by Dale Neal at York High School. In this regard, due process procedures and just cause shall not be required to terminate this Contract prior to the filling of the head basketball coaching position for the 1977-78 school year." The board of education voted to reissue the contract for the basketball coaching assignment and required Neal to sign it and return it by noon, May 14, 1976, or the position would be declared open. Thereafter, Neal filed suit in the United States District Court for the District of Nebraska for an order restraining the defendant from offering Neal a contract in the form presented. Judge Warren K. Urbom issued an injunction enjoining the School District from requiring Neal to make an agreement for coaching duties in the precise words proposed by the School District. In response to the order, the board of education met and voted to reissue to the plaintiff a reworded contract for the basketball assignment. Neal did not execute this contract. On August 9, 1976, the School District hired another person to be basketball coach for the 1976-77 school year. Neal claims the School District was contractually obligated, pursuant to his contract of employment, to pay him the sum of $1,458 for his services as varsity head basketball coach for the 1976-77 school year.

Plaintiff contends: (1) That a contract to coach is a contract subject to the procedural and substantive requirements of section 79-1254, R. R. S. 1943, and (2) that the School District failed to comply with the provisions of section 79-1254, R. R. S. 1943.

The threshold issue before this court is whether section 79-1254, R. R. S. 1943, applies to a coaching contract. Whether a particular teacher is entitled to the procedural safeguards of section 79-1254, R. R. S. 1943, is a matter of state concern. While several federal cases have recognized that tenured state teachers have interests in continued employment that are safeguarded by due process, 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; Slochower v. Board of Education, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692; Wieman v. Updegraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. Ed. 216, we are not bound by a federal court's interpretation of a state question. Chief Justice Burger underscores this point in his concurrence in Perry v. Sindermann, *supra*, and Board of Regents v. Roth, *supra*: "The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law."

Section 79-1254, R. R. S. 1943, provides: "The original contract of employment with an *administrator* or a *teacher* and a board of education * * * shall require the sanction of a majority of the members of the board. Except for the first two years of employment under any contract entered into after February 26, 1975, any contract of employment be-

tween an *administrator* or a *teacher* who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period." (Emphasis supplied.)

Nothing in the statutory language or legislative history indicates the Legislature intended the position of coach to be within the applicable statutory definition of teacher or administrator entitled to protection. The introductory words to the statute speak of contracts with administrators or teachers. We do not find any reference to "coach" in the tenure statutes nor do the statutes containing the duties of a teacher in the school system list coaching among those recognized. § 79-101, R. R. S. 1943. The defendant argues that if coaches were found to be entitled to the protection of section 79-1254, R. R. S. 1943, for any reassignment or termination, then all extracurricular assignments would be included. Such a construction would interfere with the right of school authorities to make reasonable assignments and reassignments of a teacher's extracurricular duties. See, Richards v. Board of Education, 58 Wis. 2d 444, 206 N. W. 2d 597 (1973); Enstad v. N. Cent. of Barnes Pub. Sch., etc., 268 N. W. 2d 126 (N. D., 1978); Board of Education, Tucson H. S. Dist. No. 1 v. Williams, 1 Ariz. App. 389, 403 P. 2d 324 (1965); Pease, Aplnt., v. Millcreek Twp. Sch. Dist., 412 Pa. 378, 195 A. 2d 104 (1963). A limitation of that magnitude is a decision for the Legislature.

There is no applicable case law in Nebraska considering the issue in this appeal, but some decisions from other state courts are helpful. In Chiodo v. Board of Educ. of Special School Dist. No. 1, 298 Minn. 380, 215 N. W. 2d 806 (1974), the Minnesota court denied continuing contract protection to the

school coaching assignments to regularly employed teachers. Stang v. Independent Sch. Dist. No. 191, 256 N. W. 2d 82 (Minn., 1977), involved essentially the same factual pattern except the court used the statutory definition of "teacher" applicable to first-class cities and reached the same conclusion. As a later Minnesota case points out: "[B]oth decisions bifurcated the teachers' contracts between regular and 'extra duty' assignments and held that the position of 'coach' was not within the applicable statutory definition of 'teacher' entitled to protection." Rochester Ed. Ass'n v. Independent Sch. Dist., 271 N. W. 2d 311 (Minn., 1978).

In State v. Smith, 142 So. 2d 767 (Fla. App., 1962), after 3 years of service as both a teacher and coach, appellant was assigned as a full-time teacher but was relieved of further duties as coach of the football team. Although the appellant had been assigned the duty of serving as both teacher and coach, the court noted appellant's contract did not specifically include any services appellant rendered in connection with coaching. In holding that appellant was not entitled under his continuing contract of employment to continue in his position as football coach, the court said: "It is our conclusion that appellant's rights of tenure apply only to his employment as a teacher for which he held a certificate issued by the State Department of Education. Such tenure under the continuing contract of employment held by appellant does not extend to the right of reemployment as a coach or athletic director."

Goodwin v. Bennett Co. Ind. Sch. Dist., 88 S. D. 639, 226 N. W. 2d 166 (1975), further supports our holding. There, a high school teacher brought an action against the school district to require the district to grant employment as both a teacher and coach. The school board offered the teacher a contract for the ensuing school year which did not include the basketball coaching assignment. Holding

that the contract offer satisfied the teacher's reemployment rights under the South Dakota Continuing Teacher Contract Law, the court stated: "While Goodwin was entitled to an automatic renewal of his contract to teach, he is nevertheless subject to the authority of the school board under its general powers to direct and manage the schools of the district and the employees employed therein.

"A teacher, in acquiring a permanent status, does not thereby acquire a vested right to teach any certain class or in any certain school. The tenure laws do not interfere with the general power and right of school authorities to assign teachers to particular classes and to particular schools in accordance with their judgment and desire *reasonably exercised*."

In reviewing these cases, we find the analysis of the Chiodo court persuasive: "While all these decisions can be distinguished on their facts, or on differences in the tenure acts or certification requirements, they are significant in their unanimity in denying tenure to coaches and other similar positions." Chiodo v. Board of Educ. of Special School Dist. No. 1, *supra*.

Having determined the statute does not apply in this case, it is unnecessary for us to consider the second issue.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J., concurring.

I concur in the result reached by the majority in this case. I believe, however, that the opinion decides more than the issues presented and perhaps makes too sweeping a pronouncement.

The majority notes that the threshold issue before the court is whether section 79-1254, R. R. S. 1943, applies to "a coaching contract." The majority then concludes that "a contract to coach is not a contract subject to the procedural and substantive requirements of section 79-1254, R. R. S. 1943." While I con-

cur that the facts in this case justify reaching a conclusion that the contract to coach in this case was not intended to be covered by the provisions of section 79-1254, R. R. S. 1943, I am not prepared to say that in no instance might a contract "to coach" not be subject to the requirements of section 79-1254, R. R. S. 1943.

The majority presumes that calling one "a coach" thereby precludes the individual from being "a teacher" within the meaning of section 79-1254, R. R. S. 1943. Section 79-1254, R. R. S. 1943, provides in part: "Except for the first two years of employment under any contract entered into after February 26, 1975, any contract of employment between an administrator or *a teacher* who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period." (Emphasis supplied.)

In reaching its conclusion, the majority apparently concludes that in order for one to be "a teacher" the individual must teach what is generally recognized and traditionally thought to be a course taught by "a teacher." The evidence in this case does not provide us with a sufficient basis to reach the conclusion that in every instance one who is called "a coach" has not been employed to perform a function intended to be covered by section 79-1254, R. R. S. 1943, and in fact is "a teacher." As an example, in Class IV and V school districts the term teacher means and includes all full-time certificated "educational employees" and even includes full-time nurses duly licensed by the State of Nebraska. See § 79-1255, R. R. S. 1943.

It is conceivable to me that one may be employed with the title of "coach" and in fact be a teacher in-

tended to be protected under the provisions of section 79-1254, R. R. S. 1943. It is not beyond the realm of possibility that larger school districts may employ an individual whose principal duty and basis of employment is his ability to teach athletes how to perform in an athletic event and to fill in the remainder of the "teacher's time" with courses in driver's education or something similar. Under the majority's opinion a school district might be permitted to eliminate the teacher's employment as "coach" and limit his duties solely to one class in driver education. Such action might totally defeat the purpose of section 79-1254, R. R. S. 1943. Whether the provisions of section 79-1254, R. R. S. 1943, apply or not should not depend upon whether the individual is called "teacher" or "coach." The deciding factor should be what the principal basis of the employment was, what function was principally to be performed by the school employee, and whether the employee has the right to refuse the assignment. If in fact the evidence discloses that the involvement in athletics is indeed extracurricular not only for the students but for the employee as well, and one which the employee could have refused and still retained principal employment with the school district, I would agree with the majority. On the other hand, if the evidence in a particular case discloses that the principal motivation for employment of the educational employee was his or her ability to "coach" and the additional duties were simply to fill out the day so that the coaching activity was clearly not "extracurricular" for the employee even though it may in fact be extracurricular for the student, I would hold to the contrary. In today's teaching scheme it is not unreasonable to assume that a "teacher" may be hired as a "coach" to teach physical education as well as basketball or football. That would be no different than hiring a "teacher" to teach music and lead the band. I have some diffi-

culty understanding why one who is hired as athletic director of a high school with duties to teach football as well might not have the benefit of section 79-1254, R. R. S. 1943, just because his contract describes him as a "coach." The title standing alone should not be the deciding factor. The actual work involved should be the critical issue.

That is why I have difficulty with the language in the case of Rochester Ed. Ass'n v. Independent Sch. Dist., 271 N. W. 2d 311 (Minn., 1978), cited by the majority. The Minnesota case provides in part: "[B]oth decisions bifurcated the teachers' contracts between regular and 'extra duty' assignments and held that the position of 'coach' was not within the applicable statutory definition of 'teacher' entitled to protection." That would be true if in fact in every instance it was clear that the coaching position was extra duty and not the regular assignment. We have no way of knowing that to be the case in every situation.

It is likewise for the same reason that I find fault with the decision of State v. Smith, 142 So. 2d 767 (Fla. App., 1962), cited by the majority, wherein apparently the Florida court held: "Such tenure under the continuing contract of employment held by appellant does not extend to the right of reemployment as a coach or athletic director." To be sure, in some school districts the position of athletic director may be no different than the position of counselor or department chairman. I suspect we would not hesitate to find that either a department chairman or a counselor who devoted the principal part of his time to fulfilling that function would be covered under section 79-1254, R. R. S. 1943. Likewise, I find the language in Chiodo v. Board of Educ. of Special School Dist. No. 1, 298 Minn. 380, 215 N. W. 2d 806, cited by the majority, too broad for this case. I would not declare in advance that anyone called "coach" is not a "teacher" entitled to the benefits of

the tenured teacher act. I would have simply concluded that based upon the facts in this case, it appears that Neal's work as coach was indeed extracurricular and one which he could refuse to do without jeopardizing his position as a teacher and therefore not covered within the tenured teacher act. I would not, however, have gone beyond that finding.

PLATTSMOUTH POLICE DEPARTMENT COLLECTIVE BARGAINING COMMITTEE, APPELLEE, V. CITY OF PLATTSMOUTH, APPELLANT.

288 N. W. 2d 729

Filed February 20, 1980. No. 42575.

1. **Commission of Industrial Relations: Jurisdiction.** The Commission of Industrial Relations has no general jurisdiction over contractual disputes.
2. **Commission of Industrial Relations: Wages.** Experience and longevity are proper matters to be considered in determining the wages to be paid to employees within the same job classification.
3. **Commission of Industrial Relations: Appeal and Error.** A party appealing from an order of the Commission of Industrial Relations is not required to file a motion for new trial before the commission.
4. **Commission of Industrial Relations: Trial: Evidence.** In the taking of evidence the Commission of Industrial Relations is required to follow the rules of evidence prevailing in the trial of civil cases.
5. **Witnesses: Evidence.** An expert witness should not be allowed to express an opinion where the evidence shows there is no adequate basis for the opinion.

Appeal from the Commission of Industrial Relations. Order vacated in part, and in part reversed.

Herbert J. Elworth of Casey & Elworth, for appellant.

Michael W. Amdor, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding before the Commission of Industrial Relations. The plaintiff is the bargaining agent for the employees of the police department of the defendant, City of Plattsmouth, Nebraska, other than the chief of police and lieutenant. The petition filed by the plaintiff alleged that an industrial dispute existed between the defendant and the employees of its police department. The defendant did not deny that an industrial dispute existed. It alleged that it was willing to bargain and negotiate with the plaintiff on all issues, but admitted that an impasse in negotiations existed and requested that the commission resolve the dispute.

After an evidentiary hearing the commission entered an order fixing and determining the wages and working conditions for officers, detectives, sergeants, and dispatchers employed in the police department of the defendant.

The defendant has appealed and contends that the order of the commission was erroneous in several respects. However, before proceeding to the principal issues involved in the appeal, there are several preliminary issues that require mention.

The commission found the defendant had engaged in unfair labor practices and ordered the City to promote a sergeant to lieutenant and restore a secretary/part-time dispatcher to the department. The plaintiff concedes this part of the order was beyond the jurisdiction of the commission under the rule stated in University Police Officers Union v. University of Nebraska, 203 Neb. 4, 277 N. W. 2d 529. Accordingly, that part of the order must be vacated.

The commission also ordered the City to amend its pension plan to provide a 12 percent or 6 and 6 pension plan. The pension plan is in the nature of a long-term contract which extends beyond the 2-year period over which the commission had jurisdiction in this case. The commission has no general juris-

diction over contractual disputes. See Transport Workers of America v. Transit Auth. of City of Omaha, *ante* p. 26, 286 N. W. 2d 102. That part of the order which directed the defendant to amend its pension plan was beyond the jurisdiction of the commission and must also be vacated.

The principal issues involved in this appeal relate to the determination of wages and working conditions for the employees in question for the period from August 1, 1976, to July 31, 1978. The defendant contends the commission erred in receiving evidence over its objection, that the evidence does not support the findings of the commission as to the wages which should be paid, and that the commission had no authority to establish a salary step schedule.

The salary step schedule merely determined that employees with less than 1 year's experience, employees with 1 year's experience, and employees with more than 2 years' experience, all within the same job classification, should be paid wages differently depending upon their experience. It was a recognition that experience and longevity in employment may provide a basis for an increase in compensation over the starting salary fixed for a particular job classification. This part of the order was not beyond the jurisdiction of the commission because it is a matter for consideration in the determination of wages. The order, of course, affected only wages to be paid during the period over which the commission had jurisdiction and did not bind the defendant after July 31, 1978.

The plaintiff contends that the defendant can not raise any issue on appeal concerning rulings on evidentiary matters by the commission because the defendant did not file a motion for new trial before the commission. The plaintiff relies upon section 48-812, R. R. S. 1943, which provides that appeals from an order of the commission to this court shall be taken

in the same manner and time as appeals from the District Court to this court, and shall be disposed of in this court "in the manner provided by law for disposition of equity cases."

The requirement that a motion for new trial be filed in the District Court as a prerequisite to raising certain issues on appeal is statutory in origin. Generally, we have held this requirement is not applicable to proceedings before administrative bodies in the absence of a specific statute making such a requirement. We do not interpret section 48-812, R. R. S. 1943, as making such a requirement and find no merit in the plaintiff's contention.

The commission based its order upon an array consisting of Beatrice, La Vista, Nebraska City, York, Papillion, Blair, Ralston, Fairbury, and Plattsmouth. It chose these cities because they were the four cities immediately above and below Plattsmouth in population and were within a reasonable distance of Plattsmouth. Of these cities the defendant submitted evidence only as to salaries in La Vista, Nebraska City, Blair, and Plattsmouth.

The plaintiff was allowed, over objection, to introduce exhibits compiled from questionnaires concerning salaries paid in 22 first-class cities. The plaintiff called an expert witness who, over objection, was allowed to testify as to his opinion based upon these exhibits.

The questionnaires had been prepared by the expert witness. The plaintiff had mailed the questionnaires to the police departments in the 22 cities. The questionnaires which were returned to the plaintiff through the mail were not authenticated in any way. The questionnaires listed minimum and maximum salaries but there was no indication as to whether the salaries listed were actually being paid or under what conditions employees would be entitled to receive the maximum salaries.

In the taking of evidence the commission was re-

quired to follow the rules of evidence prevailing in the trial of civil cases. § 48-809, R. R. S. 1943. Because of the lack of foundation evidence to establish the source and reliability of the information contained on the questionnaires which was the basis for the compilations offered by the plaintiff, the defendant's objections to these exhibits should have been sustained. Since the exhibits were the basis for the opinion testimony given by the plaintiff's expert witness, the defendant's objections to his testimony should have been sustained. An expert witness should not be allowed to express an opinion where the evidence shows there is no adequate basis for the opinion. Clearwater Corp. v. City of Lincoln, 202 Neb. 796, 277 N. W. 2d 236. The result is that there is no substantial evidence in the record to sustain the findings and order of the commission.

Those parts of the order of the commission relating to alleged unfair labor practices by the defendant and the defendant's pension plan are vacated. The balance of the order is reversed.

ORDER VACATED IN PART, AND IN PART REVERSED.

BRODKEY, J., concurs in result.

JESSE I. BUKER, APPELLEE, V. MARDELL K. BUKER, APPELLANT.

288 N. W. 2d 732

Filed February 20, 1980. No. 42633.

1. **Judgments: Appeal and Error.** A judgment of a District Court is supported by a presumption of correctness, and it is the appellant's duty to present and show by the record the judgment is erroneous.
2. **Affidavits: Appeal and Error.** Affidavits filed with the clerks of the District Courts are not considered on appeal unless they have been marked, offered in evidence, and are contained in the bill of exceptions.
3. **Appeal and Error: Evidence.** An assignment of error which re-

requires a review of evidence cannot prevail on appeal in the absence of an adequate bill of exceptions.

4. **Divorce: Statutes: Evidence.** In determining whether a proposed settlement is conscionable under section 42-366 (2), R. R. S. 1943, a trial judge has discretion to request production of evidence on that issue, but has no affirmative duty to produce the evidence where the parties have failed to do so.

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

Vickie G. Horton and Horton & Waggoner, for appellant.

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

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

REAGAN, District Judge.

This is an action for dissolution of marriage. The wife brings this appeal from a decree dissolving the marriage, dividing the property of the parties, and making allowances for custody, support, and alimony.

A number of errors have been assigned, but they may be reduced essentially to the following: (1) Error in finding the property settlement not unconscionable; (2) error in awarding inadequate alimony; (3) error in awarding inadequate child support; and (4) error in failing to award attorney's fees. Prior to consideration of these error assignments, it may be helpful to outline how the case was disposed of in the lower court. We also point out appellant has different counsel on appeal than in the trial court.

The parties appeared for trial in the District Court with their respective counsel. Prior to commencement of the trial, extensive settlement discussions were evidently had which ultimately bore fruit. Trial was commenced approximately 3 hours after the time originally set. Mr. Buker was sworn and

testified concerning the existence of the marriage, residence, children, the marital breakdown, and, very briefly, as to property he owned before the marriage, property acquired during the marriage, and his employment. The trial judge then announced from the bench his understanding of the agreement reached by the parties, and questioned Mr. Buker as to whether it was correct and if it was his agreement. Mr. Buker expressed some reservations about a provision of the agreement requiring him to maintain certain levels of life insurance for the children's benefit. The trial judge stated the proceeding was not for the purpose of negotiations, the parties either had reached an agreement or they had not; and if it was the latter, all issues would be decided by the court. A brief recess was taken, after which Mr. Buker acknowledged that the judge's recitation was his voluntary agreement. In response to a direct question, Mrs. Buker also acknowledged it as her voluntary agreement. The court then found the agreement not unconscionable and approved the provisions relating to child custody and support. The trial judge then announced that each party should pay his or her own attorney's fees inasmuch as the marital estate had been equally divided, and directed a decree be prepared incorporating the findings and order. Such a decree was subsequently entered.

Before considering specific assignments of error, we point out that a judgment of a District Court is supported by a presumption of correctness, and it is the appellant's duty to present and show by the record the judgment is erroneous. Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627 (1959). Appellant has urged we look to her affidavit of financial condition filed with the clerk of the District Court and contained in the transcript. But that affidavit was never marked, offered, or otherwise made a part of the bill of exceptions, and may not be properly con-

sidered in disposing of issues presented by this appeal. Frye v. Frye, 158 Neb. 694, 64 N. W. 2d 468 (1954); Brierly v. Federated Finance Co., 168 Neb. 725, 97 N. W. 2d 253 (1959); Peterson v. George, *supra*.

We now look at error assignments (2) through (4). In making determinations of alimony, child support, and attorney's fees, trial courts look to the circumstances, status, and situation of the parties, needs and costs of raising the children, division of the property, income and/or earning capacity of each party, general equities of the situation, and all other attendant circumstances that may be relevant to the disposition of those issues. Gregg v. Gregg, 193 Neb. 811, 229 N. W. 2d 546 (1975); Hermance v. Hermance, 194 Neb. 720, 235 N. W. 2d 231 (1975); Lynch v. Lynch, 195 Neb. 804, 241 N. W. 2d 123 (1976); White v. White, 202 Neb. 199, 274 N. W. 2d 546 (1979); Tilden v. Tilden, 202 Neb. 226, 274 N. W. 2d 860 (1979); Campbell v. Campbell, 202 Neb. 575, 276 N. W. 2d 220 (1979). With respect to each of these determinations, this court is required to review de novo the evidence presented in the record. But the only evidence presented here is the brief testimony of Mr. Buker, alluded to earlier in this opinion. The portion of that testimony relevant to these determinations showed a 9-year marriage; three children, ages 7, 5, and nearly 2; a steady employment with an annual income of $27,000; some personal property, including two automobiles; and a family residence which was purchased at least in part from proceeds from a residence owned by appellee at the time of the marriage. Mrs. Buker received alimony in gross of $14,000, an automobile, personal property, and child support of $175 per month per child. Mr. Buker was also required to pay the family indebtedness, provide health and accident insurance for the children, and maintain existing levels of insurance on his life for the benefit of the children. The record

is totally devoid of evidence pertaining to the value of the real or personal property, appellant's income or her earning capacity, or the needs or costs of raising the children. Recognizing the presumption of correctness and the appellant's duty to present an adequate record for review, we have no basis upon which to disturb the findings of the trial court. The situation is similar to Hanson v. Hanson, 198 Neb. 675, 254 N. W. 2d 699 (1977). In that case the wife had appealed a child support award on the basis of inadequacy. There was no bill of exceptions, and this court affirmed, stating in part: "Any assignment of error which requires an examination of the evidence cannot prevail on appeal in the absence of a bill of exceptions."

Most, if not all, of the preceding discussion is applicable to and disposes of appellant's first error assignment, but one additional claim is made which we address. Section 42-366, R. R. S. 1943, subsection (2), provides as follows: "In a proceeding for dissolution of marriage or for legal separation, the terms of the agreement, except terms providing for the support and custody of minor children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion *or on request of the court*, that the agreement is unconscionable." (Emphasis supplied.) Appellant claims each trial judge has an affirmative duty to produce evidence relating to the economic circumstances of the parties to determine whether a proposed settlement meets the statutory test of conscionability. We reject that contention. The statute properly, and without ambiguity, vests discretion in the trial court to request the parties to produce this evidence. It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial pro-

priety. Simon v. Omaha P. P. Dist., 189 Neb. 183, 202 N. W. 2d 157 (1972).

We find the judgment of the District Court should be affirmed.

AFFIRMED.

IN RE TRUST CREATED BY THE LAST WILL AND TESTAMENT OF JOHN L. TEETERS, TESTATOR. DOROTHY EVANS WOOD ET AL., APPELLANTS, V. LINCOLN GENERAL HOSPITAL ASSOCIATION ET AL., APPELLEES.

288 N. W. 2d 735

Filed February 20, 1980. No. 42638.

1. **Trusts: Charities: Intent.** If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.
2. **Gifts: Charities: Wills.** No gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses which shall in other respects be valid under the laws of this state shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same.
3. **Trusts: Charities.** If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust.
4. **Trusts: Charities: Intent.** A general charitable intent of the settlor is a precondition to the exercise of the court's cy pres power. If the trust instrument evidences no general charitable intention, then the trust fails and the devise or bequest lapses.
5. **Trusts: Wills: Intent.** The primary rule of construction of wills and trust instruments is that the court must, if possible, ascertain the intention of the testator or creator of the trust.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed as modified.

Richard H. Williams of Barney & Carter, P.C., for appellants.

Charles D. Humble of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and HASTINGS, JJ., and COLWELL, District Judge.

CLINTON, J.

The issue on this appeal is, shall the doctrine of cy pres be applied in the case of a charitable trust established by the will of John L. Teeters, or shall the bequest lapse and pass to his residuary legatees. Paragraph XII of the will, which was admitted to probate in the county court of Lancaster County, Nebraska, on October 29, 1946, provided as follows: "I hereby give, bequeath and devise in trust to my Executors named in Paragraph XIV hereof the sum of Twenty Thousand Dollars ($20,000) to be invested and the net income used at their discretion for the benefit of Nurses, Student Nurses, the School of Nursing and any employee of Lincoln General Hospital residing in the Sophy H. Teeters Nurses Home. I shall not attempt to prescribe in detail the specific manner of making use of this bequest but leave that to the Superintendent of Nurses of Lincoln General Hospital and her Assistants in Cooperation with the Superintendent of the Hospital."

The trustee administered the trust in accordance with its terms until sometime after May 30, 1975, when Lincoln General Hospital ceased to operate a school of nursing. The trustee then commenced this action in the county court of Lancaster County under the provisions of section 30-2806, R. R. S. 1943, asking for construction of paragraph XII in the light of the change of circumstances, direction as to the proper beneficiaries of the trust, or modification so that the trust provisions would carry out the intent of the testator.

Pursuant to the prayer of the petition, notice was given to all interested parties, including the Attorney General of the State of Nebraska as attorney for public charities. The county court found that the purpose of the trust had failed and that the will evidenced no general charitable intention. It directed that the trust res and accumulated income pass to the heirs at law of John L. Teeters, the residuary legatees named in his will. The Lincoln General Hospital Association appealed to the District Court for Lancaster County which reversed the decision of the county court and directed that the trust be continued for the benefit of: "(a) nurses and student nurses of Lincoln General Hospital, (b) any employees of Lincoln General Hospital, including nurses and student nurses, who might hereafter reside in the Sophy H. Teeters Nurses Home, and (c) any School of Nursing that might hereafter be established by Lincoln General Hospital, all in conformity with paragraph XII of the Last Will and Testament of John L. Teeters." The heirs at law perfected their appeal to this court. We modify by including employees as beneficiaries of the trust and as so modified affirm the judgment of the District Court.

The evidence tends to establish the following. The structure used as a nurses home is named for Sophy, the deceased wife of the testator. Pursuant to the provisions of paragraph I of the will of John L. Teeters, at his death his body was cremated and the ashes placed in a copper urn on which were engraved his name and the dates of his birth and of his death. The urn was then placed in a previously provided bronze-door cabinet in the Sophy L. Teeters Nurses Home (hereafter Teeters home), in which cabinet the ashes of Sophy were already similarly enshrined.

The facts disclosed at trial reveal that, while a school of nursing is no longer in operation at the hospital, the hospital is not devoid of student nurse

training. An arrangement has been made with the University of Nebraska nursing program whereby university student nurses receive their clinical training at Lincoln General Hospital. Anyone using the Teeters home, whether it be student nurses, faculty, nurses, or employees, is allowed to use the lounges and other facilities established through the trust.

At the time of testator's death and for many years thereafter, student nurses lived in the Teeters home. Employees and nurses did not live in the building. Although not all the student nurses lived in the building, all were entitled to use the facilities in the building during their time spent at the hospital. When the nursing program was discontinued in 1975, the student nurses, nurses, and employees continued to use the facilities provided in the Teeters home, although it is no longer used as a residence.

The present use of the Teeters home is that of an adjunct to the hospital in which chemically dependent patients are treated. Nurses and employees of the hospital work therein. No nurse or employee resides in the building. It is located immediately adjacent to the hospital building.

The income from the trust has in the past been used to furnish amenities, such as lounge and recreation furnishings, for student nurses, licensed nurses, and other employees of the hospital who have occasion to be in the Teeters home. The record indicates that the same functions can still be carried out by using the income for the same purpose in the lounges of the Teeters home and Lincoln General Hospital.

The trust corpus was the sum of $20,000. At the time of trial the res plus accumulated income totaled $22,901.66.

The Restatement sets forth the doctrine of cy pres in the following language: "If property is given in trust to be applied to a particular charitable pur-

pose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." Restatement, Trusts 2d, § 399, p. 297.

Insofar as the indefiniteness of beneficiaries is concerned, the equitable doctrine of cy pres has been embodied in our statute. Section 30-239, R. R. S. 1943, provides in part: "No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same." In Garwood v. Drake University, 188 Neb. 605, 198 N. W. 2d 336, we said: "If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust. . . . A charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest, when construed in the light of all the facts, the intent of the donor is reasonably apparent."

The foregoing statements of this court conform to the rule that a general charitable intent is a precondition to the exercise of the court's cy pres power. School District v. Wood, 144 Neb. 241, 13 N. W. 2d 153; Connecticut Bank & Trust Co. v. Johnson Memorial Hospital, 30 Conn. Sup. 1, 294 A. 2d 586; City of Danville, Kentucky v. Caldwell, 311 S. W. 2d 561 (Ky., 1958). If the trust instrument evidences no general charitable intention, then the trust fails and the devise or bequest lapses. Rohlff v. German Old

People's Home, 143 Neb. 636, 10 N. W. 2d 686.

An equitable principle applicable to charitable trusts is that of deviation. Restatement, Trusts 2d, § 381, p. 273. The distinction between the doctrine of cy pres and deviation has been stated as follows: ". . . the deviation doctrine is applicable to make changes in the manner in which a charitable trust is administered while cy pres is used in cases where a change of the settlor's specific charitable purpose is involved." 8 Real Property, Probate & Trust Journal, p. 398. The dividing line between the application of the two doctrines is sometimes difficult to draw.

Garwood v. Drake University, *supra,* and Trustees of Dartmouth College v. Quincy, 357 Mass. 521, 258 N. E. 2d 745, are both somewhat similar to the factual situation we have before us here. In Garwood, the sum of $10,000 was bequeathed to the Divinity School of Drake University for scholarships. At the time the bequest became effective, Drake had abolished its Divinity School, which granted both baccalaureate and graduate degrees in divinity, and had instead installed a Department of Religion. That department granted only baccalaureate degrees in religion. However, the same general courses were offered in the School of Religion as had previously been offered in the Divinity School. Neither the Divinity School nor the Department of Religion were legal entities. We held in that case that the trust did not lapse, but passed to Drake University for the purpose of scholarships in the School of Religion.

In Trustees of Dartmouth College v. Quincy, *supra,* there was involved a trust to establish and maintain a school for girls born in Quincy, Massachusetts. The holding in that case is stated at 8 Real Property, Probate & Trust Journal, p. 399, in the following language: "The will provided for a gift over to Dartmouth College to take effect if Quincy failed 'to comply with the words and intent of this will' or used the

trust property 'for any other purpose than contemplated in this will.' The trust was sufficient to establish such a school and to maintain it for the better part of a century, but in the late 1950's it became clear that the income from the trust was no longer sufficient to maintain the school and that the capacity of the school was considerably greater than the number of Quincy girls available to use it. The City of Quincy, as trustee, approved a plan under which qualified girls not born in Quincy could be admitted to the school, and Dartmouth College brought a petition alleging among other things that if the school could not be operated without admitting such girls, the gift over must take effect. The court permitted the admission of non-Quincyborn girls. The court stated:

" 'The situation before us does not call for the usual type of equitable application of charitable gift cy pres. The gift . . . has not yet failed entirely nor has it become impossible of execution strictly in accordance with that article without the application of traditional cy pres principles. . . .

" 'It is not wholly clear in all instances whether a particular decision involves (a) only construction of a charitable trust or a reasonable deviation, in the public interest, from its subordinate provisions, or (b) a traditional cy pres application. . . .

" 'We think that the present case is one where the means and detailed methods stated by the testator "must have been subordinate in his mind to the [predominant charitable] end which he had in view . . ." We think that the proposal now before us is . . . a proper method of carrying out . . . [the testator's] . . . primary charitable trust without violation of any of its basic charitable purposes.' "

In the matter now before this court, the primary argument of the appellants is that the specific purpose of the trust was to benefit those classes of persons described in the will as "residing in the Sophy

H. Teeters Nurses Home." Since the time of discontinuance of the school of nursing, no person of those classes has resided in the structure. Appellants argue the purpose is now impossible of accomplishment and no other general charitable purpose being evident; the bequest must lapse.

The primary rule of construction is that the court must, if possible, ascertain the intention of the testator or creator of the trust. Scully v. Scully, 162 Neb. 368, 76 N. W. 2d 239; Overbeck v. Estate of Bock, 198 Neb. 121, 251 N. W. 2d 872.

In our search to ascertain the testator's intent, we note that no specific words of limitation were used to qualify the bequest, e.g., "for so long as they may reside in the Sophy H. Teeters Nurses Home." Nor did the testator provide for an alternative taker should student nurses cease to reside in the building. It is stated in Bogert, Trusts and Trustees (Rev. 2nd Ed.), § 437, p. 529, that: "It has been held that the absence of a gift over or a provision for reverter on the failure of the charity is evidence of a general intent, ..." Fulton v. Trustees of Boston College, 372 Mass. 350, 361 N. E. 2d 1297. We note also that testator was familiar with providing for alternative takers should unexpected events arise, since he provided for alternative takers in several other portions of the will.

The following considerations persuade us that actual residence by beneficiaries in the Teeters home was not a predominant consideration in the testator's mind. The three classes of beneficiaries were student nurses, nurses, and employees of Lincoln General Hospital. It is a reasonable inference that although the testator included nurses and employees of Lincoln General Hospital in the categories of beneficiaries, he must have been aware that neither of the latter categories had ever resided in the home. He could not, therefore, have intended that residence be a condition precedent to eligibility for in-

clusion in the class. Yet it is also evident that Lincoln General Hospital was important to him for he chose a part of its premises, named after his wife, as a repository for the ashes of both. It is also significant that, although the beneficiaries are designated, the amount of income to be used for their benefit is left to [referring to the executors trustees] "their discretion." In like manner he does not prescribe "the specific manner of making use of this bequest but leave[s] that to the Superintendent of Nurses of Lincoln General Hospital and her Assistants in Cooperation with the Superintendent of the Hospital."

It is to be noted also that the "School of Nursing" was included in the category of beneficiaries although it was not apparently a legal entity. Its activities were carried on only in part at the Teeters home and the remainder at the hospital itself.

In sum, it may be said that all the categories of actual persons in the classes still exist and may be served; the place of activities still exists; and the agents of Lincoln General Hospital, to whom the exercise of discretion is entrusted, continue and apparently will continue so long as the institution exists.

From the foregoing analysis, we discern no reason why employees should be excluded from the class beneficiaries. From a strictly grammatical point of view, it may be argued that the phrase, "residing in the Sophy H. Teeters Nurses Home," modifies only "any employee of Lincoln General Hospital," rather than all the other possible antecedents. However, that this was the testator's actual intent seems unlikely since the evidence shows that, with one brief exception, no employee ever resided in the home.

We modify the judgment of the District Court by including "employees" in category (a) of that court's order. As so modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. WINFRED SAMUELS, APPELLANT.

289 N. W. 2d 183

Filed February 20, 1980. No. 42708.

1. **Criminal Law: Trial: Evidence: Verdicts.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
2. **Criminal Law: Instructions.** The fact that Nebraska Jury Instructions (NJI) does not contain a specific instruction on a subject forms no basis for the refusal of the court to give an otherwise correct and appropriate tendered instruction.
3. **Criminal Law: Evidence: Instructions.** If evidence has been received for a specific, limited purpose, a proper and appropriate instruction tendered by a party to explain the significance or limitation of the evidence should be given.
4. **Criminal Law: Instructions.** A tendered instruction, otherwise appropriate, which either misstates the law or tends to confuse or mislead the jury should not be given by the trial court.
5. **Criminal Law: Instructions: Trial.** If no standard instruction is available from Nebraska Jury Instructions (NJI) which applies to a subject upon which the jury should be instructed, the trial court must draft one appropriate to the existing conditions.
6. **Criminal Law: Homicide: Evidence: Instructions.** In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance.
7. **Criminal Law: Instructions.** An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given.
8. **Criminal Law: Instructions: Homicide.** An instruction should no more tell a jury that it may find the accused innocent of murder if it finds the character of the victim to be bad than to inform it that it may find a defendant guilty because of his own bad character.
9. **Criminal Law: Instructions: Trial.** The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given.
10. **Criminal Law: Homicide: Evidence.** In a criminal homicide case, the defendant's conduct in leaving the scene immediately or

soon after the shooting may constitute a voluntary flight which is a circumstance that may be considered together with all other evidence to aid the jury in determining the question of guilt or innocence of the accused.

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

James M. Davis of Dolan, Dinsmore & Davis, for appellant.

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

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

HASTINGS, J.

Defendant was charged with the first degree murder of Ronald Cunningham, whose death occurred on October 16, 1978. Upon being tried to a jury, he was found guilty of the lesser-included charge of second degree murder and was sentenced to 13 years in the Nebraska Penal and Correctional Complex. The errors assigned by defendant on appeal included the refusal to give defendant's proposed instructions as to motive of defendant and character of the victim, the giving of an instruction on flight pursuant to an oral request of the State, a denial of defendant's motion for mistrial based on misconduct of the prosecution, and failure of the evidence to support a conviction as a matter of law. We affirm.

On the evening of October 16, 1978, at approximately 9 p.m., police officers James Cates, Calvin Dierks, and Kenneth Bovasso, among others, were called to the scene of a shooting at 33rd and Lake Streets, in Omaha, Nebraska. There they found the victim slumped over the wheel of a 1971 white Cadillac. James Greer, a firefighter with the rescue squad, was also there and climbed into the car to examine the victim whom he found to be dead. Greer observed a cocked automatic weapon which he

handed to the police. The weapon was on the front seat near the victim's right thigh, pointed toward the dash. The victim's right hand was resting on his right thigh a couple of inches from the gun. It was later determined that the weapon was a .22-caliber automatic pistol, which was loaded as well as cocked. A search of the scene outside the automobile revealed three .25-caliber automatic shell casings. The weapon which was admitted to be that used in the killing was later found to be a .25-caliber automatic pistol.

Two occupants of the white Cadillac at the time of the killing, Elease Vaughan and Carolyn Evans, testified that the victim was sitting at the wheel visiting with two passengers in the front seat when they heard the door window being knocked out and three shots on the driver's side. Elease heard someone outside the car say "I'm going to get you." She had seen no gun inside the car.

Three other witnesses, James Smith, Shirley Marion, and Sylvester Bedford, saw someone shoot into the white Cadillac from the driver's side and then run from the scene.

By means of appropriate scientific evidence, the State established the cause of death as two gunshot wounds and identified the slugs taken from the victim's body as having been fired by the weapon admitted to having been used in the shooting.

The defendant was arrested on October 17, 1978, and after having been given the appropriate Miranda warnings, denied both on that day and the following day that he had done the shooting or, for that matter, that he had been near the scene. However, later on the 18th he recanted his prior statements and gave a tape-recorded statement in which he admitted to having shot Cunningham, but stated that Cunningham pulled a gun on him first. Defendant then told the police where the weapon could be found and it was picked up.

Following presentation of the above evidence by the State and the court's overruling of a motion to dismiss, the defense then put on its case. This consisted of the testimony of several witnesses as to the reputation of the victim for being dangerous and violent and that of the defendant as being a gentle, law-abiding person and incapable of shooting another person. Defendant himself testified, in which he admitted the shooting. However, he said he had gone with a friend of his, Simon Tunstall, to talk to Cunningham who was thought to have been the person who robbed Simon a few days before. Simon had the gun, but defendant took it because he didn't want Simon, who was considered to be hotheaded, to get into trouble. Defendant said he had no intention of using the gun, but did say he placed the loaded and cocked pistol in his pocket. He then said he tapped on the window, saw the victim go in his coat and come up with a gun which he pointed at defendant, and the latter then just fired. He didn't know how many times he fired, but immediately afterwards he ran from the scene because he was afraid.

It was in this state of the record that defendant's motions to dismiss for failure of the evidence were made, both at the close of the State's case and at the conclusion of all the evidence. It is obvious that the evidence, if believed by the jury, was sufficient for it to find that defendant did "purposely and maliciously, but without deliberation and premeditation" kill Ronald Cunningham. § 28-402, R. R. S. 1943. By the same token, there was nothing in the record which required the court to determine as a matter of law that the killing was done in self-defense. "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty."

State v. Webb, 197 Neb. 662, 250 N. W. 2d 625 (1977). The trial court did not err in refusing to direct a verdict of not guilty.

Turning next to the question of the instruction, three general observations might be appropriate at this time. In the first place, for future guidance of the trial courts, the fact that Nebraska Jury Instructions (NJI) does not contain a specific instruction on a subject forms no basis for the refusal of the court to give an otherwise correct and appropriate tendered instruction. The rule which we adopted with reference to NJI merely states that if NJI contains an instruction applicable to the situation and the court determines that the jury should be instructed on the subject, the NJI instruction should be used. Nebraska Jury Instructions, p. IX. Secondly, it would seem logical to expect, and no citation of authority should be required, that if evidence is received for a specific, limited purpose such as impeaching prior inconsistent statements, evidence of prior felonies committed by a witness, good character of the defendant for being a peaceful man, and bad character of the victim in a self-defense case, a proper and appropriate instruction tendered by a party to explain the significance or limitation of the evidence should be given. Finally, a tendered instruction, otherwise appropriate, which either misstates the law or tends to confuse or mislead the jury should not be given by the trial court. State v. Poulson, 194 Neb. 601, 234 N. W. 2d 214 (1975); Egbert v. State, 113 Neb. 790, 205 N. W. 252 (1925).

Defendant's tendered instruction No. 21 reads as follows: "The question of the motive of the defendant to kill Ronald Cunningham has been raised during trial. While motive is not an essential element of the crime of *first degree murder,* evidence of lack of motive is always permissible as a *circumstance favorable to the accused.* Such evidence is to be considered by you with the other evidence bearing

upon the question of guilt or innocence and is to be given such weight as you believe it to be fairly entitled to. When so considered, *it may be sufficient to create a reasonable doubt*, when without it, none would exist." (Emphasis supplied.) The trial court refused to give the instruction, primarily for the stated reason that NJI does not include an instruction on motive. We have previously eliminated this reason as a ground for refusing to give a properly tendered instruction. It was never intended, or at least would be impractical to believe, that NJI could possibly contain the necessary instructions applicable in every situation. If no such standard instruction is available, the court must draft one appropriate to the existing conditions.

However, was it error in any event to refuse defendant's tender? In support of his position that it was, defendant cites the following language from Trobough v. State, 119 Neb. 128, 227 N. W. 443 (1929): "The importance of motive, therefore, suggests the necessity of proper instructions to the jury concerning the same, and while absence of all evidence of motive in a case may be conceded to be circumstances favorable to the defendant, still it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance; yet this court is committed to the doctrine that the defendant is entitled to an instruction on the subject of motive, *at least to the extent that the absence of all evidence of motive is a circumstance* that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused." (Emphasis supplied.) It should be pointed out that the facts in that case disclosed that proof of the identity of defendant as the perpetrator of the crime rested on circumstantial evidence, whereas here the defendant specifically admitted his act, and additionally there was not an "absence of all evidence of motive."

Also, in Egbert v. State, 113 Neb. 790, 205 N. W. 252 (1925), the trial court refused an instruction to the effect that if the evidence failed to disclose a motive on the part of the defendant, this is a *circumstance in favor of his innocence.* We there said: "* * * that the instruction tendered is not a correct statement of the law. It is not the province of the court to instruct the jury what weight or bearing should be given to a particular circumstance. As applied to the present situation, the instruction should go no further than to inform the jury that such a circumstance should be considered by them in connection with all the other facts and circumstances in determining the guilt or innocence of the defendant." Defendant's proposed instruction contained the language relating to a "circumstance favorable to the accused," the substance of which was found to be offensive in Egbert v. State, *supra.* An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. State v. Pelton, 197 Neb. 412, 249 N. W. 2d 484 (1977); State v. Poulson, 194 Neb. 601, 234 N. W. 2d 214 (1975).

In part, defendant's tendered instruction No. 22 provided that the testimony regarding the victim's general reputation for violence might be considered in connection with defendant's claim of self-defense to show: "* * * 1. the likelihood that the deceased was the aggressor; 2. the defendant's apprehension of the deceased was reasonable. When so considered, it may be sufficient to create a reasonable doubt, when without it, none would exist. Your conclusion is to be drawn from the whole of the evidence, and where, after giving due weight to the evidence of the bad character of the deceased, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of the bad character of the deceased is unavailing." This court has held that the failure to give a requested instruction on the

good character of a defendant is reversible error. McDougal v. State, 105 Neb. 553, 181 N. W. 519 (1921). We have not passed on that precise instructional question relating to the bad character of a victim.

We have said that in a homicide case, after the defendant has first introduced evidence tending to show self-defense, evidence of the ferocity or violent disposition of the victim is admissible for the purpose of showing either the defendant was acting in terror and hence incapable of malice necessary to constitute first degree murder, or that defendant was in such extremity as to make out a case of self-defense. State v. Escamilla, 195 Neb. 558, 239 N. W. 2d 270 (1976); State v. Kimbrough, 173 Neb. 873, 115 N. W. 2d 422 (1962). As we have stated earlier in this opinion, if evidence is properly received for a special or limited purpose, a proper instruction containing a correct statement of the law explaining the application of such evidence when tendered to the court should be given.

In State v. Finn, 243 S. W. 2d 67 (S. Ct. Mo., 1951), the Missouri Supreme Court was presented the question of the failure of the trial court to give a requested instruction in a self-defense case that " 'If the jury believes from the evidence that the deceased was of rash, turbulent and violent disposition and that the defendant had knowledge of such disposition, then it is a circumstance for the consideration of the jury in considering the reasonable cause for defendant's apprehension of great personal injury to himself.' " There, such failure was held to be erroneous. However, defendant's instruction here did not limit consideration of the character evidence to show the likelihood that deceased was the aggressor or that defendant's apprehension was reasonable. The first portion did, but the proposed instruction went on to state that "Your conclusion is to be drawn from the whole of the evidence, and where,

after giving due weight to the evidence of bad character of the deceased, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of the bad character of the deceased is unavailing." The problem with that sentence of the instruction is that it suggests the generalization that bad character of the victim may be a reason for finding the defendant not guilty of his murder. This is somewhat similar to suggesting to the jury that it can find the defendant guilty if the evidence of his character shows him to be a bad man. Of course, this would be prohibited by the evidentiary exclusionary rule embodied in section 27-404, R. R. S. 1943, which renders inadmissible as part of the prosecution's evidence in chief the bad character of the defendant.

However, perhaps more nearly apropos of the situation here, we said in Scott v. State, 113 Neb. 657, 204 N. W. 381 (1925): "Error is assigned upon the court's refusal to give request * * * No. 3, [of defendant] that the prosecuting witness was of a quarrelsome disposition did not affect the nature of the act of shooting him and should be considered only upon the question of self-defense. While these requests state correct propositions, they are largely argumentative, and we think no prejudicial error is shown by the refusal, in view of the fact that by instruction No. 5, given by the court, the law of self-defense was clearly stated, and the jury told that if they 'find from the evidence that at the time defendant shot Roy Diederich, the *circumstances surrounding the defendant were such as in sound reason would, and did, justify and induce in his mind an honest belief that he was in immediate danger of receiving from Roy Diederich great bodily harm,' then his act was excusable.*" (Emphasis supplied.)

For Samuels, the court gave the appropriate portion of NJI 14.33, the self-defense or justification instruction, which contained substantially the lan-

guage found and approved in instruction No. 5 in Scott v. State, *supra*. A portion of that language is as follows: "The use of force by the defendant * * * is justified if the defendant reasonably believed that such force was immediately necessary for the purpose of protecting himself against the use of unlawful force by Ronald Cunningham * * *. If you find from the evidence * * * either the defendant was justified in his force, or there is a reasonable doubt raised in your minds as to the State sustaining its burden of proof that the defendant was not justified in the use of the force claimed by him as a defense, then it is your duty to find the defendant not guilty." As stated in State v. Bear Runner, 198 Neb. 368, 252 N. W. 2d 638 (1977): "The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given."

Defendant complains that the trial court gave instruction No. 18 on "flight" in face of the fact that not only was there no such NJI instruction, the reason assigned by the trial court in not giving defendant's proposed instructions on motive and character of the victim, but specifically, NJI 14.64 recommends that no such instruction be given. What we said above concerning the absence of a specific instruction in NJI is equally applicable here. The full text of the instruction given is as follows: "The evidence discloses that the defendant departed the scene shortly after the shooting occurred. Departure alone does not constitute 'flight.' In order for departure to acquire the legal significance of flight, you must find from all of the circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

"If you find that the defendant's conduct in leaving the scene immediately or soon after the shooting

constitutes voluntary flight, you are then instructed that voluntary flight is a circumstance nevertheless which you may consider in connection with all the other evidence in the case to aid you in determining the question of guilt or innocence of the defendant."

An instruction similar in nature was given and approved in State v. Lincoln, 183 Neb. 770, 164 N. W. 2d 470 (1969), with the clause, "is a circumstance, not sufficient of itself to establish guilt," added. Defendant here attacks the elimination of that clause. We do not feel that this was an omission of sufficient proportions to be called prejudicial error. As to the propriety of giving such instruction, there was evidence in the record from which it could be concluded that the defendant ran because he was frightened, or ran to escape detection. This was for the jury to decide in accordance with the definitional portion of the first paragraph of the instruction. Additionally, defendant insists it was error for the court to give an instruction based on an oral request of the prosecution. This claim is utterly groundless. Section 25-1111, R. R. S. 1943, requires that the court's instructions to the jury to be valid must be in writing. As to requested instructions, they need be in writing only to enable a party to assign error because of a failure of the court to give them. Obviously, the court may incorporate into its written instructions actually read to the jury any information, written or oral and from whatever source, as long as it is correct and appropriate to the situation.

Finally, defendant claims misconduct on the part of the prosecution in asking one of the defendant's character witnesses if he was aware of the fact that defendant was arrested on July 27, 1978, by the Los Angeles police department for possession of a controlled substance. His contention is that the witness having testified to defendant's being a peace-loving man, cross-examination would have to be pertinent to that characteristic and must be phrased in terms

not "are you aware of the fact?" but "have you heard that?" In any event, the question was answered before the court could rule on the objection, no opportunity to rule was given the court, no motion to strike was interposed, and the witness answered that it wouldn't make any difference anyway. There was no prejudice to the defendant.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

SHERMAN COUNTY BANK, A CORPORATION, APPELLANT, V. LORETTA LONOWSKI, INDIVIDUALLY, AND LORETTA LONOWSKI, ADMINISTRATRIX OF THE ESTATE OF EDWARD M. LONOWSKI, DECEASED, APPELLEE.

289 N. W. 2d 189

Filed February 26, 1980. No. 42453.

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

C. Patrick Shaughnessy, Jr., of Shaughnessy, Shaughnessy & Shaughnessy, for appellant.

Paul Mathew, for appellee.

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

MCCOWN, J.

This is an action by the plaintiff bank for foreclosure of a real estate mortgage given to secure an indebtedness of $20,000. The District Court found that the plaintiff was entitled to foreclosure, but also found that defendant was entitled to the setoff of two jointly held certificates of deposit which the plaintiff bank had applied against her husband's individual indebtedness after his death. The District Court found the amount due and owing to plaintiff from

defendant to be $7,841.81, and ordered foreclosure. The plaintiff bank has appealed.

On May 20, 1975, Edward M. Lonowski and his wife, Loretta Lonowski, the defendant in this action, executed and delivered to the plaintiff bank a promissory note and real estate mortgage in the sum of $20,000, payable in semiannual installments commencing November 20, 1975. Edward M. Lonowski died August 10, 1975. No payments were made on the note and mortgage.

On September 8, 1975, Loretta Lonowski was appointed administratrix of the estate of Edward M. Lonowski. The plaintiff bank filed a claim against the estate of Edward M. Lonowski in the total principal sum of $37,400, $20,000 of which was the principal amount of the note and real estate mortgage involved here, and $17,400 of which was the principal amount of various notes executed by the decedent individually. The total claim was allowed on January 30, 1976, and by later nunc pro tunc order was corrected to show that the $20,000 mortgage indebtedness was allowed as a contingent claim and the $17,400 as an allowed claim.

Each of the promissory notes executed by Edward M. Lonowski individually provided: "Payee shall have at all times a security interest in and right of set-off against any deposit balances of the maker(s) and endorser(s) hereof, and may at the time, without notice, apply the same against payment of this note or any other obligations of the undersigned to the bank, whether due or not regardless of the existence or amount of any other security held by the bank."

Two automatically renewable certificates of deposit with the Sherman County Bank, with interest compounded quarterly, were issued and outstanding at the times relevant here. Both were in the names of Edward M. Lonowski or Loretta Lonowski, either or survivor. The principal amount due on the last

compounding date was $5,282.67 on CD No. 2564, and $9,660.89 on CD No. 2310.

On March 18, 1976, the two certificates of deposit were cashed by the bank for the respective amounts of $5,340.96 and $9,707.34 and applied on the promissory notes executed by Edward M. Lonowski individually.

In October 1977, the plaintiff bank filed this proceeding to foreclose the real estate mortgage given to secure the promissory note in the principal sum of $20,000 executed on May 20, 1975, by Edward M. Lonowski and the defendant. The bank alleged that no amount had been paid on principal or interest and the entire amount was due and owing.

The defendant's answer asserted the right to setoff in the sum of $15,048.30 against the real estate mortgage indebtedness because the plaintiff bank had converted such certificates of deposit and applied them to the payment of individual indebtedness of Edward M. Lonowski rather than to indebtedness of the defendant.

The District Court found that on March 18, 1976, the defendant, Loretta Lonowski, individually, was the sole owner of certificates of deposit Nos. 2310 and 2564, on which the total amount of principal and interest then due was $15,048.30. The court found that the plaintiff bank had applied the sums due on the two certificates of deposit to the individual indebtedness of Edward M. Lonowski, but that instead the sum of $15,048.30 should be credited to the real estate mortgage note upon which the defendant had remaining liability to the plaintiff bank. The District Court determined the balance due on the real estate mortgage note after such credit was $7,841.81, and ordered foreclosure for that amount. The plaintiff bank has appealed.

The bank's position on appeal is that Edward M. Lonowski, as a joint owner of the certificates of deposit, pledged the certificates as security for his in-

dividual indebtedness, and that the possession of the certificates by the bank gave it a perfected security interest in the certificates superior to the interest of Loretta Lonowski, the surviving joint owner of the certificates, and authorized the bank to set off the certificates against the individual indebtedness of Edward M. Lonowski after his death.

Following the entry of judgment in the District Court, the bank filed a motion to reopen the record to show that the certificates were in its possession at the time the certificates were set off, and offered to prove that the certificates were in its possession at the time the individual promissory notes were executed, and that delivery of possession was intended to secure the payment of the individual promissory notes. The trial court denied the motion to reopen the record, and also ruled that such evidence would not alter the judgment of the court.

It should be noted at the outset that the statutes applicable to the factual situation presented in this case have been repealed and replaced by other provisions of the Uniform Probate Code which became operative January 1, 1977.

Prior to January 1, 1977, section 8-136, R. R. S. 1943 (Reissue 1974) (since repealed), was in effect. That section provided: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of such persons or to the survivor or survivors in due course of business." This court held that the statute fixed the property rights of the persons named in the deposit where compliance with the statute has been had, and that upon the death of one payee, the survivor takes the whole legal title, free of any debts of the deceased unless a contrary intent affirmatively appears from the terms of the deposit. DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733.

Prior to January 1, 1977, at all times relevant here, there was also a statute providing for a limited right of recovery against a surviving joint tenant by a creditor or personal representative of the decedent under specified conditions. That statute is not relevant here, nor was there any attempt to comply with it. See § 30-624, R. R. S. 1943 (Reissue 1964) (since repealed).

Courts dealing with the setoff factual situation presented in the case now before us have generally held that a bank may set off a debt owed it by one of the owners of a joint deposit standing in the names of the debtor and another where the right to setoff is exercised during the debtor's lifetime, but that the right to setoff terminates with the death of the debtor where the deposit passes to the nondebtor depositor as surviving joint tenant. See Annotation, 68 A. L. R. 3d 192. The basis of such holdings is that the debtor can grant the right of setoff only to the extent of his own interest in the joint account, and that upon his death he no longer has any interest and the right of setoff is determined by the time of exercise of the right. See, Savings Bank v. Holzer, 175 Md. 481, 2 A. 2d 639; Commercial Banking Co. v. Spurlock, 238 Ga. 123, 231 S. E. 2d 748.

Under the statutes effective prior to January 1, 1977, and at all times relevant here, the plaintiff bank, whether it had possession of the joint certificates of deposit or not, had the right to set off the debt owed by Edward M. Lonowski individually against the joint deposit represented by the certificates only where the right to setoff was exercised during Edward M. Lonowski's lifetime. The interest of Edward M. Lonowski in the joint deposit and the right of the bank to setoff against it terminated with his death, and title to the joint deposits passed to the defendant, free of the individual pledge or debt of her husband.

It should again be pointed out that the Uniform

Probate Code effective in Nebraska on January 1, 1977, effectively codified the law of multiple-party bank accounts, and relegated cases such as the present one to "something of an historical footnote." See §§ 30-2701 to 30-2713, inclusive, R. R. S. 1943. Volkmer, Nebraska Law of Concurrent Ownership, Creighton L. Rev., Vol. 13, No. 2, p. 513 (Dec. 1979).

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C. J., not participating.

JANET ELAINE BATENHORST, APPELLEE, V. DONALD FRANCIS BATENHORST, APPELLANT.

288 N. W. 2d 740

Filed February 26, 1980. No. 42485.

1. **Divorce: Parent and Child: Minors.** Custody of minor children is determined on the basis of their best interests.
2. **Divorce: Parent and Child: Appeal and Error.** An award of custody is subject to review de novo; however, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
3. **Divorce: Parent and Child: Minors: Sexual Misconduct.** Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative.

Appeal from the District Court for Hall County: JOSEPH MARTIN, Judge. Affirmed.

Luebs, Dowding, Beltzer, Leininger & Smith, for appellant.

Grady, Caskey & Thor, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and RIST and BARTU, District Judges.

BARTU, District Judge.

The marriage of Janet Batenhorst and Donald

Batenhorst was dissolved August 2, 1978, and the custody of Travis Lee Batenhorst, born February 14, 1974, Ryan Matthew Batenhorst, born November 14, 1975, and Kelly Lynn Batenhorst, born November 29, 1976, was granted to Janet Batenhorst on November 30, 1978. Donald Batenhorst appeals, contending that it was not in the best interests and welfare of the minor children and an abuse of judicial discretion to award custody to his former wife. In essence, he argues that appellee's sexual misconduct, emotional instability, and lack of care of the children render her an unfit parent.

Custody of minor children is determined on the basis of their best interests. § 42-364, R. R. S. 1943.

Was it in the best interests of the minor children that they be placed with the appellee? The judgment concerning the best interests of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of every case. The general considerations of the moral fitness of the parents; the respective environments offered by each parent; the emotional relationships between the children and their parents; the ages, sex, and health of the children; the effects on the children of continuing or disrupting an existing relationship; the attitude and the stability of character of each parent; and the capability to furnish the physical care, education, and needs of the children are some of the many factors to consider. Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111 (1974).

The parties were married in Cedar Rapids, Nebraska, on September 7, 1973, and lived in Grand Island, Nebraska, until they separated on December 2, 1977, after which appellee moved to Columbus, Nebraska.

Appellee testified that appellant's drinking problem and physical abuse of herself and the parties' 2-year-old son caused the breakup of the marriage.

Appellant testified that he separated from the appellee because she started staying out late at night after her employment. He also testified that she was a lazy, messy housekeeper, both before and after the separation. This was corroborated by other witnesses.

Approximately 1 month prior to trial, appellee suffered a nervous breakdown, took eight or nine Valium pills, and was hospitalized for 3 days.

At the time of trial appellee was 21 years of age, unemployed, receiving A. D. C., pregnant by another man with whom she had had a relationship in Columbus, Nebraska, from December 1977 to March 1978; was receiving psychiatric treatment at the mental health center; was living in a two-bedroom trailer in Columbus, Nebraska, with her three children; and was attending the Evangelical Free Church. She testified she loved her children very much.

At the time of trial appellant was 26 years of age, employed by Sperry-New Holland Company in Grand Island, Nebraska, living with his parents in Cedar Rapids, Nebraska, and was a member of and attending the Roman Catholic Church. He had made some inquiries with regard to possible baby-sitters and living quarters but had no definite plans for housing or child care for the minor children other than by his mother.

Friends of the appellee who were frequent visitors in her home testified that her household was as clean as it could be considering the children, and that appellee lived alone with her three children after March 1978.

Appellant's mother testified that when she observed appellee's home in Grand Island shortly before the separation, it was cluttered and dirty. She observed cookie crumbs and bread crumbs on the floor. When she visited appellee's home in Columbus at Easter, it was fairly decent. She also testified that if the appellant were to get custody she

and her husband would care for the children until appellant could get suitable housing and child care.

An award of custody is subject to review de novo; however, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. McCurry v. McCurry, 202 Neb. 235, 274 N. W. 2d 865 (1979); Greenfield v. Greenfield, 200 Neb. 608, 264 N. W. 2d 675 (1978); Haynes v. Haynes, *ante* p. 35, 286 N. W. 2d 108 (1979). We must also give weight to the fact that the trial court saw and observed the witnesses and the attitudes of the parties at trial and likewise had the opportunity to hear the witnesses and weigh their testimony. Fleharty v. Fleharty, 202 Neb. 245, 274 N. W. 2d 871 (1979).

Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. Ahlman v. Ahlman, 201 Neb. 273, 267 N. W. 2d 521 (1978); Lockard v. Lockard, 193 Neb. 400, 227 N. W. 2d 581 (1975); Bartley v. Bartley, 197 Neb. 246, 248 N. W. 2d 39 (1976). The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered. Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667 (1970).

There is nothing in the record from which can be inferred past, present, or future adverse effects upon the minor children by reason of appellee's sexual misconduct.

In light of all the general considerations required for an award of custody, we cannot find that the award of custody to the appellee was clearly against the weight of the evidence or an abuse of judicial discretion.

The judgment of the trial court is affirmed.

AFFIRMED.

PANHANDLE REHABILITATION CENTER, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. HAZEL LARSON, ALSO KNOWN AS HAZEL S. LARSON, APPELLANT.

288 N. W. 2d 743

Filed February 26, 1980. No. 42585.

1. **Contracts: Specific Performance.** As a general rule, where a valid, binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust.
2. _____: _____. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant.

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

R. Kevin O'Donnell and Thomas M. Shanahan of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellant.

Herbert M. Sampson III of Sampson & Forney, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and HASTINGS, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Hazel S. Larson, defendant-lessor, appeals from a decree of specific performance of an option requiring her to convey real estate to Panhandle Rehabilitation Center, Inc., plaintiff-lessee.

Plaintiff's petition alleges (1) a written lease whereby defendant leased to plaintiff with an option to buy Lot 4 and the south 32 feet of Lot 3, Block 8, Second Addition to the Town, now City, of Alliance, Box Butte County, Nebraska, according to the plat thereof, (2) the performance of all lease terms, (3) plaintiff exercised the option, (4) defendant's refusal to convey premises, and (5) no adequate remedy at

law. Defendant's answer denies the petition, and by cross-petition alleges breach of lease terms and a void option, and prays for return of possession. The trial court denied defendant's cross-petition and granted specific performance to plaintiff. We hear the appeal de novo.

Most of the evidence was stipulated. In the 1971-72 period plaintiff was functioning as a small alcoholic rehabilitation center in Alliance, Nebraska, wanting to expand its services and facilities. Defendant was a supporter of that program and, after some negotiation, she bought the described premises for $19,139.64 and leased it to plaintiff. Plaintiff's attorneys prepared the lease and, after examination by the parties and their counsel, it was executed. Briefly, the lease was for 10 years beginning January 1, 1973, at a monthly rental of $250 with an option to buy.

Plaintiff entered possession and made certain repairs and improvements required by the lease, expending more than $5,000. Lack of funds caused the closing of the Center in August 1976. Thereafter, the relationship between the parties became strained. Defendant withdrew her support of plaintiff's program, and on two occasions she attempted to induce plaintiff to release the option, first by offering to install a new furnace and next by offering 3 months free rent. She requested that possession of the premises be returned to her, claiming it was her understanding that if plaintiff's project failed the property was to be returned to her. This was not a condition or a part of the written lease. Plaintiff regularly paid all monthly rental payments through December 1977. There is evidence that at the time of trial the property was worth $38,000.

On December 27, 1977, plaintiff gave written notice to defendant by certified mail of its intention to exercise its option to buy the premises, together with a $2,000 cashier's check, as required. Defendant re-

ceived the notice and the check on December 29, 1977, and refused to honor the option, claiming that the option was void because plaintiff violated the lease terms. This suit follows.

"As a general rule, where a valid binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust." Reese v. Hatfield, 201 Neb. 540, 270 N. W. 2d 898. See, also, Bauer v. Bauer, 136 Neb. 329, 285 N. W. 565; 71 Am. Jur. 2d, Specific Performance, § 7, p. 18.

"The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought. * * * The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal." Tedco Development Corp. v. Overland Hills, Inc., 200 Neb. 748, 266 N. W. 2d 56.

The option in question provides: "9. Option. *Should Tenant have paid all rental provided herein and performed all covenants by it to be performed,* on January 2, 1978, and on the 2nd day of each year thereafter during the term of this lease, Tenant shall have the option to purchase said premises upon the following terms and conditions: (a) The purchase price shall be $19,000.00, payable $2,000.00 upon exercise of the option, the balance payable on or before 30 days after exercise of the option concurrently with approval of marketable title subject to outstanding mortgage indebtedness, if any, and conveyance of title from Owner to Tenant. * * * (c) *Notice of exercise of the option shall be given in writing on or before January 2 of the year in which the option is exercised to Owner at her last known address; if sent by mail, it shall be by certified mail or its equivalent with a postmark of P. M. December 30 of*

the year preceding the effective January 2, or earlier. * * *." (Emphasis supplied.)

Defendant claims the option is void, charging threefold violations of conditions precedent in the lease as required by the provision in the option, "Should tenant have paid all rental provided herein and performed all covenants by it to be performed, on January 2, 1978, * * *."

First, defendant contends that the option could not be exercised prior to January 2, 1978. Such a narrow interpretation overlooks the requirement in subpart (c) requiring sending the notice postmarked December 30 prior to the year of acceptance. Our court has held: "An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reached the offeror, unless the offer otherwise provides." Anderson v. Stewart, 149 Neb. 660, 32 N. W. 2d 140.

The time of acceptance provided in the option required plaintiff's strict compliance, which was clearly met.

Second, defendant insists that the payment of $250 rent on January 1, 1978, was a condition of the option that plaintiff was required to perform before it could exercise the option. "Where the option to purchase is duly exercised by an election to purchase, the relation of landlord and tenant ceases and that of vendor and purchaser arises, * * *." Mauzy v. Elliott, 146 Neb. 865, 22 N. W. 2d 142. There is no merit to defendant's claim. When she received the acceptance on December 29, 1977, there was a valid contract for the sale of real estate between the parties and the relationship of lessor-lessee was changed to that of vendor-vendee. See, also, 49 Am. Jur. 2d, Landlord and Tenant, § 367, p. 382.

Lastly, and the main issue here, is the claim that

plaintiff fell short of substantial performance of certain covenants in the lease. These covenants generally included the usual requirements relating to sidewalks, health and fire ordinances, utility charges, and building maintenance; and, in this case, the defendant particularly relies on the insurance provision which required plaintiff to carry liability insurance in certain required amounts with defendant named as an additional insured and a copy of the insurance policy to be furnished to defendant.

The evidence was that plaintiff did secure comprehensive liability insurance with coverage in excess of that required, except medical. Defendant was not an additional named insured. No copy of the policy was delivered to defendant. Although she was aware of the copy requirement, she made no request for it until January 6, 1978. On January 9, 1978, plaintiff, through its attorney, furnished defendant with a certificate of insurance showing the insurance coverage for a 3-year period ending April 24, 1978.

"A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, * * *." Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728. The annotation in 53 A. L. R. 3d, § 4, p. 435, at p. 440, discusses this general rule in terms that a lessee may be precluded from exercising an option to purchase by a substantial breach of the lease terms.

The requirement for the delivery of a copy of the insurance policy to defendant was for her information and convenience to determine if the insurance covenant had been met. That omission, coupled with the failure to name the defendant as an additional insured, was material since it exposed defend-

ant to possible liability, particularly since plaintiff was in control of complying with this covenant as to coverage, amounts, time, insureds, and defendant's knowledge of the same.

Plaintiff argues that the insurance omission did not void the option for the reasons (a) plaintiff has substantially performed all covenants required of it, (b) equity requires specific performance, and (c) defendant waived the claimed breach by accepting rent and not requiring compliance when she had full knowledge of the covenants.

Plaintiff did breach the insurance covenant; however, it did in all other things promptly and in good faith perform the lease terms for 5 years. We examine this breach in the light of its treatment as given by the parties and particularly the defendant, since this is the best indication of the true intent of the parties. See Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448. Defendant was aware of the insurance covenant; however, she made no request for plaintiff's compliance. She was interested in regaining possession of the real estate rather than a lessor's interest in plaintiff complying with the written lease. In other words, defendant did not treat this breach as substantial. We find the evidence is clear that plaintiff did substantially perform all of the lease terms.

We next examine the equities. Plaintiff has sustained its burden of proof that it substantially performed its obligation under the lease, including payment of all rentals; plaintiff made substantial improvements to the premises; the option was exercised by plaintiff at the time and in the manner required; defendant has repudiated the option and plaintiff has no adequate remedy at law; defendant will suffer no hardship; the parties will get their bargain under the lease and the option; and equity and justice require specific performance.

The general rule of waiver is stated in Randall v.

Erdman, 194 Neb. 390, 231 N. W. 2d 689: "Where a party to a contract, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived such breach." See, also, Annotation, 53 A. L. R. 3d, § 8, p. 449. Although there may be some merit to plaintiff's claim of waiver, it is not necessary to decide that issue here. Rather, those circumstances are considered with the issues of substantial performance and the equities above discussed.

The trial court did not abuse its discretion and the decree of specific performance should be affirmed.

AFFIRMED.

IDEAL BASIC INDUSTRIES, INC., A CORPORATION, APPELLANT, V. JUNIATA FARMERS COOPERATIVE ASSOCIATION ET AL., APPELLEES.

289 N. W. 2d 192

Filed February 26, 1980. No. 42607.

1. **Mechanic's Liens: Statutes.** One who claims a mechanic's lien must clearly bring himself within the terms of a statute allowing a lien on real estate.
2. **Mechanic's Liens: Statutes: Words and Phrases.** A person who manufactures, purchases, or keeps for sale materials which enter into buildings, and who sells or furnishes such materials without performing any work or labor in installing or putting them in place is a materialman within the meaning of section 52-101 et seq., R. R. S. 1943.
3. **Mechanic's Liens: Statutes.** Section 52-101 et seq., R. R. S. 1943, do not extend the right to a lien on real estate to a supplier of a supplier of materials.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Lyle E. Strom and C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

Charles W. Hastings of Dunmire & Blessing, for appellees Mel Jarvis Constr. Co. and The American Ins. Co.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and WOLF, District Judge.

WHITE, J.

This is an appeal by the plaintiff, Ideal Basic Industries, Inc. (hereafter Ideal), from an order dismissing an action to foreclose a mechanic's lien. The parties were Mel Jarvis Construction Company, Inc. (hereafter Jarvis), Larry Lambrecht, doing business as Wood River Concrete Company (hereafter Lambrecht), and The American Insurance Company (hereafter American).

The essential facts are these. Juniata Farmers Cooperative Association entered into a contract with Farmland Industries, Inc. (hereafter Farmland), for the construction of a grain elevator at Hayland, Nebraska. Farmland, as general contractor, agreed to furnish all labor and material for the construction of a concrete grain elevator. Farmland entered into a subcontract with Jarvis. Jarvis agreed to furnish all the labor and materials for the excavation, the lower pits, tunnels, slabs, and to slip form the concrete grain elevator and annex. Jarvis solicited bids for concrete for the elevator project. Lambrecht submitted a bid and Jarvis accepted by issuing a standard purchase order notifying Lambrecht. Between April and July 1976 Lambrecht supplied mixed concrete to Jarvis. All the cement necessary for making the concrete was purchased from Ideal, plaintiff in this action, on an open account.

Initially, the concrete supplied to Jarvis was mixed and transported from Lambrecht's batching plant in Wood River, Nebraska. Ideal delivered the raw cement to the plant at Wood River where Lambrecht would transport these raw materials in a

mixing truck to the Hayland site. Approximately a month after Lambrecht started delivery of concrete to Jarvis, Lambrecht constructed a batching plant at the jobsite in Hayland. Ideal then delivered the cement to the Hayland batching plant. The cement involved in this case was delivered to the Hayland plant. Ideal does not seek recovery for any cement delivered to the Wood River plant.

Evidence was adduced to show Lambrecht supplied Jarvis with concrete from April 4, 1976, to July 1976. After two payments, a dispute arose and Jarvis stopped paying Lambrecht. Ideal contends it delivered $32,130 worth of cement to Lambrecht at the Hayland site for which it has not been paid.

On September 29, 1976, Ideal filed a mechanic's lien against Juniata Farmers Cooperative Association for $33,229.82, later amended to $32,130. In order to discharge the property from the lien, Jarvis, as principal, and American, as surety, filed a bond in the amount of $38,500 pursuant to section 52-121, R. R. S. 1943. Ideal filed a petition against Juniata Farmers Cooperative, Lambrecht, Jarvis, and American in an attempt to foreclose its lien. Juniata demurred to the plaintiff's petition and the demurrer was sustained. Jarvis and American denied the allegations of plaintiff's petition. Lambrecht cross-petitioned against Juniata, Jarvis, and American, claiming a lien upon the bond filed by Jarvis for the balance due from Jarvis for the sum of $41,316.17. Upon its own motion, the court consolidated the case of Ideal Basic Industries, Inc. v. Juniata Farmers Cooperative Association et al., with that of Larry Lambrecht, doing business as Wood River Concrete Company v. Mel Jarvis Construction Company, Inc., et al. By pretrial order and pursuant to the stipulation of the parties, the court ordered that the case of "Ideal Basic Industries, Inc. vs. Mel Jarvis Construction Company, Inc." be tried first. It is that suit which is now be-

fore the court.

Ideal assigns as error the court's finding that Ideal was not entitled to the protection of the mechanic's lien statutes; that the failure of Lambrecht to tag or designate his payments to plaintiff on open account barred plaintiff from enforcing its mechanic's lien; and that the trial court erred in holding Ideal was required to prove the value of cement actually incorporated into the elevator and in failing to find that Ideal proved the value of the cement incorporated into the elevator building. We shall discuss only the first assignment of error.

The controlling question for decision is whether the supplier of a supplier of materials to be used for the construction of a grain elevator is entitled to a claim of a lien under section 52-101, R. R. S. 1943. This section defines who is entitled to a mechanic's lien and for what a lien may be claimed. Durkee v. Koehler, 73 Neb. 833, 103 N. W. 767. We have said that one claiming a lien must clearly bring himself within the terms of the statute allowing a lien on real estate. Krotter & Sailors v. Pease, 161 Neb. 774, 74 N. W. 2d 538. The section reads in relevant part: "Any person who shall perform any labor or furnish any material, machinery, or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, (1) for the construction, erection, improvement, repair, or removal of any house, mill, well, cistern, manufactory, building, or appurtenance * * * by virtue of an open running account or a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such * * * and the lot of land upon which the same shall stand or the work is performed, and such lien shall include the rental value of any equipment furnished."

In 53 Am. Jur. 2d, Mechanics' Liens, § 73, p. 585, it is stated: "Persons supplying materials to a ma-

terialman or a subcontractor must come clearly within the terms of the statute, or they can claim no lien. They are so far removed from the owner that the privilege of a lien is not often extended to them, and the plainest expressions of law must be used to entitle them to this remedy."

It is our view that section 52-101 et seq., R. R. S. 1943, provide a lien only to materialmen who supply directly to the owner of the realty, the contractor, or a subcontractor. Ideal sold its material directly to Lambrecht, looked to him for payment, and was directed by him as to the quantity of materials to be delivered and where and when such deliveries were to be made. Earl Barngrover, the Ideal sales representative, testified: "Q. Did you call on Mr. Lambrecht as a customer of Ideal? A. Yes, I did. Q. Did you make arrangements with Mr. Lambrecht for the sale of cement for the Hayland elevator job? A. Yes." The cement which was supplied by Ideal was done at the request of Lambrecht. Lambrecht was not the agent of the owner, or the contractor, or a subcontractor. Ideal argues that Lambrecht was a subcontractor because he was obliged, by contract, to mix all the cement required for the elevator and he performed that mixing on the jobsite. Although our statutes contain no precise definition of "subcontractor" or "materialman," these terms have been defined as follows: "* * * the essential feature which constitutes one a subcontractor rather than a materialman is that in the course of performance of the prime contract he constructs a definite, substantial part of the work of improvement in accord with the plans and specifications of such contract, *not that he enters upon the jobsite and does the construction there.*" (Emphasis supplied.) 53 Am. Jur. 2d, Mechanics' Liens, § 72, p. 583.

It was stated in 57 C. J. S., Mechanics' Liens, § 89, p. 599, that a materialman is: "* * * a person who does not follow the business of building or contract-

ing to build homes for others, but who manufactures, purchases, or keeps for sale materials which enter into buildings, and who sells or furnishes such materials without performing any work or labor in installing or putting them in place, * * *."

Lambrecht's agreement with Jarvis was evidenced by a standard purchase order. Jarvis testified the purpose was "* * * to let him know that his quote has been accepted and that he will be the supplier on that particular project." It was Ideal's responsibility to furnish component parts to Lambrecht who manufactured them into a material which was supplied to the subcontractor. In turn, Jarvis used its own labor to incorporate the concrete into the elevator. Lambrecht was clearly a supplier of materials and not a subcontractor.

Ideal contends that the question of whether it supplied to a materialman or a subcontractor should not be of controlling significance. Rather, the critical factor is whether the materials are delivered directly to the jobsite. We are not persuaded by this argument. The cases which the plaintiff cite in support of this proposition involve a lien by a materialman for materials supplied to a general contractor and a subcontractor. Those persons are clearly protected by the statutes. See, The Wickes Corporation v. Frye, 202 Neb. 23, 273 N. W. 2d 663 (1979); Vince Kess, Inc. v. Krueger Constr. Co., 202 Neb. 673, 276 N. W. 2d 669 (1979). We would be engaging in judicial legislation to extend the protection of the mechanic's lien to one more remote than a materialman to a subcontractor. Ideal delivered the materials to the jobsite because Lambrecht constructed a batching plant at the Hayland site. The record indicates this was a matter of convenience and none of the parties were contractually obligated to deliver or manufacture the concrete at the jobsite. Merely delivering materials at the jobsite, with no contractual obligation to do so, does not warrant the exten-

sion of Nebraska's mechanic's lien statute.

Although this state has never considered the question, the precise issue involved has been considered by courts in other jurisdictions under similar statutory framework. Generally, in interpreting a mechanic's lien statute, courts have held the supplier of a supplier of construction materials to a contractor is not entitled to a lien. Ideal does not cite any decisions to the contrary. Ga.-Pacific Corp. v. Dan Austin Prop. Inc., 126 Ga. App. 191, 190 S. E. 2d 131, involved a mechanic's lien asserted by a materialman who furnished another supplier of construction materials to a contractor. Holding that the statute did not provide for a lien to a supplier of a supplier of construction materials, the Georgia Court of Appeals said if it had been intended to extend the terms of the lien to the supplier of a supplier, the General Assembly would have spelled this out in the statute. If we were to extend the terms of the statute to cover the plaintiff, it is conceivable that a manufacturer selling to a wholesaler who, in turn, sells to a retailer and who, in turn, sells to a contractor or subcontractor could also assert a lien if payments were not made all the way back up the line for the materials. That we do not conceive to be the legislative intent.

The Michigan court in Hart v. Reid, 243 Mich. 175, 219 N. W. 692, interpreted a statute similar to our mechanic's lien statute. In denying the lien of a person furnishing lumber to another materialman, the court stated: "It does not extend beyond its express terms, and cover a materialman who furnishes materials, in pursuance of a contract with another materialman who furnishes materials in pursuance of a contract with a subcontractor under the original contractor."

In Botzum Bros. Co. v. Brown Lumber Co., 150 N. E. 2d 485 (Ohio App., 1957), a supplier and two individuals contracted for the construction of a house.

The materials and plans for the home were to be furnished by Nu Homes Association and constructed on the property owned by the Sebastians. Certain materials were purchased by Nu Homes from The Brown Lumber Company, The J. P. Loomis Concrete & Supply Company, and Botzum Bros. Company. The Court of Appeals of Ohio held that the three suppliers could not assert a mechanic's lien. The court referred to the work of DeWitt on Ohio Mechanics' Liens, at section 14: " 'Reduced to its lowest terms, the statute provides that *every person who* does work or *furnishes* machinery, *material,* or fuel, for constructing or altering certain structures or improvements, *by virtue of a contract,* express or implied, *with the owner* of any interest in real estate, or his authorized agent, *and every* subcontractor, laborer, or *materialman furnishing* labor or *material* or fuel, *to each original contractor or any subcontractor,* in carrying forward such contract, *shall have a lien.*' " Botzum Bros. Co. v. Brown Lumber Co., *supra.* The Ohio court held the statute could not be construed to provide protection to a materialman who was beyond the terms of the statute. See, also, Kingston Trust Company v. State, 291 N. Y. S. 2d 208, 57 Misc. 2d 55 (1968); Ronald A. Coco, Inc. v. St. Paul's Methodist Church, 78 N. M. 97, 428 P. 2d 636 (1967); Chesebro-Whitman Co., Inc. v. Edenboro Apts., Inc., 86 N. J. Super. 422, 207 A. 2d 186 (1965).

Ideal as a supplier of materials to a materialman is not within the class entitled to a lien under section 52-101 et seq., R. R. S. 1943. The decision of the trial court was correct and is affirmed.

AFFIRMED.

SUSAN T. BIRD, APPELLEE, V. KENNETH M. BIRD, APPELLANT.
288 N. W. 2d 747

Filed February 26, 1980. No. 42656.

1. **Divorce: Child Support.** In reviewing a child support award in a dissolution of marriage decree, this court will consider not only the child support award but also the property division and alimony provisions, if any, to determine whether there was an abuse of discretion.
2. **Divorce: Child Support: Property: Alimony.** This court will not modify a trial court's dissolution of marriage decree as to child support, property division, or alimony, if any, unless there has been an abuse of discretion.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed as modified.

David M. Geier and Bauer, Galter, Geier, Flowers & Thompson, for appellant.

Wyman E. Nelson of O'Hanlon & O'Hanlon, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and CLARK and FAHRNBRUCH, District Judges.

FAHRNBRUCH, District Judge.

This appeal involves the reasonableness of a $375 per month support award for the parties' toddler child in a dissolution of marriage decree.

The trial court granted dissolution of marriage on the wife's petition, granted her custody of the parties' 25-month-old son subject to visitation rights in the father, awarded $375 monthly child support, and divided the assets and liabilities of the parties. Respondent husband's sole issue on appeal is whether the amount of child support award is excessive under the circumstances. We affirm as modified.

In reviewing a child support award in a dissolution of marriage decree, this court will consider not only

the child support award but also the property division and alimony provisions, if any, to determine whether there was an abuse of discretion. Van Cleave v. Van Cleave, 201 Neb. 211, 266 N. W. 2d 900.

For all practical purposes the trial court divided the parties' net assets equally, with one exception. If the petitioner retains the family home, which was awarded to her subject to a $3,000 lien in favor of the respondent, until December 31, 1981, a potential liability of $5,000 to her parents will dissipate. In that event, she will have received substantially more than 50 percent of the parties' net assets. To this the respondent has made no objection. Alimony, although requested, was disallowed, and the wife did not cross-appeal.

At the time of trial each of the parties was 30 years of age and a college graduate. They had been married approximately 7 years. The wife was employed as a schoolteacher with a net monthly income of $783.56 after taxes and union dues. The husband was a consultant with the State Department of Education with a net monthly income of $1,053 after taxes and a small deduction for health insurance.

Petitioner testified that the monthly expenses for the child would be: Dental expense, $10; utilities, $54; housing, $232.50; babysitting, $165; food, $100; clothing, including coats, shoes, and diapers, $85; doctor and drugs, $30; and entertainment, $45. These items total $721.50 per month. At time of trial petitioner's own monthly expenses were estimated to be: Housing, $232.50; utilities, $54; phone, $30; life insurance, $10; food, $100; car expense, $100; clothing, medical, dental, and grooming expenses, $125; car insurance, $30; gifts, entertainment, and miscellaneous expenses, $50; and car payment, $162, these items totaling $893.50. She testified that the total expense for petitioner and the child would be $1,615. At time of trial there was no car payment, but petitioner testified she would have

to replace her 4-year-old Oldsmobile Starfire. She testified that respondent should pay $721.50 monthly child support, which is the full amount of her estimated cost of care of the child. His net monthly income at the time was $1,053.

"In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent." § 42-364 (3), R. R. S. 1943.

Respondent testified that his monthly expenses were: Rent, $165; utilities, $70; payment to GMAC, $160.48; insurance, $41.43; credit card expenses, $20; Dial Finance, $26; food, $100 to $125; and work-related expense, $25 to $50. The total is $657.91. Should respondent be required to pay $375 per month child support, his monthly expenses would total $1,032.91, leaving him the sum of $20.09 per month for clothing, medical, and dental expenses, grooming, entertainment, travel expense of visiting his son, and gasoline for travel back and forth to work. Petitioner and the child reside at Blair, Nebraska, and respondent resides in Lincoln.

While the cost of caring for a child is an important consideration in determining child support, equally important is the father's ability to make the payments. It is not advantageous to either party to place the payments for child support beyond the reach or capability of the father. Bralick v. Bralick, 194 Neb. 183, 231 N. W. 2d 129; Brus v. Brus, 203 Neb. 161, 277 N. W. 2d 683.

This court will not modify a trial court's dissolution of marriage decree as to child support, property division, or alimony, if any, unless there has been an abuse of discretion. Van Cleave v. Van Cleave, 201 Neb. 211, 266 N. W. 2d 900.

In this case, while the division of net assets of the parties and the disallowance of alimony are equitable under the circumstances, the trial court clearly failed to give due weight to the father's circum-

stances and his ability to pay child support. A de novo review of the record reflects that the respondent's ability to pay child support at time of trial did not exceed the sum of $250 per month, which amount would have been equitable in view of all the circumstances.

The decree of the trial court is modified to provide child support of $250 per month, rather than $375 per month. The decree of the trial court as so modified is affirmed.

AFFIRMED AS MODIFIED.

IMPERIAL SERVICE CORPORATION, A NEBRASKA CORPORATION, AND CHILCO COMPANY, A NEBRASKA CORPORATION, APPELLEES, V. ENA PHIPPS, A SINGLE PERSON, ROGER L. PHIPPS, AND JANICE PHIPPS, HIS WIFE, APPELLANTS,
IMPLEADED WITH WILLIAM Q. JAEGER, J. CHARLES JAEGER, AND RAYMOND EARL JAEGER, DOING BUSINESS AS JAEGER BROTHERS, A COPARTNERSHIP, APPELLEES.
288 N. W. 2d 749

Filed February 26, 1980. No. 42668.

1. **Adverse Possession.** Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party.
2. **Adverse Possession: Intent.** The claim of adverse possession is founded upon the intent with which the occupant had held posesssion, and this intent is ordinarily determined by what he has done in respect thereto.

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

Daniel E. Owens, for appellants.

James M. McQuillan of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellees Jaeger Brothers.

Leon C. Hines of Hines & Hines, for appellees Imperial Service and Chilco.

Heard before BOSLAUGH, MCCOWN, CLINTON, and HASTINGS, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Defendants Phipps appeal from a decree quieting title to the northwest quarter of Section 5, Township 3 North, Range 40 West of the 6th P.M., Dundy County, Nebraska, in the plaintiffs. Plaintiffs' petition alleges their record title, possession and defendants' permissive use of the land. Defendants by cross-petition allege title by adverse possession. We affirm.

There is limited conflict in the evidence. The adverse claims of the parties arise from these circumstances. Section 6 abuts Section 5 on the west; it is all pastureland and there is a section line fence running north and south between the two tracts which has been in place for more than 35 years. The plaintiffs are the record titleholders of the northwest quarter of Section 5. Title was acquired by the Nichols Company, Inc., in 1946 and thereafter conveyed to Jaeger Brothers in 1974, who conveyed to plaintiffs. Title to the southeast quarter of Section 6 was acquired by Hansel Phipps and Ena Phipps, husband and wife, in 1952. Roger Phipps is their son. Hansel Phipps died in 1975. The northwest quarter of Section 5 is not circumscribed by a fence, but it is fenced in and used by defendants Phipps with other land owned by them in Section 5. The southeast quarter of Section 6 is not circumscribed by a fence, but it is fenced in and used by plaintiffs with other land owned by plaintiffs in Section 6. Both pastures were equal in value for pasturage purposes. Both parties maintained the fences on the tracts used by them and paid the taxes on the tracts to which they held record title. This arrangement for the exchange of use of land had been followed for

more than 35 years by the parties and their respective predecessors in title, according to the testimony of Gerald Ambrosek, a neighbor, who had been living in that area since 1941. The record is silent as to any agreement, lease, or exchange of consideration for such use. Defendants Phipps gave notice of their claim of title to the northwest quarter of Section 5 by letter from their attorney dated April 19, 1976, directed to the Imperial Service Corporation, advising that they claimed title by adverse possession since 1952. This suit followed.

"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." Rasmussen Farms v. Gove, 201 Neb. 432, 267 N. W. 2d 764.

"Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party." Weisel v. Hobbs, 138 Neb. 656, 294 N. W. 448. See, also, Jackson v. Eichenberger, 189 Neb. 777, 205 N. W. 2d 349.

"The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto. * * * it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor." Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

The only issue here is whether the use and possession of the northwest quarter of Section 5 by defendants was either hostile or permissive.

The evidence of defendants Phipps, in support of their claim, in substance was: (a) The northwest quarter of Section 5 was fenced in with their land

and they had repaired and maintained the fence since 1952; (b) they had been in possession and using the northwest quarter of Section 5 for more than 10 years; (c) they had given notice to plaintiffs and their agents on several occasions to remove plaintiffs' cattle that had strayed onto the quarter section; and (d) in 1976 they had ordered plaintiffs' agents to leave the premises when they came upon the land for well-testing purposes.

The evidence of plaintiffs was: (a) They had also given notice to defendants Phipps to remove their cattle from the southeast quarter of Section 6 that had strayed thereon; (b) they had used the southeast quarter of Section 6, including its fence repair, for more than 35 years as an exchange-of-use arrangement; and (c) the use of the northwest quarter of Section 5 by Phipps and their predecessors in title was permissive, being a continuation of a mutual arrangement between adjoining landowners to keep the fence lines straight and to minimize fence repair.

In support of plaintiffs' claim the record shows that defendant Roger Phipps testified as to the use of the northwest quarter of Section 5, "* * * we was using theirs and they were using ours." Carl Nichols testified concerning a conversation he had with Hansel Phipps in the late 1950's concerning the use of the two quarter sections, "We just continued it. It was okay with him and it was okay with me."

Nichols and Hansel Phipps at one time agreed to exchange title to the quarter sections of land involved herein; however, they did not carry out this plan.

The land involved here is located in western Nebraska where large acreages of pastureland are commonplace. Plaintiffs' ranch includes more than 20,000 acres. Although the fencing and use of the two described pastures is unusual, it is not unique. The construction, maintenance, and repair of fences

in a straight line and the elimination of corner posts are both beneficial to ranchers. The parties here and their predecessors in title intended to and did exchange the use of the two pastures for their mutual convenience and benefit. There was no hostile use of the northwest quarter of Section 5 by the defendants.

The evidence clearly shows that the use of the northwest quarter of Section 5 by defendants Phipps and their predecessors in title was with the consent and permission of plaintiffs and their predecessors in title, and the defendants failed to prove their claim of title by adverse possession. The decree quieting title in the plaintiffs was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL E. STEWART, APPELLANT.

288 N. W. 2d 751

Filed February 26, 1980. No. 42671.

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

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

HASTINGS, J.

Defendant was convicted by a jury of the crime of manslaughter and sentenced to 1 year in the Nebraska Penal and Correctional Complex. He appeals, assigning as error that the District Court should have directed a verdict of not guilty because of a failure of the State's evidence. The jury had been instructed properly on the defense of justification, or self-defense. We affirm.

The victim of this shooting was Brent Wiitala, an account representative of Remco TV Rental Company. On November 18, 1978, at approximately 10 a.m., the victim, together with Gerald Zimmer, the local manager of Remco, called upon the defendant at his home at 3025 Pratt Street in Omaha for the purpose of repossessing a television set because of delinquent payments.

According to the testimony of Zimmer, the victim knocked on the door and, obtaining no answer, broke a glass pane, opened the door, and entered the back porch. He then withdrew, but after a few moments the victim again went onto the porch and entered the main portion of the house. Shortly thereafter, the witness observed a look of fear on Wiitala's face, saw his hand go up, and saw him back up a couple of steps and apparently turned as if to leave. There was a sound similar to a ruler slapping a table, and the victim fell to the floor. Zimmer observed no weapon in the hands of Wiitala. He did see blood coming out of the victim's nose and mouth so he dragged and carried him to their vehicle and took him to the hospital where he was pronounced dead.

The defendant's girl friend testified and she corroborated Zimmer's testimony that the victim was in the house, then retreated to the outside back porch door. After that she claimed he turned around fast, saying he was going to get his TV back. At that point the defendant fired. She also testified that she had ordered the victim out of the house and

had been the one who woke up the defendant and told him someone was breaking into the house.

The defendant made several statements to the police just after the shooting and also gave a formal, voluntary statement about 2 hours after the incident. In those statements, testified to by the police, defendant admitted the shooting, saying that he had shot an intruder. He admitted the victim had no weapon, had not threatened him, and that he knew both men and why they were there. Also received in evidence was a tape-recorded telephone conversation between the defendant and the Remco consumer affairs manager from Houston, Texas, which took place 1 week before this shooting incident. In that telephone conversation, after complaining of the tactics of Remco in repossessing televisions, the defendant said: "I know one thing, I am going to give him his money, but if he comes out here beating on these windows while I am here, I am going to act like it is somebody trying to break in here." The defendant did not testify on his own behalf at trial.

The question of defendant's guilt, including his claim of self-defense, was a question of fact properly submitted to the jury and resolved by it against the defendant. There was sufficient competent evidence to support the jury's verdict beyond a reasonable doubt. "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." State v. Samuels, *ante* p. 585, 289 N. W. 2d 183 (1980).

There was no error in the trial court's submission of the case to the jury and the conviction is affirmed.

AFFIRMED.

IN RE INTEREST OF J. L. L., A CHILD UNDER EIGHTEEN YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, RICHARD DOUGLAS MCCLAIN, GUARDIAN AD LITEM, APPELLANT, V. EDWARD F. LAMBERT ET AL., APPELLEES.
288 N. W. 2d 753

Filed February 26, 1980. No. 42674.

Appeal from the Separate Juvenile Court of Lancaster County: W. W. NUERNBERGER, Judge. Reversed and remanded with directions.

Richard Douglas McClain, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Mariclare Thomas, for appellees Lambert.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and WOLF, District Judge.

PER CURIAM.

This case arises on the application of the father of an 8-year-old boy, who was deprived of custody by the order of the Separate Juvenile Court of Lancaster County, for an order allowing unsupervised visitation with his son. The court allowed the application and the guardian ad litem appeals.

The order depriving the father of custody was occasioned by the father's incarceration in the Nebraska Penal and Correctional Complex for crimes against property, in the commission of which the son accompanied the father. A previous order allowing supervised visitation arose while the father was incarcerated and continued after release. The order allowing unsupervised visitation was suspended during the pendency of this appeal by the Separate Juvenile Court.

A number of reasons are cited by the guardian ad litem in opposition to unsupervised visitation: The father's decision to involve the boy in crimes he

committed; the pressures and threats against the boy not to reveal the crimes; the son's desire not to be alone with the father; the opposition of the county attorney; the previous threats of the father to remove the child from the jurisdiction; and finally, the boy's statements of sexual abuse.

While not rejecting the statements of the boy, the statement of the court indicates that weighing heavily on its mind was the desirability of establishing a father-son relationship, with safeguards as stated in its order.

We are extremely conscious of the great responsibility of the trial courts in juvenile matters and we place great reliance on the judges who have observed the witnesses and heard the testimony, and their judgments thereon; but here, the Separate Juvenile Court placed great weight, in making its decision, on the control inherent in the father's parole status. We note from the record that the parole was due to expire in October 1979. We note further that the court required visits by the father and son to counselors and child psychologists, that only one visit of the father had occurred before the ruling on the motion for new trial, and that no report was presented to the juvenile court and none is in the record. We are reluctant to experiment with the health and emotional well-being of a child of tender years. State v. Souza-Spittler, 204 Neb. 503, 283 N. W. 2d 48. Therefore, in the exercise of prudence, this court believes the judgment should be reversed and the cause remanded to the Separate Juvenile Court for consideration of those matters specified in its order to determine whether or not its previous order of supervised visitation should be reinstated.

REVERSED AND REMANDED WITH DIRECTIONS.

WOLF, District Judge, concurring.

I concur with the remanding of the case to the trial judge, but I am reluctant to adopt the general

philosophy which may be implied that a trial judge is not permitted to experiment with unsupervised but limited visitation between a child and his parent where there has been admitted sexual abuse in the past. On the contrary, the trial judge should have wide discretion in his attempts to rehabilitate parent and child until and unless parental rights are actually terminated.

I concur that the case should be remanded to the trial court, but only with the direction that the order of visitation be modified to provide for frequent periodic review by the trial court with the opportunity for the trial court to summarily terminate such visitation ex parte upon it appearing to the court that continuance of such visitation would not be in the best interests of the child.

FRED A. KEITH, APPELLANT, V. SCHOOL DISTRICT NO. 1 OF NORTH PLATTE, NEBRASKA, AND THE CONTINENTAL INSURANCE COMPANY, A CORPORATION, APPELLEES.

289 N. W. 2d 196

Filed February 26, 1980. No. 42694.

1. **Workmen's Compensation: Judgments: Verdicts.** Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
2. **Workmen's Compensation: Evidence.** In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workmen's Compensation: Evidence: Appeal and Error.** Where the record in a case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment for the judgment of the Workmen's Compensation Court.
4. **Workmen's Compensation: Words and Phrases.** The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of the workmen's compensation act.
5. **Workmen's Compensation: Evidence: Proof.** Under the Ne-

braska workmen's compensation act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment.

6. _____: _____: _____. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.

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

Milton E. Murphy, Murphy, Pederson, Piccolo & Anderson, and Robert E. Roeder, for appellant.

Kay & Satterfield, for appellees.

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

BRODKEY, J.

This is an appeal from a denial of workmen's compensation death benefits in an action brought by the husband of a deceased teacher against her employer school district and its insurance carrier.

In his petition filed in the Workmen's Compensation Court, Fred A. Keith, the plaintiff, alleged that he was the surviving spouse of Zella Mae Keith, hereinafter referred to as "deceased," who was employed by the defendant, School District No. 1 of North Platte, Nebraska, hereinafter referred to as "District," as a teacher in the Adams Junior High School in North Platte. Plaintiff further alleged that on September 17, 1976, his wife was accidently injured during the course of her employment when she suddenly slipped and fell on a rug or mat in front of a coffee machine in the teachers' lounge in said school; and that as a result of the accident, she sustained an injury to her arthritic right hip which made necessary a reconstructive femoral arthroplasty at St. Joseph's Hospital in Denver, Colorado, on September 24, 1976. Plaintiff further alleged that following said surgery, while convalescing in the hospital, his wife developed an infection as the result of

the surgery, from which she died on October 8, 1976. In their answer, the defendants admitted that the deceased was an employee of the District on the date of the accident, but denied that she sustained personal injuries from the accident.

A hearing was thereafter held before one judge of the Workmen's Compensation Court, who found from the evidence that the death of the deceased was caused by the fall of September 17, 1976, and the events that flowed from the fall. The judge awarded the plaintiff benefits in the amount of $100 per week for the remainder of his life or until his subsequent marriage, and also burial expenses and certain hospital and medical expenses.

The case was reheard before a three-judge panel, which found on rehearing that the operation which started the chain of events culminating in the death of the deceased was not proximately caused or necessitated by the accident, and dismissed plaintiff's petition. Plaintiff has appealed to this court from that order. We affirm.

The pertinent facts of this case may be summarized as follows. At the time of the accident, deceased was a 55-year-old female, who had been employed by the District as a teacher for a period of 9 years. On September 17, 1976, while in the teachers' lounge, she caught her toe on a mat in front of a vending machine, which caused her to fall on her right leg. She had a history of osteoarthritis in the right hip and experienced considerable pain therefrom for several years prior to the September 17, 1976, injury. Her doctor had previously indicated to her following an examination in August of 1976 that she would have to undergo an operation in from 2 to 5 years to replace the degenerated hip joint. Following her fall in the teachers' lounge, deceased experienced pain in her right hip; and after contacting her local doctor, she was advised to contact a specialist, which she did that same day. The

specialist, an orthopedic surgeon, examined her in his office on September 22, 1976, 5 days after the accident, but did not have X-rays taken of the deceased at this examination. The specialist recommended reconstructive surgery of deceased's hip, which was performed in Denver, Colorado, on September 24, 1976. Initially, deceased experienced an uncomplicated postoperative recovery; however, a urinary infection was contracted by the deceased which ran its course and resulted in her demise on October 8, 1976.

In his appeal to this court, plaintiff contends the Workmen's Compensation Court erred in finding that the operation was not necessitated by deceased's fall; in finding that the injury caused by the fall was not the proximate cause of the operation; in basing its decision on the finding that the operation was not necessitated by the fall; and in failing to award attorney's fees to the plaintiff and additions for waiting time.

The first two errors assigned above involve findings on factual issues which are to be determined by the trier of fact. The rule is now well established that findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. See, Scamperino v. Federal Envelope Co., *ante* p. 508, 288 N. W. 2d 477 (1980); Newbanks v. Foursome Package & Bar, Inc., 201 Neb. 818, 272 N. W. 2d 372 (1978); Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92 (1977). Applying the foregoing rules to the evidence in this case, we are not able to conclude that the findings of the Workmen's Compensation Court were clearly wrong.

The evidence with reference to the necessity of the operation was conflicting. The orthopedic surgeon who performed the operation testified that the fall had aggravated the prior hip condition of the deceased, making it necessary to have surgery at once. The doctor who examined the deceased in August of 1976, in response to a question as to the necessity of the surgery based on the assumption that the fall had aggravated the injury, stated: "No, I wouldn't say it was necessary. I would still leave it in the realm of an elective procedure, and I would say that this could very well have been the thing which in [deceased's] mind would have said I can't live with this thing anymore when it's going to be this bad, and this would have tipped the scales in favor of her going to surgery, but she — I feel sure she had it in her own mind for a — you know, had been considering it for a period of time." Finally, a doctor who did not examine the deceased but did examine all the relevant hospital and medical records in this matter, and who was a specialist in internal medicine with experience in total hip replacements, testified that the surgery was not necessitated by the fall. In examining the findings of the Workmen's Compensation Court, every controverted fact must be resolved in favor of the successful party. See, Hyatt v. Kay Windsor, Inc., *supra*. We have also held that where the record in a case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment for the judgment of the Workmen's Compensation Court. Marion v. American Smelting & Refining Co., 192 Neb. 457, 222 N. W. 2d 366 (1974).

Under the standard of review with which we must examine these cases, we are unable to conclude that the Workmen's Compensation Court was clearly wrong in its finding that the operation was neither proximately caused nor necessitated by the fall of

September 17, 1976, as the medical testimony on this issue was clearly conflicting. We reject plaintiff's claims to the contrary.

Plaintiff argues, however, that it was error for the Workmen's Compensation Court to base its judgment on its finding that the operation was not necessitated by the fall. Specifically, plaintiff contends that the proper test to be applied in this situation is whether the injury was compensable, not whether the operation was necessitated by the fall. However, in a workmen's compensation case, the claimant must establish that the injury was in fact caused by the employment. We have held that the acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of the workmen's compensation act. Knaggs v. City of Lexington, 171 Neb. 135, 105 N. W. 2d 727 (1960). In Hyatt v. Kay Windsor, Inc., *supra*, this court stated: "Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment. The terms 'injury' and 'personal injuries' do not include disability or death due to natural causes but occurring while the employee is at work, nor an injury, disability, or death that is the result of a natural progression of any preexisting condition. § 48-151 (2) and (4), R. R. S. 1943. * * * The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461." In rendering its decision the Workmen's Compensation Court obviously had the foregoing rules in mind.

In the instant case, it is undisputed that deceased

was suffering from a hip joint severely degenerated because of preexisting arthritis. Plaintiff had the burden of proving that the fall contributed in some material and substantial way to aggravate deceased's condition. The medical evidence on this point was conflicting, the doctors testifying on that issue reaching conflicting opinions. Plaintiff also adduced evidence that the acute pain suffered by the deceased following her accident caused a change in her teaching methods, especially her mobility in the classroom. There was evidence in the record of hemorrhaging in the hip joint at the time of the surgery. However, there was evidence which indicated that the teaching methods of the deceased before and after the accident remained the same, her mobility being reduced by her preexisting hip and back pain. Likewise, there was no evidence of recent injury to the hip joint noted in the surgeon's report of the operation, dictated the same day that the surgery was performed. The applicable statute, section 48-185, R. R. S. 1943, provides in part: "A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that * * * (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, * * *." In view of the conflicting evidence in the record, and pursuant to the rules establishing the scope of review of cases of this nature, we cannot conclude that the Workmen's Compensation Court was wrong in its conclusions, and we therefore reject this assignment of error.

Plaintiff also contends the Workmen's Compensation Court failed in awarding attorney's fees and additions for waiting time. In view of the fact that the plaintiff has not prevailed in this litigation, and also the fact that there is a legitimate dispute between the parties involved, he is entitled to neither under section 48-125, R. R. S. 1943.

In light of what we have stated above, we necessarily affirm the order entered by the Workmen's Compensation Court on rehearing.

AFFIRMED.

STATE OF NEBRASKA, V. RANDALL WOODRUFF, APPELLANT.
288 N. W. 2d 754

Filed February 26, 1980. No. 42829.

1. **Criminal Law: Controlled Substances: Evidence: Motor Vehicles.** Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control over an automobile in which the contraband was found.
2. **Criminal Law: Evidence: Verdicts.** It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Conviction affirmed. Cause remanded for resentencing.

Jacobsen, Orr & Nelson, for appellant.

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

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

MCCOWN, J.

The defendant, after trial, was found guilty by the court of possession of a controlled substance, and sentenced to imprisonment for not less than 1 nor more than 3 years.

In the early morning hours of October 11, 1978, the defendant took possession of a brown Volkswagen station wagon which he had purchased from Gary Jensen. The defendant assisted Jensen in cleaning out the vehicle and removing Jensen's belongings. Jensen testified that, to the best of his knowledge, none of his possessions were left in the vehicle. Title to the vehicle was not delivered to defendant pending the payment of a small balance due on the purchase price.

On October 12, 1978, at around 4:40 p.m., two Kearney police officers went to a residence in Kearney, Nebraska, to arrest the defendant on a felony arrest warrant. The brown Volkswagen station wagon was parked in the driveway. The officers were informed by a woman at the residence that the defendant was not there. The officers drove around the corner and one of the officers kept the residence under observation. Shortly thereafter the woman and the defendant ran from the house and got into the station wagon. The woman got into the driver's seat. The defendant got into the back seat and lay down out of sight with his head toward the driver's side of the automobile. They drove away. The officers pursued and stopped the vehicle. Both the defendant and the woman were arrested. The officers briefly looked into the vehicle, but did not search it at the time. The vehicle was towed to the police garage by a tow truck and secured there.

Approximately an hour later an inventory search of the vehicle was made. A small black wooden box, approximately $2 \times 2 \times 5$ inches was found partially under the driver's seat and partially on the floor behind the driver's seat. The box contained a powder which was subsequently determined to be methamphetamines. The defendant's jacket was lying across the rear of the back seat and a syringe needle was found in the pocket of the jacket. Several other items were also found during the inventory

search. Under the front seat a black vinyl case was found which contained, among other items, an envelope addressed to the defendant containing a bail bond receipt. A note including a list of dates and amounts, signed by "Randy," was also found. The defendant testified that he had moved the envelope from his previous vehicle and placed it in the Volkswagen. He denied any knowledge about the black box, the syringe needle, or the note and list.

The District Court found the defendant guilty and sentenced him to imprisonment for not less than 1 nor more than 3 years.

The defendant contends that the evidence that the black box and its contents were in his possession was circumstantial and was insufficient to sustain the verdict because it did not exclude all other reasonable conclusions.

The evidence establishes that the defendant was the owner of the automobile and had been in possession and control of it for approximately 2 days. There was no evidence that anyone else had had possession and control of it after the purchase. At the time of the arrest there were only two persons in the car and the defendant was the only one in the back seat and in immediate proximity to the contraband. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control over an automobile in which the contraband was found. State v. Foster, 196 Neb. 332, 242 N. W. 2d 876; State v. Klutts, 204 Neb. 616, 284 N. W. 2d 415. Such evidence is generally deemed sufficient to sustain a conviction in the absence of any other reasonable explanation.

In the case now before us the trial court, acting as the fact finder, considered the evidence in the record and found the defendant guilty beyond a reasonable doubt. It is not the province of this court to resolve

conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Fowler, 201 Neb. 647, 271 N. W. 2d 341. Although circumstantial, the evidence in the present case was sufficient to support the verdict.

Section 28-4,125 (3), R. R. S. 1943, under which the defendant was convicted, provides for a sentence of not less than 1 year nor more than 2 years. The defendant was sentenced to not less than 1 year nor more than 3 years imprisonment. A sentence to imprisonment which exceeds the maximum statutory period is merely erroneous and not void. Von Bokelman v. Sigler, 175 Neb. 305, 121 N. W. 2d 572.

In view of the provisions of the indeterminate sentencing statutes, and the fact that in this case the minimum term of imprisonment is more than one-third of the maximum term of imprisonment allowed by statute, and that an indeterminate sentence was imposed by the court originally, we deem it appropriate to remand the cause to the District Court for resentencing.

The conviction of the defendant is affirmed. The sentence is vacated and the cause remanded to the District Court for resentencing.

CONVICTION AFFIRMED. CAUSE REMANDED FOR RESENTENCING.

KRIVOSHA, C. J., and WHITE, J., concur in result.

FRED NEVELS III, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF LABOR, ET AL., APPELLEES.

289 N. W. 2d 511

Filed March 4, 1980. No. 42540.

1. **Public Officers and Employees.** In the absence of legislation, government employment can be terminated at the will of the appointing officer.
2. **Administrative Law: Judicial Notice: Evidence: Proof.** This court ordinarily will not take judicial notice of rules or regulations of a governmental department or agency where such rules or regulations are claimed to form an implied part of a contract of employment. Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity.

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

Noren & Burns, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellees.

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

MCCOWN, J.

This is an action by plaintiff seeking reinstatement to his former position as a manpower specialist in the Nebraska Department of Labor. The District Court affirmed the findings and decision of the Commissioner of Labor terminating plaintiff's employment and dismissed the appeal.

The plaintiff, Fred Nevels III, was employed by the Nebraska Department of Labor in August 1971 in the manpower planning program. In February 1975 the manpower planning division was transferred into the comprehensive employment training unit to implement the terms of a federal act. The plaintiff was reclassified and his title changed to manpower specialist III. Plaintiff's supervisor at the time was Eugene Staberg, deputy commissioner of the depart-

ment. In June 1975 Staberg was succeeded by Thomas Erixon, who was plaintiff's supervisor thereafter.

On November 19, 1975, plaintiff received a written memorandum from Erixon advising him of his termination and stating the causes for termination as: (1) Inefficiency, incompetence, and negligence in the performance of duties; (2) failure or refusal to comply with reasonable and proper assignments and instructions; (3) unauthorized or improper use of leave, abuse of meal and rest periods, tardiness, and unauthorized departures from work areas; and (4) inability to maintain satisfactory and harmonious relationships with other employees.

The plaintiff appealed his termination to the Merit System Appeal Board. Hearings were held by the board and evidence was introduced and received. On April 28, 1976, findings were made by the board and the record and the findings and recommendations were delivered to the Commissioner of Labor. The board found that although there was some evidence of inefficiency or incompetence, of failure to follow instructions, and of unsatisfactory relationships with his supervisors, the evidence, in the opinion of the board, did not justify dismissal. The board specifically found there was no discrimination involved. It also found that the plaintiff's inability to accept supervision was the basis of the problem, and that plaintiff had demonstrated a negligent attitude toward his job and the department. The board recommended to the Commissioner of Labor that plaintiff be reinstated, subject to disciplinary action.

On September 15, 1977, after reviewing the evidence and testimony, and the findings and recommendations of the appeal board, the Commissioner of Labor entered his findings and determination. The Commissioner of Labor found that the plaintiff failed to follow outlined procedures as instructed, and that he was inefficient, incompetent, and negli-

gent in the performance of his duties. He also found that plaintiff refused to travel as instructed without advance notice of at least 1 week; that he failed to treat office hours as significant; was found asleep at his desk on occasion; had conflicts with fellow employees on at least two specific occasions; and that he had a total lack of regard for management supervision and instruction. The commissioner determined that the record substantiated the termination of plaintiff's employment.

Plaintiff appealed the decision of the Commissioner of Labor to the District Court for Lancaster County. The District Court determined that the Commissioner of Labor had the power to appoint and remove all subordinate employees in the department, and had the authority to terminate plaintiff's employment. The court also found that the decision of the Commissioner of Labor to terminate the plaintiff's employment was supported by competent, material, and substantial evidence in the record, and was not arbitrary or capricious. The District Court also found that the evidence established that the plaintiff was inefficient, incompetent, and negligent in the performance of many of his duties, and that his employment was terminated for just cause. The District Court dismissed plaintiff's appeal.

The plaintiff contends that he has a property interest in continued employment by the Department of Labor, that his employment cannot be terminated in the absence of just cause, and that his employment was terminated without due process of law.

Article IV, section 1, Constitution of Nebraska, provides in part: "Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments." This court has said: "It is a settled principle that government employment, in the absence of legislation, 'can be revoked at the will of

the appointing officer." Nebraska Dept. of Roads Employees Assn. v. Department of Roads, 189 Neb. 754, 205 N. W. 2d 110. We have also recognized that a public employee may not be dismissed or terminated for impermissible constitutional reasons such as race, religion, or the assertion of rights guaranteed by law or under the Constitution. See Voichahoske v. City of Grand Island, 194 Neb. 175, 231 N. W. 2d 124.

The United States Supreme Court has recognized that persons may have constitutionally protected property interests in continued employment stemming from sources other than state law. See, Perry et al. v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570; Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548.

In Bishop v. Wood et al., 426 U. S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684, the Supreme Court, in dealing with the employment contract of a municipal police officer, said: "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. * * * The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. * * * Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question."

In the case now before us the plaintiff's claim of a right to continued employment does not rest upon any specific statutory provision. Instead, plaintiff bases his claim of entitlement upon alleged rules or regulations of the Nebraska Merit System, which are not in the record. The alleged rules were not offered or introduced in evidence, nor was there any evidence that the Commissioner of Labor had adopted

any rules or regulations which became an implied part of the employment contract of departmental employees.

Courts have ordinarily refused to take judicial notice of municipal ordinances or internal operating rules of administrative agencies or other courts, and have required a party seeking the benefit of such provisions to plead and prove the existence of the ordinance or rule. See, Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677; Fanning v. Richards, 193 Neb. 431, 227 N. W. 2d 595; American Assn. of University Professors v. Board of Regents, 203 Neb. 628, 279 N. W. 2d 621. Where such rules and regulations do not appear in the record nor in the bill of exceptions in this court, the court will not take judicial notice, nor consider the validity, of the rule or rules or their application to the facts in the case.

We therefore hold that this court ordinarily will not take judicial notice of rules or regulations of a governmental department or agency where such rules or regulations are claimed to form an implied part of a contract of employment. Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity.

Even if it be assumed that implied conditions in the plaintiff's contract of employment required just cause for termination here, the evidence clearly established that he was terminated for cause. On the evidence in the record the plaintiff's employment was terminable at the will of the Commissioner of Labor.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE EX REL. CHARLES E. SCHULER, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF LOUP COUNTY, NEBRASKA, ET AL., APPELLEES.

289 N. W. 2d 514

Filed March 4, 1980. No. 42569.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law.
2. _____. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled.

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

George Rhodes, for appellant.

Joseph M. Casson, for appellees.

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

MCCOWN, J.

This is an action by the plaintiff taxpayer, on behalf of Loup County, challenging the validity of certain claims against the county, which had been audited and allowed by the defendant county board. The action sought to have the claims declared void and invalid as against the county, and also sought judgment against the individual members of the county board for amounts paid out on such claims. The District Court sustained the defendants' motion for summary judgment and the plaintiff has appealed.

The plaintiff's amended petition alleged that at a meeting of the county board of Loup County on November 21, 1977, the board had audited, allowed, and caused to be paid six different specified claims totaling $26,578.05. The claims were for supplies, material, equipment, and contractual services. Plaintiff alleged that the purchases and contracts represented by the claims were not based on competitive

bids as required by statute, and that the contracts on which the claims were based were therefore illegal and void as obligations of the county, and that the defendant members of the county board were individually liable for the amount of county funds expended on such claims. Plaintiff also alleged that the meeting of November 21, 1977, was void because advance public notice of the meeting had not been given as required by statute. The amended petition prayed that the actions of the county board at the November 21, 1977, meeting be declared void; that the claims enumerated be declared void as obligations against the county; and that judgment be entered against the county board members individually.

The defendants' answer admitted that no advance notice of the meeting of November 21, 1977, was given, and that the claims had been audited, allowed, and caused to be paid on that date. The defendants denied the allegations that the contracts on which the claims were based were in violation of competitive bid statutes and denied that they were invalid or void as obligations of the county. The defendants alleged as a further defense that the failure to publish advance notice of the November 21, 1977, meeting was inadvertent, and alleged that at a meeting held on December 19, 1977, the county board unanimously voted to void all warrants issued on all claims audited and allowed at the previous meeting of November 21, 1977.

Answers to requests for admissions and other documents show that on February 22, 1978, the county board, after giving advance public notice, held a meeting and audited and allowed the same claims to the same individuals or companies and for the identical goods and services as contained in the claims which were audited and allowed by the county board on November 21, 1977, and that each claim was assigned to the county treasurer of Loup County.

The defendants filed a motion for summary judg-

ment. The District Court sustained the motion for summary judgment and dismissed plaintiff's petition.

The plaintiff's position is that under section 23-337, R. R. S. 1943, a taxpayer is authorized to recover from the individual defendants for the benefit of the county any funds of the county paid out illegally, and that there are material facts in issue which are disputed or denied.

The defendants take the position that this case involves only an appeal from the allowance of a claim done at a meeting which was held in violation of the public meetings law, and therefore void. Plaintiff's cause of action, however, is also grounded on section 23-337, R. R. S. 1943, and based on the allegation that the contracts or purchases which are the basis of the claims here were made and entered into without competitive bidding and were illegal and in violation of statute. That allegation is specifically denied by the defendants and there is no evidence in the record as to the facts and circumstances of any of the individual transactions involved in the specified claims.

The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152.

REVERSED AND REMANDED.

GEORGE S. MCCORMICK AND JULIEANNE MCCORMICK, APPELLANTS, V. DONALD E. TERRY ET AL., APPELLEES.

289 N. W. 2d 516

Filed March 4, 1980. No. 42573.

1. **Equity: Evidence: Appeal and Error.** Equity cases are heard de novo by this court. In determining, however, 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.
2. **Adverse Possession.** A claim of title by adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years.

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

Paine & Huston, for appellants.

Lauritsen, Baker & Brownell, for appellees.

Heard before KRIVOSHA, C. J., BRODKEY, and WHITE, JJ., and RONIN and GARDEN, District Judges.

RONIN, District Judge.

This is an action in equity wherein the plaintiff-appellants, George S. McCormick and Julieanne McCormick, seek to quiet title to certain real estate occupied by the defendant-appellees, Donald E. Terry, his wife, Nadine, and Bill L. Eppert. The defendants answered by denying plaintiffs' right to said real estate and by pleading adverse possession as an affirmative defense. The defendants also cross-petitioned for damages allegedly incurred as a result of plaintiffs' clouding their title to the subject real estate. After trial, the court found for the defendants on the plaintiffs' action to quiet title on the subject property and dismissed plaintiffs' amended petition. The court further found for the plaintiffs on the defendants' cross-petition, which was also dismissed. We affirm the judgment of the trial court.

Equity actions are heard de novo by this court, and we are required to reach an independent conclu-

sion as to fact questions without reference to the District Court.

The essential facts in this case are these. The plaintiff, George S. McCormick, purchased the southeast quarter of Section 5, Township 11 North, Range 8 West of the 6th P.M., Merrick County, Nebraska, from his predecessor in title in 1959 and received his deed in 1963. Plaintiff rented out the land for 1 year and thereafter used it for farming and raising livestock.

On December 30, 1965, the plaintiffs conveyed to four individuals, the defendants' predecessors in title, the following described real property: "* * * those parts of Lots One (1) and Two (2) on the Mainland lying North of Public Road; *referred to on plat as Ft. Kearney Road* in Section Five (5), Township Eleven (11) North, Range Eight (8) West of the 6th P.M., Merrick County, Nebraska, * * *." (Emphasis supplied.) There were additional tracts situated in the same section which were also conveyed by plaintiffs in this deed but are not relevant to the issues in this case.

The defendants' predecessors in title conveyed by warranty deed dated April 4, 1970, to the defendants the foregoing described property except that the words "referred to on plat as Ft. Kearney Road" were omitted.

Evidence was adduced at trial to describe the exact boundaries of the property which was the subject of the lawsuit. The plaintiffs' expert witness, Mr. Lester Ehlers, a civil engineer, testified by deposition. A plat prepared by him showing the relationship between the Ft. Kearney Road and the present county road was received in evidence. The old Ft. Kearney Road was drawn according to the original government field notes and the original government survey plat. The road itself can no longer be located on the land and has been farmed over for many years. The existing county road is a mail

road and is not located on a section line. It is located south of the platted Ft. Kearney Road. The questioned property occupies the entire land between the two roads. Ehlers' testimony is that the distance between the roads with respect to the questioned property varied but averages 80 feet wide, is 2,000 feet long, and the area of the questioned property was computed to be 160,000 square feet, or 3.7 acres.

Counsel conceded in oral argument that the legal title to the questioned property described above was held by the plaintiffs by reason of the legal description in the deed of December 30, 1965, by which they conveyed the land north of the platted Ft. Kearney Road, rather than the present county road which has been used for many years. The court found that the legal title to the disputed tract of 3.7 acres was vested in the plaintiffs at the time of trial.

The issue of the adverse possession of the defendants and their predecessors in title to the questioned property is the only issue in this case. The plaintiffs concede that the defendants acquired title by warranty deed dated April 4, 1970, and went into immediate exclusive possession and have continuously farmed the questioned property without any adverse claim until the filing of the plaintiffs' petition to quiet title to this property on May 26, 1977.

This court has established in a number of cases the standard by which a claim of adverse possession must be proved. In Mousel v. ten Bensel, 195 Neb. 456, 238 N. W. 2d 632 (1976), our court stated: "It is basic that a claim of title by adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years."

In the more recent case of Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866 (1977), this court again stated: "In order to establish title by adverse possession, such possession must not only have been

actual, open, and continuous, but it must have been accompanied by an intention to hold land as the owner of it and it must have been under a claim of ownership."

The critical time period for the establishment of the affirmative defense of adverse possession under the facts in this case is from April 4, 1967, to April 4, 1970. An examination of the record discloses that there is a direct conflict in the testimony as to the possession and use of the questioned property during these particular years. The record does not show that the questioned property was separately fenced nor were its boundaries on the ground determined until the survey of Mr. Ehlers was completed on November 14, 1978, just before trial. The land sold by plaintiffs to the defendants' predecessors in title lay immediately to the north of the platted road and the questioned property was but 3.7 acres of a contiguous tract of 40 acres of cropland. The southern fence line of the cropland tract was at all times at the southern edge of the county road. McCormick pastured this entire tract of land, which included the questioned property, from 1960 until they delivered possession of the property over to the purchasers who leased it to the Short brothers from March 1966 until the defendants purchased the property on April 4, 1970. The plaintiff, George McCormick, testified that he pastured livestock at various times from 1966 to 1970 not only on the questioned property but the remainder of the contiguous 40-acre tract which McCormick had conveyed to defendants' predecessors. He stated that he never discussed this use of the land of defendants' predecessors with either them or their tenant, the Short brothers. His testimony as to pasturing livestock on the questioned property was generally corroborated by the testimony of his wife and son and a former tenant, Melvin Purvis.

However, the defendants' witness, Dale Short, tes-

tified that he and his brothers farmed the 40-acre cropland tract including the questioned property from 1966 through 1969, that they kept their livestock on the premises for three summers, and that the cornstalks on the subject real estate were pastured by them in the winter of 1967. He further testified that he tended the cattle kept by him on the subject real estate every day during that winter, and that he did not see anyone else or any other livestock, including those of the McCormicks, on these premises.

The witness Short further testified that he farmed the questioned property right up to the fence on the north side of the county road, and that the Short brothers irrigated nearly every day from a well during the summers. He stated that 1 year he raised soybeans on the tract. He further stated that he made repairs to the fence after he leased the tract.

A neighbor, Raymond Werner, testified that he was familiar with the tract when Dale Short and his brothers farmed it and that they farmed all of it, including the questioned property. Another witness for the defendants, Wilbur McCumber, a licensed real estate broker and appraiser, was one of defendants' four predecessors in title. His testimony was that all the grantees in the deed from the plaintiffs thought they were acquiring all the land north of the county road; that they took complete possession of the entire tract and the questioned property in March 1966, which they rented to Dale Short and his brothers. He testified that the times he drove by the questioned property there was no evidence of anyone else farming it, and that no one ever made any kind of claim to the questioned property.

In weighing the irreconcilable conflict in the testimony on the issue of adverse possession as to the subject property, the court considers the concession of the plaintiffs that the defendants' possession was adverse from April 4, 1970, to the time the plaintiffs filed this action on May 26, 1977. The record further

discloses that the plaintiffs never conversed with the defendants and their predecessors in title with regard to any claim of ownership of the disputed tract at any time during the 10-year period. The disputed tract of 3.7 acres was at all times a part of the 40-acre cropland tract and was farmed by the defendants and their predecessors up to the fence line on the north side of the county road. The plaintiffs made no attempt to delineate the common boundary line between their acreage and the defendants' tract. If the plaintiffs grazed livestock at any time on the subject property the livestock would enter the entire tract, including the land the plaintiffs conveyed to the defendants' predecessors in title.

This court, in Ohme v. Thomas, 134 Neb. 727, 279 N. W. 480 (1938), stated that although the Supreme Court in reviewing an equity action is required to reach an independent conclusion as to fact questions without reference to District Court findings, it will, in determining the weight of evidence where there is an irreconcilable conflict on a material issue, consider the fact that the District Court observed the witnesses and their manner of testifying.

We find that the defendants have affirmatively proved by a preponderance of the evidence that they and their predecessors in title had exercised actual, open, exclusive, and continuous possession under a claim of ownership for a period of more than 10 years over the subject property.

We further find that all right and title to the real estate lying in the southeast quarter of Section 5, Township 11 North, Range 8 West of the 6th P.M., in Merrick County, Nebraska, which lies between the Fort Kearney-Omaha Road and the present existing county road is ordered quieted in the defendants, that the plaintiffs have no right, title, or interest in said real estate, and that the judgment of the District Court is affirmed.

AFFIRMED.

GEORGE C. BAKER, FLORENCE N. BAKER, RONALD R. CRONKHITE, AND MYRNA G. NEWMAN, APPELLANTS, V. GEORGE J. BUGLEWICZ, DANIEL C. LYNCH, WILLIAM GREEN, RICHARD FELLMAN, MICHAEL ALBERT, CITY OF OMAHA, A MUNICIPAL CORPORATION, AND STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEES, FONTENELLE FOREST ASSOCIATION, A NEBRASKA NONPROFIT CORPORATION, INTERVENOR-APPELLEE.

289 N. W. 2d 519

Filed March 4, 1980. No. 42580.

1. **Equity: Appeal and Error: Evidence: Trial.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Property: Municipal Corporations: Jurisdiction.** The power to accept property by gift or dedication for street purposes within 3 miles of the corporate limits of cities of the metropolitan class is necessarily implied in or incidental to expressly granted statutory powers over subdivision and zoning jurisdiction.
3. **Municipal Corporations: Streets and Alleys.** Where the dedication of a street is accepted by the city, and the city manifests an interest to use it, or it has been used by the public as a street, then the rights of the city and the public have accrued against the dedicator who cannot thereafter withdraw his dedication.

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

Russell S. Daub, for appellants.

Donald L. Knowles, Douglas County Attorney, and Jerry W. Katskee, for appellees Buglewicz et al.

Herbert M. Fitle, City Attorney, and Robert J. Hamer, for appellee City of Omaha.

Harvey B. Cooper, for intervenor-appellee Fontenelle.

Heard before KRIVOSHA, C. J., BRODKEY, and WHITE, JJ., and RONIN and GARDEN, District Judges.

RONIN, District Judge.

This is an action for a declaratory judgment and injunctive relief, by which plaintiff abutting landowners challenge the validity of a 1963 dedication of Edith Marie Avenue, a street lying within 3 miles of the city limits of Omaha, Nebraska, and located in Douglas County. The plaintiffs seek to restrain the defendants, Douglas County and the City of Omaha, from treating Edith Marie Avenue as a public street or road.

The Fontenelle Forest Association, an adjacent landowner, was allowed to intervene, and in its petition of intervention requests that the dedication of Edith Marie Avenue be declared valid and that the plaintiffs' action be dismissed. After trial, the District Court found generally for the defendants and intervenor and dismissed plaintiffs' petition. We affirm the judgment of the trial court.

Some factual background is essential to an understanding of the issues. Carl S. Jonas, an author and environmentalist, owned and lived on a large, woody, hilly tract of land overlooking the Missouri River Valley in the northwestern part of Douglas County but within 3 miles of the city limits of Omaha, Nebraska. In the summer of 1963 Jonas and his new wife, Edith Marie Lewis-Jonas, decided to build a new home just north of their residence. The building permit was issued on the express condition that the building site would front a dedicated street or alley. In 1960 the owners of two tracts of land lying to the south had granted Jonas and others an easement 16½ feet wide for ingress and egress to a county road. This was a narrow, steep, gravel road coming to a dead end some distance north of the Jonas tract. Jonas consulted his attorney, Thomas R. Burke, who advised him to ask the abutting landowners, the Moorings and plaintiffs Baker, if they would dedicate a 20-foot-wide strip of their land over the existing easement so that Jonas

would be able to secure the building permit for his new home. Burke explained to Jonas that this would make the private road a public road, which would end on his property. Thereafter, Jonas met with his neighbors, the Moorings and Bakers, and discussed his problem with them. Attorney Burke thereafter prepared the dedication agreement and, with Jonas, met with the Moorings and the Bakers in their homes. Burke's testimony is that he discussed the requirement that they must sign the dedication document granting their land to the City in order that Jonas might obtain a building permit. The Moorings and Bakers signed the dedication, with Burke taking their acknowledgments that their signatures were their voluntary act and deed. Burke thereafter obtained releases from their mortgage companies. After obtaining the approval of the City Planning Department, the city council accepted and the mayor approved the dedication, which was duly recorded with the Register of Deeds. The newly dedicated street was named Edith Marie Avenue in honor of Jonas' wife.

In 1976 Carl S. Jonas gave 45 acres of his land at the northern end of the road to the Fontenelle Forest Association to preserve the land as a wildlife refuge and to make available a forest preserve for the education of the public, which gift was accepted by the association. On October 1, 1976, Carl S. Jonas died and in his will left his remaining real estate, including his residence, in that section to the Fontenelle Forest Association. The association expended substantial sums in improving the property and in purchasing additional land. The former residence of Jonas was used as a meeting place for the activities provided for in the Jonas will. The public use of Edith Marie Avenue was greatly increased as it was the only access road to the headquarters of this forest preserve. On May 31, 1977, the plaintiffs, Myrna Newman and George and Florence Baker,

sent a notice to the City of Omaha endeavoring to withdraw the dedication which had been filed 14 years previously. On July 19, 1977, the Douglas County board placed Edith Marie Avenue on its county road system and later voted to widen and improve the road. Plaintiffs filed this action on August 1, 1977.

The first issue raised by the plaintiffs is their challenge of the validity and intent of the written instrument of the dedication of Edith Marie Avenue. The plaintiffs Baker and Dr. Mooring, the latter being a predecessor in title of the plaintiff Newman's property, testified that Jonas told them the dedication would only increase the width of the existing easement to 20 feet and that this was necessary so that he could keep his building permit for the construction of his new home. Plaintiffs contend it was their intention not to deed or convey land for the dedication of a street to the city and that they would not have signed the dedication had they known the true character of the instrument.

The dedication document clearly states: "* * * we * * * hereby dedicate to the public for the public use * * * for street purposes to be hereafter known as Avenue Edith Marie, * * *." The testimony of Thomas R. Burke, Jonas' attorney, is that the grantors were told by him, in the presence of Jonas prior to its execution, that they were giving up the fee title to the 20-foot-wide strip of their land to the City of Omaha, and that it was more than the granting of an easement or use of their land. He further testified that he informed the grantor abutting landowners that it was necessary for their mortgage companies to release their mortgages over the proposed dedicated land, as the city would require fee and title. These releases were obtained from the mortgagees of the plaintiffs Baker and predecessors in title of the plaintiff Newman. The attorney for the latter acknowledged receiving a copy of Burke's letter to

his clients' mortgage company requesting the release of their mortgage on the proposed dedicatory strip of land. The evidence is conflicting as to what the plaintiffs and the predecessors in title who were signers of the dedication intended when they signed the dedication, whether all of the said landowners made a mistake as to the nature or effect of the instrument or whether the alleged statements of Jonas made to the landowners constituted constructive fraud as alleged by plaintiffs.

Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. State v. Jones, 202 Neb. 488, 275 N. W. 2d 851 (1979). A review of the evidence in this case establishes that the trial court was correct in finding that the plaintiffs or their predecessors in title intended to and did make a valid offer of dedication of Edith Marie Avenue for public use.

The next contention of the plaintiffs is that the dedication of Edith Marie Avenue was not properly accepted prior to withdrawal. The record reflects that the City of Omaha acted in reliance on this dedication by the issuance of the building permit and the permitting of the construction of Jonas' new house. Plaintiffs contend that section 23-108, R. R. S. 1943, provided, in 1963, that only the county board had the power to acquire title to lands "by gift, prescription, dedication, the exercise of the right of eminent domain" for road purposes. The defendants do not dispute that Douglas County has the power to create and maintain roads in the county. It was in fact the action of the Douglas County board on July 19, 1977, in placing Edith Marie Avenue on its county road

system and the later action to improve the same because of the increased use of this street by the public that resulted in the plaintiffs filing this lawsuit.

Defendants contend, however, that applicable statutes of Nebraska empower the City of Omaha to accept the dedication of Edith Marie Avenue, which lies within its 3-mile limits. In 1973 section 14-116, R. R. S. 1943, expressly provided in part: "No owner of any real estate located in an area which is within three miles of the corporate limits of any city of the metropolitan class * * * shall be permitted to subdivide, plat or lay out said real estate in building lots and *streets* or other portions of the same *intended to be dedicated for public use* * * * without first having obtained the approval thereof by the city council of such city * * *. Such city shall have authority within the area above described to regulate the subdivision of land for the purpose, whether immediate or future * * *; and to *require the dedication of land for adequate streets,* drainage ways, and easements for sewers and utilities. * * * Subdivision shall mean the division of a lot, tract or parcel of land into two or more lots, blocks or other divisions of land for the purpose, *whether immediate or future,* of ownership or building developments except that the division of land shall not be considered to be subdivision *when the smallest parcel created is more than five acres in size.*" (Emphasis supplied.) A review of the plat in evidence shows that both the Newman and Baker properties were divided into two parts by the street dedication. Plaintiff George Baker testified that his son planned to build a home on his tract west of Edith Marie Avenue, which tract is less than 5 acres and comes within the purview of the statute.

It is further noted that section 14-366, R. R. S. 1943, last amended in 1959, provides: "The *power* [of the city] to so *purchase* or *appropriate* private property or public property * * * for *streets,* alleys, *avenues,*

and other construction of like kind may be exercised by the city within the corporate limits of the city or *within three miles thereof.*" (Emphasis supplied.) This section grants to the City of Omaha the power to purchase and acquire by eminent domain property within 3 miles outside its corporate limits. The power to accept property by dedication may be implied in or be incidental to the greater powers of purchase and acquisition by eminent domain.

The foregoing statutes, in existence at the time of the dedication in this case, clearly manifest a legislative intent for the City of Omaha to be given control over land within the 3-mile limit to lay out streets and other tracts, and to accept and acquire on behalf of the public such dispositions of real property. It is noted that there is no conflict with any powers of the county regarding this area within the City's zoning and subdivision jurisdiction. Section 23-373, R. R. S. 1943, in effect in 1963, expressly grants to the county the power over real property with reference to subdivisions and streets "outside the limits of subdivision jurisdiction of any city." We hold the trial court correctly found that the dedication of Edith Marie Avenue for public use was lawfully and legally approved and accepted on December 3, 1963, by the City of Omaha.

The plaintiffs further contend that the notice of withdrawal of their offer of dedication sent by the plaintiffs to the City of Omaha on May 31, 1977, was effective because the City of Omaha and Douglas County had not changed their positions by not having improved or maintained Edith Marie Avenue. Plaintiffs cite Aro Inv. Co. v. City of Omaha, 179 Neb. 569, 139 N. W. 2d 349 (1966), in support of their contention. In Aro, the City of Omaha had accepted the dedication of a plat of an addition which provided for streets. The street in question was never opened nor was it in any way used as a public way for vehicular or other traffic. Our court determined that

even though a dedication of a street is accepted by the city, "until the city manifests some intent to use it or it has been used as a street there is no public use and no rights will accrue in said street as against the city."

In this case, while Edith Marie Avenue was not a through street and was not used much by the general public, the record discloses there was some public use by hunters, visitors, and others. The street was open and used by vehicular traffic which had substantially increased with the establishment of the visitors' center at the former Jonas home by the Fontenelle Forest Association. Prior to the withdrawal notice to the City of Omaha, action was being undertaken by the City of Omaha and Douglas County for the improvement and maintenance of the street. The facts in the case at bar are distinguishable from Aro, which actually supports the defendants' contention that the withdrawal notice was of no effect because the rights of the public had accrued in the use of the street. Considerable expenditures had previously been made by the intervenor in carrying out the provisions of the Jonas bequest in reliance upon the dedication of Edith Marie Avenue.

We agree with the finding of the trial court that the plaintiffs' notice of withdrawal of their dedication, which was sent to the City of Omaha on May 31, 1977, was invalid and of no legal effect for the reason that the rights of the public and the City had accrued by the use of the street by the public. In so holding, it is not necessary to consider whether the plaintiffs failed to comply with the prescribed statutory procedure for vacating a street.

The trial court was correct in its findings and in dismissing the plaintiffs' petition, and its action in doing so is affirmed.

AFFIRMED.

JOHN ROSENBERRY, APPELLEE, V. BOB BECK, APPELLANT.
289 N. W. 2d 523

Filed March 4, 1980. No. 42675.

Contracts: Property. A contract to deliver the possession of a residence in which the heating system and built-in appliance system are to be in working condition requires the seller only to deliver possession with the systems in the same operating condition existing at the time the agreement was signed.

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

Luckey, Sipple & Hansen, for appellant.

No appearance for appellee Rosenberry.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and MARTIN, District Judge.

WHITE, J.

This is an appeal from a judgment of the District Court for Platte County, Nebraska, which affirmed a judgment for plaintiff Rosenberry in the Small Claims Court of Platte County, Nebraska. We reverse and dismiss.

On May 13, 1978, the appellant, Bob Beck and wife, entered an agreement of sale and purchase with appellee, John Rosenberry and wife, to sell certain residential property in Columbus, Platte County, Nebraska. The purchase agreement recited in part that: "This offer is based upon (our) personal inspection or investigation of the premises and not upon any representation on warranties of condition by the Seller or his agent. Seller agrees to maintain, *until delivery of possession,* the heating, air conditioning, water heater, sewer, plumbing and electrical systems and any built-in appliances in working condition." The Rosenberrys took possession of the property in June 1978. In September 1978 they called an employee of the gas company. At that time the furnace was found to have a crack in

the firebox. The furnace was red-tagged, which meant the gas company considered it unsafe for operation. The evidence indicates that the appellant Beck lived in the home from June 1969 to June 1978; that they had operated the furnace during the regular heating season and had experienced no difficulty. The evidence indicated and the trial court found that the appellant Beck had no knowledge that the firebox in the furnace was cracked either at the time possession was surrendered or thereafter. Although not cited in the brief, the case at bar is governed by a case in which the facts are strikingly similar. Gunset v. Mossman, 196 Neb. 529, 243 N. W. 2d 783. In that case the purchasers, Gunsets, entered into a real estate contract to buy a home in Omaha, Nebraska. The seller and his family had lived in the home for approximately 7 years. During that period, the boiler, the subject matter of the contract dispute, was checked annually and continued to provide adequate heat through the date of the sale to the buyers. The contract provision in the Gunset case is identical to the provision in the case at bar. Shortly after taking possession of the house, an employee of the Metropolitan Utilities District, on September 22, 1972, inspected the boiler and affixed a "red-tag" to the unit. The pertinent language on the tag stated that the boiler was leaking water and that correction of the above condition was required by rules and regulations.

The sole issue before the court in the Gunset case, as here, was whether the seller breached a condition of the purchase agreement requiring the heating system to be maintained in a working condition until the buyers obtained possession of the house. As in this case, the Gunsets relied on expert testimony elicited at the trial in determining whether the furnace was in working condition upon transfer of possession. There, the expert testified, as here, that possibly the leak was present at the time the sale

contract was executed. The District Court reversed a judgment in favor of the buyers, and Chief Justice Paul White, writing for this court affirming the judgment, said: "The error in the plaintiffs' contention is that they seek to substitute the judgment of experts for the understanding of the parties existing at the date the contract was entered into. It is that understanding of 'working condition' which is controlling.

"The only reasonable interpretation of the words 'working condition' under the facts of this case is that the defendant agreed to deliver possession of the furnace in the same operating condition existing at the time the agreement was signed. The clause in dispute was not a warranty. Since no allegation is made that the boiler's condition worsened from the date the agreement was signed to the date the plaintiffs obtained possession, the plaintiffs received all they bargained for."

The judgment of the trial court is reversed and the cause dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SANDRA KAY DRYDEN, APPELLANT, V. JAMES EDWARD DRYDEN, APPELLEE.

289 N. W. 2d 525

Filed March 4, 1980. No. 42678.

1. **Divorce: Decrees: Judgments: Interest: Statutes.** The provisions of section 45-103, R. R. S. 1943, relating to payment of interest on judgments, refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor.
2. **Divorce: Decrees: Judgments: Interest.** As to awards or decrees for the payment of money in installments, when not otherwise provided for in the order interest begins to accrue only on each individual installment from the date that it becomes due and payable.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Mohummed Sadden and Phillip S. Dandos, for appellant.

Smith, Smith & Boyd, for appellee.

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

HASTINGS, J.

Petitioner applied to the District Court for an order requiring the respondent to pay interest on a cash settlement award payable in monthly installments from date of entry 2 years earlier and without regard to the due date on each installment. This application was denied. Petitioner has appealed, and we affirm the judgment of the trial court.

On December 6, 1976, a decree dissolving the marriage then existing between the parties was entered and a motion for new trial was overruled on January 4, 1977. No appeal was taken. The decree awarded petitioner the sum of $45,000, payable $3,000 on or before February 1, 1977, and the sum of $500 per month commencing on the 15th day of December 1976, and a like amount on the 15th day of each month thereafter for a total of 84 monthly payments. There was no provision for interest in the decree.

It is petitioner's position that the award made herein being for a definite amount and not subject to modification for any cause became a vested right from the date of rendition of the judgment. Ball v. Ball, 183 Neb. 216, 159 N. W. 2d 297 (1968). She then argues that interest on a decree for the payment of money shall be paid from the date of rendition thereof. § 45-103, R. R. S. 1943. However, this contention was clearly answered by Cumming v. Cumming, 193 Neb. 601, 228 N. W. 2d 296 (1975), wherein we said: "The provisions of that section refer to judgments or decrees for money which is *immedi-*

ately due and *collectible* where its nonpayment is a breach of duty on the part of the judgment debtor." (Emphasis supplied.)

In the instant case, the award was payable in installments and interest begins to accrue only on each individual installment from the date that it becomes due and payable. There being no showing that any installment was due and unpaid, petitioner was not entitled to interest.

The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

LINDA LEE RITTER, APPELLANT, V. JERALD E. RITTER, APPELLEE.

289 N. W. 2d 526

Filed March 4, 1980. No. 42687.

1. **Divorce: Gifts.** Ordinarily, money spent by one spouse in the nature of a gift prior to marriage will not be reimbursed when the divorce is granted.
2. **Divorce: Property.** 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.
3. **Divorce: Property: Appeal and Error.** This court is not inclined to disturb the division of such property by the trial court unless it is patently unfair on the record.
4. **Divorce: Property: Alimony: Appeal and Error.** The distribution of property and fixing of alimony rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal.

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

Elizabeth Stuht Borchers and Gunderson, Abrahamson & Borchers, for appellant.

Steven J. Lustgarten of Lustgarten & Roberts, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage in which the trial court dissolved the marriage and divided the property of the parties. The petitioner wife has appealed and contends that the division of the property was unconscionable and that the trial court erred in failing to award alimony.

Petitioner and respondent were married on December 24, 1977. They separated in July of 1978, approximately 7 months later. This was petitioner's third marriage and respondent's second marriage. Both parties have children from prior marriages. During the marriage the petitioner was not employed outside the home. Respondent has been employed by Northern Natural Gas for over 20 years and receives a gross monthly salary of $3,290.

The trial court awarded petitioner the 1974 Ford station wagon and the furniture which she brought into the marriage, a $1,500 cash award, approximately one-half of the household goods, and attorney's fees in the amount of $500. The respondent was awarded the couple's residence property which has an appraised value of $71,000, and is subject to mortgage indebtedness in the amount of approximately $53,000. Additionally, the respondent was awarded approximately one-half of the household goods, the 1973 Volvo which he brought into the marriage, and all other property in his name. The respondent was ordered to pay all the debts incurred by the petitioner relating to an unsuccessful pregnancy and to reimburse the petitioner for prescription medications purchased during the pregnancy. The respondent is required to provide the petitioner and her children with adequate medical and hospitalization coverage until the decree becomes final.

Petitioner was awarded temporary possession of the couple's residence property through June 14, 1979, while respondent was ordered to make the house payments thereon. She has remained in possession of the property during the appeal.

The petitioner brought into the marriage $500 in addition to the automobile and furniture. She claims to have spent the greater part of an $8,000 settlement from her previous marriage on respondent and his family in anticipation of the marriage. At the time of the marriage the respondent owned a home in Council Bluffs, approximately 1,000 shares of Northern Natural Gas stock, two automobiles, and a savings account worth approximately $8,500.

During the marriage respondent sold his Council Bluffs residence and purchased a home in joint tenancy with petitioner. The downpayment and earnest money were provided totally from separate assets of the respondent. The petitioner and respondent worked together in making the Council Bluffs residence salable and in making their new home livable. During the marriage the petitioner contributed $250 per month to the family budget which she received as child support. Over the years the respondent has participated in a voluntary stock purchase plan which is partially matched by his employer. During the period of the marriage, respondent estimated that $1,150 worth of Northern Natural Gas stock was purchased in his name.

Petitioner contends that she is entitled to one-half the equity in the house and one-half the value of the Northern Natural Gas stock acquired during the marriage. Petitioner acknowledges that her contributions to the marriage were not monetary but argues that nonfinancial contributions are compensable. In addition, petitioner urges that money she spent on respondent and his family before the marriage should be restored to her as if it had been contributed to the marriage.

The $1,500 cash award which petitioner received to equalize the division of the property more than offsets the Northern Natural Gas stock which respondent acquired during the marriage and restores the $500 which petitioner brought into the marriage. The money which petitioner spent in anticipation of her marriage to respondent should not be considered in dividing the marital property. Ordinarily, money spent by one spouse in the nature of a gift prior to marriage will not be reimbursed when the divorce is granted. See, Dillon v. Starin, 44 Neb. 881, 63 N. W. 12 (1895); Hopper v. Hopper, 80 Nev. 302, 392 P. 2d 629 (1964).

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 such property by the trial court unless it is patently unfair on the record. Rinderknecht v. Rinderknecht, 204 Neb. 648, 284 N. W. 2d 569 (1979); Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466 (1978).

The division of the property which the trial court made resulted in the respondent receiving a larger proportion of the property than the petitioner. The division of the property was fair because the source of most of the property was the respondent's separate property. The distribution of property and fixing of alimony rest 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). As we view the record, the award was adequate and reasonable under the facts and circumstances.

The judgment of the District Court is affirmed.

AFFIRMED.

WILLIAM R. RANDOLPH, APPELLEE AND CROSS-APPELLANT, V. DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLANTS AND CROSS-APPELLEES.

289 N. W. 2d 529

Filed March 4, 1980. No. 42693.

Statutes: Prisoners: Sales. Pursuant to the provisions of section 83-151, R. S. Supp., 1978, any money derived from the sale of a hobby or craft item manufactured or produced by an offender is the money of the offender and is to be placed in the offender's individual private account.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

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

Lauren W. Wismer of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

KRIVOSHA, C. J.

This appeal arises by reason of a judgment entered by the District Court for Lancaster County, Nebraska, finding that the Department of Correctional Services (Department) is prohibited by the provisions of section 83-151, R. S. Supp., 1978, from assessing a handling charge against an inmate of the Nebraska Penal and Correctional Complex (Complex). We concur with the decision of the trial court and affirm the judgment.

The facts in the case are virtually without dispute and have to a large extent been stipulated to by the parties. The appellee in this case, William R. Randolph (Randolph), was confined at the Complex. During the time that Randolph was so confined the Department promulgated and had in effect certain rules and regulations concerning the acquisition and disposition of hobby materials by inmates of the Complex. In particular, the official memorandum,

No. 854.002 (rules), adopted November 20, 1975, and amended October 4, 1977, provides that any materials purchased by an inmate for hobby purposes must be paid in full before the merchandise will be released to the offender. Dept. Rule 854.002 (1). The regulations further provide that inmates may deliver to a hobby association finished craft for sale at the front hobby counter of the Complex or in the alternative may sell the hobby craft to outside sources by mail. Dept. Rule 854.002 (10 a and c).

The rules provide that the sale price for the item is the price established for the item by the inmate plus a 5 percent handling charge and state tax added to the sale price, all to be paid by the purchaser. Dept. Rule 854.002 (10 b). According to the rules, the pricing policy is to be followed regardless of whether the hobby item is sold at the front hobby counter or by mail. Dept. Rule 854.002 (10 c). The evidence, however, discloses that notwithstanding the provisions of the rules, in fact a different practice is followed when the item is sold by mail than when it is sold at the front hobby counter.

According to the testimony of Kirk Schmidt, hobby director at the Complex, if a hobby item is sold at the front hobby counter at the inmate's requested sale price of $5, the purchaser pays $5.45, representing the sale price of $5, $.25 for handling charges, and $.20 for sales tax. Five dollars is credited to the inmate's account. If, however, an inmate sells the same $5 hobby item by mail to a jobber, no sales tax is charged and no handling charge is added to the sale price. When the jobber remits the $5 to the Complex, $.25 is deducted for the handling charge and only $4.75 is credited to the inmate. The practice as testified by Schmidt is contrary to the Department's own rules, even if valid.

Randolph instituted this action in the District Court to recover back money which had been withheld by the Department over a period of several

years and to have the practice of withholding funds from the inmates enjoined in the future. In making his claim, Randolph maintained that memorandum No. 854.002 was a rule or regulation promulgated by an agency of state government and as such could not become effective unless and until the provisions of section 84-901 et seq., R. R. S. 1943, were met. The provisions of section 84-901 et seq., R. R. S. 1943, concern the manner in which regulations of various agencies are promulgated, including the requirement of a public hearing, approval by the Attorney General, signature by the Governor, and the filing with the Revisor of Regulations.

The trial court found that memorandum No. 854.002 was a regulation involving internal operations of the Complex and therefore need not meet the requirements of the act. § 84-901 (2), R. S. Supp., 1978. The trial court did, however, find that under the provisions of section 83-151, R. S. Supp., 1978, the Department could not withhold from the inmate's funds an amount for handling charges, which should have been paid by the purchaser. The trial court based its finding upon that portion of section 83-151, R. S. Supp., 1978, which reads as follows: "The prohibitions of this section shall not apply to items, such as hobby and craft items, manufactured or produced by offenders on their own time with their own resources, in which case any money derived from the sale of such hobby and craft items shall be placed in the offenders' own individual private accounts."

As we noted at the outset, the practice of deducting handling charges from the inmate's proceeds received in connection with mail-order sales is directly contrary to the rules of the Complex and should not have been done. While that reason alone would justify the action taken by the trial court, a reading of the section in question, section 83-151, R. S. Supp., 1978, clearly leads one to the conclusion the trial

court was entirely correct in its analysis. Any money derived from the sale of the hobby or craft item made with an offender's own resources must belong to the offender and must be placed in the offender's account.

The Department maintains that the words "any money" mean net proceeds and not gross proceeds. In support of that position the Department argues that unless the words mean "net" then there is no way to collect sales tax. With that, we do not agree. According to the statute in question, section 83-151, R. S. Supp., 1978, any money derived from the sale of the hobby or craft items belong to the offender and must be placed in his account. If, in addition to that, the law requires the purchaser to pay a sales tax or the Department requires the purchaser to pay a handling charge, those are matters in addition to the funds derived from the sale of the craft item itself and are collected in addition to the price placed upon the item by the inmate. Randolph does not argue that if the Department wishes to charge the purchaser a handling charge, it may do so. He simply objects to the Department charging him the purchaser's handling charge and deducting the amount from his sale price when the sale is by mail, while collecting the handling charge from the purchaser when the sale is made at the Complex. With that we agree. If the Department wishes to include a handling charge on items mailed and can justify the cost, they may do exactly what they do with regard to items sold at the front hobby counter. They may add the desired additional amount to the inmate's requested sale price. They may not, however, deduct from the inmate's proceeds the handling charge due to their failure to add it to the sale price. If permitted to do so, they would be compelling the inmate to pay the handling charge when the item is purchased by mail while requiring the purchaser to pay the handling charge when purchased

at the institution. We see no justification for such distinction nor do we believe that the clear meaning of section 83-151, R. S. Supp., 1978, can justify such action.

The Department further objects to the trial court's order on the ground that the evidence did not support the order directing the Department to restore to Randolph the sum of $1,367.99, being the amount allegedly withheld by the Department from Randolph during the period in question. We have reviewed the record and find sufficient evidence to support a judgment for $1,367.99. The trial court was correct in entering a judgment for the amount it did.

In view of our disposition of the case, we need not consider errors assigned by Randolph in his cross-appeal.

AFFIRMED.

BRODKEY, J., concurs in result.
HASTINGS, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. THOMAS ROGER HARLAN, APPELLANT.

289 N. W. 2d 531

Filed March 4, 1980. No. 42743.

1. **Criminal Law: Attorney and Client.** Our present test is that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.
2. _____: _____. Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant.

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

Vincent M. Powers, 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.

KRIVOSHA, C. J.

The appellant, Thomas Roger Harlan, appeals from an order of the District Court for Douglas County, Nebraska, denying Harlan's request for post conviction relief under the provisions of section 29-3001 et seq., R. R. S. 1943. We have carefully reviewed the record made at the hearing on the motion for post conviction relief as well as the record of the original trial, which was made a part of the record in this matter, and conclude that there is no merit to appellant's claim for post conviction relief. We accordingly affirm the judgment of the trial court.

For a full understanding of our conclusions in this case it is necessary to review certain of the facts involved in the original trial. Harlan was originally charged in a two-count information, the first count being that Harlan did on or about November 3, 1973, maliciously shoot one Lynnette D. Hamilton with intent to kill, wound, or maim; the second count being that Harlan did on or about the same day unlawfully use a firearm in the commission of a felony. Harlan entered a plea of not guilty to both counts and, after waiving a jury, trial was had to the court. The court found the defendant guilty of count I, count II having been dismissed. On May 1, 1974, Harlan was sentenced to a term of 5 years imprisonment in the Nebraska Penal and Correctional Complex. At the time of oral argument before this court in this matter, counsel for Harlan advised the court that Harlan had served his entire sentence and had been released from the penitentiary. Nevertheless, counsel maintained that Harlan had been illegally convicted of a felony for which he should receive relief in the form of a new trial.

The record in the original case discloses that Harlan defended himself on the ground that although he

fired the weapon, he did not intend to shoot Hamilton. He maintained the shooting was in fact an accident.

The evidence in the original case, including testimony given by Harlan, disclosed that Harlan and Hamilton had lived together for a time, as a result of which a child was born. Early in the morning of November 3, 1973, after having consumed a considerable amount of alcohol, Harlan started thinking about the way he believed Hamilton was treating their child. He had been advised that Hamilton was not properly taking care of the child. He testified that as a result of that information he decided to scare Hamilton. He returned to his parents' home, where he was then living, around 1 o'clock in the morning and got his gun. He stated the purpose of getting the gun was to scare Hamilton. He then went to her aunt's house where Hamilton was living. He required Hamilton to get dressed and go with him into a waiting cab. He stated that he could not remember very much after that. The cab driver, however, testified that he observed Harlan strike Hamilton before they got into the cab, and Harlan himself testified that he struck her when they were inside the cab. There were two other passengers in the cab. One was Harlan's half brother, Reginald Country, and the other was a friend, Clair Colvin. They drove to the home of a Willie Bearfield where the child was apparently being kept.

Harlan testified that he remembered hitting Hamilton with his shotgun while on Bearfield's front porch. He denied threatening her with the gun, however. He did admit that he remembered going to the front porch of Bearfield's house and asking him to have the baby brought out. He testified that when someone answered the door he put the gun on Hamilton's shoulder. He testified that he was mad at her because she wouldn't say anything and wasn't taking care of the baby. Events immediately thereafter are somewhat in dispute but generally indicate

that at that point, Harlan shot Hamilton in the leg and was himself shot by Bearfield. The testimony of both Harlan and Bearfield essentially corroborated the story, except Hamilton testified to the beating administered by Harlan and the fact that Harlan first fired a shot into the porch at the Bearfield home and then shot Hamilton. This testimony was material in view of the fact that Harlan maintained that the shooting of Hamilton was an accident. However, the weapon used was of the type that once it was discharged, in order to again be discharged it was necessary that the bolt be lifted up and moved back so that the spent shell could be ejected, and then again moved forward and down in order to place another shell into the chamber. Apparently, Harlan performed that necessary maneuver in order to have a second shell available with which he shot Hamilton. All of these maneuvers seem inconsistent with Harlan's claim that he did not know the gun was loaded and the shooting of Hamilton was accidental. Bearfield essentially corroborated Hamilton's testimony.

Following his conviction in 1974, Harlan perfected an appeal to this court. His court-appointed attorney filed a motion to withdraw pursuant to our Rule 1 e (1) and, in addition, filed a brief in keeping with the requirements prescribed by the United States Supreme Court in the case of Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493. As a result, this court on December 20, 1974, sustained defense counsel's motion to withdraw and affirmed the conviction.

Almost 4 years later, on October 20, 1978, Harlan filed this motion to vacate and set aside the judgment pursuant to the provisions of the Nebraska Post Conviction Act, section 29-3001 et seq., R. R. S. 1943. He maintains that he had inadequate counsel. The basis of his claim of inadequate counsel is that there were two witnesses to the shooting who were

known to Harlan's trial counsel but who were not called as witnesses. Furthermore, Harlan asserts that had they been called as witnesses their testimony would have been helpful in establishing his defense that he did not intend the shooting and that it was purely an accident.

Before proceeding to review the claims, it may be helpful to set out several recognized rules regarding post conviction relief as established by this court. In the first instance, we have said that our present test is that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Holtan, *ante* p. 314, 287 N. W. 2d 671. Likewise, we have said that where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant. State v. Lang, 202 Neb. 9, 272 N. W. 2d 775.

In support of Harlan's contention, Reginald Country was called to testify. He stated that he was a witness to the shooting, and that had he been called to testify at the original trial he would have testified that the only reason Harlan had the gun in his possession was because he, Country, had asked Harlan to carry it for him. Country testified that he wished to take the gun to Bearfield's for the purpose of borrowing some money on it and that he was afraid to carry it because he had a previous criminal record while Harlan did not. Country admitted that the gun belonged to Harlan but that its only purpose in being in Harlan's possession at the time of the shooting was because Country was going to borrow money from Bearfield and use the gun as security. This testimony was completely contrary to what Harlan himself had testified to at the time of trial. It is difficult, if not impossible, to envision how Country's testimony as now related could have in any manner been beneficial to Harlan at the time of

the trial in light of Harlan's testimony contradicting Country. Harlan claims that had Country testified that the gun was in Harlan's possession as a favor to Country, he would not have testified that it was in his possession to scare Hamilton. That hardly rises to the type of testimony which would entitle one to post conviction relief.

The insignificance of Country's testimony is made even more apparent when Country testified that he could not hear what was being said on the porch at the time of the shooting because of where he was standing and could not clearly see what was going on because of where the others were standing. A full reading of Country's testimony given at the post conviction hearing would make it clear to anyone who heard that testimony that the most Country could do would be to contradict Harlan's own testimony. It can hardly be said that in failing to call Country, Harlan's counsel did not perform at least as, well as a lawyer with ordinary training and skill in the criminal law in his area. Furthermore, the evidence adduced at the post conviction hearing concerning Country does not in any way indicate how Harlan was prejudiced in the defense of his case by reason of the failure to call him as a witness.

The testimony offered by the other witness, Clair Colvin, is even less material. Colvin did not appear at the post conviction hearing, but his affidavit was offered in evidence. His affidavit indicated that he did not witness the shooting because he remained in the cab. The most that he could testify to was that he heard shots. That can hardly be said to have been of any benefit to Harlan. His affidavit further recited that he likewise would have testified that the reason Harlan had the gun was because Country wanted to pawn it with Bearfield. As we have already noted, that would have been clearly in conflict with what Harlan himself testified. Colvin's testimony was of even less benefit than was Country's

and likewise failed in any manner to show how it was prejudicial.

Harlan's claim that he received inadequate counsel is totally frivolous and without any merit at all. The trial court recognized that fact and denied post conviction relief. We likewise recognize that fact and affirm the judgment of the trial court.

AFFIRMED.

CLINTON, J., concurs in result.

FRATERNAL ORDER OF POLICE, LODGE NO. 12, APPELLEE AND CROSS-APPELLANT, V. COUNTY OF ADAMS, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT AND CROSS-APPELLEE.
289 N. W. 2d 535

Filed March 11, 1980. No. 42549.

1. **Commission of Industrial Relations: Appeal and Error.** A party appealing from an order of the Commission of Industrial Relations is not required to file a motion for a new trial before the commission as a prerequisite to an appeal.
2. **Commission of Industrial Relations: Evidence: Appeal and Error.** In reviewing the findings and orders of the Commission of Industrial Relations we are restricted to considering whether the order of the commission is supported by substantial evidence justifying the same, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the Commission of Industrial Relations. Affirmed.

Nelson & Harding, A. Stevenson Bogue, and William A. Harding, for appellant.

Les Seiler, for appellee.

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

HASTINGS, J.

The County of Adams appeals from an order of the

Commission of Industrial Relations (CIR) ordering it to pay uniformed employees of the Adams County sheriff's department a monthly clothing allowance of $25 and increasing by $39 per month payments to the family medical insurance coverage of department employees within that program. The appellee in this action is the Fraternal Order of Police, Lodge No. 12 (Lodge), the bargaining agent for the employees involved. It cross-appeals from that portion of the CIR's order denying its request to raise certain wages, and to institute overtime and holiday pay, vacation provisions, sick leave, and tenure. However, the claimed errors are in no way discussed in its brief and in accordance with our rules will not be considered.

A petition was filed by the Lodge on August 22, 1978, alleging that an industrial dispute existed by reason of the refusal of the County to bargain concerning the items set forth above. A hearing was had and evidence consisted of testimony of Greg McGee, acting sheriff, Billy Simmons, a deputy sheriff, and Hugh Catherwood, a consultant in the field of personnel relations, as well as considerable statistical data.

The County's nine assigned errors may be consolidated into two general categories — rejection or acceptance of certain items of evidence, and awarding financial benefits to the employees, claiming that the total compensation previously received was comparable to the prevalent.

At the outset we dispose of the Lodge's contention that the appeal be dismissed because of the failure of the County to file a motion for a new trial. This is disposed of by our holding in Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth, *ante* p. 567, 288 N. W. 2d 729 (1980), that a party appealing from an order of the Commission of Industrial Relations is not required to file a motion for a new trial

before the commission as a prerequisite to an appeal. There is no merit to the Lodge's contention.

Beyond that preliminary statement, we will state that in reviewing the findings and orders of the Commission of Industrial Relations we are restricted to considering whether the order of the commission is supported by substantial evidence justifying the same, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. We affirm the action of the CIR.

The witness McGee testified as to the general duties of the various categories of employees and the average amount of overtime put in by each category.

Deputy Simmons testified that the average cost to him for the cleaning of his uniforms amounted to $29.75 per month and in addition to that he had to provide his own shoes and weapons. Also, having served in the past as a member of the Hastings police department, he described the duties of the various categories of sheriffs with corresponding police rankings so that wage comparisons could be made.

Both parties introduced statistical data which consisted of an array comprised of Hall, Dodge, Madison, Buffalo, Platte, Dawson, Seward, and York counties. Four of these counties were larger and four smaller than Adams County. The mean population of the eight counties was 27,963, the median 29,400, and the population of Adams County was 29,200. In addition, the Lodge offered evidence of pay rates and benefits paid by Lincoln County which, although objected to by the County because it had a population of 34,700, was received by the CIR. The County offered as evidence, by way of comparative wages and benefits paid by the Hastings police department as to secretary-matrons, the wages paid by selected private employers to secretaries and

clerk typists. This evidence was all rejected by the CIR for the reason that as to both the Hastings police department and private sector employees, it did not establish a similarity of work skills under the same or similar working conditions. In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Omaha Assn. of Firefighters v. City of Omaha, 194 Neb. 436, 231 N. W. 2d 710 (1975). The determinations made here, both as to acceptance and rejection of claimed comparables, were within the field of expertise of the Commission of Industrial Relations, were made after a consideration and comparison of all the evidence, and the methods of selection and comparison were in accord with the requirements of section 48-818, R. R. S. 1943. The CIR's action in accepting and rejecting evidence was within the scope of its statutory authority and was neither arbitrary, capricious, nor unreasonable.

After reviewing in some detail the various wages paid Adams County employees vis-a-vis those furnished the employees in the other nine counties, the CIR then made specific findings after adjusting all wages to the same length work week. It found that the Lodge had not sustained its burden that the wages paid were too low and the County had likewise failed in its effort to demonstrate that they were too high. Following is a tabulation of those findings, with the Adams County average pay for each occupation in parenthesis following the average minimum and maximum in the nine-county array: Jailer/Dispatcher, $696.25/$764 ($763.60); Deputy I, $749.11/$892.82 ($837.50); Deputy II, $876.57/$895.50* ($915.66); Secretary/Matron, $539.77/$678.33 ($624).** [Note: *Only two counties reported a Deputy II

maximum. ** Adjusted from $546 to a 40-hour week.]

Additionally, the CIR found that compensatory time, rather than time and one-half, was the prevalent practice and which neither party desired; that there is no prevalent practice of paying double time for holidays; that the vacation benefits were comparable to the prevalent practice; that sick leave accumulation is similar to that of the array; and that the evidence does not support the presence of "tenure" for employees in any part of the array. As to medical insurance, although the County paid slightly more, $1 to $5 for employee coverage, the amount allocated to family benefits was approximately $3 as compared to from $28 to $72 in the array. Uniform allowances ranged from $15 to $40 in the array as opposed to nothing provided by the County. Accordingly, the CIR ordered the County to pay a clothing allowance of $25 per month and family medical insurance coverage benefits of $42.11 per month, up $39 from the previous $3.11.

It was implicit in the order of the CIR, and as a matter of fact specifically so found, that all wages and benefits paid by the County were comparable to the prevalent except for the insurance benefits and clothing allowances. We hold that these findings and the order predicated on the same were supported by substantial evidence justifying the same, were based on actions of the CIR well within the scope of its statutory authority, and were neither arbitrary, capricious, nor unreasonable.

Accordingly, we affirm the order of the Commission of Industrial Relations.

AFFIRMED.

IN RE INTERESTS OF ROBERT RAYMOND WATSON WEDIGE AND APRIL JOY ANTONETTE RODRIQUEZ, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JANET ANN WEDIGE, NATURAL MOTHER, APPELLANT.

289 N. W. 2d 538

Filed March 11, 1980. No. 42586.

1. **Jurisdiction: Appearances: Parties.** A motion invoking the power of the court on any question other than jurisdiction constitutes a general appearance and confers jurisdiction over the moving party.
2. **Parent and Child: Courts: Evidence: Statutes: Minors.** In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. R. S. 1943, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child or children and refused to give the child or children necessary parental care and protection.
3. **Parent and Child: Proof: Minors: Statutes.** Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence.

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

James A. Nanfito, for appellant.

Donald L. Knowles, Douglas County Attorney, and Marjorie A. Records, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and HASTINGS, JJ., and COLWELL, District Judge.

MCCOWN, J.

This is an action in the Separate Juvenile Court of Douglas County, Nebraska, to declare two minor children lacking in proper parental care within the meaning of section 43-202 (2) (b) and (c), R. R. S. 1943, and to terminate the parental rights of the defendant, Janet Ann Wedige, under the provisions of section 43-209 (2) and (3), R. R. S. 1943. The Separate Juvenile Court found the minor children to be within

the statutory classification and terminated the parental rights of the defendant mother. The mother has appealed.

On February 22, 1978, a deputy county attorney of Douglas County filed a petition in the Separate Juvenile Court seeking to have Robert Raymond Watson Wedige, born May 8, 1966, and April Joy Antonette Rodriquez, born January 22, 1968, declared lacking in proper parental care within the meaning of section 43-202 (b) and (c), R. R. S. 1943; and praying further that the court terminate the parental rights of the defendant, Janet Ann Wedige, the natural mother of the minor children, under the provisions of section 43-209 (2) and (3), R. R. S. 1943. Summons was duly served on the defendant mother by leaving a copy of the summons and petition at her usual place of residence. Counsel was appointed for the minor children and also for the mother. Following a hearing, the children were placed in the custody of Douglas County Social Services for foster care placement pending final disposition of the case.

The defendant filed motions to make more definite and certain and to strike, which were partially granted and partially denied. An adjudication hearing date was twice set and twice continued, either on stipulation of the parties or on motion for continuance by the defendant. The adjudication hearing date was thereafter set for October 18, 1978. For some reason, additional summonses were issued and attempts made to serve the defendant on each occasion a new hearing date was set. Upon the return of the last summons showing the defendant not found in Douglas County, notice by publication was also made. On October 16, 1978, the defendant filed a special appearance challenging the jurisdiction of the court over her person which was overruled 2 days later.

The adjudication hearing was held on October 18, 1978. The defendant appeared by counsel, but did

not appear in person. The evidence established that the defendant was an alcoholic, and that when she was drinking she was unable to care for the two children. Testimony of several witnesses established that she was intoxicated three to four times a week; that she had locked the children out of the apartment on many occasions; and the apartment manager had to be called to let the children into the apartment. On occasion she left the children alone in the apartment overnight. On one occasion she left the children with a neighbor and was gone for 4 days. She was hospitalized for alcoholism on three occasions, and most of the witnesses agreed that for all or most of the time of their acquaintanceship with the defendant she was unable to provide proper parental care for the children. She attempted suicide on one occasion early in 1978, and expressed a desire to have the children remain in foster care. The evidence indicated that except when defendant was drinking the children were clothed and fed and the apartment was reasonably clean on most occasions. There was no evidence of physical abuse of the children.

Evidence at the disposition hearing established that the defendant had previously been adjudged neglectful of these children, and the record shows that since 1972 to the date of trial the children had been placed in foster care five times for periods of time ranging from 1 month to 1 year, for a total of approximately 3½ years. Each foster care placement was made because the defendant was unable to render necessary parental care.

The Separate Juvenile Court found that the two minor children were neglected children within the meaning of section 43-202 (2) (b) and (c), R. R. S. 1943, and that the defendant had substantially, continuously, and repeatedly neglected the children and failed to provide for them within the meaning of section 43-209 (2) and (3), R. R. S. 1943. The court then

terminated all parental rights of the defendant as to the two minor children and this appeal followed.

The defendant first contends that the trial court erred in overruling her special appearance objecting to jurisdiction over her person. The basis of the contention is that the final summons by publication was not in accordance with statute, and that consequently due process was violated. The record destroys the contention.

The service of the first summons was effective to give the court jurisdiction over the person of the defendant. There is no explanation as to why the subsequent three summonses were issued. There is obviously no necessity for an additional service of summons each time a new hearing has been set where a court has already acquired jurisdiction over the parties. If there were any issue as to whether service of summons in the first instance was proper, it was resolved when the defendant moved to make the petition more definite and certain and later moved for continuances. It has long been the rule that the filing of a motion to dismiss, a motion to make more definite and certain, a motion to strike or for a continuance, or any motion invoking the power of the court on any question other than jurisdiction constitutes a general appearance and confers jurisdiction over the moving party. See Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601 (1971). In the case now before us the record also shows that the defendant had actual notice of both the adjudicative and dispositional hearings, and that her counsel was present and participated. The defendant's contention as to jurisdiction and notice is frivolous.

The defendant also contends the evidence is insufficient to establish the unfitness of the defendant, or to support the termination of parental rights. 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 chil-

dren. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. R. S. 1943, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child or children and refused to give the child or children necessary parental care and protection. State v. Jenkins, 198 Neb. 311, 252 N. W. 2d 280 (1977).

Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. In a case terminating parental rights, review in the Supreme Court is made de novo on the record. State v. Spittler, 204 Neb. 503, 283 N. W. 2d 48 (1979).

Although the trial court's findings of fact are entitled to great weight in any case, the evidence of parental neglect is clear and convincing in the present case, and the judgment of the Separate Juvenile Court was correct.

AFFIRMED.

WILLIAM D. HEIN, DOING BUSINESS AS MID AMERICA COMPOST, APPELLANT, V. M & N FEED YARDS, INC., A NEBRASKA CORPORATION, ALSO KNOWN AS M & N FEEDLOT, APPELLEE.

289 N. W. 2d 756

Filed March 11, 1980. No. 42596.

1. **Actions.** The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
2. **Equity: Witnesses: Evidence.** Equity cases are heard de novo by this court. In determining the weight to be given to the evidence, however, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
3. **Damages: Evidence: Proof.** Although the plaintiff does not

have the burden to prove his damages to a mathematical certainty, the plaintiff does have the burden to prove by a preponderance of the evidence the amount of his damages to a reasonable certainty.

4. **Contracts: Damages: Interest.** The rule has been firmly established in Nebraska that where the amount due under a contract or claim is subject to reasonable controversy and is incapable of being fixed by computation, recovery of interest may be had only from the date of determination of the right of recovery and the amount thereof.

Appeal from the District Court for Kearney County: FRED R. IRONS, Judge. Affirmed.

Kelley, Wallace, Scritsmier, Moore, Romatzke, Merritt & Byrne, P.C., for appellant.

W. Wesley Lubberstedt, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and WOLF, District Judge.

WOLF, District Judge.

This is an appeal from the judgment entered by the District Court for Kearney County, Nebraska, giving judgment in favor of the plaintiff and against the defendant, M & N Feed Yards, Inc., in the amount of $4,706.50, and further ordering that each party shall pay its own court costs including costs of depositions.

When this matter went to trial before the court, the only defendant remaining was M & N Feed Yards, Inc., a Nebraska corporation, the other defendants having been previously dismissed by the court upon motion. The record discloses that the plaintiff, William D. Hein, did business as Mid America Compost out of Gothenburg, Nebraska. His principal business was contracting with feedlots to convert their organic waste into compost which would be sold as fertilizer. The defendant, M & N Feed Yards, Inc., owned and operated a feed yard approximately 6 miles south of Kearney in Kearney County, Nebraska. The plaintiff and the defendant entered into a written contract on August 11, 1976.

The essence of the contract was that the defendant would furnish the manure from its feedlot, transport it to an adjoining site where it would be placed by the defendant in windrows, and that the plaintiff would furnish the bacterial agent, machinery, and labor to treat the manure. It was further provided, in the language of the contract: "Completed compost value will be $25.00/ton. Upon completion of compost feedlot shall pay in full to MAC $5.00 estimated ton. Test weights may be taken during spreading if feedlot desires. Adjustments will be made accordingly.

"Should future sales be made the following is agreed to:

"MAC will provide promotional and informational aid to Feedlot to assist in marketing the compost including conducting sales and demonstrations.

"Feedlot shall be responsible for sales of the compost, billing therefor and collection of amounts due or to become due from purchases of the compost.

"Feedlot or MAC load and weigh the compost at time of delivery to customer.

"It is mutually agreed that each party shall have title to one-half (½) of the compost after initial treatment and that all sales shall be on a prorated basis. Sale proceeds shall be divided equally after the payment to Feedlot. Payments shall be made monthly by the tenth of the month following delivery to customer. MAC shall be furnished with such monthly payments on accounting for all transactions during the previous month.

"It is mutually agreed that the selling price shall be determined by agreement of the parties and shall be based F. O. B. the feedlot."

The defendant commenced the windrowing of the manure prior to the execution of the contract and the actual composting was started in late July or early August of 1976. The plaintiff performed the composting operation within approximately 6 to 8

weeks. Composting was finished in the latter part of September. Plaintiff's witnesses testified that before any of the compost was delivered to customers, there were five windrows, each approximately 800 feet in length. Defendant's witness testified that although there were five windrows, they were not of uniform length. He testified that the longest windrow was about 600 feet long and the shortest windrow was about 150 to 200 feet long.

Sales of the compost were arranged by the defendant and were hauled by Hooker Brothers, a commercial trucking firm. All loads delivered by Hooker Brothers were weighed on the defendant's scales and the tonnage delivered by Hooker Brothers in the fall amounted to 1,026,505 tons and used all the compost in windrow number 1 and about one-fourth of the compost in windrow number 2. In December of 1976 or January of 1977 the plaintiff had a test run on the compost by a testing laboratory and discovered that the compost delivered was of poor quality because of the excessive amount of sand in the compost. They mutually agreed that the price would be $25 for each 2 tons and that instead of spreading 2 tons per acre, they would spread 4 tons per acre. The plaintiff agreed to haul the additional 2 tons to the customers who had already been supplied. Unfortunately, the plaintiff kept no records of the tonnage hauled by him and no weights were taken of the trucks used by the plaintiff. When the plaintiff completed the hauling of the doubleup loads, there is testimony to the effect that there were parts of two windrows left at the feedlot which had not been used because they were in an area where the water level was too high. Subsequently, the defendant sold and delivered some additional compost which was charged at the rate of $12.50 per ton and some compost which was charged at the rate of $6.25 per ton on the basis that the compost had absorbed more moisture and was of less value.

The judgment awarded by the District Court in favor of the plaintiff was clearly equal to one-half the total amounts collected by the defendant feedlot for compost delivered, adjusted, however, to $12.50 a ton rather than the special price of $6.25 per ton made to one purchaser, and reduced by the $10,000 previously paid by the defendant to the plaintiff pursuant to the contract.

The principal assignments of error by the plaintiff are: (1) The court erred in requiring the plaintiff to prove the amount of his damages to a degree of certainty greater than that required by law; (2) the court erred in failing to award prejudgment interest on the amount of any judgment awarded to plaintiff; and (3) the court erred and abused its discretion in failing to tax the costs of the action against the defendant.

We note that each of the matters raised by the plaintiff cannot be adequately addressed without determining the nature of the action. The prayer of the original petition and the first amended petition upon which the action was tried is as follows: "WHEREFORE, Plaintiff prays for judgment against the Defendants and each of them in the amount of $15,000 or a sum based on an actual accounting pursuant to the terms of the written contract attached hereto as Exhibit A as subsequently orally amended together with interest as provided by law, attorneys fees as provided by law, all costs of this action, and such further equitable relief as may be deemed appropriate by this court."

The summons served upon the defendant was endorsed: "If defendant fail to appear and answer, the plaintiff will take judgment for $15,000, together with interest at the legal rate and costs."

The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. Roy v. Bladen School Dist. No. R-31,

165 Neb. 170, 84 N. W. 2d 119.

Although the plaintiff was apparently not awarded any equitable relief in the form of an accounting, the nature of the action is not based on the nature of the relief afforded but on the nature of the relief sought. Clearly, the plaintiff sought equitable relief and we, therefore, classify this as an equitable action, although neither party tried to classify the case as an action at law or as an equitable action in the briefs submitted herein.

Equity cases are heard de novo by this court. In determining the weight to be given the evidence, however, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Rudolph v. Hartung, 202 Neb. 678, 277 N. W. 2d 60; West Gate Bank v. Eberhardt, 202 Neb. 762, 277 N. W. 2d 104.

Although the plaintiff does not have the burden to prove his damages to a mathematical certainty, the plaintiff does have the burden to prove by a preponderance of the evidence the amount of his damages to a reasonable certainty. Reasonable certainty does not even require that the plaintiff establish the dollar amount in an exact fashion, but only that the plaintiff establish by a preponderance of the evidence the basic facts upon which an award may be reasonably based. This suit is brought under a written contract and the contract clearly provides that the compost material will be owned one-half by each of the parties and that there is no obligation under the contract for the defendant to pay the plaintiff anything except one-half the sale proceeds when received. Although the contract does impose the burden of collection upon the defendant, we find no mention of guarantee of payment and thus, under the contract, the plaintiff is only entitled to one-half the proceeds of the sale of the compost owned jointly by the parties. The plaintiff has not established that the defendant has actually received money

or is entitled to receive money other than that admitted to be received by the defendant, nor is there any reasonable evidence upon which it could be determined or suspected that the defendant converted the compost to its own uses.

This court concurs that the judgment of the trial court was the most reasonable judgment under all the circumstances, and that the trial judge was correct in charging the defendant with the $12.50 per ton on all fertilizer rather than the $6.25 per ton collected by the defendant on some of the fertilizer, based upon the language of the contract that "the selling price shall be determined by agreement of the parties," and there being no evidence of any agreement of the parties further reducing the sale price below $12.50 per ton.

This action having been denoted an equitable action, the trial court would have the authority as a part of the judgment to award the plaintiff prejudgment interest on all or part of the award should he have determined that the circumstances so required.

The rule has been firmly established in Nebraska that where the amount due under a contract or claim is subject to reasonable controversy and is incapable of being fixed by computation, recovery of interest may be had only from the date of determination of the right of recovery and the amount thereof. Wilson Concrete Co. v. A. S. Battiato Constr. Co., 196 Neb. 185, 241 N. W. 2d 819. We find that the amount due in this suit is dependent upon the weight and the price of that compost sold by the defendant. As reflected above, both the weight of compost and the appropriate selling price were not determined until judgment was awarded in this trial. From the record herein, it is obvious that substantial dispute existed between the parties as to the amount of compost and as to the substandard condition of the compost which could and did affect its

price. We conclude that the trial court was correct in denying prejudgment interest.

The plaintiff disputes the right of the trial court to apportion costs between the parties as they incurred them, including the costs of depositions. The plaintiff relies upon section 25-1708, R. R. S. 1943, which states: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property."

The defendant, on the other hand, apparently relies upon section 25-1711, R. R. S. 1943, which states in part: "In other actions, the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable."

In equity actions, taxation of costs rests in the discretion of the trial court. Ehlers v. Campbell, 159 Neb. 328, 66 N. W. 2d 585.

The action of the trial court in taxing costs is not reviewable unless an abuse of discretion is shown. In re Estate of Nielsen, 135 Neb. 110, 280 N. W. 246.

This court is unable to review and determine whether the trial court abused its discretion in apportioning costs where there is no record before us as to the nature and amount of the costs incurred. This court, therefore, finds no abuse of discretion by the trial court in denying plaintiff recovery of costs.

AFFIRMED.

GRANT A. PORTER, APPELLANT, V. ROSCOE BLACK, APPELLEE.

289 N. W. 2d 760

Filed March 11, 1980. No. 42652.

1. **Negligence: Proof.** Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.
2. **Negligence: Trial.** Negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it.
3. **Negligence: Proof.** Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.
4. **Negligence: Motor Vehicles.** The mere skidding of an automobile without more does not prove negligence.

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

Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellant.

Alan E. Peterson of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and WOLF, District Judge.

CLINTON, J.

This is an action for damages for personal injuries sustained by the plaintiff, Grant A. Porter, in a collision of two automobiles on Interstate 80 near the Gretna interchange, before daylight on the morning of January 4, 1977. Porter was driving his car, a Volkswagen, northeasterly when it collided with the Cadillac of the defendant, Roscoe Black, which was unoccupied, standing sideways on the highway blocking the outside eastbound traffic lane and perhaps extending somewhat into the inside lane. It had come to rest a short time earlier in that position

following a skid and collision with a guardrail adjacent to the highway.

The trial judge submitted to the jury the issues of defendant Black's negligence in the following respects: "1. He left his vehicle standing on a freeway without legal excuse. 2. He failed to provide reasonable warning to the plaintiff of the obstruction of the highway by his vehicle." The issues on the plaintiff Porter's contributory negligence were as follows: "1. He failed to keep a proper lookout; 2. He failed to keep his vehicle under reasonable control; 3. He was operating his vehicle at the time of said collision at a speed excessive under all the conditions and circumstances and in violation of the statutes pertaining to speed on the interstate highway in effect at that time." The jury found for Black and Porter appeals. We affirm.

The principal claim of error is that the court should have submitted to the jury the issues of Black's negligence claimed to have caused his car to skid, to wit, failure to maintain a proper lookout and failure to keep his vehicle under proper control. These allegations of negligence, which we will hereafter refer to as antecedent negligence, had been stricken from the petition before trial on motion of Black. After the evidence was completed the court refused to permit the amendment of the petition to include these claims of negligence.

Some further reference to the pleadings and recital of the evidence is necessary to an understanding of the arguments of the parties and our holding.

At the time of the accident there was snow on the highway. Visibility was, to some extent, restricted by falling or blowing snow. Black testified that he had been traveling at a speed of about 30 miles per hour when he observed an auto approaching from the rear at a much greater rate of speed. He stated that the approaching car appeared to be fishtailing, so he moved as far to the right as he could. As the

car was in the act of passing, it struck his car lightly, causing it to skid and go out of control.

After Black's car came to rest against the guardrail, the motor was not running. After two or three unsuccessful attempts to start the motor, he observed the lights of approaching automobiles from the southwest. He then got out of the car and ran southwesterly about 75 to 100 meters along the side of the highway and waved his arms to warn approaching traffic. Two occupants of one car observed the signal and passed safely to the left without difficulty. They then stopped and began to back up for the purpose of offering assistance. The driver of that car, which according to his estimate had been traveling at a speed of 50 to 55 miles per hour, testified that he saw the stalled vehicle before he passed Black, whom he observed waving his arms. He estimated that when he saw the stalled car he was 75 to 150 feet from it. He further testified that after he stopped his car about a "city block" beyond the stalled car and while he was backing up, he saw the headlights of Porter's car approaching. A passenger in the backing car and Black both testified that one or two other vehicles, including a truck, also passed safely. It was after that that Porter's car collided with the standing vehicle.

Black testified that when his car came to rest after the skid, its rear touched the guardrail and its front extended into the right-hand outside eastbound lane of traffic but not at all into the left-hand eastbound lane. Porter, on the other hand, testified that it blocked part of the left-hand lane as well. He also testified that because of the slick surface of the highway he was traveling only about 35 miles per hour. Porter stated he could see a "good 150 feet" ahead and that there was no change in the snowstorm during the time immediately before the accident. He described the snowstorm as moderate. Porter stated he did not see Black by the side of the high-

way, nor Black's car, since it was snow-covered and blended with the background. The head, tail, side, and interior lights of Black's car were unlit. He said that on that account he could not see Black's vehicle until he was within 15 yards of it and was unable to stop or turn aside in time to avoid the collision.

The driver of the car which passed safely and then stopped testified the lights of Black's car were unlit. A highway patrolman testified that Black's car was white over green in color and at the time of his investigation, some time after the collision, the automobile had snow on it. Black thought the head, tail, and side lights were lit on his car, but he was not certain. He did not claim that he had turned on the interior lights or the warning flashers.

An accident reconstruction expert called by Porter identified the items of damage done to Black's car by the collision with the guardrail and the damage caused by the collision with Porter's car. He could not identify any marks or damage made by a prior collision and could not give an opinion as to whether or not such a prior accident had occurred.

The marks made by the contact with the steel-cable guardrail (which consisted of three steel cables a few inches apart attached to steel posts), were on the front and left side of the car. The expert's opinion, based upon his examinations of the two vehicles after the accident, was that the Volkswagen (Porter's automobile) hit the Cadillac (Black's automobile) at the left front wheel. The two cars then rotated and contact was made between the right side of the Volkswagen and the left rear fender of the Cadillac. The Volkswagen then bounced off and came to rest in the median. The Cadillac came to rest on the right shoulder of the highway adjacent to the guardrail. There was no damage to the right side of the Cadillac.

The photograph exhibits indicate severe damage

to the front of the Volkswagen, the most severe damage being on the right front. The principal damage to the Cadillac was apparently done by the collision with the Volkswagen. Damage done by the guardrail consisted of indentations or gouges corresponding to the spaces between the cables of the guardrail or the bolts on its posts. There was no testimony that the guardrail was damaged.

The petition alleged, among other things, that at the time of the collision, Black's car was parked on the highway and that before it had come to rest across the traffic lanes, Black either lost control of his vehicle or had struck an unidentified vehicle. Porter claimed that Black's vehicle was illegally parked on the highway in violation of the provisions of section 39-670, R. R. S. 1943. Black claimed that his car was unavoidably stalled and disabled on the highway and he thus came within the exceptions of subsection (4) of section 39-670, R. R. S. 1943.

The trial court properly instructed the jury on these claims, placing the burden of proof on Black to show he came within the exception. See Fleischer v. Rosentrater, 190 Neb. 219, 207 N. W. 2d 372. No complaint is made of the instructions on the other issues which were submitted to the jury.

The arguments of the parties focus upon the applicability of the holding of this court in Doleman v. Burandt, 160 Neb. 745, 71 N. W. 2d 521, to the evidence in this case. There we said: "Where plaintiff's automobile is standing still in the highway when defendant, driving on icy pavement in a blinding snowstorm, first sees it, the only issue on contributory negligence of the plaintiff is whether plaintiff should have, under the circumstances, removed his car from the pavement or given warning. . . . Under such circumstances, instructing the jury that it was the duty of the plaintiff to keep a reasonably careful lookout, to operate his vehicle at such a speed and keep it under such control that he could

plainly see what was visible before him, and to so drive that when he saw an object in his path he could stop in time to avoid it, is prejudicially erroneous."

Black argues that under the principle announced in Doleman v. Burandt, *supra,* the specifications of antecedent negligence are not submissible where his vehicle was stopped unoccupied rather than being operated at the time of the collision and, therefore, the rulings of the trial court were proper.

Porter argues that the principles announced in Doleman v. Burandt, *supra,* are unsound and, even if correct as applied to the facts of that case, are inapplicable to the evidence here.

He makes two principal points. First, he urges that the holding in Doleman v. Burandt, *supra*, is unsound because it characterizes a stalled automobile as a "condition" rather than a "cause" without regard to whether the reason the car is parked on the highway results from the operator's negligence or some unavoidable reason. Secondly, he points out that subsection (4) of section 39-670, R. R. S. 1943, provides as follows: "This section shall not apply to the driver of any vehicle which is disabled while on the roadway in such manner and to such extent that it is *impossible to avoid stopping* and temporarily leaving such disabled vehicle in such position." (Emphasis supplied.) Therefore, if either failure to maintain a proper lookout or failure to keep the vehicle under control was the cause of the skidding, collision with the guardrail, and stalling of Black's car, then it was not "impossible to avoid stopping" within the purview of section 39-670 (4), R. R. S. 1943, and no legal excuse would exist for stopping. Hence, Porter contends he was entitled to have the issues of antecedent negligence submitted to the jury on the issue of whether the exception of section 39-670 (4), R. R. S. 1943, was applicable.

We find it unnecessary to confront the arguments made by the parties because, even if Doleman v.

Burandt, *supra*, is inapplicable, we are convinced, after a careful examination of the record, that the evidence was insufficient to submit to the jury the claims of antecedent negligence on the part of Black.

The basic principles are well summarized by this court in Fincham v. Mueller, 166 Neb. 376, 89 N. W. 2d 137, where we said: " 'Negligence is [ordinarily] a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.' Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

"But, of course, negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it. Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107. Nor can a verdict be based on conjecture or surmise. Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299. As stated in Price v. King, 161 Neb. 123, 72 N. W. 2d 603: 'Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.' "

There is no evidence in the record from which it may be inferred that Black failed to maintain a proper lookout, or that such failure is what caused his car to go out of control, strike the guardrail, and thus stall on the highway. To allow such an inference would be wholly conjectural. There is no evidence, direct or circumstantial, that he failed to observe something which, had it been seen, would have avoided the skid.

This leaves the remaining allegation that Black negligently lost control of his car. That it did skid and strike the guardrail is admitted. Even if Black's

explanation be disregarded, we are left with the lone evidentiary fact that the car did skid on a somewhat slick highway. Is that alone sufficient to support an inference that the skid was negligently caused, i.e., that Black did something or failed to do something in the management of his car which he ought, in the exercise of reasonable care, to have done?

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

Fincham v. Mueller, *supra*, was an intersection collision in which the plaintiff had to rely upon proof by circumstantial evidence because of an absence or disability of witnesses (the dead man statute). One of the circumstances was that the plaintiff's car had skidded 17 to 18 feet before the impact. One of the allegations of contributory negligence was failure to keep the car under proper control. The court held there was no evidence to support the allegation. In Oakes v. Gregory, *supra*, the plaintiff was a guest passenger and, of course, gross negligence had to be proved. The only evidence was that the car was traveling on a snowy highway at about 20 to 25 miles per hour and, without explanation, left the highway and traveled about 12 feet, striking a tree and causing the plaintiff's injuries. The court said: "Neither does the record disclose any act done by the driver of the car that even indicates that it was the result of any fault of hers. There is *no evidence of any negligence on the part of the driver* of the car, and necessarily no evidence of gross negligence as required by the guest statute." (Emphasis supplied.) In Davis v. Landis Outboard Motor Co.,

supra, which was also a guest case, the court said: " 'The fact that the car of deceased got out of his control *does not establish negligence* and much less gross negligence nor does it prove the proximate cause of the accident.' "

Skidding, together with evidence of some other facts and circumstances tending to show a failure to exercise reasonable care, may be sufficient to permit an inference of negligent loss of control. Thomas v. Haspel, 126 Neb. 255, 253 N. W. 73. Skidding is, of course, not irrelevant on the issue of negligence and may, along with other factors including its length, even require a finding of negligence under the range of vision rule. Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571.

Some jurisdictions have taken the view that skidding may, in and of itself, be sufficient to permit a jury to reach a conclusion of negligent loss of control. See Jones v. Carr, 382 S. W. 2d 853 (Ky., 1964). However, the recital of the facts in that case indicates there was evidence of more than just the fact of a skid. There was evidence the party had mismanaged the car by improper or untimely application of brakes or shifting of gears and that caused the car to skid and a loss of control. Other courts have said that a skid, in the absence of an explanation by the party, is evidence of negligence and that the jury should be so instructed. Sprenger v. Braker, 71 Ohio App. 349, 49 N. E. 2d 958.

In the case now before us, there is no evidence of excessive speed. Black was traveling at the same speed or less than Porter and considerably less than the first car which passed safely. The damage to Black's car by contact with the guardrail as shown in the photographs can be described as slight. The guardrail was apparently undamaged. None of these things indicate excessive speed and nothing whatever about the reason for the skid. A jury could arrive at a conclusion of negligent loss of con-

trol only by engaging in conjecture. There must be evidence of some fact or circumstance from which an inference can be drawn that the skidding could have been prevented by the exercise of ordinary care. Oldendorf v. Eide, 260 Minn. 458, 110 N. W. 2d 310.

AFFIRMED.

DUANE F. CONKEY, RAYMOND CONKEY, FRANK CONKEY, AND LUCILLE CONKEY, APPELLANTS, V. ANDERSON FARMS INC., APPELLEE.

289 N. W. 2d 541

Filed March 11, 1980. No. 42686.

Adverse Possession: Boundaries. Where a fence is constructed as a boundary line, although it is not the actual boundary line, and parties claim ownership of land up to the fence for the uninterrupted statutory period, parties gain title to such land by adverse possession.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Thomas A. Vakulskas, for appellants.

Smith, Smith & Boyd, for appellee.

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

WHITE, J.

The landowners appeal from an order dismissing a petition to establish a boundary of their property on government survey lines, and from the decree quieting title by adverse possession in favor of defendant to lands, the bare legal title to which is held by plaintiffs.

The weight of the evidence establishes and the trial court held that long established fence lines existed between the plaintiffs' and defendant's prop-

erty for far longer than the statutory period; that the land was occupied under claim of right for more than the statutory period; and that the claim of title was actual, open, and continuous. Winkle v. Mitera, 195 Neb. 821, 241 N. W. 2d 329 (1976).

Where a fence is constructed as a boundary line, although it is not the actual boundary line, and parties claim ownership of land up to the fence for the uninterrupted statutory period, parties gain title to such land by adverse possession. McCain v. Cook, 184 Neb. 147, 165 N. W. 2d 734 (1969).

We conclude on independent examination of the record that the trial court was correct and the judgment should be affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. FRANCIS M. MATTHEWS, APPELLANT.

289 N. W. 2d 542

Filed March 11, 1980. No. 42725.

1. **Criminal Law: Evidence: Proof.** Ordinarily, when 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: Controlled Substances: Intent: Proof.** Intent to distribute may be inferred from the equipment and quantity of controlled substances seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses.
3. **Juries: Verdicts: Appeal and Error: Evidence.** The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Richard J. Bruckner, 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.

MCCOWN, J.

A jury found the defendant guilty of unlawful possession of a controlled substance with intent to deliver, and he was sentenced to imprisonment for 2 years.

At approximately 11 p.m., on July 17, 1978, deputy sheriffs and Omaha police officers entered a one-story single-family residence in Omaha, Nebraska, under a valid no-knock search warrant. The warrant authorized the search and seizure of methamphetamines and packaging materials and equipment used in preparing the substance for street sale. The defendant had resided in the house alone for approximately 5 years. When the officers entered, there were six persons present. The defendant went into the bedroom and was apprehended there and taken into the living room where the persons in the house were detained during the search.

The bedroom was searched first. On top of the dresser was a large triple-beam scale, a bag of white powdery substance, and one large plastic bag containing three small plastic bags, each containing a white powdery substance. The substance was later found to be methamphetamines, commonly known as speed. A plastic jar with a powdered substance later identified as lactose, a cutting agent, was found in a dresser drawer, and also another scale. A roll of bills, one $50 and 36 $1 bills, was found in the headboard of the bed. In the bedroom the officers also found another scale and two packages, each containing approximately 100 clear plastic bags. No other contraband drugs or articles were found on the main floor of the house.

In the basement the officers found a large scale,

and also a metal box, taped around the edges and wrapped and taped in a plastic bag. The box contained two large bags of white powdered substance later identified as methamphetamines. One bag contained 18 ounces and the other, 15 ounces. Upon completion of the search the defendant was arrested.

At trial the defendant testified that he had never seen any of the contraband items in his house before; that he did not know they were there; that none of them were in his bedroom; and that the officers must be mistaken in their testimony. He also testified that some time between May and July 1978, he had allowed Gary Apker, an acquaintance of his, to store some property in a wooden cabinet in the basement of the house. The defendant testified that he did not know what property had been stored, although he thought he had seen some guns. He also testified that the basement was always unlocked and that Apker, as well as others, had access to it at all times.

The defendant also introduced evidence that Apker had also been arrested on the night of July 17, 1978, as the result of a search of the Apker residence, and that subsequently Apker was found guilty by a jury of possession of methamphetamines with intent to distribute based on the substances found in the Apker residence. By stipulation of counsel the entire bill of exceptions of the Apker trial was admitted into evidence at the trial here, and that record established that Apker had previously been convicted of the same offense.

At the conclusion of the trial, the case was submitted to the jury, which returned a verdict of guilty, and the defendant was sentenced to 2 years imprisonment in the penal complex.

The defendant first contends that the evidence is insufficient to sustain a conviction because it fails to establish that the defendant knowingly and intentionally possessed the drugs, and that he intended

to deliver or distribute them.

Ordinarily, when 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, 204 Neb. 616, 284 N. W. 2d 415 (1979).

It might be contended that the evidence as to Apker and his activities might constitute an explanation for the contraband found in the defendant's basement, but there was no evidence to explain the presence of the contraband materials in the defendant's bedroom. Those materials were all introduced and received into evidence. The defendant's testimony that the contraband was not there, or that the officers were mistaken, did not make the contraband materials disappear nor constitute any reasonable explanation for their presence in the bedroom.

Intent to deliver or distribute may be inferred from the equipment and quantity of controlled substances seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Rathburn, 195 Neb. 485, 239 N. W. 2d 253 (1976).

The evidence in this case is more than sufficient to establish either actual, joint, or constructive possession of methamphetamines, and an intent to distribute or deliver. The factual issues were submitted to the jury which resolved them against the defendant. In determining the sufficiency of evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

State v. Pankey, 202 Neb. 595, 276 N. W. 2d 233 (1979).

The defendant also contends that the trial court erroneously excluded certain exhibits and testimony dealing with Gary Apker. In particular, the defendant objects to the exclusion of his own offered testimony as to certain conversations with Gary Apker in one of which Apker is said to have stated: "I am sorry for the trouble I've gotten you into. I wish there was something I could do for you."

The various statements were specifically objected to upon the ground that they were immaterial, irrelevant, and hearsay. The exhibits, in general, were objected to on the premise that they were irrelevant, immaterial, hearsay, and not the best evidence. Even the specific conversation with Gary Apker which purports to include a statement intimating some sort of an expression of regret for some act of some kind having to do with the defendant does not come within the exclusion to the hearsay rule set out in section 27-804 (2)(c), R. R. S. 1943.

The evidence and testimony offered by defendant excluded by the court fell within well recognized rules of exclusion. Regardless of its materiality, the evidence was relevant only to establish that Gary Apker was a drug dealer and might have been the owner and possessor of some of the methamphetamines involved here. For that purpose it was also clearly cumulative and there was no abuse of discretion in excluding such evidence.

Defendant also contends that the court erred in giving an aiding and abetting instruction over defendant's objection. The defendant's own evidence attempted to establish the possibility that Gary Apker might have been the person in constructive possession of some of the methamphetamines involved here. If the jury were to accept that premise, the evidence was also amply sufficient to support the finding that the defendant was an aider and abettor of

Gary Apker. Whether the instruction should or should not have been given under the evidence here, the defendant was not prejudiced. An aider and abettor may be prosecuted and punished as if he were the principal offender. § 28-206, R. S. Supp. 1978.

Finally, the defendant contends that the sentence is excessive because this is his first felony conviction. The evidence in this case establishes that the street value of the methamphetamines seized in the defendant's home was approximately $100,000. The extent of the equipment and distribution supplies seized is persuasive that the defendant was engaged in the drug distribution business. The statutory penalties provide for a minimum of 1 year and a maximum of 10 years imprisonment. The defendant was sentenced to 2 years imprisonment. The sentence was within the statutory limits and there was no abuse of discretion.

The conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY P. KENNEDY, APPELLANT.

289 N. W. 2d 765

Filed March 11, 1980. Nos. 42737, 42738.

Criminal Law: Guilty Pleas: Sentences. A plea of guilty is not rendered involuntary simply because a defendant receives a more severe sentence than expected.

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

Michael L. Lazer of Levy & Lazer, 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 by the defendant, Gary P. Kennedy, from an order of March 23, 1979, of the District Court for Douglas County, denying the defendant's motions to vacate and set aside his convictions in two criminal cases. The matters on appeal arose from two independent criminal prosecutions. Docket 99, No. 400, charged the defendant with robbery which was subsequently amended to a charge of assault with intent to rob. Docket 100, No. 18, charged the defendant with shooting with intent to kill, wound, or maim and a second count of possession of a firearm by a felon. On July 14, 1977, the defendant pleaded not guilty to the robbery charge. At the second arraignment, on August 11, 1977, the defendant stood mute to the charges of shooting with intent to kill, wound, or maim and possession of a firearm by a felon. A plea of not guilty to each charge was entered by the court.

Pursuant to a plea bargain, on August 31, 1977, the defendant withdrew his plea of not guilty to the charge of robbery and pleaded guilty to the amended charge of assault with intent to rob. In exchange for a plea of guilty to the charge of shooting with intent to kill, wound, or maim, the State agreed to dismiss count II of Docket 100, No. 18, a felon in possession of a firearm.

During the hearing on August 31, 1977, before the pleas were accepted, this exchange occurred between the court, the defendant, and defendant's attorney, David Herzog: "The Court: * * * Now there has been a plea bargain set forth in the record. Do you understand that I am not bound in any way, shape or form by the terms of that plea bargain with regard to the sentence that would be imposed, do you understand that?

"The Defendant: Yes.

"The Court: Now, besides the plea bargain, have there been any threats, promises, inducements, or

promises of leniency made to you by anybody, particularly law enforcement people?

"The Defendant: No.

"Mr. Herzog: Judge, I should advise the Court at this point that Mr. Kennedy and I have discussed quite thoroughly the nature of the punishment potentially that the Court could impose, my approach to the Court on making recommendations as to an appropriate sentence and other such matters, and I have given Mr. Kennedy my belief and opinion as to what I thought an appropriate sentence would be. I don't mean to inform the Court or to suggest to Mr. Kennedy that this is binding on the Court. This is merely my observation and part of the duty that I must discharge to my client to give him my opinion as to what I think an appropriate sentence would be, and that is one of the considerations for it.

"The Court: Okay, then let me say in that regard, Mr. Kennedy, that before sentencing I will afford your counsel the opportunity to examine the pre-sentence investigation, and I am sure at that time that he will consult with me or argue with me and I am sure at the time of sentencing he will make an appropriate argument and plea and discussion of what he feels is appropriate, and he will bring to my attention any matters that may not be in the pre-sentence investigation that he thinks are relevant to the question of sentencing. But you have got to understand that what your attorney thinks may well be far different from what I think. On the other hand, they may be very similar to what I feel and think, but I have got to have you understand that what he thinks is not binding on me. Do you understand that?

"The Defendant: Yes."

After establishing a factual basis for the pleas and advising the defendant of the maximum penalty, the court accepted his pleas of guilty. On October 14, 1977, the defendant was sentenced to confinement in the Nebraska Penal and Correctional Complex for a

term of not less than 8 years nor more than 12 years on the shooting charge and a term of 3 years on the assault with intent to rob charge, the sentences to run consecutively. Motions for new trial were filed in each case and overruled. No appeal was filed in either case by counsel for the defendant, but the defendant pro se filed in Docket 100, No. 18, a notice of appeal of both sentences. The court dismissed the appeals for failure to file briefs.

The defendant filed pro se motions in each case to vacate and set aside judgment and sentence. At the post-conviction hearing, the defendant contended his counsel was ineffective. The defendant alleged he had pled guilty only upon the condition that his attorney, Herzog, had promised him that he had an agreement with the county attorney by which he would receive a sentence of no more than 5 years on both charges. Herzog testified that he did advise the defendant to plead guilty to the charges. He described his discussion with the defendant: "He asked me if I could get him five years or, as he put it in different terms, if I could get him a nickel, which is translated into five years. I told him that I would try, and I told him I thought I could." Later in his testimony, he described it thus: "A. As I recall, the case was coming very, very close to trial on Judge Grant's trial list — that is, the shooting case. And Gary and I had discussed on several occasions going to trial as one alternative or pleading as another alternative. I told Gary what his benefits were, what his liabilities were with regard to each one of the alternatives, and I suggested to him that he consider pleading or allow me to make a plea bargain. And I believe that the discussion was generally, and our understanding was generally, I would plead guilty if you can get me five years or a nickel.

"And I told Gary, I think I can do it, do you want me to try to get it for you. And he said yes, do it.

And with that authorization, I proceeded to arrange a plea bargain."

Herzog and the deputy county attorney testified they had no agreement concerning a specific recommendation on sentence, nor did Herzog have an agreement with the court. The District Court found that the defendant failed to establish grounds for relief under the Post Conviction Act and overruled and denied the motions of the defendant in each case but granted the defendant the right to a new direct appeal in each case. Defendant did not perfect a direct appeal.

The defendant contends the District Court committed error in denying the defendant's post conviction motions to vacate and set aside his convictions and sentences in each case. Defendant contends his guilty pleas are invalid because of ineffective assistance of counsel and therefore must be vacated. We disagree.

The issue to be resolved is whether the defendant's guilty pleas were rendered invalid by virtue of an alleged breach of the plea bargain as represented to him by his counsel. Implicit in the defendant's contention is that Herzog *promised* a sentence of 5 years as a condition to his plea of guilty to each charge. Herzog testified that he told his client he thought he could get 5 years and that he would try to get it. We fail to see how a defense attorney's estimate of a possible sentence constitutes a condition upon the defendant's guilty pleas. The record refutes the contention that the defendant was unaware of the fact that the court was not bound by any plea bargain agreement, and that the court might well impose the maximum sentence.

This court has previously held that a plea of guilty is not rendered involuntary simply because a defendant receives a more severe sentence than expected. An almost identical fact situation was presented to this court in State v. Busse, 186 Neb. 99, 181

N. W. 2d 124. In that case, defendant pleaded guilty to the offense of shooting with intent to kill, wound, or maim. The court sentenced him to 5 to 15 years. Subsequently, defendant moved for leave to withdraw his plea on grounds of the involuntariness of the plea and ineffective assistance of counsel. The defendant alleged that counsel "represented" or "led them to believe" that the defendant would receive a 5-year sentence. In denying defendant's motion, the court held: "The verbatim record of proceedings at arraignments of defendant for plea and sentence is filled with searching inquiry and clear statements by court and defense counsel. Defendant's acknowledgment in context leaves no room for doubt respecting voluntariness of the plea and effective assistance of counsel."

The record indicates that the defendant understood the nature of the charges, the possible penalties, his rights, and the effect of his pleas of guilty. Furthermore, the court specifically notified the defendant that it was not bound by any plea bargain agreement. This record does not support defendant's claim that his pleas of guilty were involuntary. See State v. Ristau, 201 Neb. 784, 272 N. W. 2d 274.

The decision of the trial court overruling the motions is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. MODESTO C. VALENCIA, APPELLEE.

290 N. W. 2d 181

Filed March 11, 1980. No. 42795.

1. **Criminal Law: Statutes: Constitutional Law.** The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision.
2. _____: _____: _____. Difficulty in determining whether certain

marginal offenses are within the meaning of language under attack as vague does not automatically render a statute unconstitutional for indefiniteness; the test is whether the language conveyed a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

3. **Criminal Law: Statutes: Constitutional Law: Indictments and Informations.** Questions of the constitutionality of a statute upon which an information is based may be raised by a motion to quash or a demurrer if the defect is apparent from the face of the statute.
4. **Criminal Law: Statutes: Constitutional Law: Pleas.** If not apparent from the face of the statute, the constitutionality may be challenged under a plea of not guilty.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for further proceedings.

Brian C. Silverman and Michael J. Javoronok, for appellant.

James T. Hansen and Paul Rehurek, for appellee.

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

BRODKEY, J.

Involved in this appeal is the constitutionality of section 28-1202, R. S. Supp., 1978, which reads as follows: "(1) Except as provided in subsection (2) of this section, any person who carries a weapon or weapons concealed on or about his person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, *or any other deadly weapon,* commits the offense of carrying concealed weapons.

"(2) It shall be an affirmative defense that the defendant was engaged in any lawful business, calling or employment at the time he was carrying any weapon or weapons, and the circumstances in which such person was placed at the time were such as to justify a prudent person in carrying the weapon or weapons, for the defense of his person, property or family.

"(3) Carrying concealed weapons is a Class IV felony." (Emphasis supplied.)

Defendant below, Modesto Valencia, hereinafter referred to as Valencia, was arrested at his place of employment, a packing house, on a charge not relevant to this appeal. As part of the arrest procedure, one of the arresting officers frisked Valencia to determine whether or not he was carrying any weapons upon his person. During the "pat down," a spring-operated switchblade knife was found in Valencia's left front pants pocket. Following a preliminary hearing on the matter, the State filed a two-count information against the defendant, charging him in the first count with violating section 28-512, R. S. Supp., 1978, theft by deception, and in count II with carrying a weapon concealed on or about his person, in violation of section 28-1202 (1), R. S. Supp., 1978. The defendant filed in the District Court for Scotts Bluff County a demurrer to the information on the grounds that count II, based upon section 28-1202, is unconstitutional and void because it is vague and indefinite on its face and as applied, and violates Article I, section 3, Constitution of the State of Nebraska, and the Fifth and Sixth Amendments to the Constitution of the United States; and also on the same date filed a motion to quash the information and each count thereof on the grounds that they are so vague, general, and indefinite as to violate the rights guaranteed to the defendant by the Fifth and Sixth Amendments to the Constitution of the United States. In addition, the defendant subsequently filed a motion to dismiss count II of the information based upon the allegation that section 28-1202, R. S. Supp., 1978, is unconstitutional and void because it is vague and indefinite on its face and as applied, and violates Article I, section 3, Constitution of the State of Nebraska, and the Fifth and Sixth Amendments to the Constitution of the United States.

Defendant's arraignment was postponed pending a hearing on the various motions filed by the defendant. The journal entry of the hearing on the motions reads in part as follows: "The Motion to Quash was argued to the Court. The Court sustains the Motion to Quash as to Count II of the information. The Court determined that a Motion to Quash is the correct motion to raise the issue of constitutionality. The Court finds that section 28-1202 (1) R. S. Supp. (1978) is unconstitutional as applied in the instant case for the reason that the weapon as disclosed by evidence at preliminary hearing does not fall within the specific types of knives prohibited but rather falls within the category of other 'deadly weapon,' and such category is unconstitutionally vague and overboard [sic]. The Court further determined the defendant had not waived his Motion to Quash by filing a demurrer, as both motions were intended to raise the question of constitutionality.

"Trial of the cause, set for April 20, 1979, is continued for thirty days to permit the State of Nebraska to appeal the ruling of the Court as to Count II."

The State has appealed from that order to this court. The record before us does not disclose whether Valencia was ever arraigned on this or any other charge; and it seems clear that the defendant has not as yet been placed in jeopardy.

In its brief filed in its appeal, the State sets forth three assignments of error as follows: "(1) The District Court erred in finding R. S. Supp. 28-1202 (1) (1978) unconstitutional as applied. (2) The District Court erred in finding the category of other 'deadly weapons' contained in R. S. Supp. 28-1202 (1) (1978) vague and overbroad. (3) The District Court erred in finding that the filing of a demurrer does not waive all defects which may be excepted to by a motion to quash." We conclude that the statute in question is constitutional, and reverse the order of

the District Court quashing count II of the information, and remand the matter for further proceedings.

It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Adams, 180 Neb. 542, 143 N. W. 2d 920 (1966). We have frequently stated that a crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. A crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. State v. Huffman, 202 Neb. 434, 275 N. W. 2d 838 (1979); State v. Adams, *supra*. Penal statutes prohibiting the doing of certain things in providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State, ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607 (1938); Connally v. General Const. Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). We have also held, however, that it is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Robinson, 202 Neb. 210, 274 N. W. 2d 553 (1979); State v. Nance, 197 Neb. 257, 248 N. W. 2d 339 (1976). Moreover, the prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warn-

ing that people may conform their conduct so as to avoid that which is forbidden. State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359 (1977); State v. Briner, 198 Neb. 766, 255 N. W. 2d 422 (1977).

Appellee contends that the words "other deadly weapon" as used in section 28-1202 (1), R. S. Supp., 1978, are so vague and overbroad as to render the statute unconstitutional, and points out in his brief on appeal certain examples which would appear to make certain innocent conduct criminal in nature, such as a meat cutter in a packing house carrying a knife under his apron, or a grandmother in possession of knitting needles. In this connection we point out that counsel for both parties have apparently overlooked the fact, or have ignored the fact, that the term "deadly weapon" has been statutorily defined in another section of the new Criminal Code. Section 28-109, R. S. Supp., 1978, provides in part: "As used in this code, unless the context otherwise requires: * * * (7) Deadly weapon shall mean any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, *which in the manner it is used or intended to be used* is capable of producing death or serious bodily injury; * * *." (Emphasis supplied.) Applying this definition to section 28-1202 (1), it is clear that the Legislature in enacting that statute has designated certain weapons such as revolvers, pistols, bowie knives, dirks or knives with a dirk blade attachment, and brass or iron knuckles, as deadly weapons *per se;* and the manner of the actual or intended use of such designated weapons is immaterial under the statute in question. However, with reference to the catchall phrase "or any other deadly weapon" as contained in section 28-1202 (1), it is the element of actual or intended use which renders the words "other deadly weapons" sufficiently definite to provide citizens an opportunity to conform their conduct to the statute; and to dis-

tinguish between situations involving culpable concealment, and those involving innocent concealment. It is this element of use or intended use of the object which saves the term "deadly weapon" from being vague or overbroad.

Since the weapon involved in this case, a switchblade knife, is not of the specific type enumerated in section 28-1202 (1), R. S. Supp., 1978, we have serious doubts as to whether a switchblade knife is a deadly weapon *per se,* that decision being one for the Legislature to determine if it chooses to amend that statute in question. We conclude, however, that the question of whether an object or weapon not specifically mentioned in the statute is a "deadly weapon" is clearly a question of fact to be decided by the trier of fact in prosecutions under this statute, and the resolution of this question will depend upon the evidence adduced as to the use or intended use of the object in question.

However, even if the term "deadly weapon" were not to be defined in our statutes, we would still have serious question as to whether the use of that term would render the statute in question unconstitutional because of vagueness or overbreadth. In Stout v. Dallman, 492 F. 2d 992 (6th Cir., 1974), the court held that the words "other dangerous weapon" in a statute providing that no person, while armed with a pistol, knife, or other dangerous weapon, shall steal from the person of another anything of value, were not so vague as to render the statute unconstitutional. The court further held that difficulty in determining whether certain marginal offenses are within the meaning of language under attack as vague does not automatically render a statute unconstitutional for indefiniteness; and the test is whether the language conveyed a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. In that case the court also pointed out: "The term 'dangerous weapon'

also appears without definition in the federal bank robbery statute. 18 U.S.C. § 2113(d). A considerable number of convictions have been upheld under that Act." See, also, State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569 (1969). We therefore are of the opinion that section 28-1202 (1), R. S. Supp., 1978, is neither vague nor overbroad, and we so hold.

In its brief, the State also asks this court for guidance with reference to the proper method or procedure to attack the constitutionality of a statute upon which an information is based. In its order, the District Court stated that a motion to quash was proper in this case, but indicated that a demurrer might also be an additional method of procedure used to raise the issue of constitutionality. The Nebraska statutes provide that the accused may except to an indictment by (1) a motion to quash, (2) a plea in abatement, or (3) a demurrer. § 29-1807, R. R. S. 1943. Section 29-1808, R. R. S. 1943, provides: "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Section 29-1809, R. R. S. 1943, provides: "A plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto." Section 29-1810, R. R. S. 1943, provides: "The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, when proof of it is necessary to make out the offense charged." Finally, section 29-1812, R. R. S. 1943, provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue."

In the instant case, it appears that the motion to quash and the demurrer were both filed the same

day, and ruled on at the same hearing. Under these facts, we do not believe that section 29-1812, R. R. S. 1943, would apply so as to preclude the accused from using a motion to quash to attack the constitutionality of the statute. In State v. Evjue, 253 Wis. 146, 33 N. W. 2d 305 (1948), the court held that an information which charges an offense in language of a statute which is unconstitutional states no offense and the defect is jurisdictional. The general rule is stated in 21 Am. Jur. 2d, Criminal Law, § 464, p. 461, as follows: "The question as to the validity of the statute on which the information is based is not properly raised by a plea in bar. Such question, if it goes to the constitutionality of the statute on its face, should be raised by demurrer or by motion to quash. If the statute is generally constitutional, and for some circumstance peculiar to the situation of the accused is unconstitutional, that is a matter which is properly triable under the general issue or a plea of not guilty." In the instant case, therefore, since the defect in question was a matter of interpretation of the statute itself, it would appear that either a motion to quash or a demurrer would be a proper method to challenge the constitutionality of the statute. If it be contended that the question of the constitutionality in this case only involved its application to this defendant by virtue of extraneous facts and circumstances, then, according to the foregoing authority, the constitutionality of the statute could and should be contested at trial under a plea of not guilty. In this case, so far as we are able to ascertain, a trial has not yet been held in the instant case.

We conclude that the District Court was in error in sustaining the motion to quash the information on the ground that the statute in question, section 28-1202 (1), R. S. Supp., 1978, was unconstitutionally vague and overbroad. The order of the District Court is reversed, and the cause is remanded, under section 29-2316, R. R. S. 1943, for further proceedings

consistent with this opinion, as it appears that the defendant has not as yet been placed in legal jeopardy.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CLINTON, J., concurring in part and dissenting in part.

I join in the portion of the majority opinion which holds the statute constitutional. I dissent from that portion of the opinion which expresses doubt that the switchblade knife in evidence is a deadly weapon per se under the provisions of section 28-1202 (1), R. S. Supp., 1978. I believe the design and the manner in which the knife functions demonstrate clearly that it is a deadly weapon per se and that the intention of the possessor is immaterial.

A switchblade knife is one which is made to open automatically and one of its primary purposes is use as a weapon. Precise Imports Corporation v. Kelly, 378 F. 2d 1014 (2nd Cir., 1967).

The knife here consists of a 3½-inch spring-powered blade and a handle about 5 inches long. On the handle is a button which activates the blade which, when in the closed position, is recessed in the handle. One end of the handle contains a slit or opening through which, when the button is pressed forward, the blade projects with such speed that the eye cannot follow the movement. The blade can be retracted in similar fashion by pushing the button in the opposite direction. The shape and strength of the blade indicate that it is designed for piercing, i.e., stabbing. The shape and design of the handle indicate the same purpose. At the end of the handle through which the blade is propelled are two metal projections or knobs, the apparent purposes of which are to enable the user to apply forward force and leverage by use of the forefinger and thumb; thus before the blade is projected, if the knife is held against a body, the pushing of the button would

cause the blade to penetrate. These projections also afford leverage if the knife is used in the more conventional fashion of a dagger. Patently, the knife is designed as a weapon. It can obviously be deadly. It is in essence a dirk except that the blade is shorter and retractable. A dirk is one of the weapons specifically listed in the statute. Where, in the statute, general words follow an enumeration of particular classes of things, the general words will generally be construed as applying to things of the same general class as though specifically enumerated. In re Estate of Grainger, 151 Neb. 555, 38 N. W. 2d 435; State v. End, 232 Minn. 266, 45 N. W. 2d 378. The switchblade is clearly within the class of the enumerated items.

Where a weapon is of such a character as to admit of but one conclusion in that respect, the question of whether it is a "deadly weapon" within the statute is a question of law, but where a weapon is such that its deadly character depends on the manner and circumstances of its use, the question is a question of fact for the jury. Angel v. Commonwealth, 289 Ky. 281, 158 S. W. 2d 640.

BOSLAUGH, J., joins in this concurrence and dissent.

WHITE, J., concurring.

I agree that section 28-1202 (1), R. S. Supp., 1978, is not unconstitutional and I agree with the remainder of the majority opinion that a weapon not specified by the statute may be possessed unlawfully, but only upon proof of the possession itself as well as such other facts and circumstances which would prove "* * * the manner it is used or intended to be used is capable of producing death or serious bodily injury; * * *." § 28-109 (7), R. S. Supp., 1978. Mere possession of such a weapon, standing alone, would not sustain a conviction.

I am authorized to state that McCown, J., joins in this concurrence.

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

STATE OF NEBRASKA, APPELLEE, V. RODDESS M. MAYS, APPELLANT.
289 N. W. 2d 545

Filed March 11, 1980. No. 42845.

1. **Trial: Evidence: Witnesses: New Trial.** Evidence which only tends to discredit a witness who testified at trial is not sufficient to justify a new trial.
2. **Trial: Evidence: Witnesses.** 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.
3. **Evidence: New Trial: Appeal and Error.** A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed.

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

Berry, Anderson & Creager, for appellant.

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

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

KRIVOSHA, C. J.

The appellant, Roddess M. Mays, appeals from an order of the District Court for Red Willow County, Nebraska, denying Mays' motion for new trial on the basis of newly discovered evidence. The facts involved in the original conviction are set out in the case of State v. Mays, 203 Neb. 487, 279 N. W. 2d 146, and will not be repeated herein.

As we noted in our earlier opinion, defense counsel

vigorously attempted to and did assert the defendant's innocence and built a defense on the proposition that someone else, not the defendant, committed the crime. In support of her motion for new trial Mays asserts that there was newly discovered evidence which, if offered and admitted in a new trial, would result in a different verdict. We have examined the record on the motion for new trial and do not believe that such a conclusion can be reached.

At the hearing on the motion for new trial Mays presented three witnesses who were not present at the original trial. One was a Michael Mullen who testified that the State's principal witness, Jeanette Hansen, the person whom Mays maintained was in fact the culprit, told him at some later time that in fact she, Hansen, had been the one who had stolen the rings, and displayed the rings to Mullen. The evidence in the original trial, however, established that Mays had delivered a box containing rings to Hansen, thereby explaining why Hansen had them in her possession. Mullen further testified that at some later time, the exact date of which was not clear in his mind, he encountered Hansen again and she told Mullen that "she had got out of what she did and that [Mays] was paying for what she had done and she thought it was funny." Other than Mullen's assertion of this fact there was no other evidence to support the claim as to what Hansen allegedly said.

During the original trial some attempt was made by Mays to impeach Hansen's testimony and to attempt to establish the fact that Hansen had admitted taking the rings as a joke. Apparently the jury chose not to believe that assertion. Mays now asserts that Mullen's testimony would have been helpful with regard to Hansen's credibility and her attempt to impeach Hansen.

Mays further offered in evidence at the hearing on the motion for new trial the testimony of a Lowell Holmberg who testified that one evening while in

McCook, Nebraska, an automobile drove up to where he was attempting to make a telephone call to a friend. The driver of the car offered to sell him some diamond rings. With the use of a high school yearbook he identified the driver of the car as Jeanette Hansen. He admitted he knew Roddess Mays at the time he saw Hansen, although he did not know Hansen.

The final witness was a Gary Caradori, a private professional investigator, who testified with regard to a subsequent investigation he made concerning Hansen's reputation in the community. He testified that he attempted to talk to Hansen and she refused to do so. He also testified that on the Sunday prior to the hearing on the motion for new trial he spoke to Virginia and Larry Swanson, and John Fischer, all of whom were schoolteachers in Maywood, Nebraska. The Swansons allegedly told Caradori that Hansen was a habitual liar and always fabricating stories to get other people in trouble.

Caradori further testified that he attempted to talk to the Swansons the following day, but Mrs. Swanson refused to talk to him. Her reason for refusing to talk further or to testify, according to Caradori, was because Mrs. Swanson had been told during the day that Mays was a prostitute and a doper.

It would appear that all the evidence maintained by Mays to be newly discovered evidence at best goes to the credibility of one of the State's witnesses, to wit, Hansen. That fact in and of itself is not sufficient to justify the granting of a new trial. In State v. French, 200 Neb. 137, 262 N. W. 2d 711, we said: "We have held on numerous occasions that evidence which only tends to discredit a witness who testified at trial is not sufficient to justify a new trial." See, also, State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69.

The trial court, in overruling the motion for new trial, commented on the fact that there had been other significant evidence adduced at trial in addition

to the testimony of Hansen. In particular he noted that certain of the diamonds which were recovered were identified by a Chester Johnson as being diamonds from his jewelry store where Mays was employed. Further, it was noted by the trial court, in overruling the motion for new trial, that the evidence in the original trial established that in addition to the diamonds missing from Johnson's place of business, his inventory cards also had been removed from their cabinet. It was unlikely that a shoplifter would have known to do that. The court in concluding said: "And I came to the conclusion that I do not believe that the jury would probably change their minds." It does not appear that such a conclusion is unreasonable or is not supported by the evidence. In the recent case of State v. Peery, *ante* p. 271, 287 N. W. 2d 71, we said: " '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.' " To the same effect, see State v. Munson, 204 Neb. 814, 285 N. W. 2d 703, and State v. French, *supra*. We have likewise held that a motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Munson, *supra*. A fair reading of the entire record fails to disclose how the determination by the trial court to deny the motion for new trial was an abuse of discretion. That being the case, we are compelled to affirm.

AFFIRMED.

CLINTON, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD RED FEATHER, APPELLANT.

289 N. W. 2d 768

Filed March 11, 1980. No. 42880.

1. **Criminal Law: Sexual Assault: Evidence.** In a prosecution for sexual assault it is sufficient if the prosecutrix is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue.
2. **Trial: Hearsay: Evidence.** To qualify as an excited utterance the following must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event.
3. _____: _____: _____. Statements to a physician which bear upon the nature and cause of the injury are admissible under the medical diagnosis exception to the hearsay rule insofar as they are reasonably pertinent to diagnosis or treatment.
4. **Trial: Witnesses: Confessions.** The confrontation clause is not violated by admitting out-of-court statements where the declarant testifies and is subject to cross-examination.
5. **Criminal Law: Trial: Confessions.** Volunteered statements of any kind are admissible without prior explanation of the defendant's rights.

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

Terri S. Diem, 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.

BOSLAUGH, J.

The defendant, Clifford Red Feather, also known as "Woody," was convicted of first degree sexual assault and sentenced to 8 to 15 years imprisonment in the Nebraska Penal and Correctional Complex. He has appealed and contends the trial court erred in admitting hearsay testimony into evidence, in overruling his motion to dismiss, and in overruling his motion for a new trial.

The evidence shows that in the late evening of October 14, 1978, a 7-year-old girl was sexually assaulted. Her mother returned home at approximately 11:45 p.m., to find the victim crying and bleeding profusely from between her legs. The victim said to her mother, "Look what Woody done to me."

Her mother ran into one of the bedrooms and found the defendant still lying on the bed. Bloody clothes of both the victim and defendant and blood-stained and semen-stained blankets and clothing were found in the bedroom. The mother then ran out of the house to call the police. At this time the defendant fled the scene.

Officer Guy Hielscher and Officer George Schefcik responded to the call. Both officers approached the house and found the victim at the door crying. When asked why she was crying, she told the police officers "Woody made me bleed." While Officer Hielscher checked the area for evidence, Officer Schefcik accompanied the victim and her mother to the hospital emergency room.

The victim was treated by Dr. Donald E. Wilkinson, who found her distraught, anxious, and frightened. Dr. Wilkinson first observed that she was lying in a large pool of blood. He questioned her about what had happened and she replied, "Woody did it." Upon further questioning by Dr. Wilkinson she explained that she had been sleeping on the couch in her home. Neither of her parents were there. She stated that Woody picked her up and carried her into the bedroom where he removed her pants. Pointing to her vagina she said that Woody had "put his finger in down there," and, "He got on top of me." Dr. Wilkinson found that she had sustained a massive laceration extending from the mouth of the vagina along the full length of the vagina, then splitting into a Y-shaped laceration around the cervix. The laceration was repaired

surgically by Dr. Wilkinson.

The defendant claims the corroboration evidence was insufficient. In addition to the numerous complaints of the victim, made soon after the assault, to her mother, the police officers, and Dr. Wilkinson, the evidence as to the discovery of the defendant in the bedroom by the victim's mother, together with the blood-stained and semen-stained blankets and clothes, was sufficient evidence of corroboration. It is sufficient if the prosecutrix is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Rhodes, 201 Neb. 576, 270 N. W. 2d 920 (1978).

The defense was an alibi. The evidence of the State was clearly sufficient, if believed, to establish the guilt of the defendant beyond a reasonable doubt.

The defendant further contends that the testimony of the police officers and Dr. Wilkinson as to the statements of the victim was hearsay and therefore not admissible. He argues, in the alternative, that if the evidence was admissible as a recognized exception to the hearsay rule, its admission into evidence violated his constitutional right of confrontation. Under the facts of this case we do not agree.

When the police arrived at the victim's home approximately a half hour after the assault had occurred, they found the victim bleeding, crying, and in a highly emotional state. When Hielscher asked what had happened, she replied, "Woody made me bleed." The testimony at trial by Hielscher to this effect was admissible under the excited utterance exception to the hearsay rule. § 27-803 (1), R. R. S. 1943. To qualify as an excited utterance the following must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event. State v. Reed, 201 Neb. 800, 272 N. W. 2d

759 (1978). A statement to police officers by a 7-year-old girl, made a short time after she was sexually assaulted, relating to the sexual assault, qualifies as an excited utterance.

The statements made by the victim to the emergency room physician were also admissible. The victim was brought to the hospital emergency room as quickly as possible. When she arrived at the hospital, the evidence shows that she was upset, anxious, crying, and bleeding profusely. Her statements to Dr. Wilkinson were made in response to questioning to ascertain the nature and cause of her injury and to obtain a medical history. Statements to a physician which bear upon the nature and cause of the injury are admissible under section 27-803 (3), R. R. S. 1943, insofar as they are reasonably pertinent to diagnosis or treatment. 4 Weinstein's Evidence, 803-125 (1979). That portion of the statement which related that the assailant put his fingers into her vagina and got on top of her was clearly admissible under the medical diagnosis exception.

While the entire statement to Dr. Wilkinson may not have been reasonably pertinent to diagnosis or treatment, the statement was also an excited utterance. State v. Reed, *supra*. Although the statements were made approximately one hour after the assault, time alone is not the decisive factor. The crucial point is that there was not time for conscious reflection. 4 Weinstein's Evidence, 803-84 (1979).

The testimony of Dr. Wilkinson as to the statement identifying the defendant was at most cumulative. Whether or not cumulative evidence constitutes reversible error depends upon the facts and circumstances of each case. State v. Jackson, 200 Neb. 827, 265 N. W. 2d 850 (1978). In view of the other evidence which had already been received, the testimony was not prejudicial.

The defendant further claims that admission of the testimony as to the statements of the victim violated

his right of confrontation. The victim was present in court and was subjected to cross-examination. The confrontation clause is not violated by admitting out-of-court statements where the declarant testifies and is subject to cross-examination. See, California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); State v. Saltzman, 194 Neb. 525, 233 N. W. 2d 914 (1975).

Finally, the defendant complains that the trial court incorrectly permitted testimony pertaining to admissions made by the defendant at the time of his arrest because no Miranda warnings had been given. The arresting officer testified as follows: "A. Well, I observed Woody laying under some blankets and I pulled the blankets back and I said, 'Woody, you're under arrest.' Q. What else did you say? A. And Woody says, 'What for?' And I says, 'You're under arrest for raping Stella Sanchez' daughter.' And he says, 'How do you know I did that?' And I says: I got your evidence — I've got evidence. I've got your fingerprints in blood. And he says, 'You got me.' And then we removed him from the house."

"In Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 [1966], the United States Supreme Court held specifically that volunteered statements of any kind are admissible without prior explanation of the defendant's rights." State v. Torrence, 192 Neb. 213, 219 N. W. 2d 772 (1974), cert. den., 420 U. S. 928, 95 S. Ct. 1127, 43 L. Ed. 2d 399 (1975). The testimony was properly admitted as a spontaneously volunteered statement of the defendant.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE ESTATE OF RUBIE MCCLOW, DECEASED. WALLACE G. REED, APPELLEE, V. DALLAS I. MCCLOW, PERSONAL REPRESENTATIVE, APPELLANT.

290 N. W. 2d 186

Filed March 18, 1980. No. 42600.

1. **Wills: Ademption: Statutes.** Under the provisions of subsection (b) (1) of section 30-2346, R. R. S. 1943, where a testator has, during his lifetime, sold specifically devised property and at his death an unpaid balance remains owing to him on that sale, the beneficiary of the specific bequest is entitled to receive the unpaid balance. Ademption results only as to the part of the sales price received by the testator in his lifetime.
2. **Wills: Ademption: Words and Phrases.** The most common use of the term ademption is to describe the act by which a devise or bequest of specific property becomes inoperative by the sale or extinction of the property during the testator's lifetime.
3. **Wills: Ademption: Statutes.** The common law doctrine of ademption has been modified by statute. § 30-2346, R. R. S. 1943.
4. **Statutes: Legislature.** In construing a statute, this court will presume that the Legislature intended a sensible rather than an absurd result.

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

Bernard L. Packett, for appellant.

Thomas E. Brogan of Brogan & Stafford, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and MARTIN, District Judge.

CLINTON, J.

Dallas I. McClow, personal representative of the estate of Rubie McClow, has appealed from an order of the District Court for Madison County, Nebraska, finding that Wallace G. Reed and Glenda K. List, children of the deceased, were entitled to receive the unpaid balance owing under a contract for the sale of real estate entered into by the decedent during her lifetime. The specific real estate, an 80-acre tract of land in Madison County, Nebraska, had been

devised by the testator to the appellees by a codicil to her will executed July 1, 1969. On November 20, 1974, she sold the land under an installment contract for the sum of $42,000. She died on January 25, 1977, at which time the unpaid principal balance on the contract was $19,800.

The personal representative claimed that the unpaid balance and accrued interest are assets of the estate, contending, among other things, that under the common law doctrine of ademption the sale of the real estate constituted a revocation of the specific devise. The appellee takes the position in this court that the common law doctrine has been modified by section 30-2346, R. R. S. 1943, which provides for nonademption as to the unpaid contract balance. The appellant argues that the statute does not apply because it pertains only to sales by a guardian or conservator, taking in eminent domain, and loss by casualty, and not to sales by the testator.

The term ademption has two meanings. It is most commonly used to describe the act by which a devise or bequest of specific property becomes inoperative by the sale or extinction of the property during the testator's lifetime. Baacke v. Baacke, 50 Neb. 18, 21, 69 N. W. 303 (1896); In re Estate of Bose, 136 Neb. 156, 177, 285 N. W. 319 (1939); Austin v. Austin, 147 Neb. 109, 22 N. W. 2d 560 (1946); 96 C. J. S., Wills, §§ 1172 et seq., p. 985. In its second meaning, the term includes the satisfaction of the devise or bequest by money payment, or by delivery or conveyance of the real or personal property to the beneficiary by the testator before his death. Austin v. Austin, *supra*; 96 C. J. S., Wills, § 1178, p. 1005.

The common law doctrine that ademption results where there has been a sale of the specific property by the testator before the will becomes operative appears to be the rule in Nebraska except as it may have been modified by statute. Baacke v. Baacke, *supra*; In re Estate of Bose, *supra*.

The ademption doctrine has been modified by the Nebraska Probate Code by its adoption of certain rules of construction which provide for nonademption in some cases. § 30-2345, R. R. S. 1943 (changes in devised securities); § 30-2346, R. R. S. 1943 (in case of sales; eminent domain proceedings; sales by guardian or conservator, etc.); § 30-2350, R. R. S. 1943 (ademption by satisfaction).

We have concluded that section 30-2346, R. R. S. 1943, includes the type of case before us. The appellant, however, says: "It seems very clear that the events in subsections (a) and (b) are relevant only if the testator was under a conservatorship or guardianship." The appellee responds: "It is obvious that this is not true or there would have been no point to having two subsections." Neither party, however, has attempted to analyze the statute. Nor has either party cited case authority. Perhaps there is none. Our independent research has disclosed no case construing the statute.

We have, in fact, an ambiguous statute which the drafters of the Uniform Probate Code, from which the statute was taken, might well rewrite for clarity's sake. We quote section 30-2346, R. R. S. 1943, in full so that the reader will note that what is said to be obvious is not. "(a) If specifically devised property is sold by a conservator or guardian, or if a condemnation award or insurance proceeds are paid to a conservator or guardian as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if, subsequent to the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (b).

"(b) A specific devisee has the right to the remaining specifically devised property and:

"(1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;

"(2) any amount of a condemnation award for the taking of the property unpaid at death;

"(3) any proceeds unpaid at death on fire or casualty insurance on the property; and

"(4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation."

The meaning of subsection (a) of the statute is reasonably clear. Ademption does not take place where the specifically devised property is sold by a guardian or conservator, or if the proceeds of a condemnation or fire insurance or from other casualty loss are paid to such representative. Taking the language pertaining to the latter two contingencies literally, it would not seem to make any difference whether the condemnation or casualty loss occurred before the conservatorship or guardianship came into existence. The only requirement is that the proceeds have been paid to the representative. In the case of a sale, the devisee gets a pecuniary bequest in lieu of the specific devise. In the other instances, he receives the proceeds. However, in each contingency, if the testator's disability is removed and he survives 1 year thereafter, then common law ademption takes place as though there were no statute. One ambiguity in this section, however, results from the apparent equating of the existence of a conservatorship and the existence of testamentary disability. Such is not necessarily the case. §§ 30-2601 et seq., R. R. S. 1943; § 30-2630 (2), R. R. S. 1943; § 30-2326, R. R. S. 1943.

However, the provision of section 30-2346, R. R. S. 1943, which gives rise to the ambiguity which con-

fronts us here is the last sentence of subsection (a), which reads: "The right of the specific devisee under this subsection is reduced by any right he has under subsection (b)." Although not expressly stated, subsection (b) (1) apparently contemplates the situation where the testator has, during his lifetime, sold all or a portion of the specifically devised property.

Ambiguity results because the circumstances under which there could be a right under subsection (b) at the same time the contingencies described in subsection (a) exist is not readily apparent. The representative and the testator obviously cannot have sold the identical property, so there should be no reduction by reason of a sale by the testator in his lifetime. The provision for a reduction for something received under subsection (b), e.g., in a case where a representative had sold a part of a specifically devised tract of land, would not seem to be a situation intended to be covered, for at common law a sale of a portion of the devised tract works ademption only pro tanto. Baacke v. Baacke, *supra*. Neither would it seem to apply where a representative and a testator had sold different parts of a specifically devised tract, for this would result in the anomaly of nonademption only where a sale by the testator is followed by a sale by a representative. There would seem to be no purpose in providing for nonademption in such a coincidence and not in all cases of a sale by the testator of the specifically devised property.

Subsections (b) (2) and (3), pertaining to condemnation awards and insurance proceeds unpaid at the death of the testator, ought not result in a reduction of the amounts which the devisee would receive from amounts paid to a conservator or guardian before death because this would result in negating the statutory purpose. For example, if a conservator or guardian received one-half of the casualty

loss before the death of the testator and the other half is paid after death to the executor, offsetting one against the other (reduction) would result in no payment to the devisee at all.

It should be noted in passing that the term devise, as used in the Uniform Probate Code, includes disposition of both real and personal property by will. § 30-2209 (7), R. R. S. 1943.

In construing a statute, this court will presume that the Legislature intended a sensible rather than an absurd result. State v. Goham, 191 Neb. 639, 216 N. W. 2d 869 (1974).

Although research has disclosed no cases interpreting this statute, our search has disclosed that others have apparently recognized the principal ambiguity. The drafter, in 1975, recommended that the propositions of subsections (a) and (b) be reversed. A comment to section 2-608 of the Uniform Probate Code is enlightening on this point. "In 1975, the Joint Editorial Board recommended a re-ordering of the title of this section and a reversal of the original order of the subsections. This recommendation was designed to correct an unintended interpretation of the section to the effect that all of the events described in subsections (a) and (b) had relevance only when the testator was under a conservatorship. The original intent of the section, made more apparent by this re-ordering, was to prevent ademption in all cases involving sale, condemnation or destruction of specifically devised assets where testator's death occurred before the proceeds of the sale, condemnation or any insurance, had been paid to the testator." 8 U. L. A. Estate, Probate & Related Laws (1980 Supp., p. 125). See, also, Wellman, 1 Uniform Probate Code Practice Manual, p. 163, where Professor Wellman indicates, without discussion of ambiguities, his understanding that subsections (a) and (b) cover different stituations.

We hold that, under the provisions of subsection

(b) (1) of section 30-2346, R. R. S. 1943, where a testator has, during his lifetime, sold specifically devised property and at his death an unpaid balance remains owing to him on that sale, the beneficiary of the specific bequest is entitled to receive the unpaid balance. Ademption results only as to the part of the sales price received by the testator in his lifetime.

AFFIRMED.

RAYMOND JOHNSON, GEORGE CRIBBS, BOBBY MAXWELL, AND FRANCIS MOORE, ET AL., APPELLANTS, V. JOSEPH VITEK, DIRECTOR OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

290 N. W. 2d 190

Filed March 18, 1980. No. 42613.

1. **Prisoners: Statutes: Hearings: Time.** The disciplinary process contemplated by section 83-4,121, R. R. S. 1943, is commenced when written notice of the infraction is served on the inmate.
2. _____: _____: _____: _____. Section 83-4,121, R. R. S. 1943, requires only that a disciplinary process be commenced in 8 days, not that it be completed within that time.

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

Thomas A. Wurtz, for appellants.

Paul L. Douglas, Attorney General, and Paul E. Hofmeister, for appellees.

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

WHITE, J.

This appeal by prisoners at the Nebraska Penal and Correctional Complex involves a single issue: Whether disciplinary proceedings for infractions committed by the appellants were commenced within

8 calendar days after an infraction or the discovery of an infraction as required by section 83-4,121, R. R. S. 1943. The District Court determined that the proceedings were commenced within the required period and denied relief to the inmates. We affirm.

Section 83-4,121, R. R. S. 1943, states: "No disciplinary proceeding shall be commenced more than eight calendar days after the infraction or the discovery of such infraction unless the committed person is unable or unavailable for any reason to participate in a disciplinary proceeding."

There is no due process question involved in this case. While Wolff v. McDonnell, 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), requires a 24-hour advance written notice of the charges and a written statement of fact finders at the hearing as to the evidence relied on, it does not require, as does the statute, that actions be commenced within an 8-day period.

It was obvious to the trial court, as it is to us, that there are two separate due process requirements in Wolff v. McDonnell, *supra*, the advance notice, and a later hearing with written findings.

In this case, the prisoners on October 21, 1976, were involved in an incident where marijuana was found and a misconduct report was prepared. On October 22, 1976, an investigation was conducted and the Disciplinary Misconduct Reporting Form was forwarded to the hearing officer. On October 28, 1976, the prisoners appeared before the hearing officer who orally informed them of the rule infraction, and after a hearing forwarded the misconduct report to the Adjustment Committee and provided the prisoners with a written notice of the charges.

On November 1, 1976, the prisoners appeared before the Adjustment Committee which, after a hearing, found the prisoners guilty of the infraction and took disciplinary action thereon.

The procedure followed was in accordance with

announced policies and procedures of the Department of Correctional Services.

The preliminary phases of the process, including the proceedings before the hearing officer, are merely investigative and the trigger mechanism which brings Wolff into play is the service of the written notice. This service and the subsequent hearing are part of one continuous disciplinary process, culminating in the written findings of the Adjustment Committee. We are unable to find in section 83-4,121, R. R. S. 1943, a requirement that the process be completed in 8 days, only that it be commenced. Nothing in the legislative history indicates otherwise. The purpose of the act was to effect the due process requirements of Wolff v. McDonnell, *supra*, and to place a limitation on such action. We will not read into a statute a requirement not required by the plain terms of the act, the Constitution, or the legislative history.

AFFIRMED.

HASTINGS, J., not participating.

VIOLET H. CAGLE, APPELLEE AND CROSS-APPELLANT, V. LEWIS VERNON CAGLE, APPELLANT AND CROSS-APPELLEE.

290 N. W. 2d 192

Filed March 18, 1980. No. 42626.

Divorce: Alimony: Child Support: Appeal and Error. Alimony and child support determinations, whether in an original proceeding or in an action to modify, require subjective reasoning and analysis based on the evidence and witnesses before the trial court, and will not be disturbed on appeal unless there appears a clear basis in the record for finding the trial court abused its discretion.

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

Norman H. Wright of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellant.

Michael P. Cavel of Emil F. Sodoro, P.C., for appellee.

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

REAGAN, District Judge.

This is an action to modify alimony and child support provisions of a divorce decree. From an order reducing the alimony payments, Mr. Cagle has appealed, contending an abuse of discretion by the trial court. Appellee has cross-appealed claiming an abuse of discretion in reducing child support payments.

The parties were divorced in 1972. They owned a family corporation known as Cagle, Inc., which was engaged in the drywall construction business. The company had been formed by Mr. Cagle a few years prior to their marriage with a capital investment of $3,000. The company prospered with gross sales of nearly $5 million for the year preceding the divorce. According to financial statements submitted by appellant, his net worth was approximately $500,000 in July of 1971, and it increased to just over $1.5 million as of September 1972. The parties had been married for nearly 7 years, had two children of their own, and appellee adopted two children from Mr. Cagle's first marriage. At the time of the divorce, Mr. Cagle was drawing a salary of $52,000, plus other income of approximately $20,000 and fringe benefits. Appellee was unemployed. By the terms of the property agreement and decree, Mr. Cagle received all the stock in Cagle, Inc., as well as other marital properties. Mrs. Cagle received cash and property totaling $90,000, alimony of $1,000 per month for 275 months or until her death, custody of the two children born of the marriage, and child support of $300 per month per child.

In 1977 Cagle, Inc., suffered severe financial setbacks which resulted in an adjudication of bank-

ruptcy. Appellant's employment and income from the corporation ceased. Mr. Cagle then engaged in the management of three apartment units, did some consulting work, and has now formed a new corporation to engage in construction activities. He presently draws an annual salary of $25,000 plus fringe benefits. He has remarried and adopted a daughter of his present wife. They have maintained a lifestyle that is not suggestive of the income reduction alleged, such as the breeding of racehorses, trips to Las Vegas to engage in gambling, and purchase of a Jaguar automobile with monthly payments of nearly $600.

Appellee has remained single. She is unemployed although she has some bookkeeping skills. The children in her custody were 12 and 10 years of age at the time of hearing, and the family living expenses for 1977 were approximately $16,500.

After a full evidentiary hearing, the trial court reduced the alimony award from $1,000 per month to $700 per month, but extended the term during which it was to be paid. The child support was reduced from $300 per month per child to $200 per month per child. Alimony and child support determinations, whether in the original proceeding or in a hearing to modify, require subjective reasoning and analysis based on the evidence and witnesses before the trial court, and will not be disturbed on appeal unless there appears a clear basis in the record for finding the trial court abused its discretion. Ulmer v. Ulmer, *ante* p. 351, 287 N. W. 2d 685 (1980); Boroff v. Boroff, 204 Neb. 217, 281 N. W. 2d 760 (1979); Scarpino v. Scarpino, 201 Neb. 564, 270 N. W. 2d 913 (1978). It is abundantly clear no abuse of discretion is shown with respect to either determination of the trial court, and its judgment should be affirmed. Appellee is awarded the sum of $500 for the services of her attorney in this court.

AFFIRMED.

DAIRYLAND INSURANCE COMPANY, AN INSURANCE COMPANY, APPELLANT, V. EILEEN ESTERLING, WILLIAM HEARON, AND KARLA DENAY HEARON, A MINOR, APPELLEES.

290 N. W. 2d 209

Filed March 18, 1980. No. 42669.

1. **Contracts: Insurance.** An insurance policy should be considered as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning.
2. _____: _____. However, an insurance contract will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract and, in case of doubt, the policy will be liberally construed in favor of the insured.
3. **Insurance: Motor Vehicles.** A causal relation or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for the accident or injury to come within the meaning of the clause "arising out of the ownership, maintenance or use" of a vehicle, and where such causal connection or relation is absent, coverage will be denied.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded.

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

Forrest F. Peetz, for appellee Esterling.

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

BRODKEY, J.

Plaintiff below, Dairyland Insurance Company, has filed an appeal to this court, seeking to reverse an order of the District Court for Holt County which sustained a motion for summary judgment filed by the defendant, Karla Denay Hearon, by and through her father, William Hearon, and by William Hearon on his own behalf. In its order, entered on January 3, 1979, the trial court ordered, adjudged, and decreed that the defendants' motion for summary judgment be granted and that Dairyland Insurance Com-

pany (Dairyland) be required to defend the defendant, Eileen Esterling, and to provide coverage to said defendant in a pending action against her. In its appeal to this court, Dairyland assigns as error the failure of the trial court to grant judgment in its favor on defendants' motion for summary judgment, and also in allowing and granting attorney's fees and costs to Eileen Esterling. We reverse and remand.

The action in which the motion for summary judgment was filed was a declaratory judgment action brought by Dairyland to determine the rights of the various parties to an action for damages under a "Family Combination Automobile Policy" issued by Dairyland to Robert Esterling, husband of Eileen Esterling, on November 11, 1975. That policy provided, in part, that Dairyland would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of * * * bodily injury, sickness or disease, including death resulting therefrom, * * * sustained by any person; [and also for any property damage] arising out of the ownership, maintenance or use of the owned automobile or any nonowned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient."

Dairyland attached to its petition for declaratory judgment, as an exhibit, the petition in a case filed in the District Court for Holt County entitled Karla Denay Hearon, by and through her Father and Next Friend, William Hearon, Plaintiff v. Eileen Esterling, Defendant, Case No. 17133, which petition sets out and summarizes the salient facts giving rise to this litigation. It appears that on December 4, 1975, the mother of Karla Denay Hearon left her minor

daughter in the care, custody, and control of Eileen Esterling, the wife of the named insured, engaging her to babysit with Karla for a monetary consideration. It further appears that Eileen Esterling then took their pickup truck, the insured vehicle, and drove from O'Neill, Nebraska, to Neligh, Nebraska, taking with her her sister, her 4-year-old son Bradley Esterling, and Karla Hearon. Upon arriving in Neligh, Eileen Esterling and her sister got out of the parked pickup truck, the insured vehicle, leaving Bradley and Karla by themselves in the pickup. The petition alleges that Bradley "did take a cigarette lighter and set the plaintiff's coat on fire," resulting in injuries to the plaintiff. The source of the cigarette lighter is neither alleged in the petition nor shown in the record. Karla sustained severe injuries as a result of the fire. The grounds of negligence alleged against the defendant, Eileen Esterling, were that she failed to properly supervise the plaintiff, failed to protect the plaintiff from the acts of her 4-year-old son, and failed to provide safe premises for the plaintiff. Dairyland then filed its declaratory judgment action, asking the court to declare that the policy provision referred to above provided no coverage for this incident.

The principal issue presented in this appeal is whether or not coverage exists under the policy in question, particularly under the policy provisions quoted above. As a general rule, an insurance policy should be considered as any other contract, and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning. Preferred Risk Mut. Ins. Co. v. Continental Ins. Co., 172 Neb. 179, 109 N. W. 2d 126 (1961). However, it is also a well-established rule that an insurance contract will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and in case of

doubt, the policy will be liberally construed in favor of the insured. Neal v. St. Paul Fire & Marine Ins. Co., 197 Neb. 718, 250 N. W. 2d 648 (1977).

The phrase "arising out of the ownership, maintenance, or use of the owned automobile" has frequently been examined and interpreted by the courts to determine whether insurance coverage exists. In an annotation entitled "Automobile liability insurance: what are accidents or injuries 'arising out of the ownership, maintenance, or use' of insured vehicle," 89 A. L. R. 2d 150, it is stated: "A frequent question confronting the courts in determining whether a particular injury or accident is within the coverage provided by the 'ownership, maintenance or use' clause of an automobile liability insurance policy is the one of causal connection or relationship of the accident or injury to the ownership, maintenance, or use of a vehicle. All the cases agree that a causal relation or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for the accident or injury to come within the meaning of the clause 'arising out of the ownership, maintenance or use' of a vehicle, and where such causal connection or relation is absent coverage will be denied. The difficulty therefore relates mainly to the determination whether or not there was under the facts of the particular case the required causal relationship." See, also, 6B Appleman Insurance Law and Practice, §§ 4311 to 4330 (Buckley Ed., 1979).

One of the leading and frequently quoted cases dealing with this problem is National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821 (1966), where we held that the accidental discharge of a loaded gun in an automobile being used to transport a minor home after a hunting trip was not an accident within the contemplation of the term "arising out of the use" of an automobile, under the facts of that case. In Bruecks we stated: "The policy is

intended to cover any injury caused by an accident arising out of the use of an automobile and a reasonably liberal construction should be in order if we are to effectuate the purpose of the contract. * * *

"The words 'arising out of the use' are very broad, general, and comprehensive terms, and are ordinarily understood to mean originating from, growing out of, or flowing from."

In that case we also stated: "It would seem that the obligation to defend a suit for an insured should be determined on the basis of whether the petition filed against him attempts to allege a liability within the terms of the policy. In the tort action, which is the basis for this declaratory judgment action, there is no allegation set out in the petition which would indicate that the action was brought as one arising out of the use of a motor vehicle. * * * [T]he allegations of negligence * * * may be summarized as failing to unload the gun previous to entering the automobile and in attempting to unload the gun in a moving automobile. These allegations in no way predicate recovery on the use of the automobile as such. The gun did not discharge as a result of being in the vehicle or from any reason even remotely connected with the vehicle. It seems clearly apparent that the tort action is not premised upon any connection with the automobile in which the shooting occurred, except as describing the situs of the act.

* * *

"It seems patent, however, that some causal relation must exist between the injury and the use of the vehicle to come within the ambit of 'arising out of the use of a vehicle.' "

In the instant case, the underlying tort petition does not allege that it was the act of igniting Karla's clothing that caused the injury. Rather, as previously stated, the petition alleges that the negligence of Eileen Esterling consisted of failing to supervise, failing to protect, and failing to provide

safe premises. In order to invoke coverage under the policy provisions, it is necessary that one of the three allegedly negligent acts must have arisen from "the operation, maintenance, or use" of the vehicle, and have caused the injuries to Karla. It seems clear that the first two allegations referred to cannot be said to have arisen out of the use of an automobile, and the attorney for Eileen Esterling conceded this point in his oral argument before this court. That being so, we need only consider whether the failure to provide safe premises arose out of the operation, maintenance, or use of the insured vehicle; or, to be more specific, we must determine whether the use of the vehicle as a playhouse for the children was within the intended policy coverage; and whether the injuries were the result of an accident arising out of the "use" of an automobile.

The case of Hartford Fire Ins. v. State Farm Mut. Auto. Ins., 264 Ark. 743, 574 S. W. 2d 265 (1978), is instructive and persuasive upon that question and involved a situation strikingly similar to that in the instant case. In the Arkansas case, two minors were playing inside the insured vehicle, a camper used primarily as a recreational vehicle, which was parked in a carport adjoining the residence of the insured. One of the minors inside the camper pointed a pistol at a child outside the camper. The pistol was not a part of the vehicle's equipment, but was customarily kept in a loaded condition in the vehicle. The weapon discharged, killing the child outside the camper. In finding no coverage under the automobile insurance policy, the Arkansas court stated: "We are of the view that the accidental death of [the child] cannot be said to be causally related to the use of the camper. As to causation, the accident could just have easily occurred in a field, in the driveway, or in a hunting lodge. The fact that the person discharging the pistol was inside the vehicle

at the time of this accident does not make the injury one 'arising out of the ownership, maintenance, or use' of the camper. Consequently, appellee's policy provided no coverage in this situation." We agree completely with the reasoning of the Arkansas court.

We note that appellees in their briefs have cited cases wherein coverage under the automobile liability insurance policies containing the same or similar provisions as those contained in the policy in this case has been found to exist in situations involving passengers who were bitten by dogs being transported in the vehicle. National Indemnity Co. v. Corbo, 248 So. 2d 238 (Fla., 1971); Hartford Accident & Indem. Co. v. Civil Service Employees Ins. Co., 33 Cal. App. 3d 26, 108 Cal. Rptr. 737 (1973). We believe that those cases are distinguishable from the instant case, as they involved accidents causally connected with the use of the insured vehicle. We are unable to conclude that the failure to provide safe premises for Karla, the minor child, made the injury to her one which arose out of the ownership, maintenance, or use of the vehicle. Furthermore, under the "reasonable expectations" test, we have difficulty in concluding that at the time of the inception of the insurance contract between Dairyland and the Esterlings, the parties contemplated or intended that using the vehicle as a playhouse for their minor children would constitute a use of the vehicle within the meaning of the policy. We decline to enlarge the coverage provided by the contract by judicial construction without regard to the intent of the parties when entering into the insurance contract.

We conclude, therefore, that the trial court erred in sustaining defendants' motion for summary judgment, and in finding that the plaintiff was legally obligated to defend Eileen Esterling, and to provide coverage to her. In view of our disposition of this matter, we also conclude that Mrs. Esterling is not

entitled to an award of attorney's fees and we reverse the District Court's award of such fees. We therefore reverse the order of the District Court and remand the case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

REAGAN, District Judge, concurring.

I concur with the result reached in the majority opinion, but I disagree with certain conclusions stated and some of the reasoning for the decision reached. I also feel the majority opinion lacks sufficient directions for further proceedings by the trial court.

The majority opinion rightfully states the issue presented by this action: whether plaintiff is required to provide coverage to Eileen Esterling under the policy provision providing coverage for damages "arising out of the ownership, maintenance or use of the owned automobile." The opinion correctly states the salient facts giving rise to this declaratory judgment action, although it should be pointed out the only allegation of negligence in the underlying tort action which could even arguably be covered under this policy was the one claiming the insured "failed to provide a safe premises" for the injured minor.

I agree with the majority opinion that insurance policies are considered as any other contract, and given effect according to the ordinary sense of the terms used. Preferred Risk Mut. Ins. Co. v. Continental Ins. Co., 172 Neb. 179, 109 N. W. 2d 126 (1961). I agree with, and place emphasis on, the majority statement that ambiguities in policies should be liberally construed in favor of reasonable expectations of the insured. Neal v. St. Paul Fire & Marine Ins. Co., 197 Neb. 718, 250 N. W. 2d 648 (1977).

The majority then cites 89 A. L. R. 2d 150 and 6B Appleman Insurance Law and Practice §§ 4311 to 4330 (Buckley Ed., 1979) for the proposition there

must be a causal connection between the accident or injury and the ownership, maintenance, or use of the insured vehicle for coverage to be afforded. Although such may be a correct statement of the law, it may lead to an erroneous inference that the ownership, maintenance, or use of an insured vehicle must be *the proximate or a proximate cause* of the accident or injury. Cases collected, as well as text comments, in Appleman, *supra* at § 4317, establish that ownership, maintenance, or use of a vehicle need not be the direct and efficient cause of the injury, merely that some substantial nexus between the injury and the insured vehicle exist.

The case of National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821 (1966), also relied upon by the majority, is distinguishable from the instant case in at least two important aspects. In Bruecks, there were *no* allegations of negligence in the underlying petition which could even arguably relate to the ownership, maintenance, or use of the insured vehicle. Secondly, the underlying tort action was against a passenger who was totally unconnected with the *ownership or maintenance* of the vehicle where the injury occurred.

The majority opinion then moves toward the conclusion that Mrs. Esterling's *use of the insured vehicle as a playhouse* was not within the intended policy coverage. There are two problems with this reasoning. First, it assumes that it was the insured's intent to use the vehicle as a playhouse. This is an assumption based on absolutely no evidence and one which is contrary to the normal experience of mankind. Without endorsing the safety of such practice, one must recognize how frequently adults leave small children in automobiles for a few minutes (and sometimes longer) while they run into a store for a loaf of bread or a quart of milk. Secondly, it refers only to the *use* of the vehicle and disregards the term "maintenance."

As far as this court knows, "maintenance" is not defined within Dairyland's policy. The normal definition of this term would be an act or acts of keeping or supporting a particular object (such as the insured vehicle) in a state of good repair or condition. It has been indicated in the text cited by the majority that maintenance includes acts of either commission or omission *relative to the external* or mechanical condition of the vehicle. Appleman, *supra* at § 4315, p. 339. Although Hartford Fire Ins. v. State Farm Mut. Auto. Ins., 264 Ark. 743, 574 S. W. 2d 265 (1978), is similar to the instant case in some aspects, it is substantially different in others. That case was an action for contribution between insurance companies and was decided after a full evidentiary hearing. The opinion is premised on "use" of the insured vehicle, rather than "maintenance," and it is clear the trier of fact came to the conclusion the insured vehicle was in fact *being used as a "playhouse."*

With the ambiguity in the term "maintenance," the one underlying allegation of negligence that the insured "failed to provide a safe premises," a question of fact is presented on whether coverage exists. That could only be determined on a full and complete evidentiary hearing. If this analysis is correct, the decision reached by the court this term in MFA Ins. Companies v. Mendenhall, *ante* p. 430, 288 N. W. 2d 270 (1980), entitles either party to a jury trial as a matter of right. Such a trial would not of necessity terminate the controversy, for even if coverage should exist, Dairyland could still defend the tort action on the issue of damages or on the issue of whether Mrs. Esterling's failure to supervise was the *sole* proximate cause of the injuries sustained.

Because of this, the trial court should consider the broad discretion vested in it by section 25-21,154, R. R. S. 1943, to refuse to entertain a declaratory judg-

ment proceeding that would not terminate the uncertainty or controversy. The trial court could adequately protect Dairyland's rights in the tort action by requesting the jury to make specific findings of fact regarding the cause of the injury.

A. M. BISHOP, APPELLANT, V. DEPARTMENT OF ROADS OF THE STATE OF NEBRASKA, APPELLEE.

290 N. W. 2d 193

Filed March 18, 1980. No. 42689.

Eminent Domain: Res Judicata: Collateral Attack. An owner of land taken by virtue of eminent domain proceedings, who has been paid and has accepted the award of damages, cannot afterwards contest the validity of the taking by collateral action.

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

Clyde F. Starrett, for appellant.

Paul L. Douglas, Attorney General, and Robert G. Avey, for appellee.

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

CLINTON, J.

This is an action by the appellant, A. M. Bishop, against the Department of Roads of the State of Nebraska, seeking a declaratory judgment that excess land was taken in an eminent domain proceeding. The answer of the State pled the action was barred by the statute of limitations. It also alleged that the action was barred under the doctrine of res judicata by reason of the prior award, appeal therefrom to the District Court, judgment entered, and judgment satisfied. The District Court granted the State's motion for summary judgment, based upon the expiration of the statute of limitations. Appellant now contends that the taking of the land was arbitrary and

capricious, and that the statute of limitations involved in this case is unconstitutional. We affirm.

The essential facts are not in dispute. Appellant owned several tracts of land in Hayes County, Nebraska, which were used primarily as pastureland. The Department of Roads needed some of this land in order to construct a highway between Wauneta and Palisade. In February 1973, the State filed a petition in the county court, alleging that it was necessary to acquire this land and asking that appraisers be appointed.

Appellant was awarded $600 for tract 20 and $13,791 for tract 22. He appealed from the awards of the appraisers to the District Court. The awards were reduced to $12,650 by judgment rendered on May 25, 1974. The only issue raised by appellant in the District Court was the adequacy of the award. He did not then claim the State had condemned more land than was necessary, even though he knew the route of the proposed highway and the land it would occupy. He accepted the payment for his land. The highway was completed by December 5, 1974.

We need not reach the issue of the statute of limitations, because we hold that this action to reclaim previously condemned land is barred as a matter of res judicata.

It has always been a rule in this state that one who challenges the scope or necessity of a condemnation taking must do so on appeal to the District Court. If the landowner fails to raise this issue, he cannot raise the question of necessity afterward. In Duffey v. School Dist. No. One, 200 Neb. 702, 265 N. W. 2d 212 (1978), this court dealt with the claim of a landowner who had been paid and accepted an award for his condemned land. He then brought an action almost 2 years later, seeking a declaratory judgment that the proceeding was defective due to a deficiency in the notice provisions. We held that an owner

whose land has been taken by virtue of eminent domain proceedings, who has been paid and accepted the award, cannot thereafter contest the validity of the taking by a collateral action.

In Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb. 668, 64 N. W. 2d 333 (1954), the plaintiff had already received a final award for an easement taken by the gas company. He later objected when the gas company entered his land to construct and maintain the pipeline. The court found for the gas company, holding that the issue relating to the extent of the easement should have been raised in the District Court, and, not having been raised, it was res judicata.

As early as 1905, in Roberts v. Sioux City & P. R. Co., 73 Neb. 8, 102 N. W. 60 (1905), this court stated: "Whether the amount [of land] asked for in a condemnation proceeding is necessary or not must be determined in such proceeding; and the condemnation of a certain width for a right of way is an adjudication that said width is necessary. . . . If plaintiff believed that defendant did not need a 200-feet right of way through his homestead, he should have raised that issue in the condemnation proceeding."

Appellant places great reliance upon Krauter v. Lower Big Blue Nat. Resources Dist., 199 Neb. 431, 259 N. W. 2d 472 (1977). However, the case is distinguished because there the landowner raised the issue of excess taking in his appeal from the appraiser's award.

The question of the necessity of the taking for the use intended should have been raised in the eminent domain proceeding. The appellant, having failed to raise the issue in that proceeding, cannot raise the question now.

A motion for summary judgment should be granted only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Exchange Bank & Trust

Co. v. Tamerius, 200 Neb. 807, 265 N. W. 2d 847 (1978).

AFFIRMED.

HASTINGS, J., participating on briefs.

EMMA GERALDINE WOLFE, APPELLEE, V. AMERICAN COMMUNITY STORES, DOING BUSINESS AS HINKY DINKY STORE NO. 63, APPELLANT.

290 N. W. 2d 195

Filed March 18, 1980. No. 42709.

1. **Workmen's Compensation: Verdicts: Appeal and Error.** In reviewing the judgment of the compensation court, we are bound by the findings of fact made by the Workmen's Compensation Court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and may not be set aside on appeal unless clearly wrong.
2. **Workmen's Compensation: Statutes: Words and Phrases.** Disability is defined for purposes of the workmen's compensation statutes in terms of employability and earning capacity rather than in terms of loss of bodily function.
3. **Workmen's Compensation: Verdicts: Appeal and Error.** When there is evidence in the record to support the finding of temporary total disability on the date of rehearing, we are bound by that finding.
4. **Workmen's Compensation: Statutes: Words and Phrases.** The "by accident" requirement of the workmen's compensation law is satisfied either if the cause was of an accidental character, or if the effect was unexpected or unforeseen and happened suddenly or violently.
5. **Workmen's Compensation: Statutes.** The objective symptoms of an injury produced at the time of the accident are sufficient to satisfy the requirement of the workmen's compensation law if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.

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

Hansen & Engles, for appellant.

Richard J. Spethman, for appellee.

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

WHITE, J.

This is an appeal by American Community Stores, doing business as Hinky Dinky Store No. 63, from the judgment of the three-judge compensation court which determined that the appellee, Emma Geraldine Wolfe, while employed on July 29, 1976, by the appellant as a delicatessen manager and engaged in the duties of her employment, suffered injuries to her back as the result of an accident arising out of and in the course of her employment by the appellant and found that the appellee was totally disabled from and after August 2, 1976, and was temporarily totally disabled and remained temporarily totally disabled at the time of the hearing thereon. Appellant, American Community Stores, doing business as Hinky Dinky Store No. 63, raises two issues in its assignments of error: (1) Whether or not Emma Geraldine Wolfe's injury and disability were caused by an accident in the course of employment as defined by section 48-151, R. R. S. 1943, of the Nebraska workmen's compensation law; and (2) whether or not the appellee is totally disabled. We affirm.

In reviewing the judgment of the compensation court, we are bound by the findings of fact made by that court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and we may not set them aside on appeal unless clearly wrong. Keith v. School District No. 1, *ante* p. 631, 289 N. W. 2d 196 (1980). The facts are not essentially in dispute.

On July 29, 1976, the employee, who had no history of previous back problems, reported for work at 8 a.m. to her job as delicatessen manager of the Hinky Dinky Store No. 63 in Omaha, Douglas County, Ne-

braska. The appellee testified that, on the day of the injury, she completed the job of moving ten 53-pound boxes of canned meat from a position in the front of the cooler near the delicatessen area. She then assisted in moving tubs of salad from the cooler to the counter where display pans were filled and this work was completed at approximately 11:30 or 11:45 a.m. At the time the work was completed, the employee noticed no back pain or discomfort; about noon, approximately 15 minutes to one-half hour after the last lifting episode, she felt a sharp pain in her low back. She could not recall any specific activity in which she was engaged at the onset of this pain. She reported the incident and after August 2, 1976, she has not returned to work at Hinky Dinky Store No. 63 nor engaged in any other gainful activity.

At rehearing, one physician testified that she was totally disabled. Another physician, whose deposition was an exhibit at the rehearing, testified that she was 40 percent disabled. We note that the description of her disability given by the physician who testified to 40 percent disability indicated that Mrs. Wolfe still could not engage in any lifting; that she was subject to continual pain; that her condition was aggravated by prolonged standing or sitting; and that the only real relief she could get was by the use of painkillers or lying down. Further, his definition of total disability was "If you are flat on your back, paralyzed, or dead." Suffice it to say that Mrs. Wolfe was totally disabled under section 48-121, R. R. S. 1943.

We have held in Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700 (1957), and Shotwell v. Industrial Builders, Inc., 187 Neb. 320, 190 N. W. 2d 624 (1971), that disability for purposes of our statute is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. In defining total disability, losses in bodily function are

not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof. Other than vague references to some type of sedentary occupation undefined in the record, the physicians testified that appellee was not employable. The conflict in the evidence, if one exists, between the two physicians with respect to total disability was for the compensation court to decide and they have made their determination based on the evidence before them. There being evidence in the record to support the finding of temporary total disability on the date of rehearing, we are bound by that finding. Keith v. School District No. 1, *supra*.

The more serious question is presented by the first assignment of error in which the appellant essentially contends that the appellee has failed to meet her burden in establishing by a preponderance of the evidence that she sustained an unexpected or unforeseen injury arising out of and in the course of her employment, happening suddenly and violently, and producing at the same time objective signs of injury. Appellant cites the case of Eliker v. D. H. Merritt & Sons, 195 Neb. 154, 237 N. W. 2d 130 (1975). It is uncontroverted in the record that the appellee was not engaged in any heavy lifting or other strenuous activity at the time of the onset of the low back pain. Appellant points out in the opinion of Judge Spencer's in the Eliker case the following: "We are of the opinion that the plaintiff has failed to sustain his burden of proving that his accident arose out of his employment or occurred in the course of his employment. It is true that the plaintiff said that his neck pains came on suddenly while at work. It is also true that he has been working in employment involving a lot of lifting, twisting, and stooping. There is no evidence, however, as to exactly what he might have been doing at the time of the onset of the pain. Plaintiff said he was pursuing his regular duties.

Doctor Goetowski's notes contained the following statement: ' "Consider it an accident or not, I don't know." ' Further, Doctor Goetowski noted: ' "Don't have any definite notation of an accident, but he could have had several."?' "

Unlike the Eliker case, in this case the two physicians testified, one with reasonable medical certainty and the other "probably," that Mrs. Wolfe's injuries were incurred during the course of her employment and as a result of an accident. There is no evidence of any preexisting back condition or of any other incident which was related to the appellee's injury. The sole question is whether or not this was an accident. The Workmen's Compensation Court, in its order, distinguished the Eliker case and said: "In Brokaw v. Robinson (1969), 183 Neb. 760, 164 N. W. 2d 461, in construing the 'by accident' requirement, the Supreme Court said: 'The "by accident" requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. * * *' * * * However, in view of plaintiff's having experienced no prior back injury or pre-existing condition involving her back and in view of the objective symptoms manifesting themselves within an hour of said lifting, the Court finds from all the evidence that the plaintiff has established by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by her employment by the defendant."

The compensation court further held that the requirement of objective symptoms of an injury produced at the time of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. Schoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N. W. 2d 547 (1966).

The judgment of the compensation court is supported by competent evidence and must be affirmed.

AFFIRMED.

HASTINGS, J., participating on briefs.

CERES FERTILIZER, INC., A COLORADO CORPORATION, APPELLEE, V. FRED O. BEEKMAN, APPELLANT.

290 N. W. 2d 199

Filed March 18, 1980. No. 42774.

1. **Corporations: Foreign Corporations.** The maintaining of any action or suit by a foreign corporation does not in and of itself constitute transacting business in this state so as to require the securing of a certificate of authority.
2. **Attachment: Trial: Statutes: Proof.** At a hearing on a defendant's motion to quash an attachment under section 25-1040, R. R. S. 1943, the burden is upon the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James G. Sharp of Everson, Noble, Wullschleger, Sutter & Sharp, for appellant.

Joseph M. Caffall, for appellee.

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

HASTINGS, J.

Defendant appeals from a judgment in the amount of $48,415.60 on a promissory note executed and delivered by him to the plaintiff, and from an order overruling defendant's motion to quash an order of attachment obtained by the plaintiff. The only errors assigned by the defendant pertinent to a decision in this matter are that prior to judgment, the

plaintiff, a nonresident corporation, had its authority to do business in the state revoked and therefore could not maintain the action upon which judgment was entered and that the Nebraska statutes, sections 25-1001 et seq., R. R. S. 1943, under which authority certain of defendant's property was seized by writ of attachment and held pending judgment, are violative of due process as set forth in the Fifth and Fourteenth Amendments to the Constitution of the United States of America. We affirm in part, and in part reverse the judgment of the District Court.

Plaintiff filed its petition on January 10, 1977, and defendant, his answer in the nature of a general denial on March 21, 1977. On February 23, 1977, plaintiff filed an affidavit for an order of attachment, alleging the commencement of the action, the nature and amount of its claim, and that the same was just, and that defendant was about to "assign, remove, or dispose of his property * * * with the intent to defraud his creditors" and that he "fraudulently contracted the debt * * * for which suit * * * has been brought." The affidavit having complied with the provisions of section 25-1002, R. R. S. 1943, the clerk issued an order of attachment to the sheriff of Chase County, reciting that plaintiff had filed the "necessary affidavit and undertaking" and directing the sheriff to attach "lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of Fred O. Beekman, Defendant, in Chase County * * *."

In compliance with that order, the sheriff attempted to attach defendant's corn in possession of Chase County Grain, Inc., and Imperial Grain Elevator. However, he was informed that the same had been sold, but that each grain elevator was holding $26,000 in proceeds from its sale. Additionally, the sheriff learned or had knowledge of competing claims or liens, including levies made by him upon executions issued by the clerk of the District Court

for Chase County. He therefore proceeded under the provisions of section 25-1521, R. R. S. 1943, to notify the court of the competing claims.

Following such notification, the District Court for Chase County proceeded to hold a hearing to determine the priorities of the various claims. At the hearing, evidence was presented as to the sale of corn, as set forth above, and of the nature of the various writs and liens in existence. The court found that the property was "money in the hands of" third parties and "was not subject to levy by the Sheriff without attachment or garnishment * * *" and that the plaintiff, Ceres Fertilizer, Inc., had priority over the claims of all other claimants. Accordingly, the court directed the grain companies to pay the proceeds from the sales of corn into court and directed the clerk to "pay and distribute said money to Ceres Fertilizer, Inc., and the District Court of Gage County, Nebraska, pursuant to the Attachment issued by that Court * * *."

On February 22, 1978, almost a year to the day from the issuance of the order of attachment, defendant filed a motion in the District Court for Gage County to quash the same. Hearing was had on that motion on March 31, 1978. The plaintiff offered in evidence a security agreement and financing statement executed by defendant on November 18, 1976, and filed in Chase County on November 23, 1976, securing the note which is the subject of this lawsuit. This instrument designated as security 110,000 bushels of corn belonging to defendant, 60,000 bushels of which were alleged to be stored at the Chase County Grain Company. Also received in evidence were copies of the competing executions totalling approximately $6,000.

Further hearing was held on October 10, 1978, at which time the bill of exceptions from the hearing conducted in the District Court for Chase County, previously referred to, was received in evidence.

On November 13, 1978, the District Court for Gage County overruled the defendant's motion to quash.

Trial was held on the principal issue on April 2, 1979. The plaintiff established a prima facie case and the only thing by way of defense offered by the defendant was a certificate issued by the Nebraska Secretary of State reciting the "dissolution" for nonpayment of taxes of the defendant Colorado corporation as of August 2, 1977. Judgment was entered for the plaintiff.

Taking up first the correctness of the trial court's judgment on the promissory note, there is no merit to the defendant's appeal in this regard. His reliance upon Rigid Component Systems v. Nebraska Component Systems, Inc., 202 Neb. 658, 276 N. W. 2d 659 (1979) is unavailing. That case stands for the proposition that a foreign corporation doing business within the state without a certificate of authority may not maintain an action in any court until such certificate has been procured, as provided by section 21-20,121, R. R. S. 1943. In the case at bar, plaintiff held a valid certificate of authority at all times during the period that it did business within the state and at the time of the commencement of this action. The only activity that it carried on since the cancellation of its authority to transact business was the continued maintenance of this action. Maintaining any action or suit does not, in itself, constitute transacting business in this state so as to require the securing of a certificate of authority. § 21-20,105, R. R. S. 1943. The trial court was correct in entering the money judgment that it did.

Defendant's constitutional attack is based primarily on the opinion in the case of Aaron Ferer & Sons Co. v. Berman, 431 F. Supp. 847 (D. Neb., 1977). In that case, attachment was utilized to acquire quasi in rem jurisdiction over the property of a nonresident defendant. The narrow holding of the court was that the statute in question, sections 25-1001 et

seq., R. R. S. 1943, employed "for acquiring *quasi in rem* jurisdiction" did violate the due process clause of the Fourteenth Amendment to the United States Constitution.

In arriving at its decision, the U. S. District Court relied heavily upon Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); Mitchell v. W. T. Grant Co., 416 U. S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975). Based upon its reading of those cases, the U. S. District Court identified five conditions that, in its view, must be met in order for a writ of attachment pendente lite to be constitutional: (1) The writ must be based upon an affidavit of facts prepared by the creditor or an attorney with personal knowledge of the facts; (2) there must be actual judicial participation in the issuance of the writ; (3) the creditor must indemnify the debtor against damages resulting from a wrongful taking; (4) the debtor must be able to dissolve the writ by posting a bond; and (5) there must be an immediate postseizure hearing at which the creditor is required to prove the allegations upon which the writ was issued. However, a close reading of the underlying U. S. Supreme Court decisions suggests that an attachment may be constitutional even if it does not meet all five of those conditions. In particular, lack of judicial participation in the issuance of the writ may be remedied by the provision of a prompt judicial hearing following the attachment.

The common thread running through all the U. S. Supreme Court cases is an amalgamation of the Ferer decision's items (1), (2), and (5), i.e., the concept that a debtor must be entitled to a timely judicial determination that the existing facts establish the creditor's right to attachment.

In Fuentes v. Shevin, *supra*, the majority opinion

stated: "We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing."

The majority opinion in Mitchell v. W. T. Grant Co., *supra*, upheld a Louisiana statute which permitted attachment without notice or hearing, but did permit the debtor to move for dissolution upon which a hearing would be granted, much like our own section 25-1040, R. R. S. 1943. In holding the Louisiana statute valid, the court did attach some importance to the requirement that an affidavit clearly reveal the grounds relied upon by alleging specific facts and that a judicial officer review that affidavit. Those requirements are not explicitly included in the Nebraska statutory scheme. However, the omission is not fatal, in view of the Mitchell court's statement that "The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' *Phillips v. Commissioner,* 283 U. S. 589, 596-597 (1931)."

Finally, in North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra*, a Georgia garnishment statute was struck down because it permitted a clerk to cause total impoundment of property during litigation without a hearing or other participation by a judicial officer. Justice Powell, in a concurring opinion, said that procedural due process would have been satisfied by the "establishment before a neutral officer of a factual basis of the need to resort to the remedy" and a requirement that there be provided "an opportunity for a prompt postgarnishment judicial hearing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment * * *."

Section 25-1040, R. R. S. 1943, which provides tha

"The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment * * *," does provide the debtor with the opportunity for a prompt postgarnishment judicial hearing. Such a hearing was had in this instance.

Quite apart from constitutional considerations, two early Nebraska cases, although perhaps not precisely on point, certainly are expressive of sound reasoning as to the nature of the evidence and the burden of proof to be employed at such a hearing. In Geneva Nat. Bank v. Bailor, 48 Neb. 866, 67 N. W. 865 (1896), it was stated: "The defendant, in his motion and affidavit, expressly and specifically denied each averment of fraud contained in the original affidavit on which the attachment was obtained. The *burden*, therefore, *was upon the plaintiff to sustain some one of the grounds of attachment* by a preponderance of the evidence." (Emphasis supplied.) The decision in Seidentopf v. Annabil, 6 Neb. 524 (1877), reveals prescience on the part of that early court as to coming due process requirements. The court, in that case, said: "We think, however, that in this class of cases proper practice would require that something more than the mere repetition of the language of the code should be presented to the judge. He ought to be placed in a position to act intelligently in the exercise of the power and discretion conferred by the code. A court or judge, before allowing an attachment in an action for a debt not due, might properly require a statement of facts and circumstances, such as ordinarily evince and disclose an *intent*, purpose, or effect, in the disposition of property injurious to the rights of creditors, and not act upon what might probably be a mere belief or an inference hastily drawn."

Although our entire statutory procedure for prejudgment attachment is constitutionally suspect under the holding in Ferer & Sons v. Berman, *supra,* it is

not necessary for us to make that determination in deciding this case. We do hold that at a hearing on a defendant's motion to quash an attachment, the burden is upon the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed. In this case, at no point in the various proceedings, up to and including the trial on the merits, does the record reflect any evidence supporting plaintiff's claim that the defendant was about to dispose of his property to defraud his creditors or that the defendant fraudulently contracted the debt. Therefore, the attachment was improperly issued, erroneously continued, and defendant's motion to dissolve should have been sustained.

Nevertheless, personal jurisdiction having been obtained over the plaintiff, the invalid attachment does not affect the trial court's judgment on the principal issue, and the judgment in that regard is affirmed. However, as to its order overruling the motion to quash, that portion of the judgment is reversed and the cause is remanded to the District Court for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. HENRY A. DINVERNO, APPELLANT.

290 N. W. 2d 203

Filed March 18, 1980. No. 42843.

1. **Criminal Law: Double Jeopardy: Trial: Constitutional Law.** The constitutional provisions against double jeopardy are not violated by trial on a second charge which requires different and additional evidence than that in the first, even though both of the offenses charged arise out of the same chain of events.
2. **Criminal Law: Burglary: Proof.** The crime of burglary requires proof of a willful, malicious, and forcible breaking and enter-

ing with the intent to steal property of value, which elements are not common to the crime of receiving stolen property.

3. **Criminal Law: Double Jeopardy: Constitutional Law.** Even where one and the same act constitutes two separate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy.

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

Steven Lefler, 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.

HASTINGS, J.

Defendant appeals from an order overruling his motion for post conviction relief, filed following his conviction and sentencing on a charge of burglary. His primary assignment of error relates to a claim of double jeopardy, and, secondly, that he was denied a preliminary hearing and that his motion to dismiss at the close of the State's case was overruled. We affirm the action of the District Court.

On June 8 and 9, 1977, defendant was tried on a felony charge of receiving stolen property, which property had been taken in a burglary on February 7, 1977. Originally, it was his understanding that he was to be charged with burglary, but as part of a claimed plea bargain he was told that if he waived his right to a preliminary hearing, the charge would be reduced to the one upon which he was tried. He was found not guilty by a jury following completion of his trial on June 9, 1977. Three days later he was arrested for burglary involving the same property, waived a preliminary hearing, was tried to a jury and found guilty on October 19, 1977, and sentenced on November 21, 1977. Defendant filed a notice of

appeal on January 17, 1978, which was dismissed by this court on May 24, 1978, "upon appellant's failure to file briefs."

At the post conviction hearing held on May 31, 1979, the bills of exception in each of the foregoing trials were received in evidence as well as brief testimony by the defendant. He complained about the waiver of a preliminary hearing as to the charge of receiving stolen property, but admitted that he voluntarily waived his right to such hearing on the burglary charge. Although defendant's motion for post conviction relief included a charge of incompetency of counsel because of failure to appeal the conviction, there was no evidence that defendant had ever requested that such an appeal be perfected, nor was it assigned as error.

Although the defendant's claims as to the waiver of the preliminary hearing and the failure of the trial court to sustain his motion to dismiss at the close of the evidence cannot be raised at a post conviction hearing, they may be disposed of quickly on their merits. A review of the record discloses a fact question and evidence sufficient for a jury to find defendant guilty beyond a reasonable doubt. As to the matter of the preliminary hearing, the only one that was of any consequence was the one involving the charge of burglary and defendant admitted there was nothing wrong with that waiver.

The complaint as to effectiveness of counsel was neither assigned as error nor argued, and there is no evidence to support such a claim in any event.

The remaining claimed error relates to the allegation by the defendant that having been acquitted on a charge of receiving stolen property and then being convicted of burglary of the same items, he has been subjected to double jeopardy. The constitutional provisions against double jeopardy are not violated by trial on a second charge which requires different and additional evidence than that in the first, even

though both of the offenses charged arise out of the same chain of events. State v. Saxon, 193 Neb. 278, 226 N. W. 2d 765 (1975). See, also, Kowalski v. Parratt, 533 F. 2d 1071 (8th Cir., 1976). The elements constituting the offense of receiving stolen property include the receipt of property, knowing it to be stolen, with intent to defraud the owner. § 28-508, R. R. S. 1943. The crime of burglary requires proof of a willful, malicious, and forcible breaking and entering with the intent to steal property of value, which elements are not common to the crime of receiving stolen property. § 28-532, R. R. S. 1943. Even where one and the same act constitutes two separate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy. State v. Carter, *ante* p. 407, 288 N. W. 2d 35 (1980).

There is no merit to any of defendant's contentions and the judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES LEONARD JOHNSON, ALSO KNOWN AS JAMES L. JOHNSON, ALSO KNOWN AS JIMMIE JOHNSON, APPELLANT.

290 N. W. 2d 205

Filed March 18, 1980. No. 42848.

Criminal Law: Trial: Evidence: Intent. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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

Edward D. Hotz of Hotz, Kluver, Kizer & Jahn, 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.

MCCOWN, J.

The defendant was charged with forgery and being an habitual criminal. He was found guilty by a jury of the crime of forgery, and later found to be an habitual criminal. He was sentenced to imprisonment for not less than 12 years nor more than 15 years.

The evidence for the State established that some time in February 1979, a number of blank checks were stolen from the Morford Co. in Omaha, Nebraska. At about the same time, a wallet belonging to Nikki Morford, and containing her identification cards, was stolen. On February 27, 1979, Jerrine Burge attempted to cash a Morford Co. check payable to Nikki Morford in an Omaha store. The store employee knew the named payee, suspected forgery, and Jerrine Burge was detained and arrested by the police. Jerrine Burge identified the defendant as the one who organized the forgery plan and he was arrested and charged with forgery. Jerrine Burge was processed in juvenile court and later testified at the defendant's trial.

The testimony of Jerrine Burge was that the defendant had developed and carried out a plan to forge and cash checks using false or stolen identification. Defendant delivered a group of forged Morford Co. checks to her on February 27, 1979, together with the identification of Nikki Morford. Jerrine Burge and another woman, identified as Lisa Fant, were driven to various places of business in Omaha that day by Roosevelt Logan. Jerrine Burge entered the places of business, cashed the checks, and gave the money received to Lisa Fant up until the occasion on which she was arrested. When the trip was completed they were to return to the defendant's

apartment and the proceeds were to be divided with him. The several Morford Co. checks that were cashed that day, including the one on which the charge was based, were introduced into evidence. They were all identical except for the check number.

Another witness, Barbara Dunkle, testified that, on January 27, 1979, she had cashed several checks for the defendant under a similar plan and scheme and under his instructions, and that she had also cashed some checks together with Jerrine Burge on February 9, 1979, again under the defendant's instructions and following the same plan of operation. The checks cashed on these two occasions were also introduced and received into evidence as a group.

The defendant testified in his own defense and testified that the guilty person was Roosevelt Logan, and that the defendant had refused to participate in the plan and had had no part in it. The jury found the defendant guilty and this appeal followed.

The defendant contends that the introduction of other checks into evidence was erroneous and prejudicial. The defendant relies upon the general rule that evidence of other crimes is not ordinarily admissible and relies upon section 27-404 (2), R. R. S. 1943: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The trial court admitted the other checks into evidence for the limited purposes of showing plan, method, modus operandi, scheme, motive, intent, and design. While there were numerous checks, there were only three separate groups of virtually identical checks, cashed in three separate chains of events. All the checks in each group of checks were

identical as to maker, payee, payor, amount, and date. Only the check numbers were different.

Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. Evidence which is not sufficiently related is excluded on the ground that the probative value is outweighed by the risk of undue prejudice. State v. Williams, ante p. 56, 287 N. W. 2d 18 (1979).

Evidence of other crimes similar to that charged is relevant and admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Morosin, 200 Neb. 62, 262 N. W. 2d 194 (1978).

In a forgery case involving a patterned plan of operation, evidence of prior similar acts committed within 1 month before the act charged is relevant. The evidence here clearly established intent, preparation, plan, knowledge, and identity. Even the method of carrying out the plan in each of the three instances was virtually identical.

The action of the trial court is admitting the other checks in evidence for the limited purposes for which they were received cannot be said to be an abuse of discretion. The judgment of the trial court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERALD DEAN CROUCH, APPELLANT.

290 N. W. 2d 207

Filed March 18, 1980. No. 42849.

1. **Criminal Law: Evidence: Trial: Reopening Case.** A motion to reopen a criminal case to allow introduction of further evidence is addressed to the sound discretion of the trial court.

2. **Criminal Law: Sentences.** A sentence imposed within the limits of the statute will not generally be disturbed absent an abuse of discretion.
3. **Trial: Evidence: Appeal and Error.** Generally where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Robert Sullivan of Haessler, Sullivan & Inbody, for appellant.

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

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

WHITE, J.

The defendant appeals from a jury verdict of guilty to a violation of section 28-324, R. S. Supp., 1978, and from a sentence of from 10 to 20 years in the Nebraska Penal and Correctional Complex. He assigns three errors: (1) The court erred in admitting into evidence a statement of the defendant made while in the Cedar City, Utah, jail; (2) the court erred in refusing to allow defendant to refute certain testimony of a prosecution witness; and (3) the sentence was excessive.

The evidence supporting the verdict by the jury shows the following: On the evening of March 23, 1979, the defendant and Sidney VanLaningham stayed overnight at the home of VanLaningham's sister in Lincoln, Nebraska. Between 3:30 and 4 p.m. on March 24, 1979, they left the sister's house and drove to Ashland, after picking up Sidney's brother, Mark, in Saunders County, to the home where VanLaningham's estranged wife lived with her children. The three remained for about an hour, left for other errands, and returned to the VanLaningham home. Jeannine VanLaningham, Sidney's

wife, testified that the defendant was present at her home at least as late as 8 p.m. that evening. Both Mark and Sidney VanLaningham testified that at the VanLaningham home, the three discussed raising money. The defendant was acquainted with Luther Winget, an elderly man who lived alone in Ashland. The parties determined to rob Winget. With the defendant, Jerald D. Crouch, driving, the three drove to within a half block of the Winget home. Sidney and the defendant walked to the front door of the home while Mark waited in the car. Sidney and Mark are each afflicted with a disease that causes night blindness so Sidney was guided by defendant Crouch to the front door. Sidney carried a leg from an end table from the VanLaningham home, which was recovered at the Winget home, and identified as such by Mrs. VanLaningham. After knocking at the Winget door, and answering "Yes" to Winget's question "Is that you, Ben?" the parties, Sidney in the lead, forced their way into the house where Sidney, shoved by the defendant, fell on Winget and searched for Winget's wallet, which he found and kept. While Sidney was on top of Winget, the defendant at least twice kicked Winget in the face, told him to stay down, and fled. Sidney testified that in leaving he was not guided by the defendant but he could see a streetlight and headed for the light. The parties then drove to Lincoln, the defendant and Sidney each taking part of the $288 taken from Winget. Mark did not receive any of the money. Two days later, the parties left for California after being informed by Sidney's sister that the police were seeking them.

Sidney and the defendant were arrested in Cedar City, Utah. Several days later, Ronald Osborn, an investigator with the Nebraska State Patrol, arrived in Cedar City. Sidney was taken from his cell, advised of his rights by Osborn, and gave a statement implicating himself and the defendant but omitting

any reference to his brother, Mark. Sidney testified that the defendant threatened Sidney because he believed Sidney was cooperating with the police.

The defendant, on being advised of his rights, refused to give a statement and was returned to his cell. The defendant and Sidney were placed in adjoining cells and a conversation ensued within hearing of Officer Osborn who was waiting in another room for an officer to take him back to his motel. In the conversation, Crouch implicated himself in the robbery and threatened to have Sidney killed if the story were not changed when they returned to Nebraska.

The defendant asserts that the admission of this testimony of Osborn was error since the defendant had previously refused to give a statement in the absence of counsel. The cases he cites do not support his contention. He cites Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and Brewer v. Williams, 430 U. S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). We merely point out that those cases concern statements deliberately elicited from a defendant, after indictment (Massiah), or after judicial proceedings had commenced (Brewer). There is absolutely no evidence to suggest that the statement was elicited from the defendant by surreptitious means or by interrogation or that the statement was other than voluntary. The contention is without merit. Even if the court erred in admitting Osborn's statement, it was harmless error. The threats were also testified to by Sidney VanLaningham. Generally, where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission. Meyer v. Moell, 186 Neb. 397, 183 N. W. 2d 480 (1971).

The second assignment relates to the order of the trial court refusing to allow the defendant to testify on surrebuttal. In its case-in-chief, the State intro-

duced evidence that Sidney VanLaningham had night blindness and could not see at night. The defendant testified in his own behalf and offered, in effect, an alibi as to his whereabouts at the time of the crime. The alibi was not corroborated. On rebuttal, Sidney VanLaningham testified that he could not see well enough to drive at night and, therefore, the inference that he drove from Lincoln to Ashland or in Ashland was not true. After the State again rested, counsel for the defendant asked leave to withdraw his rest and to again call the defendant who would be expected to testify that on the trip to Utah, Sidney VanLaningham drove at night. The trial court declined to allow the defendant to withdraw his rest. In its ruling, the trial court said: "Now the evidence which you propose to show by your rebuttal simply augments evidence which already appears in the record and which was available to the defendant and to which he testified indirectly at the time that he appeared on the stand. * * * I am going to overrule the Motion."

A motion to reopen a criminal case to allow introduction of further evidence is addressed to the sound discretion of the trial court. Blair v. State, 72 Neb. 501, 101 N. W. 17 (1904); State v. Pratt, 197 Neb. 382, 249 N. W. 2d 495 (1977); State v. Keith, 189 Neb. 536, 203 N. W. 2d 500 (1973). The denial of the motion to reopen cannot be said to constitute an abuse of discretion. The assignment of error is without merit.

The last assignment is also without merit. The sentence of from 10 to 20 years is well within the limits of the penalty provided in section 28-105, R. S. Supp., 1978, of from 1 to 50 years.

The crime was brutal. Defendant has previously been placed on probation for breaking and entering and has twice served sentences in county jails for breaking and entering and for possession of marijuana paraphernalia. Since the sentence imposed did not constitute an abuse of discretion and it is

within the limits of the statute, it must be affirmed. State v. Freeman, 201 Neb. 382, 267 N. W. 2d 544 (1978).

The judgment and sentence are affirmed.

AFFIRMED.

EMIL FUCHSER, APPELLEE, V. MYRON JACOBSON, APPELLANT.

290 N. W. 2d 449

Filed March 25, 1980. No. 42602.

1. **Animals: Trespass: Statutes.** Enclosed pastureland planted to grass is cultivated land for the purposes of animal trespass statutes.
2. **Negligence: Statutes.** Violation of statutes regarding trespassing livestock and restraining of bulls and other specified male animals is at least evidence of negligence and may be considered as such by the trier of facts.
3. **Animals: Damages.** The measure of damages for a purebred cow impregnated by a trespassing or unrestrained bull of scrub or inferior quality is the difference in the value of the cow immediately before impregnation and the value of the cow immediately following such impregnation.
4. _____: _____. The fact that the impregnating bull is a purebred bull does not affect the measure of damages if he is not of the same breed as the cow.
5. **Appeal and Error.** The judgment of the trial court in a law action has the effect of a jury verdict and should not be set aside unless clearly wrong.

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

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

Michael T. Varn, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY and HASTINGS, JJ., and CLARK and FAHRNBRUCH, District Judges.

CLARK, District Judge.

In an action for damages caused by the impregnation of plaintiff's purebred Hereford cow by defend-

ant's trespassing purebred Angus bull, the Small Claims Court of Sheridan County found for the plaintiff in the amount of $300 with costs taxed to the plaintiff. On appeal, the District Court for Sheridan County, Nebraska, found for the plaintiff in the amount of $400 and costs. Defendant appeals. We affirm the judgment of the District Court.

Plaintiff, a breeder of purebred Hereford cattle, maintained his cows in a fenced pasture which had previously been farmed and which was at the time of the incident planted into crested wheat grass. This pasture adjoined land owned by the defendant. By agreement, it was the obligation of defendant to maintain part of the fence which separated the pasture containing plaintiff's cows from land owned by the defendant.

In May 1977, plaintiff found one of defendant's Angus bulls in plaintiff's pasture contesting one of plaintiff's purebred Hereford bulls for the favors of one of plaintiff's purebred Hereford cows which was in heat at the time. Defendant does not contest this fact, nor the fact that, following the normal gestation period, the cow in question gave birth to a white-faced black calf. Testimony was received that such a calf could only be the product of cross-breeding of the cow with a black Angus bull. Defendant does not seriously contest the fact that the calf was the result of impregnation by his Angus bull. There was no evidence of any other black bull having access to the cow in question.

Testimony was received that the value of a purebred cow, maintained for breeding purposes, would be reduced to the value of a commercial cow upon knowledge that it had been impregnated by a bull which was not a purebred animal of the same breed. Plaintiff testified that the value of the cow before breeding by defendant's bull was $1,200 and that her value after breeding was approximately $600. Other expert testimony was received to the effect that the

value of defendant's cow as a purebred was in a range of from $700 to $2,000, but that her value as a commercial grade cow during the period in question was approximately $300 to $400.

Defendant conceded that the part of the fence which it was his obligation to keep in repair was not in good condition, needed repair, and, further, that dirt had piled up so as to cover the fence in some places. The state of disrepair had been brought to defendant's attention by plaintiff, who had offered to help defendant repair it. Defendant also testified that the fence was insufficient to restrain a bull, although he also stated he did not think any ordinary fence was sufficient.

Defendant further testified that his bulls were not ordinarily kept on the land adjoining plaintiff's pasture, but were kept in a location further removed and were fenced in by an electrified "hot wire" which admittedly often failed to function due to shorting out of the electrical power.

Defendant assigns as error that the District Court erred in: (1) Finding that the defendant failed to restrain his animal and in disregarding the obligation of the plaintiff to take adequate safeguards, and (2) its assessment of damages.

This matter originated in Small Claims Court where no formal pleadings are required. On appeal, it was tried de novo to the court without a jury pursuant to statutes. §§ 24-526 and 24-527, R. R. S. 1943. Inasmuch as no specific theories of recovery are required to be pleaded in Small Claims Court, that court's decision must be affirmed by the District Court if it can be founded on any theory supported by the evidence.

"Generally, at common law the owner of domestic animals is under an absolute duty to keep them restrained on his own property, and is liable for their trespasses on the land of another person. The rule applies whether the lands trespassed upon are

cultivated, inclosed [sic] or uninclosed. . . .

"Under the general rule the liability of the owner for damages resulting from trespasses committed by his animals upon the lands of others is absolute, and depends in no degree upon the question of his negligence. . . ." 3A C. J. S. Animals, § 241, p. 752. See, also, Fiene v. Robertson, 184 Neb. 668, 171 N. W. 2d 179 (1969).

"The common-law liability of owners of trespassing animals may be modified by statutes . . . limiting the liability to trespasses on particular types of land." 3A C. J. S. Animals, § 242, p. 754, citing Randall v. Gross, 67 Neb. 255, 93 N. W. 223 (1903).

Nebraska's statute on liability for damages to owners of trespassing animals modifies the common law liability only in that it restricts liability to trespasses on "cultivated lands." § 54-401, R. R. S. 1943. Section 54-408, R. R. S. 1943, defines "cultivated lands" to "include all forest trees, fruit trees and hedgerows planted on such lands, also all lands surrounded by a plowed strip not less than one rod in width, which strip shall be plowed at least once a year." See, also, Randall v. Gross, *supra*.

Defendant conceded in oral argument before this court that, if the lands involved in this case were cultivated lands within the meaning of section 54-408, the defendant would be liable for damages. Defendant maintains that the pasture involved was not "cultivated" land because it was not surrounded by a plowed strip not less than one rod in width. The pasture was fenced and had been planted to wheat grass.

This court has held that the provision calling for a plowed strip is meaningful only when applied to the wild and unreclaimed prairie land of the state. It is not applicable to fenced or enclosed farm or pasture land. Brown v. Sylvester, 37 Neb. 870, 56 N. W. 709 (1893); Fiene v. Robertson, *supra*; Delaney v. Errickson, 10 Neb. 492, 6 N. W. 600 (1880). Trespass

under the statute has even been held to apply to open city lawns, Lingonner v. Ambler, 44 Neb. 316, 62 N. W. 486 (1895), and to land which had previously been planted to corn with the stalks of the corn being used for forage, Angus Cattle Co. v. McLeod, 98 Neb. 108, 152 N. W. 322 (1915).

Plaintiff's pasture was "cultivated land" within the meaning of the statute and defendant's argument to the contrary must fail.

Further, Nebraska statutes specifically provide that the owner of any bull (and other specified male animals) shall restrain the same and shall be liable for damages for failure to do so. The duty imposed by this statute is not restricted to "cultivated lands." § 54-304, R. R. S. 1943.

Under the statutes, as under the common law, the burden of restraining domestic animals is placed squarely upon the owner and ordinarily no excuse for failure to restrain them is recognized. In Fiene, for example, the defendant's cattle trespassed on plaintiff's cultivated land and consumed hay stacked thereon. The court held that plaintiff could properly recover whether or not trespass was willful and whether or not plaintiff was negligent in maintaining a division fence between the properties.

Although, obviously, an argument might be made for strict liability in this case under the Nebraska statutes, it is not necessary to make that decision here. As previously noted, since this case was tried on very informal pleadings from Small Claims Court, no specific theory of recovery was alleged, and any theory of recovery supported by the evidence is sufficient for affirmance.

The statutes in question impose a duty regarding restraint of bulls and trespassing cattle. Violation of the duty imposed by statutes is evidence of negligence and may be considered as such by the trier of facts. Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870 (1956); Floridia v. Farlee, 201 Neb. 39,

266 N. W. 2d 204 (1978).

Here, in addition to the violation of duties required by statute, there was evidence which could show negligence on the part of the defendant in relation to maintenance of his part of the pasture fence and also in regard to the known malfunctionings of the "hot wire" fence maintained by the defendant.

Defendant's contentions that plaintiff was guilty of contributory negligence or assumption of risk by pasturing his cows in the enclosed field is not supported by the record. Plaintiff had the right to use his pasture without being required to erect a fence strong enough to keep out trespassing or unrestrained bulls.

The trial court was correct in its finding of liability on the part of the defendant.

The only question now remaining is that of damages. Defendant maintains that the damages were speculative in that there was an insufficient showing that plaintiff's cow would have borne a purebred calf, or any calf, even if she had not been impregnated by defendant's bull. This is immaterial inasmuch as the proper measure of damages in a case of this type is the difference between the value of the cow as a purebred registered Hereford for breeding purposes immediately before the defendant's bull serviced her and the value of the cow immediately after impregnation by defendant's bull. Hall v. Umiker, 87 S. D. 362, 209 N. W. 2d 361 (1973); Annotation: Measure and elements of damages, in action other than one against a carrier, for conversion, injury, loss, or destruction of livestock, 79 A. L. R. 2d 677, 708; Madison v. Hood, 207 Iowa 495, 223 N. W. 178 (1929); Burleigh & Jackson v. Hines, 124 Ia. 199, 99 N. W. 723 (1904).

Defendant argues that the measure of damages set out above should apply only when impregnation is by inferior or scrub bulls and that, inasmuch as defendant's bull was a purebred Angus, should not

apply in this case. Evidence was adduced to the effect that a calf produced by a purebred Angus bull and a purebred Hereford cow would have no value in the purebred market and would be the same as a calf sired by a scrub or inferior bull. Defendant's argument is not persuasive and cannot be sustained.

The trial court's finding as to the damages incurred by the plaintiff was well within the values testified to and is correct.

The judgment of the trial court in a law action has the effect of a jury verdict and should not be set aside unless clearly wrong. Ineba Ranch v. Cockerill, 201 Neb. 592, 271 N. W. 2d 44 (1978).

The judgment of the District Court is correct in all respects and is affirmed.

AFFIRMED.

HASTINGS, J., concurs in result.

STATE EX REL. NEBRASKA NURSES ASSOCIATION, A NONPROFIT CORPORATION, AND DARLENE CORDING, APPELLEES, V. STATE OF NEBRASKA BOARD OF NURSING, AND PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANTS.

290 N. W. 2d 453

Filed March 25, 1980. No. 42606.

1. **Mandamus.** The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. § 25-2156, R. R. S. 1943.
2. **Mandamus: Statutes.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act: (1) The duty must be imposed by law; (2) the duty must still exist at the time the writ is applied for; and (3) the duty to act must be clear.
3. **Courts: Justiciable Issue.** Courts of this state are not permitted to give advisory opinions but can only declare the law and its application to a given set of facts when a justiciable controversy is presented for the determination of the court.

4. **Courts: Constitutional Law: Justiciable Issue.** Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Peremptory writ of mandamus vacated. Cause remanded with directions.

Paul L. Douglas, Attorney General, Marilyn B. Hutchinson, and Paul E. Hofmeister, for appellants.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Johnson, Koukol & Fortune, P.C., for appellees.

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

MCCOWN, J.

This proceeding, brought by the Nebraska Nurses Association and Darlene Cording, an individual registered nurse, sought a peremptory writ of mandamus requiring the Attorney General to file an action in the appropriate court to determine the constitutionality and validity of section 71-1,132.11 (15), R. S. Supp., 1978. The District Court for Lancaster County, Nebraska, issued a peremptory writ of mandamus against Paul L. Douglas, Attorney General for the State of Nebraska, commanding him to initiate an action pursuant to section 84-215, R. S. Supp., 1978, in order to determine the constitutionality of section 71-1,132.11 (15), R. S. Supp., 1978. The Attorney General has appealed.

In 1975, subsection (15) was added to section 71-1,132.11, as a portion of L.B. 422, section 6. L.B. 422 amended numerous sections and repealed several sections of Chapter 71, article 1, dealing with the practice of nursing. Subsection (15) requires that the Board of Nursing shall: "(15) Develop rules

and regulations in cooperation with the Board of Examiners in Medicine and Surgery governing the expanding role of the professional nurse, and implement such rules and regulations. Such rules and regulations shall provide for the kind of functions the nurse would be able to perform, under what circumstances such function would be performed, and the necessary educational and clinical preparation needed to do so; * * *."

The Board of Nursing drafted a set of general rules regulating the practice of nurses in expanded roles and held public hearings on the proposed rules. The general rules created a new title and classification of registered nurses entitled "Advanced Registered Nurse Practitioner," and also authorized and provided for the creation of additional specialty subclassifications of certified advanced registered nurse practitioners, and established qualifications for such newly created classifications of professional nurses. The general rules also included provisions for violations and penalties and fees for certification and licensing.

The general rules were submitted to the Attorney General for his consideration as to the statutory authority and constitutionality of such rules and his approval or disapproval under the provisions of section 84-905.01, R. R. S. 1943. On February 23, 1978, the Attorney General, by letter, advised the Board of Nursing: "We are returning the above rules without our approval. We have concluded that the Board does not have authority to make them." The Attorney General cited the general rule that the Legislature may not delegate legislative powers to an administrative agency and stated: "We have concluded that in this case the Legislature has left to the Board of Nursing and the Board of Examiners in Medicine and Surgery the determination of what the law shall be. They have not thereby acquired authority to do so."

Because the rules and regulations were not approved by the Attorney General, they were not filed with the Secretary of State and the Revisor of Regulations and, therefore, have not become effective. See § 84-902, R. S. Supp., 1978, and § 84-906, R. R. S. 1943.

The record establishes that the Board of Nursing has worked consistently to implement its concept of what subsection (15) authorized. The District Court found that "The State Board of Nursing has failed to implement or further develop the rules and regulations required pursuant to this statute by reason of a Nebraska Attorney General's written opinion to the effect that such statute is unconstitutional." The District Court also found that the Attorney General had a duty to file an action to determine the constitutional validity of subsection (15), and entered a peremptory writ of mandamus against the Attorney General commanding him to initiate an action pursuant to section 84-215, R. S. Supp., 1978, in order to determine the constitutionality of section 71-1,132.11 (15), R. S. Supp., 1978. The Attorney General has appealed.

Section 84-215, R. S. Supp., 1978, provides: "When the Attorney General issues a written opinion that an act of the Legislature is unconstitutional and any state officer charged with the duty of implementing the act, in reliance on such opinion, refuses to implement the act, the Attorney General shall, within ten working days of the issuance of the opinion, file an action in the appropriate court to determine the validity of the act. * * *."

In the case now before us, the relators, Nebraska Nurses Association, a nonprofit corporation, and Darlene Cording, an individual registered nurse, allege no special standing or right to bring this action except that they represent a body of registered professional nurses. The action is brought under the provisions of section 25-2156, R. R. S. 1943, which

provides in part: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." The writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent. To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act: (1) The duty must be imposed by law; (2) the duty must still exist at the time the writ is applied for; and (3) the duty to act must be clear. State ex rel. Blome v. Bridgeport Irr. Dist., *ante* p. 97, 286 N. W. 2d 426 (1979).

In the present case, any duty of the Attorney General to act, insofar as filing a court action is concerned, stems from section 84-215, R. S. Supp., 1978, and unless a clear duty to act exists under the terms of that statute, the writ of mandamus should not issue. The first requirement of the statute is that the Attorney General shall have issued a written opinion that an act of the Legislature is unconstitutional. In this case no opinion as to the constitutionality of subsection (15) was ever requested by anyone; the Board of Nursing simply drafted a set of rules and regulations under its own concept of what subsection (15) authorized and presented those rules to the Attorney General for his approval or disapproval as required by section 84-905.01, R. R. S. 1943. That section requires the submission of rules of an administrative agency to the Attorney General for his consideration "as to the statutory authority and constitutionality" of such rules.

It is difficult to determine whether the Attorney General's disapproval letter was based upon statutory or constitutional grounds and whether it was directed primarily to the particular rules and regu-

lations adopted or was directed at the language of subsection (15). On its face, the Attorney General's letter does not express the opinion that any act of the Legislature is unconstitutional, although there is the implication that if subsection (15) were interpreted to authorize the adoption of the rules and regulations proposed, some portions of the section might constitute an unconstitutional delegation of legislative power.

To interpret section 84-215, R. S. Supp., 1978, as applicable to the opinion of the Attorney General in this case would mean that whenever the Attorney General disapproved proposed rules of any administrative agency because the rules were beyond the statutory and constitutional limits authorized by the enabling act of the Legislature, the Attorney General would then be required to file a court action to test the validity of the entire act which authorized the making of the rules and regulations. The other available alternative is to leave the administrative agency to its remedy of bringing an action against the Attorney General seeking a determination as to whether his disapproval of the proposed rules was valid or invalid. The latter procedure would limit the case to the narrow issues in controversy rather than involve broad issues of constitutionality as to which there may be no justiciable controversy.

It is doubtful that the Attorney General's letter of February 23, 1978, constituted a written opinion that section 71-1,132.11 (15), R. S. Supp., 1978, was unconstitutional. In any event, the record here is clear that no officer charged with the duty of implementing the act ever refused to implement it, nor even that any officer failed to implement it "in reliance on such opinion." The District Court did not find that the Board of Nursing had refused to implement the act in reliance upon the letter but only that the board had failed to implement or further develop the rules because of the opinion letter.

Section 84-215, R. S. Supp., 1978, specifies the conditions which must exist before the Attorney General has a duty to file an action to determine the validity of a legislative act. The record here fails to establish that those conditions existed in this case. Unless the duty to act is clear, the issuance of a peremptory writ of mandamus is not authorized. See State ex rel. Blome v. Bridgeport Irr. Dist., *supra*.

This court has repeatedly held that courts of this state are not permitted to give advisory opinions but can only declare the law and its application to a given set of facts when a justiciable controversy is presented for the determination of the court. Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913 (1965). The latest succinct statement of those principles is set out in American Fed. of S., C. & M. Emp. v. State, 200 Neb. 171, 263 N. W. 2d 643 (1978): "The courts of this state decide controversies and are not empowered to render advisory opinions." This court has also said: "Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes. Its power to declare an act of the Legislature unconstitutional arises only when it affects a right of a litigant in such a case." Ritums v. Howell, 190 Neb. 503, 209 N. W. 2d 160 (1973).

The Board of Nursing and the Attorney General are joint defendants and not adverse parties in this case. No justiciable dispute is established by this record, nor is there any showing as to how the right of any relator is adversely affected. The peremptory writ of mandamus issued by the District Court is vacated and the cause is remanded to the District Court with directions to dismiss.

PEREMPTORY WRIT OF MANDAMUS VACATED.
CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. FRANK B. SVOBODA, APPELLEE, V. NORMAN H. WEILER, APPELLANT.

290 N. W. 2d 456

Filed March 25, 1980. No. 42616.

1. **Mineral Estates: Property: Taxation.** A mineral interest is real estate and when severed from the surface ownership must be separately listed on the tax rolls in the name of the owner.
2. _____: _____: _____. When requested by the owner of surface rights, the county assessor must separately list the severed mineral interests in the names of the owners of such interests.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

Patrick B. Hays, Deputy Keith County Attorney, for appellant.

Firmin Q. Feltz, for appellee.

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

WHITE, J.

In this case, the relator filed suit in the District Court for Keith County, Nebraska, for a peremptory writ of mandamus directing the county assessor of Keith County, Nebraska, to add to the real estate tax rolls of Keith County, Nebraska, and place a value thereon, all severed mineral interests of real estate lying within the boundaries of Keith County. The trial court issued its peremptory writ of mandamus requiring respondent, the county assessor, to add to the real estate tax rolls of Keith County, Nebraska, all severed mineral interests in which Freedom Farms, Inc., was the owner of the surface rights, and directing that said real estate be listed on or before January 1, 1978, at 12:01 a.m. so the same could be assessed for tax purposes as required by section 77-1301, R. R. S. 1943. The respondent appeals. The relator does not cross-appeal. We affirm.

A brief statement of the facts is necessary. In 1975 the relator purchased 7½ sections of land in

Keith County, Nebraska. Said land was conveyed to Freedom Farms, Inc., a corporation owned by the relator. In 1960, the prior owners of the land conveyed by mineral deed to one Asa L. Henson, 63/64ths of the mineral interests in and to the real estate. Subsequently, Asa L. Henson conveyed to 57 others, by mineral deed, various interests in and to the mineral interests beneath the 7½ sections. By stipulation, the parties admit that relator had made demand on the respondent for the listing of the mineral interests on the tax rolls of Keith County, Nebraska, and that the respondent had refused to do so.

Section 77-201, R. R. S. 1943, provides in part: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, * * *."

Section 77-103, R. R. S. 1943, defines real property: "The terms real property, * * * shall include * * * mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, * * *."

Section 77-1317, R. R. S. 1943, provides in part: "It shall be the duty of county assessors to cause all lands and improvements in their respective counties that, for any reason, have not been assessed or have escaped taxation for any former year * * * to be placed upon the tax list * * *."

We have previously said that a mineral interest is real estate. In Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N. W. 75 (1918), it is stated: "It was conceded at the argument that the owner of land holds from the center of earth to the sky, and that he may subdivide his estate laterally, conveying the right to the surface only to one individual, and reserving the right to the minerals to himself with power of disposal. * * *

"Whatever view may be taken in some states with reference to the nature and character of such an in-

strument and of the right to remove minerals from the land, the legislative definition prevails, and the property must be considered as real estate." See, also, Conway v. County of Adams, 172 Neb. 94, 108 N. W. 2d 637 (1961).

Therefore, it is obvious that the mineral interests conveyed by deed are real property under Nebraska law, and the assessor is bound by the statutes to assess that property. It follows that the judgment of the trial court requiring the assessor to separately list and tax said mineral interests was correct. This appears to be the view of the majority of jurisdictions that have passed on this issue. Wolfe County, & c v. Beckett, & c, 127 Ky. 252, 105 S. W. 447 (1908); Sims v. Vosburg, 43 N. M. 255, 91 P. 2d 434 (1939); Bilby v. Wire, 77 N. W. 2d 882 (N. D., 1956); Graciosa Oil Co. v. Santa Barbara, 155 Cal. 140, 85 Cal. Rptr. 545, 99 P. 483 (1909); Texas Company v. Daugherty et al., 107 Tex. 226, 176 S. W. 717 (1915); *Contra,* State v. Shamblin, 185 Okla. 126, 90 P. 2d 1053 (1939). The commentators agree that mineral interests should be taxed to the holder of the interest. See, 4 Summers, Oil and Gas, c. 26, § 784, p. 372, which refers to section 57-227, R. R. S. 1943. This section indicates: "* * * provides that a mineral or royalty interest in land is not affected by a lien for taxes against any other estate or interest in the land or minerals owned by another person. From this provision it must be concluded that separate estates in oil, gas and other minerals are assessed and taxed separately from the land itself."

Although evidence was introduced with respect to value, the court made no finding thereon and we make none. We merely point out the duty of the assessor to list real estate under the statute. The value to be placed thereon is a separate and distinct question to be determined initially by the assessor.

Finding no error in the record, we affirm.

AFFIRMED.

HASTINGS, J., participating on briefs.

GLENN A. PETTIS, APPELLANT, V. CORLEE A. LOZIER, APPELLEE.

290 N. W. 2d 215

Filed March 25, 1980. No. 42646.

1. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. **Adverse Possession: Words and Phrases.** Claim of right or of ownership means hostile and these terms describe the same element of adverse possession.
3. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law.
4. _____. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

William E. Pfeiffer of Spielhagen, Pfeiffer, Miller & Weingarten, Associates, for appellant.

Kutak Rock & Huie, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and MARTIN, District Judge.

MCCOWN, J.

The plaintiff brought this action to quiet title to certain land in Douglas County, Nebraska, based upon a claim of adverse possession. The defendant denied the allegations of adverse possession and claimed record title under certain warranty deeds. The District Court for Douglas County sustained the defendant's motion for summary judgment and

dismissed the plaintiff's petition.

The only evidence received at the hearing on the motion for summary judgment was the deposition of the plaintiff. That evidence and the pleadings establish that the land involved consists of approximately 8 acres of timber and grazing land located north of the city of Omaha in Douglas County, Nebraska. In January 1966, the plaintiff purchased land adjacent to the land in question. Plaintiff had a survey made at the time he purchased his property and knew that the land involved in this action was not owned by him. Plaintiff had some knowledge of adverse possession. He observed that the land appeared to be abandoned; that no one had come onto the property nor done anything to maintain or enhance it; and that brush, thickets, and trees were encroaching upon the grazing areas. He testified that he set out to acquire legal title to the property by adverse possession and that he formed the intent to obtain title to the land by means of adverse possession on August 13, 1967.

During 1966 and until August 1967, plaintiff and one Harold Halstead had used the land together. Plaintiff had grazed goats on the property, cut brush and firewood, and dumped trash in the gullies to stop erosion. Halstead had grazed horses there. Some time in 1967, plaintiff ordered Halstead off the land and Halstead complied. In October 1967, the plaintiff began referring to the land as his own. Since October 1967, plaintiff has maintained the old fences and built new fences on the property; has kept livestock on the property, including goats, horses, sheep, and some geese; and kept movable sheds on the property as livestock shelters. He has cut weeds, brush, and trees; seeded brome grass; and planted pine trees. He cut down dead trees and used the trees as firewood. He dumped trash in the gullies to stop erosion and stored and kept various vehicles on the property. He posted signs forbidding

hunting and attempted to keep trespassers off the property. Since 1973, plaintiff has kept a hive of bees on the property.

In the late 1960's, he refused a real estate agent access to the property to show it to prospective customers and told the agent the property was not for sale. In 1974, he removed "For Sale" signs which a real estate agent had placed on the property when the defendant listed the property for sale. In 1978, the plaintiff ordered a surveyor off the property when the surveyor attempted to survey the land for the defendant.

In 1973 or 1974, the plaintiff learned that the defendant was the record holder of the property involved and that the taxes were paid. The plaintiff made no attempt to communicate with the defendant, although he testified that he did not care if the defendant knew that he was claiming the property and occupying and using it. Plaintiff has never paid any taxes on the property but taxes have been paid by the defendant.

The District Court sustained defendant's motion for summary judgment on the ground that there was no question of fact involved and that the plaintiff, as a matter of law, did not hold the property in question under a claim of ownership which was adverse to the defendant. The District Court dismissed plaintiff's petition and this appeal followed.

The only essential issue on this appeal is whether or not the plaintiff held the property in question under a claim of ownership. Plaintiff contends that he has occupied and used the property under a claim of ownership and that summary judgment should have been denied because there are issues as to material facts because the defendant has denied plaintiff's allegations of fact. The defendant, on the other hand, contends that because the plaintiff knew that the property was owned by the defendant or, at least, was not owned by the plaintiff, the plaintiff's

possession and use of the property was not under a "claim of ownership," which is one of the necessary elements to be proved in a case of adverse possession.

We believe the cases of Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976), and 200 Neb. 450, 264 N. W. 2d 186 (1978), are dispositive of the issues here. In both appearances of that case in this court we quoted 3 Am. Jur. 2d, Adverse Possession, § 96, p. 177: "Terms such as 'claim of right,' 'claim of title,' and 'claim of ownership,' when used in this connection, mean 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. * * * Thus, 'claim of right' means no more than 'hostile' and if possession is hostile it is 'under a claim of right.' "

In both of the Barnes cases we quoted from Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331 (1957), and pointed out that adverse possession is founded upon the intent with which the occupant held possession and can best be determined by his acts.

In the first Barnes v. Milligan decision, we said: "It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete." (Quoting Purdum v. Sherman, *supra.*)

The record at this stage in the case now before us establishes an intention to appropriate and use the land as plaintiff's own, and establishes a "claim of ownership" which was adverse to the defendant. Adverse possession does not depend upon the remote

motives or purposes of the occupant, nor upon whether his motivation is guilty or innocent. 3 Am. Jur. 2d, Adverse Possession, § 104, p. 188. This court expressed the same thought in an early case. See Fitzgerald v. Brewster, 31 Neb. 51, 47 N. W. 475 (1890).

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. "Claim of right" or "of ownership" means "hostile" and these terms describe the same element of adverse possession. Barnes v. Milligan, 200 Neb. 450, 264 N. W. 2d 186 (1978).

The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976).

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CARVAN D. JACKSON, APPELLANT.

290 N. W. 2d 458

Filed March 25, 1980. No. 42773.

1. **Criminal Law: Right to Counsel: Evidence: Confessions.** The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time.
2. _____: _____: _____: _____. The failure of police to notify counsel who represents the accused, when they have knowledge of the fact of such representation, will not render a statement made

by accused inadmissible where the record reveals a voluntary relinquishment and waiver by the accused of his right to have counsel present during a custodial interrogation.

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

Alan L. Plessman, for appellant.

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

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

BRODKEY, J.

Defendant, Carvan Jackson (Jackson), was charged in a multicount information with committing the offenses of: (1) Assault with intent to rob; (2) use of a firearm to commit a felony; and (3) shooting with intent to kill, wound, or maim. He was convicted of all the aforementioned offenses after trial to the jury; and was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a term of 2 years on the first count; for a term of 3 years on the second count, said sentence to be served consecutively to the sentence imposed for count one; and for a term of 3 years on the third count, to be served concurrently with the sentences imposed on the first and second counts. Furthermore, credit was given for 129 days spent in custody prior to sentencing, and costs of the action were taxed to Jackson. He has appealed those convictions to this court. We affirm.

In the early afternoon hours of December 12, 1978, two men entered a liquor store in Lincoln, Nebraska. In the store at that time were the manager of the store, a customer, and a liquor salesman. One of the two men produced a handgun and ordered the manager to open the cash register. As the manager was walking toward the register, he was shot by the man holding the weapon. Even though he

was wounded, the manager attempted to open the cash register. However, these attempts proved futile because the register locked shut. Shortly thereafter, someone in the store yelled "let's go" and the two men left the store without taking anything.

The police were summoned and their investigative efforts uncovered footprints in the vicinity of the liquor store which led to a nearby residence. The person who lived in the first floor apartment of the residence allowed the police to enter and conduct a search of the apartment. A handgun was found in the bedroom of the apartment. This weapon was later tested and found to be the weapon used to wound the manager of the liquor store.

Among the various persons found in the apartment at the time of the search was defendant Jackson. He was placed under arrest following the discovery of the weapon. Prior to his transfer to the police headquarters, Jackson volunteered a statement to one of the policemen: "[W]e did it, we're the ones who did it. We were the ones that you are hunting for." Jackson was then transferred to the police headquarters where he later made a statement to the police.

A lineup concerning this case was conducted subsequent to the day of the robbery. At that time, the police department was informed that Jackson was being represented by counsel. On December 19, 1978, Jackson made a statement to Detective Richard Kohles of the Lincoln Police Department that it was his idea to rob the liquor store. The evidence as to whether Jackson was advised of his Miranda rights and whether he waived his right to have counsel present at the December 19, 1978, interrogation was conflicting. The aforementioned statements made by Jackson were introduced at trial by the State. Testimony of the persons inside the liquor store at the time of the robbery and of other persons

in the neighborhood of the liquor store at the time was also adduced at trial. On the basis of the evidence presented at trial, the jury found Jackson to be guilty on all three counts. Sentencing was imposed as previously set forth.

Jackson thereafter appealed, assigning as error the trial court's failure to exclude the testimony of the police officers with reference to statements made by him to those officers. Specifically, counsel for Jackson contends that statements taken during interrogation of "in-custody" defendants after the police or prosecution are aware that defendant is represented by counsel are involuntary and inadmissible unless defendant's counsel first grants permission to the police to hold the interrogation.

In this case the State moved for summary affirmance pursuant to Rule 20-A (2), Revised Rules of the Supreme Court, 1977, on the ground that that issue had not been raised in Jackson's motion for a new trial presented in the trial court. We denied this motion but ordered the appellant and appellee to supplement their briefs, and to address the issue of whether the rule announced in People v. Arthur, 22 N. Y. 2d 325, 292 N. Y. S. 2d 663, 239 N. E. 2d 537 (1968), should be held to be the law of this state. They have done so, and we now examine that issue.

In People v. Arthur, *supra*, a pre-Miranda case, the New York Court of Appeals reversed a conviction of attempted murder in the second degree. In that case it appears the defendant was arrested by police near a river and immediately confessed that he had thrown his son into the river. Defendant was then taken to police headquarters where he was interrogated by the police, after which a written statement was prepared. Defendant signed this statement at approximately 6:45 p.m., 1¼ hours after the crime occurred. It further appears that an attorney who had represented the defendant in another mat-

ter became aware of the arrest and went to police headquarters to advise the defendant. The attorney arrived at approximately 6:20 p.m. and informed the police of the attorney-client relationship between him and the defendant. However, he was not allowed to contact the defendant until after the statement had been signed. Following his meeting with the defendant, the attorney instructed the police that the defendant should not be further interrogated. The next day, the defendant made incriminating statements during an interrogation conducted outside his attorney's presence and without his attorney's knowledge. He was convicted at the trial in which those statements were introduced. The conviction was reversed by the Court of Appeals, which stated: "[I]n enunciating the fundamental right of the accused to be represented by counsel, we painted with broad strokes. Thus, in *People v. Donovan,* Judge Fuld, speaking for the court, stated at * * * [13 N. Y. 2d 148, 151, 243 N. Y. S. 2d 841, 843, 193 N. E. 2d 628, 629 (1963)]: '[W]e are of the opinion that, quite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel * * *, not to mention our own guarantee of due process * * *, require the exclusion of a confession taken from a defendant, during a period of detention, after his attorney had requested and been denied access to him' (accord *People v. Failla,* 14 N. Y. 2d 178, 180 [250 N. Y. S. 2d 267, 269, 199 N. E. 2d 366, 367 (1964)]).

* * *

"[T]he principle which may be derived from the pre-*Miranda* (*Miranda v. Arizona,* 384 U. S. 436 [86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)]) cases is that, once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the

accused's right to counsel attaches; and this right is not dependent upon the existence of a formal retainer.

* * *

"Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney of the defendant's right to counsel (*People v. Vella,* 21 N. Y. 2d 249 [287 N. Y. S. 2d 369, 234 N. E. 2d 422 (1967)]). There is no requirement that the attorney or the defendant request the police to respect this right of the defendant." See, also, People v. Cunningham, 49 N. Y. 2d 203, 424 N. Y. S. 2d 421, 400 N. E. 2d 360 (1980), which extended protection to a defendant who had requested representation by legal counsel but was not yet represented.

We note in passing that the Court of Appeals clearly based the Arthur rule on the New York Constitution and not on the United States Constitution. "*Arthur's* requirements exceeded those of the Warren Court decisions, so that by the twilight of the Warren era in the late sixties, the New York Court of Appeals could properly claim that '[t]he right to counsel in this State has had a rich development under the State's Constitution.' " Galie, State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978, 28 Buffalo L. Rev. 157 (1979), quoting People v. Blake, 35 N. Y. 2d 331, 361 N. Y. S. 2d 881, 320 N. E. 2d 625 (1974). See, also Kelder, Criminal Procedure, 30 Syracuse L. Rev. 15 (1979).

In Nebraska, we have previously had the opportunity to examine this issue and argument in a case factually similar to the instant case, and have rejected it. In State v. Moore, 189 Neb. 354, 202 N. W. 2d 740 (1972), this court stated: "The application which the defendant argues for would be an extention or enlargement of the doctrine of Miranda. The

defendant's position is that if the defendant has an attorney, either retained or appointed, then there may be no interrogation of the defendant even if there has been no prior in-custody interrogation or attempts to interrogate. This position in substance amounts to the contention that once counsel is appointed or has been retained there can be no waiver unless it be by counsel or in his presence.

"Miranda does not go that far."

We further stated that although the rule might someday be extended as requested in State v. Moore, *supra*, we did not feel a compulsion to be among the first of the courts to so extend those rights. We are still not persuaded that our rule should be changed at this time. There has been little acceptance of the Arthur rule outside New York. Even in that jurisdiction, there appears to be a disagreement as to the extent of the rule. See, for example, People v. Kaye, 25 N. Y. 2d 139, 303 N. Y. S. 2d 41, 250 N. E. 2d 329 (1969), where a spontaneous statement to a police officer was held to be admissible.

Also, so far as we have been able to ascertain, the Supreme Court of the United States has not as of this date adopted the New York position on this issue. In Brewer v. Williams, 430 U. S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), the court stated: "There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. [Citations omitted.] But its basic contours, which are identical in state and federal contexts, [citations omitted], are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — 'whether by way of formal charge, preliminary hearing, in-

dictment, information, or arraignment.'

* * *

"The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not."

The circuit courts have also declined to adopt the Arthur rule. See, United States v. Monti, 557 F. 2d 899 (1st Cir., 1977); United States v. Barone, 467 F. 2d 247 (2d Cir., 1972); United States v. Crook, 502 F. 2d 1378 (3d Cir., 1974), cert. den., 419 U. S. 1123, 95 S. Ct. 808, 42 L. Ed. 2d 823 (1975); United States v. Springer, 460 F. 2d 1344 (7th Cir., 1972), cert. den., 409 U. S. 873, 93 S. Ct. 205, 34 L. Ed. 2d 125 (1972); Coughlan v. United States, 391 F. 2d 371 (9th Cir., 1968), cert. den., 393 U. S. 870, 89 S. Ct. 159, 21 L. Ed. 2d 139 (1968); United States v. Brown, 569 F. 2d 236 (5th Cir., 1978).

Other state courts have also declined to follow New York's rule. See, Pierce v. State, 235 Ga. 237, 219 S. E. 2d 158 (1975); Lamb v. Commonwealth, 217 Va. 307, 227 S. E. 2d 737 (1976).

We therefore refuse to adopt the Arthur rule as the law of this state. Jackson's appeal is based on the alleged failure of the trial court to suppress statements made by him to police officers. As earlier stated, the evidence with reference to whether Jackson was advised of his constitutional rights and whether he waived those rights was conflicting. When evidence is conflicting on a motion for suppression of evidence, the decision upon the motion is for the trial court and will not be reversed on appeal in the absence of an abuse of discretion by the court. State v. Weinacht, 203 Neb. 124, 277 N. W. 2d 567 (1979); State v. Harig, 192 Neb. 49, 218 N. W. 2d 884 (1974). See, also, State v. Williams, *ante* p. 56, 287 N. W. 2d 18 (1979). After reviewing the record, we find that no abuse of discretion occurred here and

that the decision of the trial court must be sustained.

There appearing to be no error requiring reversal of this case, the judgment and sentence of the trial court must be affirmed.

AFFIRMED.

KRIVOSHA, C. J., and WHITE, J., concur in result.

FIRST STATE BANK, HICKMAN, NEBRASKA, APPELLANT, V. NORMAN L. PETERSON, APPELLEE.

290 N. W. 2d 634

Filed April 1, 1980. No. 42615.

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

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded.

Teresa K. Luther of Luther & Beaurivage, for appellant.

Ronald Rosenberg of Rosenberg & Yungblut, for appellee.

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

BOSLAUGH, J.

This is a suit on an unconditional guaranty agreement executed on October 26, 1973, by the defendant, Norman L. Peterson. The agreement unconditionally guaranteed prompt payment of any notes or other indebtedness of the Hickman Lumber and Mercantile Co., Hickman, Nebraska, to the plaintiff bank. The guaranty agreement provided that it was applicable to any and all notes made at any time by

the debtor, and that the bank might, without notice to the guarantor, elect the specific notes, indebtedness, or liability to which the guaranty would apply and from time to time change its election. The liability of the defendant under the guaranty agreement was limited to $12,000.

On October 31, 1973, the bank loaned $12,000 to the lumber company. The principal amount of the lumber company's total indebtedness to the bank on that date was $16,000, none of which was secured by the pledge of any collateral. Thereafter, the bank advanced additional amounts to the lumber company until the total indebtedness was in excess of $60,000. Some of the later notes were secured by a security interest in the lumber company's inventory.

On April 2, 1976, the lumber company was in default on its obligations to the bank. On that date, the bank and the lumber company stipulated that the bank could take possession of the inventory of the lumber company and, in the event the indebtedness of the lumber company was not paid by April 30, 1976, the bank could sell the inventory and apply the proceeds to the indebtedness. The inventory was sold at public auction on June 5, 1976, and the proceeds from the sale in the amount of $12,744.05 were applied to the indebtedness of the lumber company which was then in excess of $48,000.

The bank did not give notice of the sale of the inventory to the defendant.

This action was commenced on July 30, 1976. The trial court found that the plaintiff's failure to comply with the rule stated in DeLay First Nat. Bank and Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N. W. 2d 745 (1976), barred its recovery on the guaranty agreement. The plaintiff has appealed.

In the DeLay case we held that a guarantor was a debtor within the meaning of section 9-504 (3), U. C. C., and that a creditor who failed to give reasonable notification of the sale of collateral to the guarantor

was barred from recovering a deficiency judgment against the guarantor. It is undisputed in this case that the bank did not give notice of the sale of the inventory to the defendant.

The plaintiff argues that where, as in this case, the guaranty agreement did not contemplate the taking of security by the bank and the debtor has not been prejudiced by the disposal of the collateral, the failure to give reasonable notification of the sale to the guarantor is not a defense.

The DeLay case involved a corporate debtor and a guarantor who was the sole stockholder and chief executive officer of the debtor corporation. The bank and the debtor corporation were engaged in a floor-plan financing plan in which all obligations of the debtor to the bank were secured. The bank disposed of the collateral without complying with the notice requirements of section 9-504 (3), U. C. C., as to either the debtor corporation or the guarantor.

In this case, no security interest in collateral existed or was contemplated at the time the guaranty agreement was made. The $12,000 loan on October 31, 1973, to the principal debtor, the lumber company, was made in reliance upon the guaranty.

The rights of the principal debtor, Hickman Lumber and Mercantile Co., are not involved. The collateral was sold at public auction pursuant to the agreement with the principal debtor and there is no suggestion of commercial unreasonableness in the sale. The indebtedness appears to have far exceeded the value of the collateral and there is no evidence of prejudice to the guarantor in its disposition.

Under section 3-606, U. C. C., a guarantor who is a party to the instrument is discharged by an unjustifiable impairment of collateral which was given "by or on behalf of the party or any person against whom he has a right of recourse" only to the extent that the impairment occurred without the consent of the party. It is a general rule of suretyship that a

surety is discharged only pro tanto by any wrongful loss or release of security. See Pierce v. Atwood, 64 Neb. 92, 89 N. W. 669 (1902); Restatement of Security, § 132 (1941).

In a number of cases it has been held that an absolute guarantor is not discharged by a loss of security. See, First Nat. Park Bank v. Johnson, 553 F. 2d 599 (9th Cir., 1977); Nation Wide, Inc. v. Scullin, 256 F. Supp. 929 (D. N. J., 1966), aff'd. 377 F. 2d 554 (3d Cir., 1967); A & T Motors, Inc. v. Roemelmeyer, 158 So. 2d 567 (Fla. App., 1963); F. Mayer Boot & Shoe Co. v. Dickerson et al., 11 La. App. 457, 123 So. 493 (1929); Fegley v. Jennings, 44 Fla. 203, 32 So. 873 (1902). See, also, American Bank of Commerce v. Covolo, 88 N. M. 405, 540 P. 2d 1294 (1975). In Home Savings Bank v. Shallenberger, 95 Neb. 593, 146 N. W. 993 (1914), an absolute guarantor was held liable even though the bank had allowed a lien upon cattle, given to secure the note, to expire, thus depriving the guarantor of any right of subrogation. This court approved an instruction which stated in part that any negligence or failure on the part of the bank to follow up and take the mortgaged property was no defense to an action upon the guaranty.

Under the facts and circumstances in this case, we believe the failure of the bank to give notice of the sale of the inventory to the defendant was not a defense to an action upon the guaranty agreement.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

KRIVOSHA, C. J., not participating.

FRED A. LOCKWOOD, APPELLANT AND CROSS-APPELLEE, v. CONNIE L. LOCKWOOD, APPELLEE AND CROSS-APPELLANT.

290 N. W. 2d 636

Filed April 1, 1980. No. 42670.

1. **Witnesses: Fees.** A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness' fee.
2. **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.
3. **Divorce: Alimony: Property: Appeal and Error.** The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of that discretion, will not be disturbed on appeal.
4. **Divorce: Child Support.** In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent; the status, character, and situation of the parties; and attendant circumstances thereof.
5. _____: _____. Other than ordering child support payments, the trial court cannot award any specific property belonging to the parent to a child as child support.

Appeal from the District Court for Scotts Bluff County: ROBERT R. MORAN, Judge. Affirmed as modified.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Wright & Simmons and John A. Selzer, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY and HASTINGS, JJ., and FAHRNBRUCH and CLARK, District Judges.

BRODKEY, J.

This matter involves an appeal by Fred A. Lock-

wood (Fred) and a cross-appeal by Connie L. Lockwood (Connie) from a decree entered by the District Court for Scotts Bluff County, Nebraska, dissolving the marriage of the parties; distributing the property of the marriage; and awarding child support, alimony, attorney's fees, and witness' fees. We affirm as modified.

The parties were married on September 3, 1961. The record does not indicate the amount of property which the parties possessed at the time they entered into this union. However, both parties attained post-secondary education degrees shortly before the marriage, Fred receiving a bachelor of science in business administration and Connie receiving a nursing certificate. Two children, Jon Thorval and Tracy Ann, were born as issue of the marriage on November 21, 1963, and December 29, 1969, respectively. The care and custody of these children were placed in Connie with reasonable rights of visitation to Fred, which award is not involved here.

During the marriage, the parties prospered financially. Some time in the early part of 1964, Fred began practicing as a certified public accountant. His practice grew over the years and he eventually became associated with a statewide accounting firm. Fred became a partner in that firm in July 1969 and remained a partner until January 1977, at which time he withdrew from the partnership and again started his own practice. Shortly thereafter, Fred formed a partnership with two other accountants. At the time of trial, his ownership interest in the partnership was 78 percent.

Connie does not appear to have contributed monetarily to the marriage to the extent that Fred did. She devoted her time to the task of being a mother, although she did work as a nurse early in the marriage and from the time the parties separated in 1978 until the time of trial.

Evidence with reference to the aforementioned background, as well as to the value of the various assets of the marital estate, was adduced at trial. The evidence presented was, in some respects, conflicting and such evidence as is necessary to resolve the assignments of error in this matter will be set out in the discussion of the respective assignments. On the basis of the evidence adduced, the trial court, in its decree, after dissolving the marriage and awarding custody of the children to Connie subject to rights of visitation, ordered Fred to pay child support in the amount of $300 per month per child until the child dies, marries, attains majority, or becomes self-supporting or until further order of the court; and to pay the medical, dental, and prescription eyeglass expenses of the children. The court also ordered that Fred should have all the property of the parties except the life insurance on Connie's life, the residence and the household goods and furnishings therein, and the 1974 Pontiac, all of which were assigned to Connie. The court ordered Fred to pay all the debts except those on Connie's life insurance policies and further ordered Fred to retain his ownership interests in the children's life insurance policies, to immediately pay the loans on them, not to borrow on them in the future, to pay the premiums thereon, and to assign the policies to the children when his support obligation terminates. The court also ordered that, in lieu of further division of property, Fred should pay to Connie $66,775 in 10 annual installments of $6,677.50, with interest at 8 percent per annum on the unpaid balance, payments to commence on May 1, 1979, and to continue on the first day of May of each year thereafter until paid, with the privilege to prepay the principal in whole or in part at any time. In addition, the court, in its decree, ordered that commencing April 1, 1979, and on the first day of each month thereafter for a total of 121 months, Fred shall pay Connie alimony through

the clerk of the court in the sum of $1,100 per month. The court also ordered Fred to pay the sum of $2,000 to apply upon Connie's attorney's fees and also to pay the costs of trial, including expert witness' fees in the sum of $1,100 for Connie's expert witness, George Blundell, an accountant, as well as appraiser's fees for Connie's appraiser in the sum of $275.

Fred has prosecuted this appeal from that decree, making two assignments of error in his brief: (1) That it was error to tax the accountant's and appraiser's fees as costs; and (2) that the total award to Connie and the children was excessive. Connie has cross-appealed, claiming: (1) That the trial court undervalued Fred's interest in an accounting partnership; (2) that the trial court undervalued Fred's stock in a certain closely-held corporation; (3) that the trial court should have ordered interest to be attached to any unpaid installment payments; and (4) that the further property division should have been made payable within 10 years. We first examine the errors raised in Fred's appeal.

Fred contends that the trial court erred in taxing Connie's accountant's and appraiser's fees as costs to Fred. It has long been the rule that a witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness fee. See, Anderson v. State, 184 Neb. 467, 168 N. W. 2d 522 (1969); Hefti v. Hefti, 166 Neb. 181, 88 N. W. 2d 231 (1958); Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387 (1952); § 33-139, R. R. S. 1943.

In this action, the accountant who was Connie's expert witness testified that the accounting firm of which he was a partner was employed by Connie to examine certain documents furnished to Connie by Fred in preparation for trial. These documents dealt with the financial status of the various marital assets and were, in large part, accepted as evi-

dence at trial. He testified that the documents were examined in preparation for the accountant's testimony as a witness in the dissolution proceedings and also testified as to the value of the services rendered. From this testimony, we conclude that there was a contract for those services and that the taxing of the accountant's fees in the amount of $1,100 as costs was proper.

The same may be said for the cost of the appraisal of the marital residence and of certain farm property. Section 42-367, R. R. S. 1943, provides, in part: "When dissolution of marriage or a legal separation is decreed, the court may decree costs against either party and award execution for the same, * * *." The fees for appraising the family residence and the farm property were taxed as costs in the amount of $275. While no oral testimony was adduced from the appraiser, it is clear that the person was under an obligation to Connie to use his expertise in valuing the house and the farm property. The appraisal reports received in evidence contained the amount of his charges. We reject Fred's first assignment of error.

Fred next contends that the total award to Connie and the children was excessive and therefore error. Fred apparently concedes that the provisions of the decree with reference to child support, alimony, and property distribution, when taken individually, are not unreasonable. However, it is his contention that when those three provisions are examined together, the total award becomes excessive and unreasonable. Section 42-365, R. R. S. 1943, provides, in part: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of

the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of that discretion, will not be disturbed on appeal. Falcone v. Falcone, 204 Neb. 800, 285 N. W. 2d 694 (1979); Phillips v. Phillips, 200 Neb. 253, 263 N. W. 2d 447 (1978).

With the foregoing rules in mind, we now consider the reasonableness of the decree entered herein. It should be noted at the outset that the worksheet used by the trial court in determining the property distribution was given to the parties and is included in the record on appeal. The parties do not dispute the values placed on the various items, with the following exceptions: (1) The value of the accounting partnership; (2) the value of stock in a closely-held corporation; and (3) the value of Fred's interest in a family partnership owning certain farm land. We therefore limit our remarks to these items.

Fred contends that his interest in the accounting practice was valued in excess of its true worth by the trial court. Connie contends in her cross-appeal that his interest was undervalued. The value of the assets was determined as of December 31, 1977, a date not disputed by either party. Furthermore, the sole issue of dispute was the value of the goodwill of the practice. Fred and his expert witness both indicated that the goodwill of the practice would be in the $60,000 to $65,000 range. Connie's expert witness valued Fred's share of the goodwill of the practice (85 percent of the total) at between $284,257 and $361,913. The trial court valued the goodwill at $300,000. In Boroff v. Boroff, 204 Neb. 217, 281 N. W. 2d 760 (1979), we stated: "While in a divorce action the case is to be tried de novo, this court will give

weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Patton v. Patton, 203 Neb. 638, 279 N. W. 2d 627 (1979). Obviously a trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given the greater weight in arriving at a factual determination on the merits. The testimony need not be accepted in its entirety and the trier of fact must use a commonsense approach and apply that common knowledge which is understood in the community." Our review of the evidence in this case convinces us that the determination of the trial court was reasonable, and that the valuation of the goodwill at $300,000 was appropriate.

Connie's cross-appeal on this issue must be considered in the same light. She contends that the value of the goodwill should have been placed at $330,000. However, the value assigned to the goodwill by the trial court was within the range to which Connie's own expert testified. From our review of the evidence, we conclude that the trial judge's decision in valuing the goodwill at $300,000 was reasonable and supported by the evidence. Connie's contention to the contrary is likewise without merit.

Connie next contends that Fred's interest in the accounting practice should have been placed at 90 percent instead of the 85 percent ownership which the trial court found. It is undisputed that Fred owned 85 percent of the accounting practice as of December 31, 1977, the date on which the valuation of all marital assets was based. Connie contends that Fred reduced his ownership interest in an attempt to place property beyond her reach. From a review of the record, we are not convinced that the erosion of Fred's ownership interest in the accounting practice was for a nefarious purpose. Indeed, it would appear to us that Fred diluted his interest for

sound business reasons. We therefore find no merit in Connie's contention.

Finally, Connie contends that Fred's capital account was undervalued by at least $10,000. We believe that this contention does have merit. The trial court valued Fred's capital account at $45,000 by adjusting his capital account as shown by the 1977 partnership tax return for his accounting practice. It should be noted that, during 1977, the accounting practice changed tax periods from a calendar year basis to a tax year beginning October 1. The trial court used the tax return for January 1, 1977, to September 30, 1977, and adjusted Fred's capital account to December 31, 1977, based on that 9-month period. Fred had a capital account of $54,722 on September 30, 1977. On September 30, 1978, Fred's capital account, as shown on the partnership tax return, was $71,058. It would seem that Fred's capital account was somewhere between these two amounts on December 31, 1977. The valuing of the capital account at $45,000 was therefore error. However, such error did not prejudice Connie in this action. At most, the result would be that Fred would receive more than Connie under the property settlement award entered by the trial court. Taking this difference into account, the award entered was clearly within guidelines previously announced by this court, approving an award of one-third to one-half of the marital estate. See, Baker v. Baker, 201 Neb. 409, 267 N. W. 2d 756 (1978), Grummert v. Grummert, 195 Neb. 148, 237 N. W. 2d 126 (1975); Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430 (1967). We therefore reject both Fred's and Connie's claims of error in the valuation of Fred's interest in the accounting practice.

Fred next contends that the valuation placed on the stock of the closely-held corporation was excessive. Conversely, Connie, in her cross-appeal, has contended that the valuation was too low. The trial court valued the stock at $50,000. From our review

of the record, we conclude that this value was reasonable. The value assigned to the stock by the trial court was clearly within the range of values to which the parties adduced evidence and we reject both Fred's and Connie's assignments of error on this issue.

Fred also contends that the property award was in error in the extent to which it determined his interest in a family partnership owning farmland. It is his contention that his ownership interest in the partnership was 25 percent instead of 50 percent as the trial court found. However, it is clear from the partnership tax returns that Fred owned a 50-percent interest on the December 31, 1977, valuation date. Furthermore, the value placed on the farm property by the trial court was clearly within the range of values which each party introduced into evidence at trial. We find no merit in this assignment of error.

Fred also contends that the award with reference to the amount of child support and the disposition of the insurance policies on the children's lives was inappropriate. "In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent." § 42-364 (3), R. R. S. 1943. Other factors which may be considered include the status, character, and situation of the parties and attendant circumstances thereof. Brus v. Brus, 203 Neb. 161, 277 N. W. 2d 683 (1979). In this case, we do not believe that the award was inequitable. Fred is an accountant whose income was never less than $32,000 in the 4 years preceding this action. His income in the year just prior to this action was almost $50,000. In fact, the record reveals that, had he chosen to do so, his earnings could have been much greater for that year. Connie, on the other hand, was shown to have a much lower earning capacity. There is no question that Fred is the party more financially able to provide support for

the minor children. Moreover, the amount awarded was not beyond his ability to pay as shown by the evidence.

Fred also requests this court to eliminate the provisions in the decree with reference to certain life insurance policies on the lives of his children. These provisions require him to continue such policies in effect and, upon the termination of his liability for child support, to turn such policies over to the children. Although he admits that he has found no authority supporting his position in this regard, he points out that the provision in the divorce decree would require him to turn over a portion of his property to his children when they become adults. We agree with his contention in this regard. In 24 Am. Jur. 2d, Divorce and Separation, § 837, p. 949, it is stated: "A divorce court cannot award any part of the father's property to his children. He is obligated to support them, but not to settle an estate upon them. It has also been held that the statutory authority to award money for maintenance of a child does not include the power to require the husband to maintain life insurance for the benefit of a child, since life insurance does not provide food, clothing, housing, or any other necessary during the life of the husband." He admits that, had the insurance been on his life, rather than the lives of his children, it would have been proper for the court to require him to maintain the insurance policies or even take out additional insurance to insure the payment of child support in the event of his death. In this connection see Annotation, Divorce: Provision in decree that one party obtain or maintain life insurance for benefit of other party or child, 59 A.L.R. 3d 9. We believe that the decree should be modified to eliminate the provision with reference to the insurance policies on the children's lives, but wish to point out that it is still possible for the parties to attain that result by their joint agreement.

Finally, Fred contends that the award in its totality was inequitable, especially when compared to other cases reviewed by this court. In this connection, however, we have stated that 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, *supra*. We examine each case on its own facts to determine whether the total award is equitable. Moreover, alimony may be awarded in addition to a property settlement. § 42-366 (6), R. R. S. 1943; Magruder v. Magruder, 190 Neb. 573, 209 N. W. 2d 585 (1973); Baker v. Baker, *supra*. The record reveals that Fred's earning capacity will undoubtedly increase in the future. Connie, on the other hand, faces a limited earning potential. Given the attendant status and circumstances of the parties, we cannot conclude that the award in its totality was unreasonable. Therefore, we reject Fred's assignment of error to the contrary.

Having found no merit to any errors assigned by Fred in his appeal, we now turn our attention to the other errors assigned by Connie in her cross-appeal. She first contends that interest on the unpaid balance of the cash property settlement should have been awarded. We note that such award was made by the trial judge in his decree and we reject this assignment as lacking merit.

Finally, Connie contends that the trial court committed error in not ordering the property settlement installment payments to be completed in less than 10 years. She has cited no authority to show how or in what manner the length of the payment period would, in and of itself, create error. Her sole contention seems to be that the tax consequences of this award will result in Fred's receiving a disproportionate share of the marital assets. Again we note that, in these awards, exact division of the marital assets is impossible. We reject this claim on

the part of Connie.

Having examined the errors assigned by both parties herein, we conclude that the decree entered herein was reasonable and, except as modified herein, should not be disturbed by this court. The judgment is therefore affirmed as modified and Connie is awarded attorney's fees in the amount of $750 for services of her attorney in this court.

AFFIRMED AS MODIFIED.

COUNTY OF MERRICK, APPELLANT, V. HAROLD BECK, APPELLEE.

290 N. W. 2d 642

Filed April 1, 1980. No. 42684.

1. **Statutes: Forfeitures and Penalties.** Statutes imposing a forfeiture or penalty are subject to strict construction and will not be construed to include anything beyond their letter, even though it may be within their spirit.
2. **Statutes: Appeal and Error: Courts.** On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court.
3. _____: _____: _____. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it.

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

Steven M. Curry, Merrick County Attorney, for appellant.

William A. Francis and Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

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

MCCOWN, J.

This is a statutory action under section 77-1509, R. R. S. 1943, for a $500 forfeiture for failure to respond to a subpoena duces tecum issued by the Merrick County Board of Equalization. The county court of Merrick County found the defendant had failed to comply with process and ordered the forfeiture of the statutory sum of $500. On appeal, the District Court for Merrick County, Nebraska, found that the defendant was not technically in violation of section 77-1509, R. R. S. 1943, reversed the judgment of the county court, and dismissed the action. The county has appealed.

On May 13, 1977, the defendant was served with a subpoena duces tecum issued by the Merrick County Board of Equalization pursuant to sections 77-1508 and 77-1509, R. R. S. 1943. The subpoena directed the defendant to appear before the board of equalization on May 24, 1977, and to bring with him and produce "all inventores [sic], book of accounts and Federal income tax returns for the years 1974, 1975 & 1976 for inspection."

The defendant appeared before the board of equalization on May 24, 1977. He was placed under oath and answered all questions put to him by the members of the board of equalization. No record was kept of the meeting, nor were any minutes prepared afterward, and the testimony in the county court is confusing as to what records were produced at the meeting of the board of equalization.

The defendant and his son testified that the defendant had taken the book of accounts and the income tax returns to the meeting and that the documents were returned to the defendant at the meeting. The chairman of the board and other members of the board of equalization could not recall what

specific documents were produced, if any, and did not recall returning any documents to the defendant. The record is reasonably clear, however, that what the board wanted was a complete list of the defendant's depreciable personal property, preferably an itemized depreciation schedule from his federal income tax returns. The defendant explained to the board that the depreciation schedule in his income tax return for 1976, which was under discussion, listed the personal property merely as groups 1, 2, 3, and 4 instead of listing specific items. He testified that his accountant kept the depreciation schedule of specific items and that the defendant himself did not understand the depreciation method used. He also testified that he had given the board everything he had and that he would have to consult with his accountant in Omaha before he would be able to tell the board anything more about it. The defendant then told the board that he would make the itemized listing of depreciable property available to the board, but subsequently declined to do so.

When the defendant advised the board of his refusal to carry out his agreement, the County of Merrick filed this action in the county court. The action was tried to the county court without a jury. The county court found the defendant had failed to comply with process and ordered the forfeiture of the statutory $500. The defendant appealed to the District Court and requested the District Court to take additional evidence. No additional evidence was received and the appeal was tried in the District Court de novo on the record. The District Court found that the defendant was not in technical violation of section 77-1509, R. R. S. 1943, reversed the judgment of the county court, and dismissed the action. The County of Merrick has appealed.

Section 77-1509, R. R. S. 1943, provides in part: "The county board of equalization may issue process to compel the attendance before it of any person

with books, records and papers, if necessary, which process shall be served by the sheriff the same as a summons from the district court, and he shall receive the same fees therefor. Any person who shall fail to respond to such process, or who shall refuse to answer any proper question put to him by the board, shall forfeit the sum of five hundred dollars, to be recovered in a civil action in the name of the county."

The county contends that the District Court failed to consider the fact that the county court observed the witnesses and their manner of testifying and that the judgment of the District Court is clearly against the weight of the evidence. The defendant contends that there is sufficient competent evidence in the record to support the judgment of the District Court.

The dispute in this case is essentially a factual one. There can be no doubt that the subpoena duces tecum did not specifically designate a depreciation schedule nor an itemized list of personal property. The evidence also establishes that the defendant appeared at the time and place specified and answered all questions that were put to him by the members of the board of equalization. It is unclear exactly what records he brought with him, but it is clear that the issue of whether he failed to respond to the subpoena is a factual issue.

Section 77-1509, R. R. S. 1943, is a statute imposing a forfeiture or penalty. Such statutes are subject to strict construction. Statutes imposing penalties will not be construed to include anything beyond their letter, even though it may be within their spirit. 36 Am. Jur. 2d, Forfeitures and Penalties, § 8, p. 615.

On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. State v. Worrell, 198 Neb. 507, 253 N. W. 2d 843 (1977).

Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. Fauss Constr., Inc. v. City of Hooper, 197 Neb. 398, 249 N. W. 2d 478 (1977). There is sufficient competent evidence in the present case to support the judgment of the District Court.

AFFIRMED.

DAVID DENTON, DOING BUSINESS AS DENTON EXCAVATING, APPELLEE, V. CLIFFORD E. NELSON, APPELLANT.

290 N. W. 2d 462

Filed April 1, 1980. No. 42695.

1. **Contracts: Payments.** Where services are furnished to a party and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services.
2. **Statutes: Appeal and Error: Courts.** On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court.
3. _____: _____: _____. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it.

Appeal from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

William C. Stanek of Stanek & Smith, for appellant.

Clarence E. Mock of Johnson & Mock, for appellee.

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

MCCOWN, J.

This is a contract action to recover the balance due under an alleged oral agreement for the construction of certain waterways. As an alternative cause of action the plaintiff sought recovery for the reasonable value of the services under quantum meruit. The case was tried in the county court without a jury. The county court found for the defendant and dismissed plaintiff's petition. On appeal, the District Court found generally for the plaintiff on the cause of action in quantum meruit and entered judgment against the defendant in the sum of $1,621. The defendant has appealed.

The plaintiff is a contractor engaged in earthmoving work. The defendant is the owner of farmland upon which he wished to have certain waterways constructed. The parties were well acquainted and the plaintiff had previously done work for the defendant in bulldozing trees. In 1977, the defendant filed an application with the United States Department of Agriculture requesting federal participation for a waterway project on defendant's land. The project was approved, and the soil conservation service agreed to pay $882 toward the estimated cost of the earthwork for the project. That figure represented 70 percent of the total estimated cost and was computed without reference to any agreements between landowners and contractors. The estimate included only earthmoving within the boundaries of the waterways without reference to any site preparation costs or landscaping.

Plaintiff's testimony was that he entered into an oral agreement with the defendant to construct three waterways on the defendant's land using a Caterpillar bulldozer. The price was to be $40 per hour and there was no discussion about tying the price to

the estimate of the United States Department of Agriculture. The plaintiff testified that he knew the defendant had signed up for the federal program and that the government paid 70 percent of the estimated cost under that program.

The defendant's testimony was that no contract was entered into on the occasion testified to by the plaintiff. Defendant testified that his son had made the preliminary arrangements with the plaintiff to do the work and that the defendant then told the plaintiff to go ahead with the work on the basis of 70 percent from the government and 30 percent from the defendant. The defendant also testified that there was no discussion about an hourly rate, and that he would not have contracted with anyone on an hourly basis.

The plaintiff began construction of the waterways in the fall of 1977, based on oral width and depth specifications given to him by a technician of the United States Soil Conservation Service. Work continued until December 16, 1977, and the work was resumed on March 28, 1978, and completed April 1, 1978. The total job required 109.25 hours, plus 1 hour for equipment moving.

The evidence was in conflict as to the amount of site preparation work which was required and as to the amount of silting which had to be removed. The plaintiff's testimony was that the former waterways, or what was left of them, had completely silted in and that due to the rolling topography of the land, the silt had to be removed and the hillside landscaped before the waterways could be constructed to drain properly. The defendant's evidence was that there was no significant silting and that the work performed by the plaintiff was only shaping up. The evidence was also conflicting as to the reasonable value of the work performed.

The defendant paid plaintiff $300 in November 1977. The defendant's son paid plaintiff $1,200 on

defendant's behalf in December 1977, and the defendant also made a payment of $1,249 in March 1978. On April 3, 1978, plaintiff sent a final statement to defendant showing the sum of $1,663 due. The plaintiff refused payment and this action followed.

Plaintiff's petition in the county court set out two alternative causes of action. The first cause of action was on an oral contract for the performance of the work at an agreed-upon price of $40 per hour. The second cause of action sought recovery for the reasonable value of the services on the basis of quantum meruit. The county court found for the defendant and dismissed plaintiff's petition. The plaintiff appealed to the District Court. The District Court affirmed dismissal of the first cause of action but found generally for the plaintiff on the second cause of action in quantum meruit. The District Court found that the plaintiff constructed the waterways at the specific instance and request of the defendant, which reasonably entailed 109.25 hours of work at the reasonable rate of $40 per hour, resulting in the sum of $4,370 due plaintiff from defendant, less credit for $2,749 previously paid. The District Court entered judgment against the defendant for the sum of $1,621, together with costs.

The defendant contends that on an appeal from the county court to the District Court de novo on the record, where the evidence is in conflict, the District Court should consider the fact that the county court had an opportunity to observe the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other. The plaintiff contends that it is the duty of the District Court to reach an independent conclusion without reference to the decision of the county court, and that the judgment of the District Court is supported by the evidence and is not clearly wrong.

Where services are furnished to a party and know-

ingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. Bush v. Kramer, 185 Neb. 1, 173 N. W. 2d 367 (1969).

On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. County of Merrick v. Beck, *ante* p. 829, 290 N. W. 2d 642 (1980).

There is sufficient competent evidence in the present case to support the judgment of the District Court.

AFFIRMED.

HASTINGS, J., participating on briefs.

JOYCE HALE, APPELLEE, V. ALAN HALE, APPELLANT.

290 N. W. 2d 465

Filed April 1, 1980. No. 42703.

Parent and Child: Child Support. In determining whether a modification of child support is warranted, the circumstances of the parent as well as those of the children must be considered.

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

Paul E. Watts and Gerald E. Moran, for appellant.

Sally Millett Rau of Walsh, Walentine & Miles, for appellee.

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

BOSLAUGH, J.

This is an appeal by the respondent from an order denying his application for a reduction in child support payments.

The marriage of the parties was dissolved on February 3, 1976, at which time the court ordered the respondent to pay alimony of $160 per month and child support of $40 per week for each of the couple's two minor children. On May 25, 1977, upon a joint application of the parties, the decree was modified to eliminate the respondent's alimony obligations after April 1, 1977.

On June 20, 1978, the respondent filed this application for an additional modification of the decree in order to reduce his child support obligation to $100 per month per child. In a reciprocal support act proceeding in Minnesota the respondent had been ordered to pay $100 per month per child from April 1, 1978.

The respondent alleged there had been a material change in circumstances because his income has been reduced since the date of the decree. The trial court found that there had not been a sufficient change in circumstances to justify a modification in the amount of child support and dismissed the application.

In 1975, prior to the dissolution, the respondent's income was $14,229.79. In 1978, his income was approximately $10,812. The respondent contends the decrease in his annual income was a substantial change in circumstances, and that his financial position and ability to meet his support obligations were not adequately considered by the District Court.

Both petitioner and respondent have remarried. The respondent's wife has an annual income of $7,068, plus child support which she receives for the child of her previous marriage. The petitioner is not currently employed but stays at home to care for the infant child of her second marriage. Her hus-

band earns $11,000 to $12,000 annually.

In determining whether a modification of child support is warranted, the circumstances of the parent as well as those of the children must be considered. Bruckner v. Bruckner, 201 Neb. 774, 272 N. W. 2d 270 (1978). It is not advantageous to either party to place the payments for child support beyond the reach or capacity of the father. Bird v. Bird, *ante* p. 619, 288 N. W. 2d 747 (1980).

The decrease in the annual income of the respondent from $14,229.79 to $10,812 was a material change in circumstances. His present child support obligations amount to $4,160 per year, or approximately 40 percent of his current annual income.

As we view the record, the respondent's ability to pay child support does not exceed the sum of $125 per month per child. The decree of dissolution is therefore modified to provide child support of $125 per month per child.

The petitioner is allowed $350 for the services of her attorney in this court.

JUDGMENT MODIFIED.

THE DANISH VENNERFORNING AND OLD PEOPLES HOME, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT AND CROSS-APPELLEE.

290 N. W. 2d 791

Filed April 1, 1980. No. 42706.

1. **Eminent Domain: Damages.** The amount of damages sustained in a condemnation action is peculiarly a question of a local nature and ordinarily is to be determined by a jury. Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.
2. **Eminent Domain: Damages: Interest: Statutes.** One whose property is taken or damaged by a governmental subdivision authorized to institute condemnation proceedings, without an

award being paid into county court prior to the taking or damaging of the property, is entitled to interest as provided for in section 76-711, R. R. S. 1943, from the date of the taking or damaging in the same manner as if the provisions of sections 76-701 to 76-725, R. R. S. 1943, had been followed.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and John E. Brown, for appellant.

Harry H. Foulks and James B. Miller of Farnham, Farnham & Miller, for appellee.

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

KRIVOSHA, C. J.

It has been said that the third time is the charm. At least it so appears to be in this case. This is the third appearance of this matter before this court. For a complete description of the facts in this case, see Danish Vennerforning and Old Peoples Home v. State, 191 Neb. 774, 217 N. W. 2d 819 (1974). In its second appearance before this court, reported at 201 Neb. 233, 266 N. W. 2d 914 (1978), we reversed and remanded the cause to the District Court solely for a determination of damages as of the date of taking, saying: "When property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results."

As a result of our direction in the second case, trial to the court was had a third time in the District Court for Douglas County, Nebraska, and as a result of that trial an award in the amount of $37,500 was entered by the court in favor of the appellee and against the State. The State now appeals from that

verdict maintaining that the evidence was insufficient to sustain the verdict. The appellee has cross-appealed, maintaining that the trial court erred in not granting it interest on the $37,500 from the date of taking, being September 1971. We have examined the record in detail and now conclude that the judgment of the trial court in the amount of $37,500 was correct and is amply sustained by the record and should be affirmed. We likewise find, for reasons more fully set out herein, that the appellee should have been awarded interest from the date of taking and, accordingly, reverse that part of the trial court's order.

Each side called several witnesses who testified as to value. As might be anticipated, the State testified that the value of the property after the taking was virtually the same as it was before the taking and that, therefore, little or no damages were suffered. At least one of the property owner's witnesses testified unequivocally that the value of the property immediately prior to the taking was $45,000 and immediately following the taking was $7,500, thereby reflecting damage in the amount of $37,500. It was obviously that witness which the trial court chose to believe.

The manner of determining the damages, if any, was in exact accord with our directions in the second Danish Vennerforning case and cannot be disputed. The only question that can be raised, and is raised by the State, has to do with the sufficiency of the evidence as it relates to the determination of the damages. The State argues that the evidence presented by the property owner should have been disregarded by the trial court and should likewise be ignored by us on appeal. We have frequently stated in cases of this type that the amount of damages sustained by a landowner is a question of a local nature proper to be determined by a jury of the county, and the Supreme Court ordinarily will not interfere with the

verdict if it is based on the evidence in the case. See Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548 (1968). Likewise, we have said, "The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by a jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong." Harmony Lanes v. State, 193 Neb. 826, 229 N. W. 2d 203 (1975). In this case, a jury having been waived, the judgment of the trial court is accorded the same consideration as that of a jury. V. P. O., Inc. v. Money, 201 Neb. 30, 266 N. W. 2d 79 (1978).

The evidence in this case is obviously in conflict. The State in its brief argues that the landowner's witnesses cannot be believed. There is, however, sufficient evidence in the record from which a jury or, in this case, a trial court could render a judgment in the amount of $37,500. The judgment was not clearly wrong and, therefore, we are obliged to affirm the judgment.

The only question then remaining is the matter of interest. The trial court denied prejudgment interest to the property owner.

The State maintains that the property owner is not entitled to interest because the action was not brought pursuant to the eminent domain statutes, sections 76-701 to 76-725, R. R. S. 1943.

It is true that the action was not commenced initially under the provisions of sections 76-701 to 76-725, R. R. S. 1943. Nevertheless, once the request for injunctive relief was denied, all the parties, and the court as well, considered this to be an action for inverse condemnation. See Danish Vennerforning and Old Peoples Home v. State, 201 Neb. 233, 266 N. W. 2d 914 (1978).

The State believed it had, in fact, acquired the access within the original condemnation, yet paid no

money for the damages to the access.

The property owner was never afforded the rights provided under section 76-711 or 76-719.01, R. R. S. 1943. We see no reason why the landowner should not be accorded the same rights, when the taking or damaging is done outside the provisions of sections 76-701 to 76-725, R. R. S. 1943, as when done in accordance with the statutory provisions, since "[i]t is generally conceded that the recovery of interest is a matter of strict constitutional right." Petersen v. School Dist. of Bellevue, 188 Neb. 354, 196 N. W. 2d 510 (1972). It is further generally conceded that interest must run from the time of taking. See Annotation, Interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property, 36 A. L. R. 2d 443. We therefore now hold that one whose property is taken or damaged by a governmental subdivision authorized to institute condemnation proceedings, without an award being paid into county court prior to the taking or damaging of the property, is entitled to interest as provided for in section 76-711, R. R. S. 1943, from the date of the taking or damaging in the same manner as if the provisions of sections 76-701 to 76-725, R. R. S. 1943, had been followed.

It appears clear to us that the taking or damaging in this case occurred in September 1971, and that interest should be allowed from that date in the amounts provided for in section 76-711, R. R. S. 1943. The judgment of the trial court is affirmed in all respects save as to the matter of interest, and in that regard is reversed and the cause remanded with directions to enter judgment for the amount of interest determined in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. HARRIS, APPELLANT.

290 N. W. 2d 645

Filed April 1, 1980. No. 42713.

1. **Prosecuting Attorneys: Supreme Court: Records: Appeal and Error.** Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of exceptions.
2. _____: _____: _____: _____. Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks.
3. **Appeal and Error: Records.** An assignment of error requiring an examination of evidence cannot prevail on appeal in the absence of a proper bill of exceptions.
4. **Trial: Evidence: Motions, Rules, and Orders: Appeal and Error.** Where the evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the trial court and its decision will not be reversed on appeal in the absence of a showing of an abuse of discretion.
5. **Criminal Law: Identification Procedures.** The determination as to whether the identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures.

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

W. Patrick Betterman and McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

KRIVOSHA, C. J.

The appellant, Robert L. Harris (Harris), was charged in a two-count information. The first count charged that, on or about the 9th day of September

1978, Harris, in the County of Douglas and State of Nebraska, did forcibly and by violence or by putting in fear, take from the personal protection of Jordan Schwening (Schwening) personal property of value, the property of Husky Service Station, with intent to rob or steal. The second count charged that Harris did, at the same time, unlawfully use a firearm in the commission of a felony. To both of these charges a plea of not guilty was entered on behalf of Harris by the court. Thereafter, the case was tried to a jury which returned a verdict of guilty on each count. The trial court accepted the jury's verdict of guilty as to both counts and sentenced Harris to imprisonment at hard labor in the Nebraska Penal and Correctional Complex for an undetermined period of not less than 4 years nor more than 6 years on count I and imprisonment at hard labor for a period of 3 years on count II, said sentences to be served consecutively.

Harris has appealed from that conviction and sentence, maintaining that the trial court committed three errors. The errors assigned are: (1) That the court erred in not sustaining Harris' motion in limine to prohibit the prosecution from arguing in closing argument that an adverse inference against Harris could be drawn from Harris' failure to call a particular corroborating witness; (2) that the trial court erred in refusing to permit Harris to interrogate a prosecution witness as to whether he was wanted for first degree murder in Alabama; and (3) that the trial court erred in not sustaining Harris' motions to suppress both the pretrial lineup identification of Harris by Schwening and one Scott Corder (Corder) and the in-court identification of Harris by Schwening and Corder.

Our examination of the record compels us to reach the conclusion that the assignments of error are without merit and that the judgments and sentences should be affirmed.

On the evening of September 9, 1978, Schwening was working alone at the Husky Service Station located at 65th and Ames Streets in Omaha, Nebraska. At about 10 p.m., a male appeared at the station saying he was having trouble with his car which was parked several blocks away. The male was later identified by several witnesses, including an admitted accomplice, as being Harris. Harris remained in the station for about an hour, during which time he made a telephone call, visited with Schwening, and generally stood around the station.

After Harris had been in the station for approximately 15 or 20 minutes, a second party appeared who was later identified by his own admission as James Wiggins (Wiggins), the accomplice. Wiggins indicated to Schwening that he was waiting for his girl friend to pick him up and remained in the vicinity of the station.

Shortly before 11 p.m., Harris purchased a package of cigarettes and asked Schwening for some change. As Schwening was in the process of making the change, Wiggins returned to the station, pointed a sawed-off shotgun at Schwening, and proceeded to take the cash representing the station's receipts for the evening that Schwening had been carrying in his left front pocket. Harris then searched Schwening and, finding nothing further, reached into the cash drawer and took the loose change kept there.

Harris then placed Schwening in the station's restroom, closed the door, and ordered him to remain there for a while. Harris and Wiggins then left and, after a few minutes, Schwening left the restroom and called the police.

Approximately 2 weeks after the robbery, on September 24, 1978, Schwening was asked by the Omaha police department to look at some mug shots and to view a lineup of eight photographs. Included among the eight photographs was a picture of Harris taken some time earlier while Harris was in the Navy.

Schwening was unable to identify Harris from the photo lineup. An examination of the photos, however, easily discloses that Harris' appearance at the time of the robbery was substantially different from that reflected by the earlier Navy photograph. In the Navy photograph, Harris is wearing a Navy hat. Also, Harris appears clean-shaven. At the time of the robbery, Harris had a mustache and goatee and appeared somewhat older.

On January 4, 1979, Harris was arrested for the robbery and Schwening was asked to come to Omaha police headquarters to view a lineup. The police indicated to Schwening when they asked him to come to the station that they wanted him to view some individuals because they thought they had caught the robber. Schwening identified Harris as the robber during the lineup.

Another pretrial lineup was conducted on February 14, 1979, at which time Corder was asked to view four individuals, including Harris. Corder had been a parking attendant at an Omaha restaurant located immediately adjacent to the filling station. He testified later at trial that he had talked to Harris during the evening, though admittedly there was some confusion as to the exact time. Corder identified Harris as the man he had spoken to in the restaurant parking lot on the night of the robbery.

Trial was commenced in the District Court for Douglas County, Nebraska. During the course of the trial, both Schwening and Corder positively identified Harris as the man involved in the holdup. The prosecution also offered both Schwening's and Corder's pretrial identification of Harris as corroboration of their in-court identification.

Wiggins likewise testified that he and Harris together committed the robbery in question. Prior to Wiggins' testimony, the State filed a motion in limine to direct defense counsel not to attempt to offer evidence that Wiggins was wanted for first de-

gree murder in Alabama. The State's motion in limine was sustained over defense counsel's contention that such evidence was relevant to show Wiggins' bias and interest in the outcome of the Harris trial.

On direct examination, Wiggins testified that he had met Harris for the first time 3 or 4 days prior to the robbery. Wiggins stated that a Paul Sanders or Paul Saunders (Saunders) had introduced him to Harris on that occasion. Harris, on the other hand, testified that he had not met Paul Saunders until several days after the Husky robbery and therefore could not have met Wiggins before the robbery. Neither side called Saunders to testify nor did either side offer any evidence as to whether Saunders was unavailable to testify. Harris' defense was based upon the claim that he was ill and in bed on the date of the robbery.

Immediately before closing argument, outside of the jury's presence, defense counsel moved the court by a motion in limine to direct the prosecution not to argue that an adverse inference against Harris be drawn because he failed to call Saunders. The trial court denied the motion.

At this point, events at the trial become unclear due to the fact that no record was made of what occurred during closing arguments. Defense counsel maintains that, in the closing argument to the jury, the prosecution argued that the jury might draw an adverse inference against Harris because he did not call Saunders as a corroborative witness. Unfortunately, however, the closing argument was not recorded nor was a record made of the facts immediately following the closing argument and after the jury was dismissed. It was not until defense counsel filed his motion for new trial that the matter was raised in its present form. During the motion for new trial, defense counsel attempted to obtain the prosecution's agreement as to what in fact was said

during the closing arguments by both parties. Defense counsel was unsuccessful in obtaining such an agreement as to what was said by the prosecution.

The summary by the parties at the motion for new trial would indicate that the prosecuting attorney made no argument concerning Saunders' absence during the opening portion of his closing argument. Defense counsel then, during his portion of the closing argument, argued that the jury should decide the case on the record only. As an example, he said, it would be improper for the jury to draw an inference adverse to the State for the State's failure to call Saunders to impeach or discredit the testimony of Harris even though the State had the burden of proof, because there was no foundation in the record to establish whether Saunders was available. It was because of defense counsel's suggestion to the jury that no inference should be drawn from the failure to call Harris that the prosecutor made comment. We are unable, however, to determine what the comment was. The most we have is defense counsel's assertion that "the Prosecutor then raised the argument that an adverse inference be drawn to Mr. Harris that Mr. Sanders was not called." That statement, standing alone, hardly tells us what in fact was said or the context in which it was said. Further, the prosecutor does not admit to defense counsel's characterization of what the prosecutor said. As already noted, however, none of this is found in the record and comes about only by reason of the parties' attempting to recollect what was said. The trial court overruled the motion for new trial.

With that background, we then turn to Harris' first assignment of error. While Harris frames the assignment in terms of the trial court's error in not sustaining Harris' motion in limine, in fact he argues that it was error for the prosecution in the closing portion of its final argument to make reference to Saunders' absence even though defense

counsel was the one to first mention that fact in his closing argument. The record before us, such as it is, does not indicate that there was any prejudice to Harris by reason of the court overruling Harris' initial motion in limine. Not all action by a trial court, even if erroneous, justifies a new trial. If the error is harmless, it will afford the defendant no relief. See Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 705 (1967). Even if the trial court should have sustained the motion, a fact we do not now decide, it would not entitle Harris to a new trial. The overruling of the motion did not cause Harris any harm. The prosecution made no comment in his opening portion of the closing argument. The situation, following the State's opening portion of its closing argument, was no different than it would have been had the motion been sustained.

The difficulty arises by reason of the fact that Harris, apparently fearing that the prosecution might yet say something, took it upon himself to introduce to the jury the matter of Saunders' absence in his closing argument.

Whether a prosecutor should be permitted to make comment about a defendant's failure to call a witness in a criminal case is an open question. This court has said in the past that, in an appropriate case, it is proper for counsel to comment on the failure of the opposing side to produce a witness. State v. Heiser, 183 Neb. 665, 163 N. W. 2d 582 (1968). In an extensive law review article entitled Drawing an Inference From the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations, 61 Cal. L. Rev. 1422 (1973), the counterarguments and cases are raised. Perhaps in a case with an appropriate record, we may again address that issue. Unfortunately, this is not that case.

The fact of the matter is that we do not have a record before us which would in any way indicate to us what it was that Harris' counsel said or what the

prosecution said in closing. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon and that the same be made a part of the record by a proper bill of exceptions. Johnson v. Nebraska Public Power Dist., 187 Neb. 421, 191 N. W. 2d 594 (1971); Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865 (1964); Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142 (1957). Much of the difficulty with which we are presently confronted would have been easily eliminated had counsel, at the conclusion of the closing arguments, asked for the court reporter and made an offer of proof. Having failed to do that, we are totally at a loss to know what in fact took place. We are unable to review the alleged error with the record in the state it is in. It is the law in Nebraska that, where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks. State v. Spurgeon, 200 Neb. 719, 265 N. W. 2d 224 (1978); State v. Costello, 199 Neb. 43, 256 N. W. 2d 97 (1977); State v. Godinez, 190 Neb. 1, 205 N. W. 2d 644 (1973). We have likewise held that an assignment of error requiring an examination of evidence cannot prevail on appeal in the absence of a proper bill of exceptions. State v. Pope, 192 Neb. 755, 224 N. W. 2d 521 (1974); State v. Kortum, 176 Neb. 108, 125 N. W. 2d 196 (1963). This record does not permit us to consider the assignment of error and it must be overruled.

We therefore turn to Harris' second assignment of error. Harris concedes that the fact Wiggins was wanted in Alabama for first degree murder does not constitute impeachment evidence contemplated by section 27-609, R. R. S. 1943. Nevertheless, Harris argues that such evidence should have been ad-

mitted for the purpose of impeaching his credibility on the basis of bias and interest in the outcome of these proceedings. Harris urges that such evidence was admissible to show that Wiggins was testifying in hope of being rewarded by the Alabama authorities. There is no evidence to support that claim. The record does not in any manner indicate that any promises had been made to Wiggins by anyone in return for his testimony. The evidence that Wiggins was wanted in another state for an alleged crime was not admissible under any theory and the court's refusal to permit such evidence to be introduced was entirely correct. Harris' second assignment of error is without merit.

We therefore turn to Harris' last assignment of error. In reviewing this assignment of error, we must keep in mind the standard by which such review is conducted. We have frequently held that where the evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the trial court and its decision will not be reversed on appeal in the absence of a showing of an abuse of discretion. State v. Weinacht, 203 Neb. 124, 277 N. W. 2d 567 (1979); State v. Batchelor, 191 Neb. 148, 214 N. W. 2d 276 (1974); State v. Harig, 192 Neb. 49, 218 N. W. 2d 884 (1974).

We have reviewed the entire record, both with regard to the pretrial lineup and the in-court identification, and we are unable to see how it can be said that the trial court's rulings constituted an abuse of discretion.

The determination as to whether the identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures. State v. Joseph, 202 Neb. 268, 274 N. W. 2d 880 (1979). When one considers the totality of the circumstances surrounding the procedures in this

case, one is compelled to conclude that the trial court did not abuse its discretion in allowing the evidence to be considered by the jury.

For all of these reasons, therefore, the assignments of error advanced by the appellant are without merit and the judgment in each count is affirmed.

AFFIRMED.

CLINTON, J., not voting.

DOUGLAS G. GRAY, INCOMPETENT, BY AND THROUGH HIS NEXT FRIEND, JANET A. GRAY, HIS WIFE, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

290 N. W. 2d 651

Filed April 1, 1980. No. 42739.

1. **Workmen's Compensation: Appeal and Error: Judgments: Verdicts.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong and in testing the sufficiency of evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party.
2. **Workmen's Compensation: Burden of Proof.** In a workmen's compensation case, the claimant must establish that the injury for which compensation is sought arose out of and in the course of the employment.
3. **Workmen's Compensation: Employer and Employee.** Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

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

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

BRODKEY, J.

Douglas L. Gray, an incompetent, by and through his wife and next friend, Janet A. Gray, has appealed an order entered by the Nebraska Workmen's Compensation Court which, on rehearing, dismissed his petition for workmen's compensation benefits. We affirm.

The facts giving rise to this action are not in dispute. Douglas L. Gray (Gray) was employed in Omaha, Nebraska, by the State of Nebraska Department of Labor (State) on August 26, 1977. Gray took 4 hours of annual or vacation leave that afternoon for the purpose of purchasing supplies and helping to prepare for a planned zone meeting of the International Association of Personnel in Employment Security (IAPES) to be held at Norfolk, Nebraska, that same evening. IAPES is an organization of persons engaged in community services in the areas of employment security and employment insurance. The organization, as far as is pertinent to this appeal, includes four zones within the State of Nebraska. Each zone is required to have two meetings per year; however, other meetings may be called by the zone chairman or at the request of one-third of the zone members. It does not appear that the meeting to which Gray was traveling was one of the two required meetings. Furthermore, the meeting was characterized by one of the planners as primarily a social event, although it appears there was also a business meeting scheduled for that evening.

Gray and a companion, who also took vacation leave for the afternoon of August 26, 1977, began the trip to the zone meeting. The vehicle they were using developed mechanical problems. While wait-

ing for repairs to be made, the parties consumed an undetermined amount of alcoholic beverages. After the vehicle was repaired, the parties continued the journey, leaving the Omaha area at approximately 4:30 p.m. According to witnesses following the vehicle as it approached the Norfolk area, the vehicle was driven in an erratic manner, crossing the center line of the two-lane highway on several occasions. Shortly thereafter, the vehicle left the traveled portion of the highway and rolled over completely at least once. Gray was found about 60 feet away from the vehicle and his companion was found about 4 feet from the vehicle. It is not definitely known who was operating the vehicle at the time of the accident, but evidence in the record indicates that Gray had been riding as a passenger. Gray sustained a head injury and remained comatose for approximately 3 weeks following the accident. Since that time, his rehabilitation has been rather slow due to what was described by doctors as severe organic brain damage. There is little chance that he will ever be employable in the future.

This action was initiated by Janet A. Gray in the Nebraska Workmen's Compensation Court to recover benefits for her husband's injuries. The State's answer contended that Gray's injuries did not arise out of and in the course of his employment and that Gray was intoxicated at the time of the accident. The Nebraska Workmen's Compensation Court dismissed the petition after finding that the State did not derive a substantial, direct benefit from Gray's attendance at the zone meeting. On rehearing before a three-judge panel of that court, the order of dismissal was affirmed. The panel found that the State did not receive a direct or substantial benefit from Gray's participation in the meeting. One judge dissented on the ground that attendance at IAPES functions was contemplated as an incident of employment and therefore the State derived a

substantial, direct benefit from the activity. Gray has appealed to this court contending that, on rehearing, the Nebraska Workmen's Compensation Court committed reversible error. We therefore turn our attention to those assigned errors.

Gray contends, first, that it was error to find the IAPES meeting to be primarily, if not wholly, for recreational and social purposes. The rule is well established that findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong and that in testing the sufficiency of evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party. See, Keith v. School Dist. No. 1, *ante* p. 631, 289 N. W. 2d 196 (1980); Scamperino v. Federal Envelope Co., *ante* p. 508, 288 N. W. 2d 477 (1980); Newbanks v. Foursome Package & Bar, Inc., 201 Neb. 818, 272 N. W. 2d 372 (1978); Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92 (1977). From our examination of the evidence herein we cannot conclude that the Nebraska Workmen's Compensation Court was clearly wrong in its finding.

The majority of that court found that the meeting was "a primarily social activity," a finding with which the dissenting judge agreed. While it is true that the planners had scheduled a business meeting of Zone I, IAPES, it is likewise true that the meeting was primarily social in nature, as was indicated by the testimony of one of the planners of the meeting. We do not believe that this finding was clearly wrong and therefore reject Gray's claim to the contrary.

Gray next contends that it was error to conclude that the injury did not arise out of and in the course of his employment. Specifically, he contends that the Nebraska Workmen's Compensation Court erroneously limited its review by considering the as-

pects of the zone meeting by itself instead of considering the IAPES organization as a whole in determining whether the State derived a direct and substantial benefit from Gray's activities. Although the dissenting judge accepted that position in his opinion on rehearing, he urged a liberal construction of the law, with which we cannot agree. In a workmen's compensation case, the claimant must establish that the injury for which compensation is sought arose out of and in the course of the employment. § 48-101, R. R. S. 1943. The term "in the course of" refers to the time, place, and circumstances of the accident. See, Mauser v. Douglas & Lomason Co., 192 Neb. 421, 222 N. W. 2d 119 (1974); Reis v. Douglas County Hospital, 193 Neb. 542, 227 N. W. 2d 879 (1975). "The course of employment requirement tests work-connection as to time, place and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment." 1 Larson, Workmen's Compensation Law, § 14.00 (1978). We therefore must focus on the activity which gave rise to the injury for which compensation is claimed and examine that activity by itself to determine whether compensation may be allowed. The majority of the Nebraska Workmen's Compensation Court was correct, on rehearing, in examining only the activity which gave rise to the injury and not examining the overall character of the organization in making its determination of the compensability of the injury.

Attendance at the Zone I, IAPES, meeting was the activity which gave rise to the injury for which compensation was claimed. The Nebraska Workmen's Compensation Court, on rehearing, found that such meeting was primarily social in nature. We have earlier stated that cases related to social and recreational activities often raise matters difficult to resolve. See, Kuethe v. State, 191 Neb. 167, 214 N. W.

2d 380 (1974); Adler v. Jerryco Motors, Inc., 187 Neb. 757, 193 N. W. 2d 757 (1972). The tests to be applied in such cases are stated in 1A Larson, Workmen's Compensation Law, § 22.00 (1978), as follows: "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."

The determination of whether an activity falls within one of the aforementioned three tests is a factual determination to be made by the finder of fact. While it is true that no specific finding was made with reference to the first test, it is likewise true that Gray could not recover under this proposition as the injury unquestionably did not occur on the premises of the employer. As to the latter two tests, the Nebraska Workmen's Compensation Court found on rehearing that Gray attended the IAPES zone meeting without any encouragement or request, express or implied, on the part of the State, and further found that the State did not benefit either directly or substantially from Gray's participation therein.

Such findings cannot be set aside on appeal to this court unless clearly wrong. See, Keith v. School District No. 1, *supra*; Scamperino v. Federal Envelope Co., *supra*. Evidence was adduced at the hearing on this matter which could support the findings made by the Nebraska Workmen's Compensation Court on rehearing.

It is to be noted that the third test as set forth in

1A Larson, Workmen's Compensation, *supra,* and adopted by this State in Kuethe v. State, *supra,* employs the term "substantial, direct benefit." Black's Law Dictionary (5th Ed., 1979) defines "substantial," in part, as: "Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable." That same authority defines the word "direct," in part, as: "Immediate; proximate; by the shortest course; without circuity; operating by an immediate connection or relation, instead of operating through a medium; the opposite of *indirect.*" The term "benefit" is defined there, in part, as: "Advantage; profit; fruit; privilege; gain; interest." We conclude from the evidence in the record that the benefit, if any, to the State of Nebraska was neither substantial nor direct. The evidence indicates that attendance at zone meetings of IAPES served primarily a social function which resulted in little, if any, benefit to the State. Neither administrative leave nor expenses are granted by the department for attendance at IAPES *zone* meetings. Furthermore, testimony adduced from officials of the Nebraska Department of Labor indicated that membership in IAPES was neither expressly nor impliedly required.

Considering the scope and standard of review of this matter on appeal to this court, as we must, we conclude that the judgment of the Nebraska Workmen's Compensation Court on rehearing was correct and that its action in dismissing Gray's petition for compensation benefits was correct, and must be affirmed.

AFFIRMED.

CLINTON, J., not voting.

WAITE LUMBER COMPANY, INC., A CORPORATION, APPELLEE, V. JERRY A. CARPENTER AND SHARON KAY CARPENTER ET AL., APPELLEES, IMPLEADED WITH HUEY LONG CO., INC., A CORPORATION, APPELLANT.

290 N. W. 2d 655

Filed April 1, 1980. No. 42740.

1. **Notice: Presumptions.** The presumption that a letter addressed, stamped, and mailed reached the addressee in the usual course of mails does not arise where it is shown that an incorrect address was used.
2. **Mechanic's Liens: Notice: Statutes.** A failure to serve a notice of the filing of a lien under the provisions of section 52-103, R. S. Supp., 1978, makes such lien void and unenforceable.
3. **Mechanic's Liens: Trial: Appeal and Error.** A mechanic's lien is tried by this court de novo on the record, giving 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 other.

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

Christine J. Law of Atkins, Ferguson, Hahn, Zimmerman & Carney, for appellant.

Leland K. Kovarik of Holtorf, Hansen, Kovarik & Nuttleman, P.C., for appellees Carpenter.

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

HASTINGS, J.

This is an appeal by cross-petitioner, Huey Long Co., Inc. (Huey Long), from a judgment of the District Court in favor of defendants Carpenter, which judgment released and discharged a mechanic's lien filed by Huey Long. Huey Long was a named defendant in the original action between Waite Lumber Company, Inc., plaintiff, and Jerry A. and Sharon Kay Carpenter, defendants, naming as codefendants various parties who claimed liens against the property of the Carpenters. This appeal is from a ruling in favor of the Carpenters on a cross-petition by

Huey Long against the defendants Carpenter. The error assigned is that the trial court erred in finding that no proper notice was given to the Carpenters of the filing of the mechanic's lien by Huey Long, as required by section 52-103, R. S. Supp., 1978. We affirm.

The following facts were stipulated to by the parties. On January 31, 1977, El-Con Corporation, a Nebraska corporation, as contractor (El-Con), and the Carpenters, as owners, entered into a written contract for the construction of a residence on Lot 6, Block 4, Pioneer Plaza Addition to the city of Gering, Nebraska. The contract provided in part that El-Con would supply all necessary materials and labor and would be reimbursed for the same by the Carpenters.

Pursuant to this contract, El-Con ordered from Huey Long casement-type windows and a sliding glass door to be used in the residence property being constructed. The windows and door were shipped from Huey Long and delivered on July 11, 1977, to the premises of the Carpenters. It was stipulated that the fair and reasonable value of the windows and door was $1,914.57, and that the materials supplied by Huey Long to the Carpenters were incorporated in and are now a part of the residence property owned by the Carpenters. This residence property is otherwise known as 1565 K Street, Gering, Nebraska.

There appears in the Scottsbluff telephone directory a Jerry Carpenter whose wife is Norma J. Carpenter, and whose address is 1865 Birch Street, Gering, Nebraska.

On October 25, 1977, a mechanic's lien was timely and duly filed in the office of the register of deeds of Scotts Bluff County on behalf of Huey Long. Also filed on that date was an affidavit of Huey Long's then attorney, which states in part that notice of the filing of the lien was mailed on October 24, 1977, to

Jerry A. Carpenter and Sharon Kay Carpenter at 1865 Birch Street, Gering, Nebraska. This was the correct Carpenter, but the wrong address. The Carpenters deny ever receiving such notice.

There was testimony by Norma J. Carpenter (the wrong Carpenter) that she received a letter "from some lumber company" and after taking a closer look determined that it was for a different Carpenter. She then resealed and returned it to her mailbox, which is a rural box, for the mailman to pick up. On the letter she wrote, "Not at this address, on K Street." She was unable to give any date when this occurred.

Huey Long argues on appeal that where a party who has filed a mechanic's lien sends notice of such filing to the owners of the real property by United States mail, postage prepaid, within 5 days after the last day for filing such lien, that party has complied with section 52-103, R. S. Supp., 1978, and has no other obligation of notice to the owners of the real property. Reliance is on National Masonic Accident Ass'n v. Burr, 57 Neb. 437, 77 N. W. 1098 (1899), for the rule that a letter addressed, stamped, and mailed is presumed to have reached the addressee in the usual course of the mails. Huey Long argues that a presumption arose upon the sending of notice by United States mail with postage prepaid, and such presumption is not overcome by a denial of receipt; rather a denial merely presents a question of fact to be determined. It is contended that the trial court erred in determining that the question of fact on the issue of notice should be resolved in favor of the Carpenters.

In support of this contention, Huey Long relies upon testimony by both Sharon Carpenter and Norma Carpenter that the two households had occasionally received mail intended for the other. Both women would put a notation on the letter showing that it was addressed incorrectly and place the letter

back in the mailbox for the mailman. It is Huey Long's position that the testimony of the two Mrs. Carpenters shows that the "usual course of the mails," as it related to them, involved occasional correction and redirection of mail that was misdelivered to them as a result of having two Jerry Carpenters living in Gering, Nebraska.

It is well established that a letter addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails. National Masonic Accident Ass'n v. Burr, *supra*. This presumption may be rebutted by any relevant evidence; however, positive testimony by the addressee that a letter was not received simply raises a question of fact to be decided by the trier of fact. Miller v. Wehrman, 81 Neb. 388, 115 N. W. 1078 (1908). Although we have never decided this specific question, it seems implicit from the holdings in the earlier cases that the presumption of receipt of mail by the addressee does not arise unless it is shown that the letter was *properly* addressed, stamped, and mailed. Miller v. Wehrman, *supra;* City of Omaha v. Yancey, 91 Neb. 261, 135 N. W. 1044 (1912).

In a case outside our jurisdiction, it was said: "Unless a letter is correctly addressed to the *street, number* and city in which the addressee lives, the usual presumption that it was received will not be entertained." (Emphasis supplied.) Baltimore & O. R. Co. v. Reaux, 59 F. Supp. 969 (N. D. Ohio, 1945). See, also, Pillsbury Co. v. Buchanan, 37 Ill. App. 3d 876, 346 N. E. 2d 386 (1976). The letter to the Carpenters was not properly addressed to the parties to whom it was intended for receipt; therefore the presumption that it reached the Carpenters did not arise.

Huey Long would have this court apply the presumption as a result of the actions of Norma Carpenter when she resealed a letter "from some lumber

company'' and placed it in her rural mailbox. ''Proper address'' is not such a broad term as to encompass the act of an intermediary in writing ''Not at this address, on K Street,'' on a misdelivered letter. Huey Long cites Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 P. 803 (Wash., 1915), for the proposition that the incorrect address is not a fatal defect. However, that case is distinguishable from this one in that the address correction there was made by the postal authorities in the usual course of the mails.

The mechanic's lien statute states, in part: ''Failure to serve notice of lien, if required by this section, shall make such lien void and unenforceable; * * *.'' § 52-103, R. S. Supp., 1978. Service of such notice is of primary importance in establishing the lien. Sherwood v. Tucker, 203 Neb. 56, 277 N. W. 2d 437 (1979).

A mechanic's lien action is tried de novo in the Supreme Court. § 25-1925, R. R. S. 1943; Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc., 193 Neb. 781, 229 N. W. 2d 192 (1975). In a trial de novo, this court 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 other. The Wickes Corporation v. Frye, 202 Neb. 23, 273 N. W. 2d 663 (1979). Considering the case de novo, we find the evidence establishes that the Carpenters did not have actual notice of the mechanic's lien and that Huey Long having failed to meet the notice requirements of section 52-103, R. S. Supp., 1978, its purported lien was void and unenforceable.

The judgment of the trial court is affirmed.

AFFIRMED.

SHIRLEY LAVON BURTON, APPELLEE, V. RICHARD CECIL BURTON, APPELLANT.

290 N. W. 2d 658

Filed April 1, 1980. No. 42754.

1. **Divorce: Property.** The rules for determining the division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Such awards are to be determined by the facts in each case.
2. **Divorce: Alimony: Appeal and Error.** The fixing of alimony rests in the sound discretion of the District Court and will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Divorce: Alimony: Property.** In a proper case, the division of property and the matter of alimony may be considered together.

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

Cunningham Law Office, P.C., for appellant.

Sinor, Blount & Sebby, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage; divided the property; awarded alimony to the petitioner; and awarded custody of the parties' minor daughter to the respondent. The respondent has appealed and contends the award of alimony and the division of the real property was erroneous.

The parties were married on October 20, 1956. They have three children, two of whom have reached their majority. Rhonda Sue, the youngest child, is now 15.

The petitioner is not a high school graduate and has no particular training or skills. During the marriage she worked as a babysitter in her home for several children. At the time of trial she had a

temporary job earning $3.25 per hour.

The respondent has been employed as a postal clerk for over 13 years. At the time of trial his annual salary was approximately $17,000.

The major asset owned by the parties was their home and surrounding acreage. Its appraised value at the time of trial was $69,000, subject to a mortgage in the amount of approximately $36,000. The parties had accumulated household goods which the petitioner valued at $15,000. The respondent estimated their value at $2,000.

The trial court awarded custody of the couple's minor child, Rhonda Sue, to the respondent and awarded him the use of the family residence until Rhonda Sue ceased to live on the property or until June 1, 1983, whichever event occurred first. During this period, the respondent was ordered to keep the premises in good repair and pay all taxes and insurance premiums. Upon the occurrence of either event, the property was to be sold. The remaining encumbrances on the property, the expenses of the sale, and the principal payments on the mortgage made by the respondent between the date of the judgment and the sale were to be deducted from the proceeds of the sale. One-half of the money remaining from the proceeds of the sale was to be paid to the petitioner.

In addition to her share in the proceeds from the sale of the family residence, the petitioner was awarded $9,500 in permanent alimony, payable at the rate of $100 per month, until the sale of the residence, with the balance then due to be paid in full at the time of the sale of the realty. The petitioner was also awarded a few of the household goods.

The respondent contends the trial court should not have awarded alimony to petitioner and that the award which was made was excessive. He further contends that the division of the real property was patently unfair.

The rules for determining the division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. Such awards are to be determined by the facts in each case. Matlock v. Matlock, *ante* p. 357, 287 N. W. 2d 690 (1980). The fixing of alimony rests in the sound discretion of the District Court and will not be disturbed on appeal in the absence of an abuse of discretion. Ulmer v. Ulmer, *ante* p. 351, 287 N. W. 2d 685 (1980). In a proper case, the division of property and the matter of alimony may be considered together. Ragains v. Ragains, 204 Neb. 50, 281 N. W. 2d 516 (1979).

When considered together, we find no error in the division of property and the award of alimony which was made in this case. The alimony which was awarded to the petitioner equalized the division of the property and was not an abuse of discretion by the trial court.

The judgment of the District Court is affirmed and the petitioner is awarded $350 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED W. MYERS, APPELLANT.

290 N. W. 2d 660

Filed April 1, 1980. No. 42839.

1. **Criminal Law: Trial: Witnesses: Mental Health.** Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at, and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion.
2. **Criminal Law: Trial: Juries: Statutes.** Under section 29-2022, R. R. S. 1943, the determination of whether or not a jury should be sequestered during the trial of a criminal case is left to the discretion of the court.

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

Casey & Elworth, 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.

CLINTON, J.

The defendant, Fred W. Myers, was charged with murder in the first degree in having shot and killed his father at their home in Louisville, Nebraska. After a court-entered plea of not guilty, the defendant was tried before a jury, found guilty of murder in the second degree, and sentenced to life imprisonment in the Nebraska Penal and Correctional Complex.

On appeal to this court, defendant contends that the trial court erred in two matters: Failure to sequester the jury during a break in the trial, and allowing a nonexpert witness to give opinion testimony as to the sanity of the defendant. We affirm.

The evidence indicates that on the evening of September 12, 1978, the defendant and his father were both at home. The county sheriff and a deputy came to defendant's house to inform him that his son, John Myers, was going to be placed in a temporary foster home. While John Myers was gathering some of his clothes and personal items, the defendant spoke briefly with the sheriff. He showed the sheriff that his father (John's grandfather) was passed out from drunkenness again, and stated that he would like to have his father committed for treatment of his alcoholism. A short time later, after the sheriff had left and was en route to Cedar Creek, he received a call telling him that there had been a shooting at the Myers home. Upon returning there, the sheriff talked to the defendant and arrested him

without further incident.

The fact that the defendant did shoot his father has never been in issue, since the defendant told both the sheriff and another person about the shooting. However, an issue was raised concerning the sanity of the defendant at the time of the shooting. The defendant claims it was error to allow one of the investigating officers, Sheriff Fred Tesch, to express his opinion as to the sanity of the defendant on the night of the shooting.

The rule in Nebraska has always been that a nonexpert with an intimate personal acquaintance may be allowed to testify as to the sanity or insanity of a defendant. In Torske v. State, 123 Neb. 161, 242 N. W. 408 (1932), the court dealt with a similar problem and stated the following: "Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion." This rule was later approved in Noble v. Sigler, 244 F. Supp. 445 (D. C. Neb., 1964), aff'd. 351 F. 2d 673, cert. den. 385 U. S. 853, 87 S. Ct. 98, 17 L. Ed. 2d 81 (1966). See, also, Bothwell v. State, 71 Neb. 747, 99 N. W. 669 (1904); People v. Wright, 58 Mich. App. 735, 228 N. W. 2d 807 (1975); People v. Gilbert Johnson, 52 Mich. App. 560, 218 N. W. 2d 65 (1974). The jury may weigh this opinion testimony and determine its credibility, but the mere fact that it is given by a nonexpert witness does not make it inadmissible if the witness qualifies as an intimate personal acquaintance of the accused.

The evidence indicates that the nonexpert witness, Sheriff Tesch, had the necessary intimate personal relationship with the defendant. The sheriff had dealt with and known the defendant for some 15 years, having observed the defendant in various

emotional states. He conversed with the defendant both shortly before and after the shooting. The nonexpert witness in this case clearly fits within the definition of an intimate personal acquaintance. The trial court did not err in allowing him to express his opinion on the sanity of the defendant.

The defendant also contends that the court erred in failing to sequester the jury during trial. The jury was impaneled and sworn on April 12, 1979. Due to the Easter holidays, trial did not begin until April 16, 1979. In State v. Robbins, *ante* p. 226, 287 N. W. 2d 55 (1980), the court stated that the determination of whether or not a jury should be sequestered during the trial of a criminal case is left to the discretion of the trial court. The defendant has produced no evidence at all that any jury tampering or misconduct occurred during the 4-day break from April 12 to April 16. The trial court did not abuse its discretion in this matter. We find both of defendant's assigned errors to be without merit.

AFFIRMED.

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

I concur in the result reached by the majority in this case. I cannot, however, agree that the rule expressed by the majority concerning the right of a nonexpert witness to testify as to a criminal defendant's sanity or insanity is or should be the law. I am fearful that the majority opinion, standing alone without further explanation, may cause the unwary to be led astray. The ultimate fact to be determined in this case was not whether the defendant was sane or insane (meaning whether he was mentally competent) at the time of the commission of the crime, but rather whether he had the ability to distinguish between right and wrong at that time, and who may testify concerning that ultimate fact. The rule involved in this case had its inception in the now famous M'Naghten's Case, 8 Eng. Rep. 718 (1843), wherein the House of Lords determined, "That

where an accused person is supposed to be insane, a *medical man,* who has been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong." (Emphasis supplied.)

This jurisdiction has, since its very beginning, followed the rule in the M'Naghten case. See Wright v. The People, 4 Neb. 407 (1876).

In 1973, in the case of State v. Jacobs, 190 Neb. 4, 205 N. W. 2d 662 (1973), this court was specifically asked to abandon the M'Naghten rule and to replace it with either "the irresistible impulse" rule first announced in Durham v. United States, 214 F. 2d 862, (D.C. Cir., 1954), or the American Law Institute rule. We rejected both suggestions and again reaffirmed our adoption of the M'Naghten rule. We continue to adhere to that rule. See State v. Simants, 197 Neb. 549, 250 N. W. 2d 881 (1977).

Moreover, in the Jacobs case, we were careful to point out that insanity alone was not material, saying: "The fact that a defendant may have some form of mental illness or deficiency does not of itself constitute a defense or establish lack of responsibility. [Citation omitted.] The law recognizes no form of insanity or uncontrolled impulse as a defense even though the mental faculties are disordered or deranged if the defendant had the capacity to know what he was doing and to understand the act was wrong. [Citations omitted.] It is only when the defendant is unable to understand the nature and quality of his act or unable to distinguish between right and wrong with respect to it that he cannot be held responsible."

The opinion of a nonexpert witness that one is or is not insane does not address the issue as established in the M'Naghten case and as adopted by this jurisdiction.

The majority here would lead one to believe that a nonexpert witness who has had an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person before, at, and after the time in question may be permitted to testify as to that person's sanity or insanity when the witness has stated the primary facts which support his conclusion. Further, the majority would seem to say that having so testified, a legitimate issue concerning the defendant's sanity or insanity in a criminal case is created for the jury's consideration. Such testimony, standing alone, does not satisfy the requirements of the law under the M'Naghten rule and does not raise a legitimate issue to be submitted to the jury. So long as we profess to follow the M'Naghten rule, we should strictly adhere to its requirements.

If, as in this case, a sheriff may render an opinion as to one's sanity within the M'Naghten rule, then to be sure other nonexperts likewise may render opinions as to the defendant's insanity. We should not permit that to be done. We do not permit nonexperts to render opinions concerning physical illness. We likewise should not permit nonexperts to render opinions concerning mental illness, particularly when the nature of the mental illness must be of such magnitude as to preclude the defendant from knowing the difference between right and wrong. Such an opinion requires more than just a layman's conclusion that a person is either "sane" or "insane." As clearly pointed out by our decision in the Jacobs case, mere mental illness alone is not sufficient. A lay person may conclude that an individual is insane because he is a paranoid or a schizophrenic or a manic-depressive. All that being true, however, it is not sufficient to meet the issues which are raised in a murder case where the defendant pleads not guilty by reason of insanity.

A nonexpert witness may be permitted in a proper

case to testify as to what he has observed about the defendant's behavior; but he should not be permitted to state his own conclusions. In this particular case, as a matter of fact, the sheriff was not permitted by the trial court to testify as to what he observed but was required to testify only as to his ultimate conclusion. The trial court was wrong in so limiting the sheriff. However, because of other appropriate testimony in the case, as noted below, the action of the trial court with regard to the sheriff's testimony did not constitute prejudicial error and did not entitle the defendant to a new trial. See Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The record in this particular case discloses that the State called an eminent board-certified psychiatrist who testified that in his opinion, based upon his examination of the defendant, the defendant, at the time of the commission of the crime, did in fact know the difference between right and wrong. The defendant then called a board-certified psychiatrist who testified that in his opinion the defendant did not know the difference between right and wrong. It was that conflicting testimony that satisfied the requirements of the rule in the M'Naghten case and which raised the issue for the jury to decide. It was not the sheriff's testimony, standing alone, which created a jury question concerning the defendant's sanity or insanity. The most the sheriff could do by describing what he observed was to corroborate and support the medical conclusion rendered by the expert. If our decision in Torske v. State, 123 Neb. 161, 242 N. W. 408 (1932), relied upon by the majority, stands for anything more than that limited rule, it should be disavowed by this court and overruled.

I believe the record in this case provided the jury with ample medical testimony from which it could reach its conclusion. It is for that reason that I concur in the results while disagreeing with the rationale.

McCOWN and HASTINGS, JJ., join in this concurrence.

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Actions.

The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. Hein v. M & N Feed Yards, Inc. 691

Ademption.

1. Under the provisions of subsection (b)(1) of section 30-2346, R. R. S. 1943, where a testator has, during his lifetime, sold specifically devised property and at his death an unpaid balance remains owing to him on that sale, the beneficiary of the specific bequest is entitled to receive the unpaid balance. Ademption results only as to the part of the sales price received by the testator in his lifetime. Reed v. McClow 739
2. The most common use of the term ademption is to describe the act by which a devise or bequest of specific property becomes inoperative by the sale or extinction of the property during the testator's lifetime. Reed v. McClow 739
3. The common law doctrine of ademption has been modified by statute. § 30-2346, R. R. S. 1943. Reed v. McClow 739

Administrative Law.

1. The Commission of Industrial Relations is not a court and is in fact an administrative body performing a legislative function. Transport Workers of America v. Transit Auth. of City of Omaha 26
2. An administrative agency cannot enlarge its own jurisdiction nor can jurisdiction be conferred upon the agency by parties before it. Accordingly, it is held that deviations from an agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver or estoppel. Transport Workers of America v. Transit Auth. of City of Omaha 26
3. As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise

powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts. Transport Workers of America v. Transit Auth. of City of Omaha 26

4. The Department of Water Resources has original and exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights. State ex rel. Blome v. Bridgeport Irr. Dist. 97

5. This court ordinarily will not take judicial notice of rules or regulations of a governmental department or agency where such rules or regulations are claimed to form an implied part of a contract of employment. Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity. Nevels v. State 642

Admissions Against Interest.

1. Admissions of a party to the litigation are excepted from the rule that a foundation for admission of inconsistent statements must be laid on cross-examination by affording a witness the opportunity to explain and deny the same. § 27-613, R. R. S. 1943. Fortin v. Hike 344

2. Inconsistent statements of a party are properly admissible as rebuttal evidence. Fortin v. Hike 344

Adverse Possession.

1. Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party. Imperial Service Corp. v. Phipps 622

2. The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto. Imperial Service Corp. v. Phipps 622

3. A claim of title by adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years. McCormick v. Terry 650
Pettis v. Lozier 802

4. Where a fence is constructed as a boundary line, although it is not the actual boundary line, and parties claim ownership of land up to the fence for the uninterrupted statutory period, parties gain title to such land

by adverse possession. Conkey v. Anderson Farms, Inc. 708
5. Claim of right or of ownership means hostile and these terms describe the same element of adverse possession. Pettis v. Lozier 802

Affidavits.

Affidavits filed with the clerks of the District Courts are not considered on appeal unless they have been marked, offered in evidence, and are contained in the bill of exceptions. Buker v. Buker 571

Agency.

There must be causation between the negligence of the insurance broker or agent and the damage to his principal. Kenyon & Larsen v. Deyle 209

Aggravating and Mitigating Circumstances.

The trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating circumstance as set forth in section 29-2523. State v. Holtan 314

Alimony.

1. The fixing of alimony rests in the sound discretion of the District Court and in the absence of an abuse of discretion will not be disturbed on appeal. Ulmer v. Ulmer 351
Burton v. Burton 865
2. How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. Matlock v. Matlock 357
3. This court will not modify a trial court's dissolution of marriage decree as to child support, property division, or alimony, if any, unless there has been an abuse of discretion. Bird v. Bird 619
4. The distribution of property and fixing of alimony rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Ritter v. Ritter 668
Lockwood v. Lockwood 818

5. Alimony and child support determinations, whether in an original proceeding or in an action to modify, require subjective reasoning and analysis based on the evidence and witnesses before the trial court, and will not be disturbed on appeal unless there appears a clear basis in the record for finding the trial court abused its discretion. Cagle v. Cagle 747
6. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, 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. Lockwood v. Lockwood 818
7. In a proper case, the division of property and the matter of alimony may be considered together. Burton v. Burton 865

Animals.

1. Enclosed pastureland planted to grass is cultivated land for the purposes of animal trespass statutes. Fuchser v. Jacobson 786
2. The measure of damages for a purebred cow impregnated by a trespassing or unrestrained bull of scrub or inferior quality is the difference in the value of the cow immediately before impregnation and the value of the cow immediately following such impregnation. Fuchser v. Jacobson 786
3. The fact that the impregnating bull is a purebred bull does not affect the measure of damages if he is not of the same breed as the cow. Fuchser v. Jacobson 786

Appeal and Error.

1. The discretion of the trial court on the granting or changing of custody of minor children is subject to de novo review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Turner v. Turner 6
Haynes v. Haynes 35
Kennedy v. Kennedy 363
Sikes v. Sikes 441
Batenhorst v. Batenhorst 601

2. An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the finding of the District Court will not be disturbed by this court on appeal unless clearly wrong. State ex rel. Blome v. Bridgeport Irr. Dist. 97
3. The decision of a trial judge on a question of fact has the effect of a jury verdict and will not be set aside or disturbed on appeal unless it is clearly wrong. Dale Electronics, Inc. v. Federal Ins. Co. 115
MFA Ins. Companies v. Mendenhall 430
Fuchser v. Jacobson 786
4. A jury verdict will not be set aside on appeal unless it is so clearly against the weight of the evidence as to be clearly the result of passion, prejudice, or mistake. Howard v. Chambers 150
5. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. A corollary of the principle is that where there is no bill of exceptions presented to us, it will be presumed that the evidence supports the judgment. Tedco Development Corp. v. Overland Hills, Inc. 194
6. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Taylor v. Benton 203
7. A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion. Kenyon & Larsen v. Deyle 209
8. Although normally the constitutionality of a legislative act must be raised at the trial or it will be considered to be waived, this court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice. Linn v. Linn 218
9. Depending upon the nature of the action, we are inclined to note plain error which, if regarded, would necessitate a reversal and, if disregarded, would impose unjust results or consequences. Linn v. Linn .. 218
10. A finding of guilty is a conviction, but it is not a judgment or final order from which an appeal may be taken. State v. Long 252
11. An appeal in a criminal case before a sentence has been imposed is premature. State v. Long 252
12. The rule is well established that where evidence on material questions of fact is in irreconcilable conflict, the

Supreme Court, in determining the weight of the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying, and therefore must have accepted one version of the facts rather than the opposite. This rule has been applied both in annulment actions and in divorce actions. Edmunds v. Edwards 255
Baker v. Buglewicz 656

13. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Moon v. Winger Boss Company, Inc. 292
14. An action for injunctive relief is an equitable action which is triable de novo in this court. Stuthman v. Lippert 302
15. This court will dispose of an appeal on the theory on which it was presented to the trial court by the parties. Knoell Constr. Co., Inc. v. Hanson 305
16. An appeal of a juvenile case is by trial de novo upon the record. State v. Burger 340
17. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law. Kennedy v. Kennedy ... 363
18. Ordinarily, where the action is in equity and is tried de novo in this court, a claim that the trial judge was disqualified for bias and prejudice is not material. Kennedy v. Kennedy 363
19. Error may be predicated upon a ruling which excludes evidence, even though no offer of proof was made, when the substance of the evidence was apparent from the context within which questions were asked. Sherman County Bank v. Kallhoff 392
20. Error without prejudice appearing from the record does not entitle appellant to a reversal on appeal. Botsch v. Leigh Land Co. 401
21. A question of fact arising in an equitable action is reviewed de novo by the Supreme Court, but in determining the weight to be given the evidence, it will consider the fact that the trial court observed the witnesses and their manner of testifying. Botsch v. Leigh Land Co. 401
McCormick v. Terry 650
22. Where, on appeal, findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court, and the Supreme Court, unless on the retrial the facts relating to the issues upon

which the findings were made are materially and substantially different from those adduced on the former trial. Botsch v. Leigh Land Co. 401

23. It is the duty of this court on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby to give weight thereto. Delp v. Laier 417

24. Although this appeal is triable de novo in this court, we must give weight to the fact that the trial court saw and observed the witnesses and the attitude of the parties at trial and, likewise, had the opportunity to hear the witnesses and weigh their testimony. Sikes v. Sikes 441

25. Findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict and will not be set aside on appeal unless clearly wrong. McCann v. Holy Sepulchre Cemetery Assn. 444

26. Except for appeals involving eminent domain proceedings, neither party is required to file a petition on appeal in the District Court when appealing from a judgment or decree entered by a county court or municipal court. Hornung v. Hatcher 449

27. In appeals involving eminent domain proceedings, the first party appealing must file a petition on appeal within 50 days from the rendition of the award or judgment of the county court, although the filing of the petition is not jurisdictional. See, Estate of Tetherow v. State, 193 Neb. 150, 226 N. W. 2d 116; City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537. Hornung v. Hatcher 449

28. A trial de novo in a reviewing court is a trial held as if no action whatever had been instituted in the court below. Hornung v. Hatcher 449

29. A de novo trial in the District Court on appeal in probate matters is likewise held as if no action whatever had been instituted in the county court. Hornung v. Hatcher 449

30. The action of the trial court in excluding testimony of a witness may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. Hornung v. Hatcher 449

31. A motion for a change of venue in a criminal action is addressed to the sound discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Fallis 465

32. A proper judgment will not be reversed because the

trial court gave an erroneous reason for its rendition, and the rule applies in equity cases as well as in actions at law. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

33. 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. Scamperino v. Federal Envelope Co. 508

34. A party appealing from an order of the Commission of Industrial Relations is not required to file a motion for new trial before the commission. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
Fraternal Order of Police v. County of Adams 682

35. A judgment of a District Court is supported by a presumption of correctness, and it is the appellant's duty to present and show by the record the judgment is erroneous. Buker v. Buker 571

36. Affidavits filed with the clerks of the District Courts are not considered on appeal unless they have been marked, offered in evidence, and are contained in the bill of exceptions. Buker v. Buker 571

37. An assignment of error which requires a review of evidence cannot prevail on appeal in the absence of an adequate bill of exceptions. Buker v. Buker 571
State v. Harris 844

38. Where the record in a case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment for the judgment of the Workmen's Compensation Court. Keith v. School Dist. No. 1 631

39. This court is not inclined to disturb the division of such property by the trial court unless it is patently unfair on the record. Ritter v. Ritter 668

40. The distribution of property and fixing of alimony rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Ritter v. Ritter 668
Lockwood v. Lockwood 818
Burton v. Burton 865

41. In reviewing the findings and orders of the Commission of Industrial Relations we are restricted to considering whether the order of the commission is sup-

ported by substantial evidence justifying the same, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Fraternal Order of Police v. County of Adams 682

42. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Matthews 709

43. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Mays 730

44. Alimony and child support determinations, whether in an original proceeding or in an action to modify, require subjective reasoning and analysis based on the evidence and witnesses before the trial court, and will not be disturbed on appeal unless there appears a clear basis in the record for finding the trial court abused its discretion. Cagle v. Cagle 747

45. In reviewing the judgment of the compensation court, we are bound by the findings of fact made by the Workmen's Compensation Court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and may not be set aside on appeal unless clearly wrong. Wolfe v. American Community Stores 763

46. When there is evidence in the record to support the finding of temporary total disability on the date of rehearing, we are bound by that finding. Wolfe v. American Community Stores 763

47. Generally where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission. State v. Crouch 781

48. On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. County of Merrick v. Beck 829
Denton v. Nelson 833

49. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not

be set aside if there is sufficient competent evidence to support it. County of Merrick v. Beck 829
Denton v. Nelson 833

50. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of exceptions. State v. Harris 844
51. Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks. State v. Harris 844
52. Where the evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the trial court and its decision will not be reversed on appeal in the absence of a showing of an abuse of discretion. State v. Harris 844
53. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong and in testing the sufficiency of evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party. Gray v. State 853
54. A mechanic's lien is tried by this court de novo on the record, giving 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 other. Waite Lumber Co., Inc. v. Carpenter 860

Appearances.

A motion invoking the power of the court on any question other than jurisdiction constitutes a general appearance and confers jurisdiction over the moving party. State v. Wedige 687

Appropriation of Payments.

1. Where payments are made on an open account, and no appropriation thereof has been made by either party before a controversy has arisen concerning them, the law will apply them in discharge of the earliest items. Diesel Service, Inc. v. Accessory Sales, Inc. 381
2. The debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is cer-

tainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and a fortiori at the time of the trial. Diesel Service, Inc. v. Accessory Sales, Inc. 381

Attachment.

At a hearing on a defendant's motion to quash an attachment under section 25-1040, R. R. S. 1943, the burden is upon the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed. Ceres Fertilizer, Inc. v. Beekman 768

Attorney and Client.

1. Where one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant. State v. Holtan 314
State v. Harlan 676
2. The adequacy of counsel cannot be determined solely on the basis of the amount of time he spent interviewing his client. State v. Holtan 314
3. A lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties. Ames Bank v. Hahn 353
4. Counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and should conscientiously protect the interests of his client. State v. Comer 549
State v. Harlan 676

Attorney's Fees.

Under the mandatory language of section 44-359, R. R. S. 1943, a successful litigant is entitled to receive a reasonable attorney's fee for in-house counsel actually engaged in the preparation and trial of the litigation to the same extent as outside counsel. Dale Electronics, Inc. v. Federal Ins. Co. 115

Bailments.

An officer is required to exercise reasonable care and diligence for the safekeeping of property within his custody. The care required is that which men of average prudence would exercise in the conduct of their own affairs and must be commensurate with the dangers involved, having regard for the nature and situation of the property. The officer is responsible for reasonably foreseeable happenings or contingencies which could have been prevented by the exercise of reasonable

care. Nash v. City of North Platte 480

Banks and Banking.

In bank insolvency proceedings an award of interest to creditors may be made out of surplus for the period during which the insolvent bank has been in the hands of the receiver. Department of Banking v. Elm Creek State Bank 323

Boundaries.

Where a fence is constructed as a boundary line, although it is not the actual boundary line, and parties claim ownership of land up to the fence for the uninterrupted statutory period, parties gain title to such land by adverse possession. Conkey v. Anderson Farms, Inc. ... 708

Breach of Contract.

1. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Transport Workers of America v. Transit Auth. of City of Omaha 26
2. In a damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
3. Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

Brokers.

1. There must be causation between the negligence of the insurance broker or agent and the damage to his principal. Kenyon & Larsen v. Deyle 209
2. The measure of damages for the loss caused by the negligence of the broker in failing to obtain insurance is the amount that would have been due under the policy if it had been obtained by the broker. Kenyon & Larsen v. Deyle 209

Burden of Proof.

In a workmen's compensation case, the claimant must es-

tablish that the injury for which compensation is sought arose out of and in the course of the employment. Gray v. State 853

Burglary.

The crime of burglary requires proof of a willful, malicious, and forcible breaking and entering with the intent to steal property of value, which elements are not common to the crime of receiving stolen property. State v. Dinverno 775

Certificate of Title Act.

1. 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. The Cornhusker Bank of Omaha v. McNamara 504
2. No court shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless there is substantial compliance by such claimant with the provisions of section 60-105, R. R. S. 1943. The Cornhusker Bank of Omaha v. McNamara 504

Charities.

1. If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. Wood v. Lincoln General Hospital Assn. ... 576
2. No gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses which shall in other respects be valid under the laws of this state shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. Wood v. Lincoln General Hospital Assn. 576
3. If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust. Wood v. Lincoln General Hospital Assn. 576
4. A general charitable intent of the settlor is a precondi-

tion to the exercise of the court's cy pres power. If the trust instrument evidences no general charitable intention, then the trust fails and the devise or bequest lapses. Wood v. Lincoln General Hospital Assn. 576

Child Support.

1. In reviewing a child support award in a dissolution of marriage decree, this court will consider not only the child support award but also the property division and alimony provisions, if any, to determine whether there was an abuse of discretion. Bird v. Bird 619
2. This court will not modify a trial court's dissolution of marriage decree as to child support, property division, or alimony, if any, unless there has been an abuse of discretion. Bird v. Bird 619
3. Alimony and child support determinations, whether in an original proceeding or in an action to modify, require subjective reasoning and analysis based on the evidence and witnesses before the trial court, and will not be disturbed on appeal unless there appears a clear basis in the record for finding the trial court abused its discretion. Cagle v. Cagle 747
4. In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent; the status, character, and situation of the parties; and attendant circumstances thereof. Lockwood v. Lockwood 818
5. Other than ordering child support payments, the trial court cannot award any specific property belonging to the parent to a child as child support. Lockwood v. Lockwood 818
6. In determining whether a modification of child support is warranted, the circumstances of the parent as well as those of the children must be considered. Hale v. Hale 837

Collateral Attack.

An owner of land taken by virtue of eminent domain proceedings, who has been paid and has accepted the award of damages, cannot afterwards contest the validity of the taking by collateral action. Bishop v. Department of Roads 760

Colleges and Universities.

The Commission of Industrial Relations has jurisdiction in industrial disputes involving the Board of Trustees of the Nebraska State Colleges and its employees. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trust-

ees 107

Commission of Industrial Relations.

1. Where the Commission of Industrial Relations has no jurisdiction in the subject matter of the action, all proceedings in such action are void. Transport Workers of America v. Transit Auth. of City of Omaha 26
2. The Commission of Industrial Relations is not a court and is in fact an administrative body performing a legislative function. Transport Workers of America v. Transit Auth. of City of Omaha 26
3. A uniquely personal termination of employment does not constitute an industrial dispute over which the Commission of Industrial Relations has jurisdiction. Transport Workers of America v. Transit Auth. of City of Omaha 26
4. The public policy of the Commission of Industrial Relations is expressed in section 48-802, R. R. S. 1943, of the act and points out that the act is intended to provide public employees who do not otherwise have the right to strike an opportunity to mediate and arbitrate matters of employment which have not yet been agreed to by the employer. Transport Workers of America v. Transit Auth. of City of Omaha 26
5. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Transport Workers of America v. Transit Auth. of City of Omaha 26
6. The Commission of Industrial Relations has jurisdiction in industrial disputes involving the Board of Trustees of the Nebraska State Colleges and its employees. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees 107
7. The Commission of Industrial Relations, in determining an appropriate unit for bargaining and voting, is required to consider, among other proper criteria, the established bargaining units and established policies of the employer. The prior bargaining history to be considered includes even that which may not have taken place under the auspices of the commission. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees 107
8. The Commission of Industrial Relations has no au-

thority to enter declaratory judgments or exercise other judicial functions. Its fact-finding powers are to be confined to the area of its jurisdiction in resolving industrial disputes as that term is defined in Transport Workers of America v. Transit Auth. of City of Omaha, *ante* p. 26, 286 N. W. 2d 102. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees 107

9. The Commission of Industrial Relations has no general jurisdiction over contractual disputes. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth ... 567
10. Experience and longevity are proper matters to be considered in determining the wages to be paid to employees within the same job classification. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
11. A party appealing from an order of the Commission of Industrial Relations is not required to file a motion for new trial before the commission. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
Fraternal Order of Police v. County of Adams 682
12. In the taking of evidence the Commission of Industrial Relations is required to follow the rules of evidence prevailing in the trial of civil cases. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
13. In reviewing the findings and orders of the Commission of Industrial Relations we are restricted to considering whether the order of the commission is supported by substantial evidence justifying the same, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Fraternal Order of Police v. County of Adams 682

Confessions.

1. The admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made. State v. Williams 56
2. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Williams 56
3. The confrontation clause is not violated by admitting out-of-court statements where the declarant testifies and is subject to cross-examination. State v. Red Feather 734
4. Volunteered statements of any kind are admissible without prior explanation of the defendant's rights. State v. Red Feather 734

5. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Jackson 806
6. The failure of police to notify counsel who represents the accused, when they have knowledge of the fact of such representation, will not render a statement made by accused inadmissible where the record reveals a voluntary relinquishment and waiver by the accused of his right to have counsel present during a custodial interrogation. State v. Jackson 806

Confinement.

The place of confinement for serving a sentence for felony is the Nebraska Penal and Correctional Complex. State v. Rathbun 329

Constitutional Law.

1. An issue regarding the constitutionality of a statute must be raised at the earliest opportunity consistent with good pleading or it will be deemed waived. Quiring v. School Dist. No. 91 9
2. As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts. Transport Workers of America v. Transit Auth. of City of Omaha 26
3. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Otey 90
4. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is applicable to state tax legislation and imposes restraint upon state taxing power. State ex rel. Douglas v. State Board of Equalization and Assm't 130
5. Although normally the constitutionality of a legislative act must be raised at the trial or it will be considered to be waived, this court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice. Linn v. Linn 218
6. The Due Process Clause of the Fourteenth Amendment

of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined. Linn v. Linn ... 218

7. Termination of parental rights because it is in the "best interests and welfare of the children," as provided for in section 42-364, R. R. S. 1943, is not sufficiently specific to apprise parents of why the state may find it necessary to terminate parental rights and is an insufficient warning of prohibited conduct by which the parents can regulate their parental activities. As such, it is impermissibly vague and is unconstitutional. Linn v. Linn 218

8. Where an offending portion of a legislative act can be separated from the remainder so that the latter may be enforced independent of the former, and the invalid portion did not constitute such an inducement to the passage of the valid parts so that the latter would not have been passed without the former, the act is severable and the valid portions may remain enforceable. Linn v. Linn 218

9. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. State v. Valencia 719

10. Difficulty in determining whether certain marginal offenses are within the meaning of language under attack as vague does not automatically render a statute unconstitutional for indefiniteness; the test is whether the language conveyed a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. State v. Valencia 719

11. Questions of the constitutionality of a statute upon which an information is based may be raised by a motion to quash or a demurrer if the defect is apparent from the face of the statute. State v. Valencia 719

12. If not apparent from the face of the statute, the constitutionality may be challenged under a plea of not guilty. State v. Valencia 719

13. The constitutional provisions against double jeopardy are not violated by trial on a second charge which requires different and additional evidence than that in the first, even though both of the offenses charged arise out of the same chain of events. State v. Dinverno 775

14. Even where one and the same act constitutes two sepa-

rate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy. State v. Dinverno 775

15. Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes. State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792

Continuances.

1. A motion for a continuance is addressed to the sound discretion of the trial court, and an order denying a continuance will not be disturbed in the absence of a showing of a clear abuse of discretion. State v. Otey 90
2. Where the purpose of a continuance is to obtain the testimony of witnesses who are absent from the jurisdiction, a showing should be made that the witnesses can be located, that they will testify, and that their testimony would be relevant. State v. Otey 90

Contractors.

1. There is generally no single test by which the determination may be made of whether or not a workman is an employee as distinguished from an independent contractor. However, the ultimate question is what was the contract between the parties. Stephens v. Celeryvale Transport, Inc. 12
2. Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Stephens v. Celeryvale Transport, Inc. 12
3. Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the work as provided in the contract. The contractor has the burden of proving the amount of damages with reasonable certainty. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

Contracts.

1. The relationship of employer and employee, as well as that of employer and independent contractor, arises from the contract between the parties. Stephens v. Celeryvale Transport, Inc. 12
2. There is generally no single test by which the determination may be made of whether or not a workman is an employee as distinguished from an independent contractor. However, the ultimate question is what was the contract between the parties. Stephens v. Celeryvale Transport, Inc. 12
3. The burden of proof is on the claimant employee to prove the nature of the contractual relationship. Stephens v. Celeryvale Transport, Inc. 12
4. If there exists a written contract, it must be considered and may be of prime importance. However, a writing which merely denominates the relationship may not be used to conceal the true arrangement. Stephens v. Celeryvale Transport, Inc. 12
5. Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Stephens v. Celeryvale Transport, Inc. 12
6. Insurance contracts will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and a reasonable construction should be given so as to effectuate the purpose for which it was made. In cases of doubt, the policy is to be liberally construed in favor of the insured. Dale Electronics, Inc. v. Federal Ins. Co. 115
   Dairyland Ins. Co. v. Esterling 750
7. Where an insurance contract is reasonably susceptible to two or more interpretations, the one most favorable to the insured will be adopted. Dale Electronics, Inc. v. Federal Ins. Co. 115
8. If the language used in an insurance policy is ambiguous, it should be construed most strictly against the insurance company which is responsible for the language. Dale Electronics, Inc. v. Federal Ins. Co. 115
9. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are

clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract. Sampson v. State Farm Mut. Ins. Co. 164
Dairyland Ins. Co. v. Esterling 750

10. A vendor in a contract for sale of real estate must pay all taxes or assessments for which he is liable by the terms of the contract or the covenants in the deed, and in the absence of an express agreement, generally the vendor must pay all taxes which are a lien at the time of delivery of the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
11. A purchaser in a contract for sale of real estate must pay the taxes and assessments for which he is liable under the provisions of the contract or deed, and the purchaser will ordinarily be liable for all taxes which become a lien after the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
12. Taxes and assessments should, under some circumstances, be apportioned between the vendor and purchaser. Such circumstances would include cases where proration is specifically provided for in the contract or deed or where there is a local custom to that effect; where the contract is silent, statutory provisions may govern; where there is a specific contractual provision, it will govern. Tedco Development Corp. v. Overland Hills, Inc. 194
13. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. Kenyon & Larsen v. Deyle 209
14. A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit. Knoell Constr. Co., Inc. v. Hanson 311
15. Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Remington v. Bryan 372
16. Where a creditor has treated a debtor's account as an open or running account by debiting purchases and crediting payments and showing the balance due after each entry, he may not reconstruct the account after a dispute has arisen by crediting particular payments to particular purchases so as to claim a breach of an agreement by the debtor to pay for purchases within 30 days. Diesel Service, Inc. v. Accessory Sales, Inc. 381

17. The total cost method of calculating damages for an equitable adjustment under a construction contract is not preferred, but is permissible when no other method is feasible and the supporting evidence is substantial. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
18. The acceptability of the total cost method hinges on proof that: (1) The nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the bid or estimate was realistic; (3) the actual costs were reasonable; and (4) the contractor was not responsible for the added expenses. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
19. In an equitable adjustment case involving a construction contract a "jury verdict" may be allowed if there is clear proof that the contractor was injured, and there was no more reliable method for computing damages, but only where the evidence adduced was sufficient to enable a court or jury to make a fair and reasonable approximation of the damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
20. Profits may be included as one of the elements of an equitable adjustment pursuant to the contract terms. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
21. In an equitable adjustment case involving a construction contract the allowance of profit is not mandatory but is discretionary. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
22. Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the work as provided in the contract. The contractor has the burden of proving the amount of damages with reasonable certainty. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
23. A contract to coach is not a contract subject to the procedural and substantive requirements of section 79-1254, R. R. S. 1943. Neal v. School Dist. of York 558
24. As a general rule, where a valid, binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Panhandle Rehabilitation Center, Inc. v. Larson 605
25. A party who seeks specific performance must show not

only that he has a valid, legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant. Panhandle Rehabilitation Center, Inc. v. Larson 605

26. A contract to deliver the possession of a residence in which the heating system and built-in appliance system are to be in working condition requires the seller only to deliver possession with the systems in the same operating condition existing at the time the agreement was signed. Rosenberry v. Beck 664
27. The rule has been firmly established in Nebraska that where the amount due under a contract or claim is subject to reasonable controversy and is incapable of being fixed by computation, recovery of interest may be had only from the date of determination of the right of recovery and the amount thereof. Hein v. M & N Feed Yards, Inc. 691
28. Where services are furnished to a party and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. Denton v. Nelson 833

Controlled Substances.

1. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control over an automobile in which the contraband was found. State v. Woodruff 638
2. Intent to distribute may be inferred from the equipment and quantity of controlled substances seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Matthews 709

Convictions.

1. A determination of guilt of the crime charged and the imposition of a sentence constitute a conviction. State v. McDaniel 53
2. A person can be said to be charged with a crime as well after conviction as before. The conviction simply establishes the charge conclusively. State v. McDaniel 53
3. A finding of guilty is a conviction, but it is not a judgment or final order from which an appeal may be taken. State v. Long 252
4. A defendant cannot be convicted of two degrees of the same offense or a crime and a lesser-included offense

based upon the same act or transaction. A conviction or acquittal of the principal offense bars any prosecution or punishment for a lesser-included offense. State v. Aby 267

Corporations.

The maintaining of any action or suit by a foreign corporation does not in and of itself constitute transacting business in this state so as to require the securing of a certificate of authority. Ceres Fertilizer, Inc. v. Beekman 768

Costs.

1. The total cost method of calculating damages for an equitable adjustment under a construction contract is not preferred, but is permissible when no other method is feasible and the supporting evidence is substantial. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
2. The acceptability of the total cost method hinges on proof that: (1) The nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the bid or estimate was realistic; (3) the actual costs were reasonable; and (4) the contractor was not responsible for the added expenses. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

Counties.

1. The ultimate decision whether to acquire or accept right-of-way and to establish and/or improve a new road under the provisions of sections 39-1638 to 39-1655, R. R. S. 1943, is vested in the sound discretion of the county commissioners and the exercise of their authority in this respect may not be compelled by mandamus. State ex rel. Stansbery v. Schwasinger 457
2. The authority of the county commissioners to establish new roads or to extend existing roads under the Rural Road Improvement District Act, sections 39-1638 to 39-1655, R. R. S. 1943, depends not only upon compliance with the procedures outlined in the act, but also upon the acquisition by the county in some manner of the necessary right-of-way. § 39-1644, R. R. S. 1943. State ex rel. Stansbery v. Schwasinger 457

Courts.

1. Except for appeals involving eminent domain proceedings, neither party is required to file a petition on appeal in the District Court when appealing from a judg-

ment or decree entered by a county court or municipal court. Hornung v. Hatcher 449
2. A de novo trial in the District Court on appeal in probate matters is held as if no action whatever had been instituted in the county court. Hornung v. Hatcher 449
3. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Fallis ... 465
4. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. R. S. 1943, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child or children and refused to give the child or children necessary parental care and protection. State v. Wedige 687
5. Courts of this state are not permitted to give advisory opinions but can only declare the law and its application to a given set of facts when a justiciable controversy is presented for the determination of the court. State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792
6. Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes. State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792
7. On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. County of Merrick v. Beck 829
Denton v. Nelson 833
8. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. County of Merrick v. Beck 829
Denton v. Nelson 833

Covenants.

Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants. Stuthman v. Lippert 302

Criminal Law.

1. The crime of forgery is established by proving the false making or material altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. State v. Walker 42
2. Essential elements of a crime may be proved by circumstantial evidence. State v. Walker 42
3. Threat of future injury does not constitute a defense to a charge of escape. State v. Reed 45
4. The District Court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused had his preliminary examination. State v. Reed 45
5. A determination of guilt of the crime charged and the imposition of a sentence constitute a conviction. State v. McDaniel 53
6. A person can be said to be charged with a crime as well after conviction as before. The conviction simply establishes the charge conclusively. State v. McDaniel 53
7. Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses. State v. Williams 56
8. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Williams 56
State v. Johnson 778
9. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Williams 56
10. If a photograph illustrates or makes clear some controverted issue in a homicide case, proper foundation hav-

ing been laid, it may be received in evidence even if it is gruesome. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court. State v. Williams 56

11. 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 and injuries, and to establish malice or intent. State v. Williams ... 56

12. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Williams 56
State v. Fallis 465

13. The admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made. State v. Williams 56

14. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Williams 56

15. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not affect "materiality" in the constitutional sense. State v. Williams 56

16. In a criminal case the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Williams 56

17. It is not error to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity. State v. Williams 56

18. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Williams 56
State v. Samuels 585
State v. Stewart 626

19. In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a

case where a sentence of death has been imposed. State v. Williams 56
20. Where a death sentence has been imposed, and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis. State v. Williams 56
21. Under L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. State v. Williams 56
22. The indorsement of the names of additional witnesses upon the information just before trial is a practice that should be avoided. State v. Otey 90
23. The State is entitled to prove any fact or circumstance which tends to establish any element of the crime, even though the fact or circumstance may prove or tend to prove another crime. State v. Otey 90
24. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Otey 90
25. The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the law who are amenable to treatment, and confinement without treatment for those subject to the law but not amenable to treatment. State v. Otey 90
26. A determination as to whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed. State v. Otey 90
27. Under section 29-2022, R. R. S. 1943, the determination of whether or not a jury should be permitted to separate during the trial of a criminal case is left to the discretion of the court. State v. Robbins 226
State v. Myers 867
28. Under section 29-2022, R. R. S. 1943, after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until they agree upon a verdict or are discharged by the court. State v. Robbins 226
29. Under section 29-2022, R. R. S. 1943, the trial court may properly permit the separation of the jury after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after submis-

sion without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation. State v. Robbins 226

30. A failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case without the express agreement or consent of the parties is erroneous but does not, in and of itself, constitute reversible error. State v. Robbins 226

31. In the absence of express agreement or consent by the defendant, a failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted. State v. Robbins 226

32. A defendant may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. State v. Doyle 234

33. Evidence is sufficient to sustain a guilty verdict only when the jury could properly find guilt beyond a reasonable doubt. State v. Doyle 234

34. In a prosecution for killing a newly born baby it is incumbent upon the State to prove that the child was born alive and had an independent and separate existence apart from its mother and that the accused was the criminal agent causing the infant's death. State v. Doyle 234

35. 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. Doyle 234

36. 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 other reasonable hypothesis of innocence. State v. Doyle 234

37. 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. Doyle 234

38. Where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count. State v. Eagle Deer 249

39. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury, and the verdict must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Eagle Deer 249
State v. Carter 407
State v. Fallis 465
State v. Woodruff 638

40. A finding of guilty is a conviction, but it is not a judgment or final order from which an appeal may be taken. State v. Long 252

41. The judgment in a criminal case is the sentence. State v. Long 252

42. An appeal in a criminal case before a sentence has been imposed is premature. State v. Long 252

43. The testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. State v. Aby 267

44. Corroboration as to material facts and circumstances is sufficient and evidence that a complaint was made after the offense is admissible. State v. Aby 267

45. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Aby 267

46. A crime and a lesser-included offense may be charged in separate counts of the same information. State v. Aby 267

47. A defendant cannot be convicted of two degrees of the same offense or a crime and a lesser-included offense based upon the same act or transaction. A conviction or acquittal of the principal offense bars any prosecution or punishment for a lesser-included offense. State v. Aby 267

48. All evidence that is not turned over to the defendant does not constitute suppressed evidence. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigating work on a case. State v. Peery ... 271

49. Title 18 U.S.C.A., section 2518, and section 86-705, R. R. S. 1943, are, in all substantive ways and in wording, virtually identical. They describe the information the application must contain, what the judge entering the order must be able to find, and what the order must contain, as well as certain other matters. State v. DiMauro and Kessler 275
50. The language of Title 18 U.S.C.A., sections 2518 (1) (c) and 2518 (3) (c), is designed to assure the wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. State v. DiMauro and Kessler 275
51. In enacting Title III, Congress did not require the exhaustion of "specific" or "all possible" investigative techniques before wiretap orders could issue. State v. DiMauro and Kessler 275
52. There is no requirement that every investigative methodology be exhausted prior to application for a section 2518 authorization under Title 18 U.S.C.A. Investigators are not obliged to try all theoretically possible approaches. It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion. State v. DiMauro and Kessler 275
53. The history of both the federal act and the state statute concerning wiretapping makes clear that the statute must be used with great caution and may not be indiscriminately used by authorities. State v. DiMauro and Kessler 275
54. Statutory authority for wiretapping is to be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures are not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. State v. DiMauro and Kessler 275
55. Neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued nor is the government required to use a wiretap only as a last resort. State v. DiMauro and Kessler 275
56. It is not necessary for the State to use all other investigative techniques before making application for the use

of a wiretap. The State must, however, show that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried. State v. Trader 282

57. No capital case in which a final sentence was imposed prior to the effective date of L. B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act. State v. Holtan 314

58. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Holtan 314

59. The trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating circumstance as set forth in section 29-2523. State v. Holtan 314

60. Where one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant. State v. Holtan 314
State v. Harlan 676

61. The adequacy of counsel cannot be determined solely on the basis of the amount of time he spent interviewing his client. State v. Holtan 314

62. If competent counsel, after investigation, considers a point worthless, the fact that he is court appointed does not require him to pursue it. The right to counsel does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit. State v. Holtan 314

63. The mere fact that the defendant maintains he does not recall committing the crime but with full faculty enters a plea does not impose upon the trial court an obligation or duty to require a competency hearing. State v. Holtan 314

64. Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer or agent provides a favorable opportunity for the violation does not constitute entrapment. State v. Lampone 325

65. Ordinarily where the defense of entrapment is properly raised and an entrapment instruction is given by the trial court, the instruction should be in the form of NJI 14.34, although the names of law enforcement officers or agents may be added or other pertinent alterations made where appropriate. State v. Lampone 325
66. The place of confinement for serving a sentence for felony is the Nebraska Penal and Correctional Complex. State v. Rathbun 329
67. Where the maximum term of a sentence pronounced is the statutory maximum for the offense, credit for jail time must be given. State v. Rathbun 329
68. Section 39-669.07, R. R. S. 1943, governs the sentence limits which the court may impose for violations of that section. State v. Chapman 368
69. Misdemeanor offenses which arise to felony status by virtue of repetition may not act as a trigger conviction for purposes of determining whether the defendant may be given an enhanced penalty under the Habitual Criminal Act. State v. Chapman 368
70. The defense of former jeopardy, including that form thereof sometimes described as collateral estoppel, may be waived by failure to assert the defense and offer proof thereof in the trial court. State v. Carter 407
71. Among the relevant factors considered in determining whether a change of venue should be granted due to pretrial publicity are the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn. State v. Fallis 465
72. Nebraska's method of jury selection from voter registration lists is racially neutral. State v. Fallis 465
73. The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not in itself sufficient to warrant the appointment of substitute counsel. State v. Fallis 465
74. The test to be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict ac-

quitting defendant of the offense charged and convicting him of the lesser offense. State v. Fallis 465
75. 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. Fallis 465
76. Legal custody is an essential element of the crime of escape from the legal custody of a law enforcement officer under section 28-736, R. R. S. 1943. State v. Dickson 476
77. An accused who was arrested for violation of a temporary order which had been issued under section 42-357, R. R. S. 1943, and which was not in effect at the time of the arrest, was not in legal custody. State v. Dickson 476
78. In the ordinary case, the seizure of some items beyond those specified in a search warrant does not result in the suppression of those items which were validly seized. Where items unspecified in the warrant are seized in a valid search, the fact that they are not admissible in evidence does not require suppression of property seized in accordance with the warrant. State v. Tara Enterprises, Inc. 516
79. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a reasonable person in other areas of the law. State v. Tara Enterprises, Inc. 516
80. The Nebraska obscenity statutes are not an impermissible infringement upon freedom of speech. State v. Tara Enterprises, Inc. 516
81. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. State v. Payne 522
82. Murder in the second degree is distinguished from murder in the first degree only in the absence of the requirement of deliberation and premeditation; but malice and the purpose to kill are the essential elements of murder in the second degree. State v. Payne 522
83. Circumstances capable of an innocent construction may be interpreted in the light of the defendant's admissions, and the fact under investigation be thus given a criminal aspect. State v. Payne 522
84. An essential element of a crime, including deliberation and premeditation in a first degree murder case, may be proven circumstantially. Circumstantial evidence

may also be used to establish the *corpus delicti* of the crime. State v. Payne 522
85. When circumstantial evidence is used to convict a defendant in a criminal case, it must be of such weight and character as to establish proof of guilt beyond a reasonable doubt. State v. Payne 522
86. The *corpus delicti* is the body or substance of the crime, the fact that the crime has been committed without regard to the identity of the person committing it, and is not established until it is proved that a human being is dead, and that the death occurred as the result of the criminal agency of another. State v. Payne 522
87. Where murder in the first degree is charged, the court is required to charge without request on such lesser degrees of homicide as the evidence could support. In order for the rule to be applicable, the record must contain some evidence which would tend to show that the crime was of a lesser degree than the homicide charged. State v. Payne 522
88. Where the evidence is sufficient to justify the submission to the jury of instructions on more than one degree of homicide, the jury is not required to convict the defendant of the higher offense, even if warranted by the evidence. State v. Payne 522
89. The trial court may properly refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Payne 522
State v. Samuels 585
90. Once an accused is arrested and informed of his Miranda rights, there is no requirement that rewarnings be given each time he is questioned about a crime or crimes different from that for which he was arrested. State v. Comer 549
91. Counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and should conscientiously protect the interests of his client. State v. Comer 549
State v. Harlan 676
92. The fact that Nebraska Jury Instructions (NJI) does not contain a specific instruction on a subject forms no basis for the refusal of the court to give an otherwise correct and appropriate tendered instruction. State v. Samuels 585
93. If evidence has been received for a specific, limited purpose, a proper and appropriate instruction tendered by a party to explain the significance or limitation of the evidence should be given. State v. Samuels 585
94. A tendered instruction, otherwise appropriate, which

either misstates the law or tends to confuse or mislead the jury should not be given by the trial court. State v. Samuels 585

95. If no standard instruction is available from Nebraska Jury Instructions (NJI) which applies to a subject upon which the jury should be instructed, the trial court must draft one appropriate to the existing conditions. State v. Samuels 585

96. In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance. State v. Samuels 585

97. An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. State v. Samuels 585

98. An instruction should no more tell a jury that it may find the accused innocent of murder if it finds the character of the victim to be bad than to inform it that it may find a defendant guilty because of his own bad character. State v. Samuels 585

99. In a criminal homicide case, the defendant's conduct in leaving the scene immediately or soon after the shooting may constitute a voluntary flight which is a circumstance that may be considered together with all other evidence to aid the jury in determining the question of guilt or innocence of the accused. State v. Samuels ... 585

100. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control over an automobile in which the contraband was found. State v. Woodruff 638

101. Ordinarily, when 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. Matthews 709

102. Intent to distribute may be inferred from the equipment and quantity of controlled substances seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Matthews 709

103. A plea of guilty is not rendered involuntary simply because a defendant receives a more severe sentence than expected. State v. Kennedy 714
104. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. State v. Valencia 719
105. Difficulty in determining whether certain marginal offenses are within the meaning of language under attack as vague does not automatically render a statute unconstitutional for indefiniteness; the test is whether the language conveyed a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. State v. Valencia 719
106. Questions of the constitutionality of a statute upon which an information is based may be raised by a motion to quash or a demurrer if the defect is apparent from the face of the statute. State v. Valencia 719
107. If not apparent from the face of the statute, the constitutionality may be challenged under a plea of not guilty. State v. Valencia 719
108. In a prosecution for sexual assault it is sufficient if the prosecutrix is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Red Feather 734
109. Volunteered statements of any kind are admissible without prior explanation of the defendant's rights. State v. Red Feather 734
110. The constitutional provisions against double jeopardy are not violated by trial on a second charge which requires different and additional evidence than that in the first, even though both of the offenses charged arise out of the same chain of events. State v. Dinverno 775
111. The crime of burglary requires proof of a willful, malicious, and forcible breaking and entering with the intent to steal property of value, which elements are not common to the crime of receiving stolen property. State v. Dinverno 775
112. Even where one and the same act constitutes two separate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy. State v. Dinverno 775
113. A motion to reopen a criminal case to allow introduction of further evidence is addressed to the sound discretion of the trial court. State v. Crouch 781
114. A sentence imposed within the limits of the statute will not generally be disturbed absent an abuse of discre-

tion. State v. Crouch 781
115. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Jackson 806
116. The failure of police to notify counsel who represents the accused, when they have knowledge of the fact of such representation, will not render a statement made by accused inadmissible where the record reveals a voluntary relinquishment and waiver by the accused of his right to have counsel present during a custodial interrogation. State v. Jackson 806
117. The determination as to whether the identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures. State v. Harris 844
118. Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at, and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion. State v. Myers 867
119. See also State v. Hadley & Marker 412
State v. Roundtree 479

Damages.

1. Where the employee suffers an accident which causes only trivial injury and no loss to the employee either by way of medical expenses or loss of wages related to the trivial injury, the employer is not obligated to compensate the employee. Taylor v. Benton 203
2. The measure of damages for the loss caused by the negligence of the broker in failing to obtain insurance is the amount that would have been due under the policy if it had been obtained by the broker. Kenyon & Larsen v. Deyle 209
3. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
4. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is con-

flicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
Danish Vennerforning & Old Peoples Home v. State ... 839

5. Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Remington v. Bryan 372
6. In seeking temporary damages as a result of a nuisance, where plaintiffs on a retrial are limited by the trial court in the presentation of evidence to the time period covered by the first trial, there is no prejudice to the plaintiff when the opportunity exists to dismiss the pending suit and refile the same covering the extended time period, or to file a separate action for the alleged later-arising damages. Botsch v. Leigh Land Co. 401
7. Where such question of fact involves the assessment of money damages, the Supreme Court will not set aside such judgment if it is within the range of the evidence and is not arbitrary. Botsch v. Leigh Land Co. 401
8. Where the evidence establishes that the injury will be either continuous or repetitive, the granting of an injunction is an appropriate remedy. Delp v. Laier 417
9. Where it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. Delp v. Laier 417
10. In proving damages, the law requires not mathematical certainty but merely the best evidence obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Delp v. Laier 417
11. The total cost method of calculating damages for an equitable adjustment under a construction contract is not preferred, but is permissible when no other method is feasible and the supporting evidence is substantial. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
12. The acceptability of the total cost method hinges on proof that: (1) The nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the bid or estimate was realistic; (3) the actual costs were reasonable; and (4) the contractor was not responsible for the added expenses. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

13. In a damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
14. Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
15. In an equitable adjustment case involving a construction contract, a "jury verdict" may be allowed if there is clear proof that the contractor was injured, and there was no more reliable method for computing damages, but only where the evidence adduced was sufficient to enable a court or jury to make a fair and reasonable approximation of the damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
16. Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the work as provided in the contract. The contractor has the burden of proving the amount of damages with reasonable certainty. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
17. Although the plaintiff does not have the burden to prove his damages to a mathematical certainty, the plaintiff does have the burden to prove by a preponderance of the evidence the amount of his damages to a reasonable certainty. Hein v. M & N Feed Yards, Inc. 691
18. The rule has been firmly established in Nebraska that where the amount due under a contract or claim is subject to reasonable controversy and is incapable of being fixed by computation, recovery of interest may be had only from the date of determination of the right of recovery and the amount thereof. Hein v. M & N Feed Yards, Inc. 691
19. The measure of damages for a purebred cow impregnated by a trespassing or unrestrained bull of scrub or inferior quality is the difference in the value of the cow immediately before impregnation and the value of the cow immediately following such impregnation. Fuchser v. Jacobson 786
20. The fact that the impregnating bull is a purebred bull does not affect the measure of damages if he is not of the same breed as the cow. Fuchser v. Jacobson 786
21. One whose property is taken or damaged by a governmental subdivision authorized to institute condemna-

tion proceedings, without an award being paid into county court prior to the taking or damaging of the property, is entitled to interest as provided for in section 76-711, R. R. S. 1943, from the date of the taking or damaging in the same manner as if the provisions of sections 76-701 to 76-725, R. R. S. 1943, had been followed. Danish Vennerforning & Old Peoples Home v. State 839

Death Penalty.

1. In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Williams 56
2. Where a death sentence has been imposed, and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis. State v. Williams 56
3. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Otey 90
4. A determination as to whether a defendant is a sexual sociopath is of no importance where a death sentence has been imposed. State v. Otey 90
5. No capital case in which a final sentence was imposed prior to the effective date of L. B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act. State v. Holtan 314

Decedents' Estates.

1. If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation. Turnbough v. Bolte 24
2. If the issue of grandparents are all the same degree of

kinship to the deceased, they will share equally in the intestate estate, but if of unequal degree, then those of more remote degree take by representation. Turnbough v. Bolte 24

Declaratory Judgments.

1. An action for declaratory judgment brought under section 25-21,149 et seq., R. R. S. 1943, which involves a question of fact, entitles the parties to a jury trial. MFA Ins. Companies v. Mendenhall 430
2. A judgment on a fact issue tried to the court alone has the effect of a verdict of a jury and will not be set aside unless clearly wrong. MFA Ins. Companies v. Mendenhall 430

Decrees.

1. The provisions of section 45-103, R. R. S. 1943, relating to payment of interest on judgments, refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. Dryden v. Dryden 666
2. As to awards or decrees for the payment of money in installments, when not otherwise provided for in the order interest begins to accrue only on each individual installment from the date that it becomes due and payable. Dryden v. Dryden 666

Discovery.

1. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not affect "materiality" in the constitutional sense. State v. Williams 56
2. In a criminal case the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Williams 56

Discrimination.

Nebraska's method of jury selection from voter registration lists is racially neutral. State v. Fallis 465

Dismissal.

The general rule in an equity case, where a motion to dismiss at the close of plaintiff's case is erroneously sustained, requires that the cause be remanded to the trial court for a new trial. Botsch v. Leigh Land Co. 401

Divorce.

1. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Turner v. Turner 6
Haynes v. Haynes 35
Sikes v. Sikes 441
Batenhorst v. Batenhorst 601
2. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Turner v. Turner 6
Haynes v. Haynes 35
Kennedy v. Kennedy 363
Sikes v. Sikes 441
Batenhorst v. Batenhorst 601
3. While the wishes of a child under the age of 14 years are not controlling where in conflict with what the courts regard as the minor's best interests, still, even though an infant is under the age of 14, if he has reached an age sufficient to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian. Haynes v. Haynes 35
4. While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Haynes v. Haynes 35
5. Both parties to a marriage are obligated to support minor children. Coffey v. Coffey 191
6. The right of a parent to maintain custody of his or her own child free of interference from the state is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child. Linn v. Linn 218
7. Termination of parental rights because it is in the "best interests and welfare of the children," as provided for in section 42-364, R. R. S. 1943, is not sufficiently specific to apprise parents of why the state may find it necessary to terminate parental rights and is an insufficient warning of prohibited conduct by which the par-

ents can regulate their parental activities. As such, it is impermissibly vague and is unconstitutional. Linn v. Linn 218

8. The rule is well established that where evidence on material questions of fact is in irreconcilable conflict, the Supreme Court, in determining the weight of the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying, and therefore must have accepted one version of the facts rather than the opposite. This rule has been applied both in annulment actions and in divorce actions. Edmunds v. Edwards 255

9. The fixing of alimony rests in the sound discretion of the District Court and in the absence of an abuse of discretion will not be disturbed on appeal. Ulmer v. Ulmer 351
Burton v. Burton 865

10. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. Matlock v. Matlock 357
Ritter v. Ritter 668
Burton v. Burton 865

11. The court shall also have regard for the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities. Matlock v. Matlock 357

12. How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. Matlock v. Matlock 357

13. Ordinarily, jurisdiction over the custody of a child in a divorce proceeding terminates when the child reaches his majority. Kennedy v. Kennedy 363

14. A decision on child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless the court abused its discretion. Welke v. Welke 426

15. A judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. Sikes v. Sikes 441

16. In determining whether a proposed settlement is conscionable under section 42-366 (2), R. R. S. 1943, a trial judge has discretion to request production of evidence on that issue, but has no affirmative duty to produce

the evidence where the parties have failed to do so. Buker v. Buker 571

17. Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. Batenhorst v. Batenhorst 601

18. In reviewing a child support award in a dissolution of marriage decree, this court will consider not only the child support award but also the property division and alimony provisions, if any, to determine whether there was an abuse of discretion. Bird v. Bird 619

19. This court will not modify a trial court's dissolution of marriage decree as to child support, property division, or alimony, if any, unless there has been an abuse of discretion. Bird v. Bird 619

20. The provisions of section 45-103, R. R. S. 1943, relating to payment of interest on judgments, refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. Dryden v. Dryden 666

21. As to awards or decrees for the payment of money in installments, when not otherwise provided for in the order interest begins to accrue only on each individual installment from the date that it becomes due and payable. Dryden v. Dryden 666

22. Ordinarily, money spent by one spouse in the nature of a gift prior to marriage will not be reimbursed when the divorce is granted. Ritter v. Ritter 668

23. This court is not inclined to disturb the division of such property by the trial court unless it is patently unfair on the record. Ritter v. Ritter 668

24. The distribution of property and fixing of alimony rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Ritter v. Ritter 668
Lockwood v. Lockwood 818

25. Alimony and child support determinations, whether in an original proceeding or in an action to modify, require subjective reasoning and analysis based on the evidence and witnesses before the trial court, and will not be disturbed on appeal unless there appears a clear basis in the record for finding the trial court abused its discretion. Cagle v. Cagle 747

26. 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. Lockwood v. Lockwood 818

27. In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent; the status, character, and situation of the parties; and attendant circumstances thereof. Lockwood v. Lockwood 818

28. Other than ordering child support payments, the trial court cannot award any specific property belonging to the parent to a child as child support. Lockwood v. Lockwood 818

29. In a proper case, the division of property and the matter of alimony may be considered together. Burton v. Burton 865

Double Jeopardy.

1. The defense of former jeopardy, including that form thereof sometimes described as collateral estoppel, may be waived by failure to assert the defense and offer proof thereof in the trial court. State v. Carter 407

2. The constitutional provisions against double jeopardy are not violated by trial on a second charge which requires different and additional evidence than that in the first, even though both of the offenses charged arise out of the same chain of events. State v. Dinverno 775

3. Even where one and the same act constitutes two separate and distinct crimes, neither an acquittal nor a conviction of one bars a prosecution for the other as placing the defendant in double jeopardy. State v. Dinverno 775

Drainage.

1. It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature. Delp v. Laier 417

2. It is fundamental that an owner may not by ditch, dam, or terrace divert surface waters in such a manner as to cast them in volume upon the adjoining lands of another to his damage. Delp v. Laier 417

Due Process.

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined. Linn v. Linn ... 218

Election of Remedies.

Ordinarily, an election between theories of recovery will not be required unless the theories are so inconsistent that a party cannot logically choose one without renouncing the other. Kenyon & Larsen v. Deyle 209

Eminent Domain.

1. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
2. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
Danish Vennerforning & Old Peoples Home v. State ... 839
3. Except for appeals involving eminent domain proceedings, neither party is required to file a petition on appeal in the District Court when appealing from a judgment or decree entered by a county court or municipal court. Hornung v. Hatcher 449
4. In appeals involving eminent domain proceedings, the first party appealing must file a petition on appeal within 50 days from the rendition of the award or judgment of the county court, although the filing of the petition is not jurisdictional. See, Estate of Tetherow v. State, 193 Neb. 150, 226 N. W. 2d 116; City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537. Hornung v. Hatcher 449
5. An owner of land taken by virtue of eminent domain proceedings, who has been paid and has accepted the

award of damages, cannot afterwards contest the validity of the taking by collateral action. Bishop v. Department of Roads 760

6. One whose property is taken or damages by a governmental subdivision authorized to institute condemnation proceedings, without an award being paid into county court prior to the taking or damaging of the property, is entitled to interest as provided for in section 76-711, R. R. S. 1943, from the date of the taking or damaging in the same manner as if the provisions of sections 76-701 to 76-725, R. R. S. 1943, had been followed. Danish Vennerforning & Old Peoples Home v. State 839

Employer and Employee.

1. The relationship of employer and employee, as well as that of employer and independent contractor, arises from the contract between the parties. Stephens v. Celeryvale Transport, Inc. 12
2. There is generally no single test by which the determination may be made of whether or not a workman is an employee as distinguished from an independent contractor. However, the ultimate question is what was the contract between the parties. Stephens v. Celeryvale Transport, Inc. 12
3. The burden of proof is on the claimant employee to prove the nature of the contractual relationship. Stephens v. Celeryvale Transport, Inc. 12
4. If there exists a written contract, it must be considered and may be of prime importance. However, a writing which merely denominates the relationship may not be used to conceal the true arrangement. Stephens v. Celeryvale Transport, Inc. 12
5. Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor, is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Stephens v. Celeryvale Transport, Inc. 12
6. Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by

making the activity part of the services of an employee, brings the activity within the orbit of employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. Gray v. State 853

Entrapment.

1. Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer or agent provides a favorable opportunity for the violation does not constitute entrapment. State v. Lampone 325
2. Ordinarily where the defense of entrapment is properly raised and an entrapment instruction is given by the trial court, the instruction should be in the form of NJI 14.34, although the names of law enforcement officers or agents may be added or other pertinent alterations made where appropriate. State v. Lampone 325

Equity.

1. In weighing the evidence in an equitable action, we take into consideration the fact that the trial court had the advantage of observing the witnesses and, where the evidence is conflicting, must have accepted the successful party's version of the facts. Stuthman v. Lippert 302
2. Ordinarily, where the action is in equity and is tried de novo in this court, a claim that the trial judge was disqualified for bias and prejudice is not material. Kennedy v. Kennedy 363
3. The general rule in an equity case, where a motion to dismiss at the close of plaintiff's case is erroneously sustained, requires that the cause be remanded to the trial court for a new trial. Botsch v. Leigh Land Co. .. 401
4. A question of fact arising in an equitable action is reviewed de novo by the Supreme Court, but in determining the weight to be given the evidence, it will consider the fact that the trial court observed the witnesses and their manner of testifying. Botsch v. Leigh Land Co. 401
   McCormick v. Terry 650
   Baker v. Buglewicz 656
   Hein v. M & N Feed Yards, Inc. 691

5. Where such question of fact involves the assessment of money damages, the Supreme Court will not set aside such judgment if it is within the range of the evidence and is not arbitrary. Botsch v. Leigh Land Co. 401
6. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance thereby, unless it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly. Botsch v. Leigh Land Co. 401
7. In an action in equity where the evidence is conflicting and cannot be reconciled, the Supreme Court will consider the fact that the trial court saw and heard the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
8. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition, and the rule applies in equity cases as well as in actions at law. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
9. In an equitable adjustment case involving a construction contract a "jury verdict" may be allowed if there is clear proof that the contractor was injured, and there was no more reliable method for computing damages, but only where the evidence adduced was sufficient to enable a court or jury to make a fair and reasonable approximation of the damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
10. Profits may be included as one of the elements of an equitable adjustment pursuant to the contract terms. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
11. In an equitable adjustment case involving a construction contract the allowance of profit is not mandatory but is discretionary. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

Escape.

1. Threat of future injury does not constitute a defense to a charge of escape. State v. Reed 45
2. Legal custody is an essential element of the crime of escape from the legal custody of a law enforcement officer under section 28-736, R. R. S. 1943. State v. Dickson 476
3. An accused who was arrested for violation of a temporary order which had been issued under section 42-357, R. R. S. 1943, and which was not in effect at the time of the arrest, was not in legal custody. State v. Dickson 476

Evidence.

1. A defendant is entitled to see and hear the witness and other evidence presented against him at trial. State v. Vail 1
2. The use of a substitute tape recorder was merely a more critical examination of evidence properly before the jury. The defendant's rights of confrontation were not violated. State v. Vail 1
3. Error in the admission of evidence may be harmless if the fact is established by other evidence. State v. Walker 42
   State v. Crouch 781
4. Essential elements of a crime may be proved by circumstantial evidence. State v. Walker 42
5. Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses. State v. Williams 56
6. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Williams 56
   State v. Johnson 778
7. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Williams 56
8. If a photograph illustrates or makes clear some controverted issue in a homicide case, proper foundation having been laid, it may be received in evidence even if it is gruesome. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court. State v. Williams 56
9. 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 and injuries, and to establish malice or intent. State v. Williams ... 56
10. The admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made. State v. Williams 56
11. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced

is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Williams 56
State v. Samuels 585
State v. Stewart 626

12. Where the purpose of a continuance is to obtain the testimony of witnesses who are absent from the jurisdiction, a showing should be made that the witnesses can be located, that they will testify, and that their testimony would be relevant. State v. Otey 90

13. The State is entitled to prove any fact or circumstance which tends to establish any element of the crime, even though the fact or circumstance may prove or tend to prove another crime. State v. Otey 90

14. In determining the sufficiency of the evidence to sustain a judgment, the evidence is required to be considered most favorably to the successful party. Each controverted fact must be resolved in favor of that party and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence. Dale Electronics, Inc. v. Federal Ins. Co. 115

15. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. Howard v. Chambers 150

16. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. A corollary of the principle is that where there is no bill of exceptions presented to us, it will be presumed that the evidence supports the judgment. Tedco Development Corp. v. Overland Hills, Inc. 194
Buker v. Buker 571

17. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. Taylor v. Benton 203
McCann v. Holy Sepulchre Cemetery Assn. 444

18. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Taylor v. Benton 203
Keith v. School Dist. No. 1 631

19. In a workmen's compensation case the plaintiff has the burden of establishing, by a preponderance of the evidence, that the injury sustained by the employee was caused by or related to the accident and was not the

result of the normal progression of the employee's preexisting condition which would have been sustained by the employee even in the absence of the accident. Taylor v. Benton 203

20. A defendant may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. State v. Doyle 234

21. Evidence is sufficient to sustain a guilty verdict only when the jury could properly find guilt beyond a reasonable doubt. State v. Doyle 234

22. 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. Doyle 234
State v. Payne 522

23. 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 other reasonable hypothesis of innocence. State v. Doyle ... 234

24. 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. Doyle 234

25. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury, and the verdict must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Eagle Deer 249
State v. Carter 407
State v. Fallis 465
State v. Woodruff 638

26. It is the general rule that the existence of a valid marriage is a question of fact. Edmunds v. Edwards 255

27. The rule is well established that where evidence on material questions of fact is in irreconcilable conflict, the Supreme Court, in determining the weight of the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying,

and therefore must have accepted one version of the facts rather than the opposite. This rule has been applied both in annulment actions and in divorce actions. Edmunds v. Edwards 255
Sikes v. Sikes 441
28. The testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. State v. Aby 267
29. Corroboration as to material facts and circumstances is sufficient and evidence that a complaint was made after the offense is admissible. State v. Aby 267
30. All evidence that is not turned over to the defendant does not constitute suppressed evidence. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigating work on a case. State v. Peery ... 271
31. Newly discovered evidence must be of such a nature that if offered and admitted at a former trial, it probably would have produced a substantial difference in result. State v. Peery 271
32. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Moon v. Winger Boss Company, Inc. 292
33. In weighing the evidence in an equitable action, we take into consideration the fact that the trial court had the advantage of observing the witnesses and, where the evidence is conflicting, must have accepted the successful party's version of the facts. Stuthman v. Lippert 302
Omaha P.P. Dist. v. Darin & Armstrong, Inc. 484
McCormick v. Terry 650
Baker v. Buglewicz 656
Hein v. M & N Feed Yards, Inc. 691
34. Where the evidence is conflicting on the question of "sole proximate cause," the determination of that issue is for the trier of facts. Brown v. State 332
35. An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence. State v. Burger 340
36. Inconsistent statements of a party are properly admissible as rebuttal evidence. Fortin v. Hike 344
37. In order that evidence of consumption of alcoholic liquor by the operator of a motor vehicle be sufficient to submit the issue of the driver's intoxication to the jury, there must exist some evidence of facts or circumstances or competent opinion, either lay or expert, from which the trier of fact could conclude that be-

cause of the consumption of alcoholic liquor the physical or mental faculties of the driver were impaired to any appreciable degree so as to affect the driver's ability to operate his motor vehicle as an ordinarily prudent and cautious driver would operate it. Fortin v. Hike 344

38. A motion to amend the pleadings to conform to the evidence, made at the close of all evidence, rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment. Remington v. Bryan 372

39. Error may be predicated upon a ruling which excludes evidence, even though no offer of proof was made, when the substance of the evidence was apparent from the context within which questions were asked. Sherman County Bank v. Kallhoff 392

40. Where, on appeal, findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court, and the Supreme Court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial. Botsch v. Leigh Land Co. 401

41. It is the duty of this court on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby to give weight thereto. Delp v. Laier 417

42. Where it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. Delp v. Laier 417

43. In proving damages, the law requires not mathematical certainty but merely the best evidence obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Delp v. Laier ... 417

44. Although this appeal is triable de novo in this court, we must give weight to the fact that the trial court saw and observed the witnesses and the attitude of the parties at trial and, likewise, had the opportunity to hear the witnesses and weigh their testimony. Sikes v. Sikes 441

45. The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means. McCann v. Holy Sepul-

chre Cemetery Assn. 444
46. The action of the trial court in excluding testimony of a witness may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. Hornung v. Hatcher 449
47. 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. Fallis 465
State v. Matthews 709
48. In an equitable adjustment case involving a construction contract a "jury verdict" may be allowed if there is clear proof that the contractor was injured, and there was no more reliable method for computing damages, but only where the evidence adduced was sufficient to enable a court or jury to make a fair and reasonable approximation of the damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
49. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Scamperino v. Federal Envelope Co. 508
50. In the ordinary case, the seizure of some items beyond those specified in a search warrant does not result in the suppression of those items which were validly seized. Where items unspecified in the warrant are seized in a valid search, the fact that they are not admissible in evidence does not require suppression of property seized in accordance with the warrant. State v. Tara Enterprises, Inc. 516
51. Circumstances capable of an innocent construction may be interpreted in the light of the defendant's admissions, and the fact under investigation be thus given a criminal aspect. State v. Payne 522
52. An essential element of a crime, including deliberation and premeditation in a first degree murder case, may be proven circumstantially. Circumstantial evidence may also be used to establish the *corpus delicti* of the crime. State v. Payne 522
53. Where murder in the first degree is charged, the court is required to charge without request on such lesser degrees of homicide as the evidence could support. In order for the rule to be applicable, the record must contain some evidence which would tend to show that the

crime was of a lesser degree than the homicide charged. State v. Payne 522
54. Where the evidence is sufficient to justify the submission to the jury of instructions on more than one degree of homicide, the jury is not required to convict the defendant of the higher offense, even if warranted by the evidence. State v. Payne 522
55. In the taking of evidence the Commission of Industrial Relations is required to follow the rules of evidence prevailing in the trial of civil cases. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
56. An expert witness should not be allowed to express an opinion where the evidence shows there is no adequate basis for the opinion. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
57. If evidence has been received for a specific, limited purpose, a proper and appropriate instruction tendered by a party to explain the significance or limitation of the evidence should be given. State v. Samuels 585
58. In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance. State v. Samuels 585
59. In a criminal homicide case, the defendant's conduct in leaving the scene immediately or soon after the shooting may constitute a voluntary flight which is a circumstance that may be considered together with all other evidence to aid the jury in determining the question of guilt or innocence of the accused. State v. Samuels 585
60. Where the record in a case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment for the judgment of the Workmen's Compensation Court. Keith v. School Dist. No. 1 631
61. Under the Nebraska workmen's compensation act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. Keith v. School Dist. No. 1 631
62. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employ-

ment. Keith v. School Dist. No. 1 631
63. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control over an automobile in which the contraband was found. State v. Woodruff 638
64. This court ordinarily will not take judicial notice of rules or regulations of a governmental department or agency where such rules or regulations are claimed to form an implied part of a contract of employment. Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity. Nevels v. State 642
65. In reviewing the findings and orders of the Commission of Industrial Relations we are restricted to considering whether the order of the commission is supported by substantial evidence justifying the same, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Fraternal Order of Police v. County of Adams 682
66. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. R. S. 1943, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child or children and refused to give the child or children necessary parental care and protection. State v. Wedige 687
67. Although the plaintiff does not have the burden to prove his damages to a mathematical certainty, the plaintiff does have the burden to prove by a preponderance of the evidence the amount of his damages to a reasonable certainty. Hein v. M & N Feed Yards, Inc. 691
68. Ordinarily, when 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. Matthews 709
69. Evidence which only tends to discredit a witness who testified at trial is not sufficient to justify a new trial. State v. Mays 730
70. Newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it prob-

ably 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. Mays 730

71. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Mays 730

72. In a prosecution for sexual assault it is sufficient if the prosecutrix is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Red Feather 734

73. To qualify as an excited utterance the following must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event. State v. Red Feather 734

74. Statements to a physician which bear upon the nature and cause of the injury are admissible under the medical diagnosis exception to the hearsay rule insofar as they are reasonably pertinent to diagnosis or treatment. State v. Red Feather 734

75. A motion to reopen a criminal case to allow introduction of further evidence is addressed to the sound discretion of the trial court. State v. Crouch 781

76. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Jackson 806

77. The failure of police to notify counsel who represents the accused, when they have knowledge of the fact of such representation, will not render a statement made by accused inadmissible where the record reveals a voluntary relinquishment and waiver by the accused of his right to have counsel present during a custodial interrogation. State v. Jackson 806

78. Where the evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the trial court and its decision will not be reversed on appeal in the absence of a showing of an abuse of discretion. State v. Harris 844

Fees.

A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness' fee. Lockwood v. Lockwood 818

Foreign Corporations.

The maintaining of any action or suit by a foreign corporation does not in and of itself constitute transacting business in this state so as to require the securing of a certificate of authority. Ceres Fertilizer, Inc. v. Beekman 768

Forfeitures and Penalties.

Statutes imposing a forfeiture or penalty are subject to strict construction and will not be construed to include anything beyond their letter, even though it may be within their spirit. County of Merrick v. Beck 829

Forgery.

The crime of forgery is established by proving the false making or material altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. State v. Walker 42

Fraud.

1. The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. Ames Bank v. Hahn 353
2. The requirement of scienter is satisfied by alleging that the person making the statement knew the statement was false, or made it as a positive statement without knowledge as to whether it was true or false, and the false statement was made with intention that it should be acted upon. Ames Bank v. Hahn 353

Gifts.

1. No gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses which shall in other respects be valid under the laws of this state shall be invalid by reason of the indefiniteness or uncertainty of

the persons designated as the beneficiaries thereunder in the instrument creating the same. Wood v. Lincoln General Hospital Assn. 576
2. Ordinarily, money spent by one spouse in the nature of a gift prior to marriage will not be reimbursed when the divorce is granted. Ritter v. Ritter 668

Governmental Subdivisions.

A governmental subdivision has no authority to improve roads and levy special assessments except for public roads to which it has title. State ex rel. Stansbery v. Schwasinger 457

Guilty Pleas.

A plea of guilty is not rendered involuntary simply because a defendant receives a more severe sentence than expected. State v. Kennedy 714

Habitual Criminals.

Misdemeanor offenses which arise to felony status by virtue of repetition may not act as a trigger conviction for purposes of determining whether the defendant may be given an enhanced penalty under the Habitual Criminal Act. State v. Chapman 368

Hearings.

1. The mere fact that the defendant maintains he does not recall committing the crime but with full faculty enters a plea does not impose upon the trial court an obligation or duty to require a competency hearing. State v. Holtan 314
2. The disciplinary process contemplated by section 83-4,121, R. R. S. 1943, is commenced when written notice of the infraction is served on the inmate. Johnson v. Vitek 745
3. Section 83-4,121, R. R. S. 1943, requires only that a disciplinary process be commenced in 8 days, not that it be completed within that time. Johnson v. Vitek 745

Hearsay.

1. To qualify as an excited utterance the following must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event. State v. Red Feather 734
2. Statements to a physician which bear upon the nature and cause of the injury are admissible under the medi-

cal diagnosis exception to the hearsay rule insofar as they are reasonably pertinent to diagnosis or treatment. State v. Red Feather 734

Highways.

1. The ultimate decision whether to acquire or accept right-of-way and to establish and/or improve a new road under the provisions of sections 39-1638 to 39-1655, R. R. S. 1943, is vested in the sound discretion of the county commissioners and the exercise of their authority in this respect may not be compelled by mandamus. State ex rel. Stansbery v. Schwasinger 457
2. A governmental subdivision has no authority to improve roads and levy special assessments except for public roads to which it has title. State ex rel. Stansbery v. Schwasinger 457
3. The authority of the county commissioners to establish new roads or to extend existing roads under the Rural Road Improvement District Act, sections 39-1638 to 39-1655, R. R. S. 1943, depends not only upon compliance with the procedures outlined in the act, but also upon the acquisition by the county in some manner of the necessary right-of-way. § 39-1644, R. R. S. 1943. State ex rel. Stansbery v. Schwasinger 457

Homicide.

1. If a photograph illustrates or makes clear some controverted issue in a homicide case, proper foundation having been laid, it may be received in evidence even if it is gruesome. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court. State v. Williams 56
2. 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 and injuries, and to establish malice or intent. State v. Williams ... 56
3. Under L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. State v. Williams 56
4. Where a death sentence has been imposed, and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

State v. Williams 56

5. In a prosecution for killing a newly born baby it is incumbent upon the State to prove that the child was born alive and had an independent and separate existence apart from its mother and that the accused was the criminal agent causing the infant's death. State v. Doyle 234
6. Murder in the second degree is distinguished from murder in the first degree only in the absence of the requirement of deliberation and premeditation; but malice and the purpose to kill are the essential elements of murder in the second degree. State v. Payne 522
7. The *corpus delicti* is the body or substance of the crime, the fact that the crime has been committed without regard to the identity of the person committing it, and is not established until it is proved that a human being is dead, and that the death occurred as the result of the criminal agency of another. State v. Payne 522
8. Where murder in the first degree is charged, the court is required to charge without request on such lesser degrees of homicide as the evidence could support. In order for the rule to be applicable, the record must contain some evidence which would tend to show that the crime was of a lesser degree than the homicide charged. State v. Payne 522
9. Where the evidence is sufficient to justify the submission to the jury of instructions on more than one degree of homicide, the jury is not required to convict the defendant of the higher offense, even if warranted by the evidence. State v. Payne 522
10. In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance. State v. Samuels 585
11. An instruction should no more tell a jury that it may find the accused innocent of murder if it finds the character of the victim to be bad than to inform it that it may find a defendant guilty because of his own bad character. State v. Samuels 585
12. The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given. State v. Samuels 585

13. In a criminal homicide case, the defendant's conduct in leaving the scene immediately or soon after the shooting may constitute a voluntary flight which is a circumstance that may be considered together with all other evidence to aid the jury in determining the question of guilt or innocence of the accused. State v. Samuels 585

Identification Procedures.

The determination as to whether the identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures. State v. Harris 844

Indictments and Informations.

1. The District Court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused had his preliminary examination. State v. Reed 45
2. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Williams 56
3. The indorsement of the names of additional witnesses upon the information just before trial is a practice that should be avoided. State v. Otey 90
4. Where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count. State v. Eagle Deer 249
5. A crime and a lesser-included offense may be charged in separate counts of the same information. State v. Aby 267
6. Questions of the constitutionality of a statute upon which an information is based may be raised by a motion to quash or a demurrer if the defect is apparent from the face of the statute. State v. Valencia 719

Infants.

In a prosecution for killing a newly born baby it is incumbent upon the State to prove that the child was born alive and had an independent and separate existence apart from its mother and that the accused was the criminal agent causing the infant's death. State v. Doyle 234

Injunction.

1. Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants. Stuthman v. Lippert 302
2. An injunction will not issue against discontinued acts unless there are reasonable grounds to believe there will be a resumption of the violations or activities. The purpose of injunctive relief is preventive, protective, and prohibitory. Stuthman v. Lippert 302
3. An action for injunctive relief is an equitable action which is triable de novo in this court. Stuthman v. Lippert 302
4. A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation. West Fort Residents Assn. v. Housing Auth. of City of Omaha 397
5. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance thereby, unless it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly. Botsch v. Leigh Land Co. 401
6. Where the evidence establishes that the injury will be either continuous or repetitive, the granting of an injunction is an appropriate remedy. Delp v. Laier 417

Instructions.

1. It is not error to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity. State v. Williams 56
2. Ordinarily where the defense of entrapment is properly raised and an entrapment instruction is given by the trial court, the instruction should be in the form of NJI 14.34, although the names of law enforcement officers or agents may be added or other pertinent alterations made where appropriate. State v. Lampone 325

3. The trial court may properly refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Payne 522
State v. Samuels 585
4. The fact that Nebraska Jury Instructions (NJI) does not contain a specific instruction on a subject forms no basis for the refusal of the court to give an otherwise correct and appropriate tendered instruction. State v. Samuels 585
5. If evidence has been received for a specific, limited purpose, a proper and appropriate instruction tendered by a party to explain the significance or limitation of the evidence should be given. State v. Samuels 585
6. A tendered instruction, otherwise appropriate, which either misstates the law or tends to confuse or mislead the jury should not be given by the trial court. State v. Samuels 585
7. If no standard instruction is available from Nebraska Jury Instructions (NJI) which applies to a subject upon which the jury should be instructed, the trial court must draft one appropriate to the existing conditions. State v. Samuels 585
8. In a criminal homicide case where there is an absence of all evidence of motive on the part of the accused, the defendant, upon request, is entitled to an instruction that the same is a circumstance that should be considered by the jury in connection with all other facts and circumstances in determining the guilt or innocence of the accused. However, it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance. State v. Samuels 585
9. An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. State v. Samuels 585
10. An instruction should no more tell a jury that it may find the accused innocent of murder if it finds the character of the victim to be bad than to inform it that it may find a defendant guilty because of his own bad character. State v. Samuels 585

Insurance.

1. Insurance contracts will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract, and a reasonable construction should be given so as to effectuate the purpose for which it was made. In cases of doubt, the policy is to be liberally construed in favor of the insured. Dale

Electronics, Inc. v. Federal Ins. Co. 115
Dairyland Ins. Co. v. Esterling 750
2. Where an insurance contract is reasonably susceptible to two or more interpretations, the one most favorable to the insured will be adopted. Dale Electronics, Inc. v. Federal Ins. Co. 115
3. If the language used in an insurance policy is ambiguous, it should be construed most strictly against the insurance company which is responsible for the language. Dale Electronics, Inc. v. Federal Ins. Co. 115
4. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract. Sampson v. State Farm Mut. Ins. Co. 164
5. Section 44-516, R. R. S. 1943, requiring notice of cancellation for nonpayment of premium, applies only to a cancellation by the unilateral action of the insurer before the end of the policy term. It does not apply to an automatic termination by expiration of the policy period. Sampson v. State Farm Mut. Ins. Co. 164
6. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. Kenyon & Larsen v. Deyle 209
7. There must be causation between the negligence of the insurance broker or agent and the damage to his principal. Kenyon & Larsen v. Deyle 209
8. The measure of damages for the loss caused by the negligence of the broker in failing to obtain insurance is the amount that would have been due under the policy if it had been obtained by the broker. Kenyon & Larsen v. Deyle 209
9. Permission as used in the standard automobile insurance policy is not limited to that expressly granted, but may arise and be implied from a course of conduct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of the owner. MFA Ins. Companies v. Mendenhall 430
10. Express permission granted for limited specific purposes on isolated occasions does not imply general permission to use an automobile for purposes wholly unrelated in time, character, or circumstances. MFA Ins. Companies v. Mendenhall 430

11. Implied permission to use an automobile arises from a course of conduct indicating mutual acquiescence or lack of objection under circumstances signifying assent. MFA Ins. Companies v. Mendenhall 430
12. An insurance policy should be considered as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning. Dairyland Ins. Co. v. Esterling 750
13. A causal relation or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for the accident or injury to come within the meaning of the clause "arising out of the ownership, maintenance or use" of a vehicle, and where such causal connection or relation is absent, coverage will be denied. Dairyland Ins. Co. v. Esterling 750

Intent.

1. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than the literal meaning that would have the effect of defeating the legislative intent. State v. McDaniel 53
2. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Williams 56
State v. Johnson 778
3. 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 and injuries, and to establish malice or intent. State v. Williams ... 56
4. Murder in the second degree is distinguished from murder in the first degree only in the absence of the requirement of deliberation and premeditation; but malice and the purpose to kill are the essential elements of murder in the second degree. State v. Payne 522
5. An essential element of a crime, including deliberation and premeditation in a first degree murder case, may be proven circumstantially. Circumstantial evidence may also be used to establish the *corpus delicti* of the crime. State v. Payne 522
6. If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular pur-

pose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. Wood v. Lincoln General Hospital Assn. 576

7. A general charitable intent of the settlor is a precondition to the exercise of the court's cy pres power. If the trust instrument evidences no general charitable intention, then the trust fails and the devise or bequest lapses. Wood v. Lincoln General Hospital Assn. 576
8. The primary rule of construction of wills and trust instruments is that the court must, if possible, ascertain the intention of the testator or creator of the trust. Wood v. Lincoln General Hospital Assn. 576
9. The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto. Imperial Service Corp. v. Phipps 622
10. Intent to distribute may be inferred from the equipment and quantity of controlled substances seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Matthews 709

Interest.

1. In bank insolvency proceedings an award of interest to creditors may be made out of surplus for the period during which the insolvent bank has been in the hands of the receiver. Department of Banking v. Elm Creek State Bank 323
2. The provisions of section 45-103, R. R. S. 1943, relating to payment of interest on judgments, refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. Dryden v. Dryden 666
3. As to awards or decrees for the payment of money in installments, when not otherwise provided for in the order interest begins to accrue only on each individual installment from the date that it becomes due and payable. Dryden v. Dryden 666
4. The rule has been firmly established in Nebraska that where the amount due under a contract or claim is subject to reasonable controversy and is incapable of being fixed by computation, recovery of interest may be had only from the date of determination of the right of recovery and the amount thereof. Hein v. M & N Feed

Yards, Inc. 691
5. One whose property is taken or damaged by a governmental subdivision authorized to institute condemnation proceedings, without an award being paid into county court prior to the taking or damaging of the property, is entitled to interest as provided for in section 76-711, R. R. S. 1943, from the date of the taking or damaging in the same manner as if the provisions of sections 76-701 to 76-725, R. R. S. 1943, had been followed. Danish Vennerforning & Old Peoples Home v. State 839

Intoxicating Liquors.

In order that evidence of consumption of alcoholic liquor by the operator of a motor vehicle be sufficient to submit the issue of the driver's intoxication to the jury, there must exist some evidence of facts or circumstances or competent opinion, either lay or expert, from which the trier of fact could conclude that because of the consumption of alcoholic liquor the physical or mental faculties of the driver were impaired to any appreciable degree so as to affect the driver's ability to operate his motor vehicle as an ordinarily prudent and cautious driver would operate it. Fortin v. Hike 344

Judges.

1. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Kennedy v. Kennedy 363
2. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law. Kennedy v. Kennedy ... 363
3. Ordinarily, where the action is in equity and is tried de novo in this court, a claim that the trial judge was disqualified for bias and prejudice is not material. Kennedy v. Kennedy 363

Judgments.

1. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Williams 56
2. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Williams 56
3. The decision of a trial judge has the effect of a jury

verdict and will not be set aside or disturbed on appeal unless it is clearly wrong. Dale Electronics, Inc. v. Federal Ins. Co. 115
4. In determining the sufficiency of the evidence to sustain a judgment, the evidence is required to be considered most favorably to the successful party. Each controverted fact must be resolved in favor of that party and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence. Dale Electronics, Inc. v. Federal Ins. Co. 115
Gray v. State 853
5. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. Taylor v. Benton 203
Scamperino v. Federal Envelope Co. 508
Keith v. School Dist. No. 1 631
Gray v. State 853
6. The judgment in a criminal case is the sentence. State v. Long 252
7. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment, and one so based must be set aside. Moon v. Winger Boss Company, Inc. 292
8. Findings of the trial court in actions brought under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. Brown v. State 332
9. A judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. Sikes v. Sikes 441
10. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Fallis ... 465
11. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition, and the rule applies in equity cases as well as in actions at law. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
12. 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. Scamperino v. Federal Envelope Co. 508
13. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Scamperino v. Federal Envelope Co. 508
14. A judgment of a District Court is supported by a presumption of correctness, and it is the appellant's duty to present and show by the record the judgment is erroneous. Buker v. Buker 571
15. The provisions of section 45-103, R. R. S. 1943, relating to payment of interest on judgments, refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. Dryden v. Dryden 666
16. As to awards or decrees for the payment of money in installments, when not otherwise provided for in the order interest begins to accrue only on each individual installment from the date that it becomes due and payable. Dryden v. Dryden 666

Judicial Notice.

This court ordinarily will not take judicial notice of rules or regulations of a governmental department or agency where such rules or regulations are claimed to form an implied part of a contract of employment. Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity. Nevels v. State 642

Juries.

1. The use of a substitute tape recorder was merely a more critical examination of evidence properly before the jury. The defendant's rights of confrontation were not violated. State v. Vail 1
2. It is not error to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity. State v. Williams 56
3. A jury verdict will not be set aside on appeal unless it is so clearly against the weight of the evidence as to be clearly the result of passion, prejudice, or mistake. Howard v. Chambers 150

4. Under section 29-2022, R. R. S. 1943, the determination of whether or not a jury should be permitted to separate during the trial of a criminal case is left to the discretion of the court. State v. Robbins 226
State v. Myers 867
5. Under section 29-2022, R. R. S. 1943, after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until they agree upon a verdict or are discharged by the court. State v. Robbins 226
6. Under section 29-2022, R. R. S. 1943, the trial court may properly permit the separation of the jury after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation. State v. Robbins 226
7. A failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case without the express agreement or consent of the parties is erroneous but does not, in and of itself, constitute reversible error. State v. Robbins 226
8. In the absence of express agreement or consent by the defendant, a failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted. State v. Robbins 226
9. Evidence is sufficient to sustain a guilty verdict only when the jury could properly find guilt beyond a reasonable doubt. State v. Doyle 234
10. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
11. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
12. Where the record indicates that a case was tried to the court without a jury and there is no indication of protest or objection on the part of either litigant, it will be

presumed that a jury was waived. MFA Ins. Companies v. Mendenhall 430
13. Nebraska's method of jury selection from voter registration lists is racially neutral. State v. Fallis 465
14. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. State v. Payne 522
15. Where the evidence is sufficient to justify the submission to the jury of instructions on more than one degree of homicide, the jury is not required to convict the defendant of the higher offense, even if warranted by the evidence. State v. Payne 522
16. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Matthews 709

Jurisdiction.

1. Where the Commission of Industrial Relations has no jurisdiction in the subject matter of the action, all proceedings in such action are void. Transport Workers of America v. Transit Auth. of City of Omaha 26
2. An administrative agency cannot enlarge its own jurisdiction nor can jurisdiction be conferred upon the agency by parties before it. Accordingly, it is held that deviations from an agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver or estoppel. Transport Workers of America v. Transit Auth. of City of Omaha 26
3. A uniquely personal termination of employment does not constitute an industrial dispute over which the Commission of Industrial Relations has jurisdiction. Transport Workers of America v. Transit Auth. of City of Omaha 26
4. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Transport Workers of America v. Transit Auth. of City of Omaha 26
5. The Department of Water Resources has original and

exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights. State ex rel. Blome v. Bridgeport Irr. Dist. 97

6. The Commission of Industrial Relations has jurisdiction in industrial disputes involving the Board of Trustees of the Nebraska State Colleges and its employees. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees 107
7. The Commission of Industrial Relations has no authority to enter declaratory judgments or exercise other judicial functions. Its fact-finding powers are to be confined to the area of its jurisdiction in resolving industrial disputes as that term is defined in Transport Workers of America v. Transit Auth. of City of Omaha, *ante* p. 26, 286 N. W. 2d 102. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees 107
8. Ordinarily, jurisdiction over the custody of a child in a divorce proceeding terminates when the child reaches his majority. Kennedy v. Kennedy 363
9. The Commission of Industrial Relations has no general jurisdiction over contractual disputes. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth ... 567
10. The power to accept property by gift or dedication for street purposes within 3 miles of the corporate limits of cities of the metropolitan class is necessarily implied in or incidental to expressly granted statutory powers over subdivision and zoning jurisdiction. Baker v. Buglewicz 656
11. A motion invoking the power of the court on any question other than jurisdiction constitutes a general appearance and confers jurisdiction over the moving party. State v. Wedige 687

Jurors.

1. When the disqualification of a juror is not discovered until after the jury has been sworn, the juror should be excused and an alternate juror seated. State v. Otey 90
2. The right to challenge a juror for cause may be waived or lost by a lack of diligence. The failure to make appropriate inquiry as to the qualifications of prospective jurors on voir dire waives later objections based on facts that might have been disclosed by such inquiry. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
3. A juror is entitled to draw on his own knowledge of the

views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a reasonable person in other areas of the law. State v. Tara Enterprises, Inc. 516

Justiciable Issue.

1. Courts of this state are not permitted to give advisory opinions but can only declare the law and its application to a given set of facts when a justiciable controversy is presented for the determination of the court. State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792
2. Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature. It has power only to decide justiciable disputes. State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792

Juvenile Courts.

An appeal of a juvenile case is by trial de novo upon the record. State v. Burger 340

Labor and Labor Relations.

1. A uniquely personal termination of employment does not constitute an industrial dispute over which the Commission of Industrial Relations has jurisdiction. Transport Workers of America v. Transit Auth. of City of Omaha 26
2. The Commission of Industrial Relations' authority to resolve disputes concerning terms, tenure, or conditions of employment is limited to situations in which the parties have not yet reached agreement. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter. Transport Workers of America v. Transit Auth. of City of Omaha 26
3. The Commission of Industrial Relations, in determining an appropriate unit for bargaining and voting, is required to consider, among other proper criteria, the established bargaining units and established policies of the employer. The prior bargaining history to be considered includes even that which may not have taken place under the auspices of the commission. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of

Trustees 107
4. The Commission of Industrial Relations has no authority to enter declaratory judgments or exercise other judicial functions. Its fact-finding powers are to be confined to the area of its jurisdiction in resolving industrial disputes as that term is defined in Transport Workers of America v. Transit Auth. of City of Omaha, *ante* p. 26, 286 N. W. 2d 102. State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees 107
5. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted. Craig v. American Community Stores Corp. 286

Legislature.

1. As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts. Transport Workers of America v. Transit Auth. of City of Omaha 26
2. No capital case in which a final sentence was imposed prior to the effective date of L. B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act. State v. Holtan 314
3. In enacting a statute the Legislature must be presumed to have knowledge of all previous legislation upon the subject. Wahlers v. Frye 399
4. The Legislature having failed to provide for a procedure to determine paternity under section 42-762 et seq., R. R. S. 1943, the Revised Uniform Reciprocal Enforcement of Support Act, it is necessary to look to the general paternity statutes, and in particular section 13-112, R. R. S. 1943, and the alleged father is entitled to a jury trial on the issue of paternity at his request. Wahlers v. Frye 399
5. In construing a statute, this court will presume that the Legislature intended a sensible rather than an absurd result. Reed v. McClow 739

Lesser-Included Offenses.

1. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Aby 267
2. A crime and a lesser-included offense may be charged in separate counts of the same information. State v. Aby 267
3. A defendant cannot be convicted of two degrees of the same offense or a crime and a lesser-included offense based upon the same act or transaction. A conviction or acquittal of the principal offense bars any prosecution or punishment for a lesser-included offense. State v. Aby 267
4. The test to be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense. State v. Fallis 465
5. Where murder in the first degree is charged, the court is required to charge without request on such lesser degrees of homicide as the evidence could support. In order for the rule to be applicable, the record must contain some evidence which would tend to show that the crime was of a lesser degree than the homicide charged. State v. Payne 522
6. Where the evidence is sufficient to justify the submission to the jury of instructions on more than one degree of homicide, the jury is not required to convict the defendant of the higher offense, even if warranted by the evidence. State v. Payne 522

Mandamus.

1. To warrant the issue of a peremptory writ of mandamus to compel the performance of a legal duty to act: (1) The duty must be imposed by law; (2) the duty must still exist at the time the writ is applied for; and (3) the duty to act must be clear. State ex rel. Blome v. Bridgeport Irr. Dist. 97
   State ex rel. Stansbery v. Schwasinger 457
   State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792
2. An action in mandamus is a law action in which a jury trial on issues of fact is not demandable as a matter of right, and the finding of the District Court will not be disturbed by this court on appeal unless clearly wrong. State ex rel. Blome v. Bridgeport Irr. Dist. 97
3. A writ of mandamus may be issued to any inferior

tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion. § 25-2156, R. R. S. 1943. State ex rel. Stansbery v. Schwasinger 457

4. The ultimate decision whether to acquire or accept right-of-way and to establish and/or improve a new road under the provisions of sections 39-1638 to 39-1655, R. R. S. 1943, is vested in the sound discretion of the county commissioners and the exercise of their authority in this respect may not be compelled by mandamus. State ex rel. Stansbery v. Schwasinger 457
5. The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. § 25-2156, R. R. S. 1943. State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792

Marriage.

1. Although by statute marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential, it is not a contract resembling in any but the slightest degree any other contract with which the courts have to deal, except as to the element of consent. What persons establish by entering into matrimony is not only a contractual relation, but also a social status. The interest of the state must always be taken into account. Edmunds v. Edwards 255
2. Marriages are void when either party, at the time of the marriage, is insane or mentally incompetent to enter into the marriage relation. Edmunds v. Edwards 255
3. A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto. Edmunds v. Edwards 255
4. Mere weakness of mind is not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his free, intelligent consent to it. Edmunds v. Edwards 255
5. Absolute inability to contract, insanity, or idiocy will void a marriage, but mere weakness of mind will not

unless it produces a derangement sufficient to void all contracts by destroying the power to consent. Edmunds v. Edwards 255

6. A marriage is valid if a party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates. Edmunds v. Edwards 255
7. A marriage is presumed valid, and the burden of proof is upon the party seeking annulment. Edmunds v. Edwards 255
8. It is the general rule that the existence of a valid marriage is a question of fact. Edmunds v. Edwards 255
9. The rule is well established that where evidence on material questions of fact is in irreconcilable conflict, the Supreme Court, in determining the weight of the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying, and therefore must have accepted one version of the facts rather than the opposite. This rule has been applied both in annulment actions and in divorce actions. Edmunds v. Edwards 255

Mechanic's Liens.

1. One who claims a mechanic's lien must clearly bring himself within the terms of a statute allowing a lien on real estate. Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611
2. A person who manufactures, purchases, or keeps for sale materials which enter into buildings, and who sells or furnishes such materials without performing any work or labor in installing or putting them in place is a materialman within the meaning of section 52-101 et seq., R. R. S. 1943. Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611
3. Section 52-101 et seq., R. R. S. 1943, do not extend the right to a lien on real estate to a supplier of a supplier of materials. Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611
4. A failure to serve a notice of the filing of a lien under the provisions of section 52-103, R. S. Supp., 1978, makes such lien void and unenforceable. Waite Lumber Co., Inc. v. Carpenter 860
5. A mechanic's lien is tried by this court de novo on the record, giving 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 other. Waite Lumber Co., Inc. v. Carpenter 860

Mental Health.

1. It is not error to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity. State v. Williams 56
2. Marriages are void when either party, at the time of the marriage, is insane or mentally incompetent to enter into the marriage relation. Edmunds v. Edwards 255
3. A marriage contract will not be declared void for mental incapacity to enter into it unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto. Edmunds v. Edwards 255
4. Mere weakness of mind is not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his free, intelligent consent to it. Edmunds v. Edwards 255
5. Absolute inability to contract, insanity, or idiocy will void a marriage, but mere weakness of mind will not unless it produces a derangement sufficient to void all contracts by destroying the power to consent. Edmunds v. Edwards 255
6. A marriage is valid if a party has sufficient capacity to understand the nature of the contract and the obligations and responsibilities it creates. Edmunds v. Edwards 255
7. Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at, and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion. State v. Myers .. 867

Mineral Estates.

1. A mineral interest is real estate and when severed from the surface ownership must be separately listed on the tax rolls in the name of the owner. State ex rel. Svoboda v. Weiler 799
2. When requested by the owner of surface rights, the county assessor must separately list the severed mineral interests in the names of the owners of such interests. State ex rel. Svoboda v. Weiler 799

Minors.

1. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the

best interests and welfare of the child. Turner v. Turner 6
Haynes v. Haynes 35
Batenhorst v. Batenhorst 601
2. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Turner v. Turner 6
3. While the wishes of a child under the age of 14 years are not controlling where in conflict with what the courts regard as the minor's best interests, still, even though an infant is under the age of 14, if he has reached an age sufficient to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian. Haynes v. Haynes 35
4. While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Haynes v. Haynes 35
5. Both parties to a marriage are obligated to support minor children. Coffey v. Coffey 191
6. Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. Batenhorst v. Batenhorst 601
7. In a proceeding in juvenile court under sections 43-202(2) and 43-209, R. R. S. 1943, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child or children and refused to give the child or children necessary parental care and protection. State v. Wedige 687
8. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Wedige 687
9. See also McClain v. Lambert 629

Miranda Rights.

Once an accused is arrested and informed of his Miranda rights, there is no requirement that re-warnings be given

each time he is questioned about a crime or crimes different from that for which he was arrested. State v. Comer 549

Misdemeanors.

Misdemeanor offenses which arise to felony status by virtue of repetition may not act as a trigger conviction for purposes of determining whether the defendant may be given an enhanced penalty under the Habitual Criminal Act. State v. Chapman 368

Mistrial.

1. A motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution. State v. Reed 45
2. A motion for a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a showing of an abuse of discretion. Kenyon & Larsen v. Deyle 209

Motions, Rules, and Orders.

1. A motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution. State v. Reed 45
2. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. Kennedy v. Kennedy 363
3. Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law. Kennedy v. Kennedy ... 363
4. When the allegations of the pleadings and the evidence offered at the hearing on a motion for summary judgment show there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained and summary judgment should be granted. McGreevy v. Bremers 554
5. Where the evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the trial court and its decision will not be reversed on appeal in the absence of a showing of an abuse of discretion. State v. Harris 844

Motor Vehicles.

1. In order that evidence of consumption of alcoholic liquor by the operator of a motor vehicle be sufficient to submit the issue of the driver's intoxication to the

jury, there must exist some evidence of facts or circumstances or competent opinion, either lay or expert, from which the trier of fact could conclude that because of the consumption of alcoholic liquor the physical or mental faculties of the driver were impaired to any appreciable degree so as to affect the driver's ability to operate his motor vehicle as an ordinarily prudent and cautious driver would operate it. Fortin v. Hike 344

2. Permission as used in the standard automobile insurance policy is not limited to that expressly granted, but may arise and be implied from a course of conduct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of the owner. MFA Ins. Companies v. Mendenhall 430
3. Express permission granted for limited specific purposes on isolated occasions does not imply general permission to use an automobile for purposes wholly unrelated in time, character, or circumstances. MFA Ins. Companies v. Mendenhall 430
4. Implied permission to use an automobile arises from a course of conduct indicating mutual acquiescence or lack of objection under circumstances signifying assent. MFA Ins. Companies v. Mendenhall 430
5. 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. The Cornhusker Bank of Omaha v. McNamara 504
6. No court shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless there is substantial compliance by such claimant with the provisions of section 60-105, R. R. S. 1943. The Cornhusker Bank of Omaha v. McNamara 504
7. Constructive possession may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of ownership, dominion, and right of control over an automobile in which the contraband was found. State v. Woodruff 638
8. The mere skidding of an automobile without more does not prove negligence. Porter v. Black 699
9. A causal relation or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for the accident or injury

to come within the meaning of the clause "arising out of the ownership, maintenance or use" of a vehicle, and where such causal connection or relation is absent, coverage will be denied. Dairyland Ins. Co. v. Esterling 750

Municipal Corporations.

1. A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation. West Fort Residents Assn. v. Housing Auth. of City of Omaha 397
2. The power to accept property by gift or dedication for street purposes within 3 miles of the corporate limits of cities of the metropolitan class is necessarily implied in or incidental to expressly granted statutory powers over subdivision and zoning jurisdiction. Baker v. Buglewicz 656
3. Where the dedication of a street is accepted by the city, and the city manifests an interest to use it, or it has been used by the public as a street, then the rights of the city and the public have accrued against the dedicator who cannot thereafter withdraw his dedication. Baker v. Buglewicz 656

Nebraska Probate Code.

Issue of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code. § 30-2209, R. R. S. 1943. Turnbough v. Bolte 24

Negligence.

1. There must be causation between the negligence of the insurance broker or agent and the damage to his principal. Kenyon & Larsen v. Deyle 209
2. The measure of damages for the loss caused by the negligence of the broker in failing to obtain insurance is the amount that would have been due under the policy if it had been obtained by the broker. Kenyon & Larsen v. Deyle 209
3. A manufacturer is not liable for injuries to a user of a product which it has manufactured in accordance with plans and specifications of one other than the manufacturer, except when the plans are so obviously, patently, or glaringly dangerous that a manufacturer exer-

cising ordinary care under the circumstances then existing would not follow them. Moon v. Winger Boss Company, Inc. 292
4. Findings of the trial court in actions brought under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. Brown v. State 332
5. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of. Porter v. Black 699
6. Negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it. Porter v. Black 699
7. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed. Porter v. Black 699
8. The mere skidding of an automobile without more does not prove negligence. Porter v. Black 699
9. Violation of statutes regarding trespassing livestock and restraining of bulls and other specified male animals is at least evidence of negligence and may be considered as such by the trier of facts. Fuchser v. Jacobson 786

New Trial.

1. The general rule in an equity case, where a motion to dismiss at the close of plaintiff's case is erroneously sustained, requires that the cause be remanded to the trial court for a new trial. Botsch v. Leigh Land Co. .. 401
2. At a new trial, amendments to the pleadings not inconsistent with the opinion directing the remand should be allowed, and the trial court may decide the case on the record already made, or may take additional evidence or try all issues de novo. Botsch v. Leigh Land Co. 401
3. In seeking temporary damages as a result of a nuisance, where plaintiffs on a retrial are limited by the trial court in the presentation of evidence to the time period covered by the first trial, there is no prejudice to the plaintiff when the opportunity exists to dismiss the pending suit and refile the same covering the extended time period, or to file a separate action for the alleged later-arising damages. Botsch v. Leigh Land Co. 401

4. Where, on appeal, findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court, and the Supreme Court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial. Botsch v. Leigh Land Co. 401
5. Evidence which only tends to discredit a witness who testified at trial is not sufficient to justify a new trial. State v. Mays 730
6. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and, unless an abuse of discretion is shown, its determination will not be disturbed. State v. Mays 730

Notice.

1. Section 44-516, R. R. S. 1943, requiring notice of cancellation for nonpayment of premium, applies only to a cancellation by the unilateral action of the insurer before the end of the policy term. It does not apply to an automatic termination by expiration of the policy period. Sampson v. State Farm Mut. Ins. Co. 164
2. The code requirement for a private sale of collateral is that reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. First Nat. Bank & Trust Co. v. Hermann 169
3. Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. First Nat. Bank & Trust Co. v. Hermann 169
4. Notification under the code does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in ordinary course. First Nat. Bank & Trust Co. v. Hermann 169
5. A notice sent by ordinary mail will comply with the statute. First Nat. Bank & Trust Co. v. Hermann 169
6. A notification of the sale of collateral sent by certified mail is sufficient under the statute if forwarded to the correct address of the debtor even though it is "unclaimed" by the debtor and returned to the sender. First Nat. Bank & Trust Co. v. Hermann 169

7. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for further indebtedness is not a defense to an action upon the guaranty agreement. First State Bank v. Peterson 814
8. The presumption that a letter addressed, stamped, and mailed reached the addressee in the usual course of mails does not arise where it is shown and that an incorrect address was used. Waite Lumber Co., Inc. v. Carpenter 860
9. A failure to serve a notice of the filing of a lien under the provisions of section 52-103, R. S. Supp., 1978, makes such lien void and unenforceable. Waite Lumber Co., Inc. v. Carpenter 860

Nuisances.

1. In seeking temporary damages as a result of a nuisance, where plaintiffs on a retrial are limited by the trial court in the presentation of evidence to the time period covered by the first trial, there is no prejudice to the plaintiff when the opportunity exists to dismiss the pending suit and refile the same covering the extended time period, or to file a separate action for the alleged later-arising damages. Botsch v. Leigh Land Co. 401
2. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance thereby, unless it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly. Botsch v. Leigh Land Co. 401

Obscenity.

The Nebraska obscenity statutes are not an impermissible infringement upon freedom of speech. State v. Tara Enterprises, Inc. 516

Parent and Child.

1. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. Turner v. Turner 6
2. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear

abuse of discretion or it is clearly against the weight of the evidence. Turner v. Turner 6
Haynes v. Haynes 35
Kennedy v. Kennedy 363
Sikes v. Sikes 441

3. While the wishes of a child under the age of 14 years are not controlling where in conflict with what the courts regard as the minor's best interests, still, even though an infant is under the age of 14, if he has reached an age sufficient to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian. Haynes v. Haynes 35
4. The primary consideration in matters involving child custody, whether arising as a part of the proceeding for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child. Haynes v. Haynes 35
5. While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Haynes v. Haynes 35
6. Both parties to a marriage are obligated to support minor children. Coffey v. Coffey 191
7. The right of a parent to maintain custody of his or her own child free of interference from the state is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child. Linn v. Linn 218
8. Termination of parental rights because it is in the "best interests and welfare of the children," as provided for in section 42-364, R. R. S. 1943, is not sufficiently specific to apprise parents of why the state may find it necessary to terminate parental rights and is an insufficient warning of prohibited conduct by which the parents can regulate their parental activities. As such, it is impermissibly vague and is unconstitutional. Linn v. Linn 218
9. An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence. State v. Burger 340
10. Parental rights may be terminated for any one of the six independent circumstances proscribed by section

43-209, R. R. S. 1943. State v. Burger 340
11. Ordinarily, jurisdiction over the custody of a child in a divorce proceeding terminates when the child reaches his majority. Kennedy v. Kennedy 363
12. A decision on child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless the court abused its discretion. Welke v. Welke 426
13. In determining the question of child custody, the paramount consideration must be the best interests and welfare of the child. Sikes v. Sikes 441
14. A judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. Sikes v. Sikes 441
15. Custody of minor children is determined on the basis of their best interests. Batenhorst v. Batenhorst 601
16. An award of custody is subject to review de novo; however, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Batenhorst v. Batenhorst 601
17. Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. Batenhorst v. Batenhorst 601
18. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. R. S. 1943, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child or children and refused to give the child or children necessary parental care and protection. State v. Wedige 687
19. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Wedige 687
20. In determining whether a modification of child support is warranted, the circumstances of the parents as well as those of the children must be considered. Hale v. Hale 837

Parties.

1. Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the

controversy. West Fort Residents Assn. v. Housing Auth. of City of Omaha 397
2. A motion invoking the power of the court on any question other than jurisdiction constitutes a general appearance and confers jurisdiction over the moving party. State v. Wedige 687

Paternity.

The Legislature having failed to provide for a procedure to determine paternity under section 42-762 et seq., R. R. S. 1943, the Revised Uniform Reciprocal Enforcement of Support Act, it is necessary to look to the general paternity statutes, and in particular section 13-112, R. R. S. 1943, and the alleged father is entitled to a jury trial on the issue of paternity at his request. Wahlers v. Frye 399

Payments.

1. The defense of payment is an affirmative defense and the burden of proving it is on the party alleging it. Foremost Ins. Co. v. Allied Financial Services, Inc. ... 153
2. Where a creditor has treated a debtor's account as an open or running account by debiting purchases and crediting payments and showing the balance due after each entry, he may not reconstruct the account after a dispute has arisen by crediting particular payments to particular purchases so as to claim a breach of an agreement by the debtor to pay for purchases within 30 days. Diesel Service, Inc. v. Accessory Sales, Inc. 381
3. Where services are furnished to a party and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. Denton v. Nelson 833

Plea Bargains.

1. The trial judge should not participate in plea discussions. State v. Svoboda 175
2. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence when the judge becomes a participant in plea bargaining. State v. Svoboda 175

Pleadings.

1. The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, by inserting other allegations material to the case or, when the amendment does not change substantially the claim or defense, by

conforming the pleading or proceeding to the facts proved. The trial court may exercise its discretion in granting an amendment to the pleadings at any stage of the proceedings, even after the parties rest. Foremost Ins. Co. v. Allied Financial Services, Inc. 153

2. In the absence of a bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the trial court. A corollary of the principle is that where there is no bill of exceptions presented to us, it will be presumed that the evidence supports the judgment. Tedco Development Corp. v. Overland Hills, Inc. 194
3. The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, but judicial admissions. Knoell Constr. Co., Inc. v. Hanson 305
4. A party cannot plead one cause of action and then introduce proof to establish another. Knoell Constr. Co., Inc. v. Hanson 311
5. A motion to amend the pleadings to conform to the evidence, made at the close of all evidence, rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment. Remington v. Bryan 372
6. Under the Nebraska system of code pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense. Remington v. Bryan 372
7. At such new trial, amendments to the pleadings not inconsistent with the opinion directing the remand should be allowed, and the trial court may decide the case on the record already made, or may take additional evidence or try all issues de novo. Botsch v. Leigh Land Co. 401
8. Except for appeals involving eminent domain proceedings, neither party is required to file a petition on appeal in the District Court when appealing from a judgment or decree entered by a county court or municipal court. Hornung v. Hatcher 449
9. In appeals involving eminent domain proceedings, the first party appealing must file a petition on appeal within 50 days from the rendition of the award or judgment of the county court, although the filing of the petition is not jurisdictional. See, Estate of Tetherow v. State, 193 Neb. 150, 226 N. W. 2d 116; City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537. Hornung v. Hatcher 449

10. When the allegations of the pleadings and the evidence offered at the hearing on a motion for summary judgment show there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained and summary judgment should be granted. McGreevy v. Bremers 554

Pleas.

1. The mere fact that the defendant maintains he does not recall committing the crime but with full faculty enters a plea does not impose upon the trial court an obligation or duty to require a competency hearing. State v. Holtan 314
2. If not apparent from the face of the statute, the constitutionality may be challenged under a plea of not guilty. State v. Valencia 719

Police Officers and Sheriffs.

An officer is required to exercise reasonable care and diligence for the safekeeping of property within his custody. The care required is that which men of average prudence would exercise in the conduct of their own affairs and must be commensurate with the dangers involved, having regard for the nature and situation of the property. The officer is responsible for reasonably foreseeable happenings or contingencies which could have been prevented by the exercise of reasonable care. Nash v. City of North Platte 480

Post Conviction.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Holtan 314

Powers.

As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts. Transport Workers of America v. Transit Auth. of City of Omaha 26

Presumptions.

The presumption that a letter addressed, stamped, and mailed reached the addressee in the usual course of mails does not arise where it is shown that an incorrect address was used. Waite Lumber Co., Inc. v. Carpenter 860

Prisoners.

1. Pursuant to the provisions of section 83-151, R. S. Supp., 1978, any money derived from the sale of a hobby or craft item manufactured or produced by an offender is the money of the offender and is to be placed in the offender's individual private account. Randolph v. Department of Correctional Services 672
2. The disciplinary process contemplated by section 83-4,121, R. R. S. 1943, is commenced when written notice of the infraction is served on the inmate. Johnson v. Vitek 745
3. Section 83-4,121, R. R. S. 1943, requires only that a disciplinary process be commenced in 8 days, not that it be completed within that time. Johnson v. Vitek 745

Probate and Administration.

A de novo trial in the District Court on appeal in probate matters is likewise held as if no action whatever had been instituted in the county court. Hornung v. Hatcher 449

Proof.

1. The burden of proof is on the claimant employee to prove the nature of the contractual relationship. Stephens v. Celeryvale Transport, Inc. 12
2. The defense of payment is an affirmative defense and the burden of proving it is on the party alleging it. Foremost Ins. Co. v. Allied Financial Services, Inc. ... 153
3. In a workmen's compensation case the plaintiff has the burden of establishing, by a preponderance of the evidence, that the injury sustained by the employee was caused by or related to the accident and was not the result of the normal progression of the employee's preexisting condition which would have been sustained by the employee even in the absence of the accident. Taylor v. Benton 203
4. A defendant may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. State v. Doyle 234
5. 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 other reasonable hypothesis of innocence. State v. Doyle 234

6. A marriage is presumed valid, and the burden of proof is upon the party seeking annulment. Edmunds v. Edwards 255
7. A party cannot plead one cause of action and then introduce proof to establish another. Knoell Constr. Co., Inc. v. Hanson 311
8. A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit. Knoell Constr. Co., Inc. v. Hanson 311
9. In proving damages, the law requires not mathematical certainty but merely the best evidence obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Delp v. Laier 417
10. Under the Nebraska Workmen's Compensation Law, the claimant seeking compensation has the burden of proof to establish by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought. McCann v. Holy Sepulchre Cemetery Assn. 444
11. The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means. McCann v. Holy Sepulchre Cemetery Assn. 444
12. Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the work as provided in the contract. The contractor has the burden of proving the amount of damages with reasonable certainty. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
13. Under the Nebraska workmen's compensation act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. Keith v. School Dist. No. 1 631
14. The presence of a preexisting disease or condition en-

hances the degree of proof required to establish that the injury arose out of and in the course of employment. Keith v. School Dist. No. 1 631
15. This court ordinarily will not take judicial notice of rules or regulations of a governmental department or agency where such rules or regulations are claimed to form an implied part of a contract of employment. Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity. Nevels v. State 642
16. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Wedige 687
17. Although the plaintiff does not have the burden to prove his damages to a mathematical certainty, the plaintiff does have the burden to prove by a preponderance of the evidence the amount of his damages to a reasonable certainty. Hein v. M & N Feed Yards, Inc. ... 691
18. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of. Porter v. Black 699
19. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed. Porter v. Black 699
20. Ordinarily, when 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. Matthews 709
21. Intent to distribute may be inferred from the equipment and quantity of controlled substances seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Matthews 709
22. At a hearing on a defendant's motion to quash an attachment under section 25-1040, R. R. S. 1943, the burden is upon the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed. Ceres Fertilizer, Inc. v. Beekman 768
23. The crime of burglary requires proof of a willful, malicious, and forcible breaking and entering with the intent to steal property of value, which elements are not common to the crime of receiving stolen property.

State v. Dinverno 775

Property.

1. The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all the landowners within the district upon fair and equitable terms and conditions. State ex rel. Blome v. Bridgeport Irr. Dist. 97
2. All water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied. An irrigation district has a duty to procure the necessary right-of-way and deliver water on fair and equitable terms and conditions to each tract of land subject to assessment. State ex rel. Blome v. Bridgeport Irr. Dist. 97
3. An irrigation district has no power to cancel or terminate the water rights of a landowner, nor can it suspend delivery of water except for nonpayment of taxes and assessments as provided by statute and the by-laws of the district. State ex rel. Blome v. Bridgeport Irr. Dist. 97
4. An irrigation district has a duty to deliver water to each tract of land subject to assessment, and the determination of whether one or more than one point of delivery to a tract is required must be made on a case-by-case basis. The point or points of water delivery reasonably required on any given tract of land must be determined upon the basis of what is just and equitable under the facts and circumstances of each case. State ex rel. Blome v. Bridgeport Irr. Dist. 97
5. The requirement of uniformity in taxation is applicable not only to the valuation of property, but also to the rate of taxation thereon. State ex rel. Douglas v. State Board of Equalization and Assm't 130
6. A vendor in a contract for sale of real estate must pay all taxes or assessments for which he is liable by the terms of the contract or the covenants in the deed, and in the absence of an express agreement, generally the vendor must pay all taxes which are a lien at the time of delivery of the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
7. A purchaser in a contract for sale of real estate must pay the taxes and assessments for which he is liable under the provisions of the contract or deed, and the purchaser will ordinarily be liable for all taxes which become a lien after the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
8. Taxes and assessments should, under some circum-

stances, be apportioned between the vendor and purchaser. Such circumstances would include cases where proration is specifically provided for in the contract or deed or where there is a local custom to that effect; where the contract is silent, statutory provisions may govern; where there is a specific contractual provision, it will govern. Tedco Development Corp. v. Overland Hills, Inc. 194

9. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. Matlock v. Matlock 357

10. The court shall also have regard for the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities. Matlock v. Matlock 357

11. How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. Matlock v. Matlock 357

12. This court will not modify a trial court's dissolution of marriage decree as to child support, property division, or alimony, if any, unless there has been an abuse of discretion. Bird v. Bird 619

13. The power to accept property by gift or dedication for street purposes within 3 miles of the corporate limits of cities of the metropolitan class is necessarily implied in or incidental to expressly granted statutory powers over subdivision and zoning jurisdiction. Baker v. Buglewicz 656

14. A contract to deliver the possession of a residence in which the heating system and built-in appliance system are to be in working condition requires the seller only to deliver possession with the systems in the same operating condition existing at the time the agreement was signed. Rosenberry v. Beck 664

15. 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. Ritter v. Ritter 668
Burton v. Burton 865

16. This court is not inclined to disturb the division of such property by the trial court unless it is patently unfair on the record. Ritter v. Ritter 668

17. The distribution of property and fixing of alimony rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Ritter v. Ritter 668
Lockwood v. Lockwood 818
18. A mineral interest is real estate and when severed from the surface ownership must be separately listed on the tax rolls in the name of the owner. State ex rel. Svoboda v. Weiler 799
19. When requested by the owner of surface rights, the county assessor must separately list the severed mineral interests in the names of the owners of such interests. State ex rel. Svoboda v. Weiler 799
20. 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. Lockwood v. Lockwood 818
21. In a proper case, the division of property and the matter of alimony may be considered together. Burton v. Burton 865
22. See also Sherman County Bank v. Lonowski 596

Prosecuting Attorneys.

1. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of exceptions. State v. Harris 844
2. Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks. State v. Harris 844

Proximate Cause.

1. Where the evidence is conflicting on the question of "sole proximate cause," the determination of that issue is for the trier of facts. Brown v. State 332
2. Under the Nebraska Workmen's Compensation Law,

the claimant seeking compensation has the burden of proof to establish by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought. McCann v. Holy Sepulchre Cemetery Assn. 444

3. In a damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

4. Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery for breach of contract. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

Public Officers and Employees.

In the absence of legislation, government employment can be terminated at the will of the appointing officer. Nevels v. State 642

Public Policy.

The public policy of the Commission of Industrial Relations is expressed in section 48-802, R. R. S. 1943, of the act and points out that the act is intended to provide public employees who do not otherwise have the right to strike an opportunity to mediate and arbitrate matters of employment which have not yet been agreed to by the employer. Transport Workers of America v. Transit Auth. of City of Omaha 26

Records.

1. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of exceptions. State v. Harris 844

2. Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks. State v. Harris 844

3. An assignment of error requiring an examination of evidence cannot prevail on appeal in the absence of a proper bill of exceptions. State v. Harris 844

Reopening Case.

A motion to reopen a criminal case to allow introduction of further evidence is addressed to the sound discretion of the trial court. State v. Crouch 781

Replevin.

The plaintiff in a replevin action has the burden of proof and must recover on the strength of its or his right in or to the property, and not upon any weakness of the interest of the defendant therein. The Cornhusker Bank of Omaha v. McNamara 504

Reports.

All evidence that is not turned over to the defendant does not constitute suppressed evidence. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigating work on a case. State v. Peery 271

Res Judicata.

1. Res judicata is an affirmative defense which must ordinarily be pleaded in order to be available. Tedco Development Corp. v. Overland Hills, Inc. 194
2. An owner of land taken by virtue of eminent domain proceedings, who has been paid and has accepted the award of damages, cannot afterwards contest the validity of the taking by collateral action. Bishop v. Department of Roads 760

Right-of-Way.

The authority of the county commissioners to establish new roads or to extend existing roads under the Rural Road Improvement District Act, sections 39-1638 to 39-1655, R. R. S. 1943, depends not only upon compliance with the procedures outlined in the act, but also upon the acquisition by the county in some manner of the necessary right-of-way. § 39-1644, R. R. S. 1943. State ex rel. Stansbery v. Schwasinger 457

Right to Counsel

1. If competent counsel, after investigation, considers a point worthless, the fact that he is court appointed does not require him to pursue it. The right to counsel does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit. State v. Holtan 314
2. The right of an indigent defendant to have counsel

does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not in itself sufficient to warrant the appointment of substitute counsel. State v. Fallis 465
3. The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time. State v. Jackson 806
4. The failure of police to notify counsel who represents the accused, when they have knowledge of the fact of such representation, will not render a statement made by accused inadmissible where the record reveals a voluntary relinquishment and waiver by the accused of his right to have counsel present during a custodial interrogation. State v. Jackson 806

Rules of Evidence.

1. Under section 27-407, R. R. S. 1943, evidence of subsequent measures is admissible to show "feasibility of precautionary measures, if controverted." Kurz v. Dinklage Feed Yard, Inc. 125
2. "Feasibility" as used in section 27-407, R. R. S. 1943, means more than capable of being done. It includes effectiveness and practicality. Kurz v. Dinklage Feed Yard, Inc. 125

Sales.

1. The code requirement for a private sale of collateral is that reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. First Nat. Bank & Trust Co. v. Hermann 169
2. Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. First Nat. Bank & Trust Co. v. Hermann 169
3. A notification of the sale of collateral sent by certified mail is sufficient under the statute if forwarded to the correct address of the debtor even though it is "unclaimed" by the debtor and returned to the sender. First Nat. Bank & Trust Co. v. Hermann 169
4. Under the Uniform Commercial Code, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physi-

cal delivery of the goods, unless otherwise explicitly agreed. Sherman County Bank v. Kallhoff 392
5. Pursuant to the provisions of section 83-151, R. S. Supp., 1978, any money derived from the sale of a hobby or craft item manufactured or produced by an offender is the money of the offender and is to be placed in the offender's individual private account. Randolph v. Department of Correctional Services 672

Schools and School Districts.

1. Class II school districts are those districts which maintain both elementary and high school grades and have a population of 1,000 or less, while Class III school districts, also maintaining elementary and high school grades, have a population in excess of 1,000 and less than 50,000. Quiring v. School Dist. No. 91 9
2. A district of the third class may be reclassified as a district of the second class, upon application of the board of education of such district, if the commissioner finds that the number of inhabitants of such district has decreased to the level established for districts of the second class. Quiring v. School Dist. No. 91 9
3. Automatic reduction from a Class III to a Class II district does not take place on a reduction in population. Quiring v. School Dist. No. 91 9
4. A contract to coach is not a contract subject to the procedural and substantive requirements of section 79-1254, R. R. S. 1943. Neal v. School Dist. of York 558

Searches and Seizures.

In the ordinary case, the seizure of some items beyond those specified in a search warrant does not result in the suppression of those items which were validly seized. Where items unspecified in the warrant are seized in a valid search, the fact that they are not admissible in evidence does not require suppression of property seized in accordance with the warrant. State v. Tara Enterprises, Inc. 516

Security Interest.

The purchase money priority provided for in section 9-312, U. C. C., is an exception to the first to file rule, and should be applied only in strict accordance with the limitations in the Uniform Commercial Code. Sherman County Bank v. Kallhoff 392

Sentences.

1. In the context of Chapter 29, article 25, the word "sen-

tence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Williams 56
2. The judgment in a criminal case is the sentence. State v. Long 252
3. Where the maximum term of a sentence pronounced is the statutory maximum for the offense, credit for jail time must be given. State v. Rathbun 329
4. Section 39-669.07, R. R. S. 1943, governs the sentence limits which the court may impose for violations of that section. State v. Chapman 368
5. A plea of guilty is not rendered involuntary simply because a defendant receives a more severe sentence than expected. State v. Kennedy 714
6. A sentence imposed within the limits of the statute will not generally be disturbed absent an abuse of discretion. State v. Crouch 781

Sexual Assault.

1. The testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. State v. Aby 267
2. Corroboration as to material facts and circumstances is sufficient and evidence that a complaint was made after the offense is admissible. State v. Aby 267
3. In a prosecution for sexual assault it is sufficient if the prosecutrix is corroborated as to material facts and circumstances which support her testimony as to the principal fact in issue. State v. Red Feather 734

Sexual Misconduct.

Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. Batenhorst v. Batenhorst 601

Sexual Sociopaths.

1. The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the law who are amenable to treatment, and confinement without treatment for those subject to the law but not amenable to treatment. State v. Otey 90
2. A determination as to whether a defendant is a sexual sociopath is of no importance where a death sentence

has been imposed. State v. Otey 90

Special Assessments.

A governmental subdivision has no authority to improve roads and levy special assessments except for public roads to which it has title. State ex rel. Stansbery v. Schwasinger 457

Specific Performance.

1. A vendor, sued for specific performance, who has retained possession and received rents and profits of the land, is liable for taxes accruing between the time of contract and the trial. Tedco Development Corp. v. Overland Hills, Inc. 194
2. As a general rule, where a valid, binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust. Panhandle Rehabilitation Center, Inc. v. Larson 605
3. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant. Panhandle Rehabilitation Center, Inc. v. Larson 605

Standing.

Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. West Fort Residents Assn. v. Housing Auth. of City of Omaha 397

Statutes.

1. An issue regarding the constitutionality of a statute must be raised at the earliest opportunity consistent with good pleading or it will be deemed waived. Quiring v. School Dist. No. 91 9
2. Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is incon-

sistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Stephens v. Celeryvale Transport, Inc. 12

3. Issue of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code. § 30-2209, R. R. S. 1943. Turnbough v. Bolte 24

4. The public policy of the Commission of Industrial Relations is expressed in section 48-802, R. R. S. 1943, of the act and points out that the act is intended to provide public employees who do not otherwise have the right to strike an opportunity to mediate and arbitrate matters of employment which have not yet been agreed to by the employer. Transport Workers of America v. Transit Auth. of City of Omaha 26

5. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than the literal meaning that would have the effect of defeating the legislative intent. State v. McDaniel 53

6. In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Williams 56

7. Under L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. State v. Williams 56

8. The sentencing procedure provided by the Nebraska death penalty statute does not violate either the Nebraska or the federal Constitution. State v. Otey 90

9. The purpose of the sexual sociopath law is to provide confinement with treatment for those persons subject to the law who are amenable to treatment, and confinement without treatment for those subject to the law but not amenable to treatment. State v. Otey 90

10. An irrigation district has no power to cancel or terminate the water rights of a landowner, nor can it suspend delivery of water except for nonpayment of taxes and assessments as provided by statute and the bylaws of the district. State ex rel. Blome v. Bridgeport

Irr. Dist. 97
11. Under the mandatory language of section 44-359, R. R. S. 1943, a successul litigant is entitled to receive a reasonable attorney's fee for in-house counsel actually engaged in the preparation and trial of the litigation to the same extent as outside counsel. Dale Electronics, Inc. v. Federal Ins. Co. 115
12. Under section 27-407, R. R. S. 1943, evidence of subsequent measures is admissible to show "feasibility of precautionary measures, if controverted." Kurz v. Dinklage Feed Yard, Inc. 125
13. "Feasibility" as used in section 27-407, R. R. S. 1943, means more than capable of being done. It includes effectiveness and practicality. Kurz v. Dinklage Feed Yard, Inc. 125
14. Section 44-516, R. R. S. 1943, requiring notice of cancellation for nonpayment of premium, applies only to a cancellation by the unilateral action of the insurer before the end of the policy term. It does not apply to an automatic termination by expiration of the policy period. Sampson v. State Farm Mut. Ins. Co. 164
15. Although normally the constitutionality of a legislative act must be raised at the trial or it will be considered to be waived, this court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice. Linn v. Linn 218
16. The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined. Linn v. Linn 218
17. Termination of parental rights because it is in the "best interests and welfare of the children," as provided for in section 42-364, R. R. S. 1943, is not sufficiently specific to apprise parents of why the state may find it necessary to terminate parental rights and is an insufficient warning of prohibited conduct by which the parents can regulate their parental activities. As such, it is impermissibly vague and is unconstitutional. Linn v. Linn 218
18. Where an offending portion of a legislative act can be separated from the remainder so that the latter may be enforced independent of the former, and the invalid

portion did not constitute such an inducement to the passage of the valid parts so that the latter would not have been passed without the former, the act is severable and the valid portions may remain enforceable. Linn v. Linn 218

19. Under section 29-2022, R. R. S. 1943, the determination of whether or not a jury should be permitted to separate during the trial of a criminal case is left to the discretion of the court. State v. Robbins 226

20. Under section 29-2022, R. R. S. 1943, after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until they agree upon a verdict or are discharged by the court. State v. Robbins 226

21. Under section 29-2022, R. R. S. 1943, the trial court may properly permit the separation of the jury after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation. State v. Robbins 226

22. A failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case without the express agreement or consent of the parties is erroneous but does not, in and of itself, constitute reversible error. State v. Robbins 226

23. In the absence of express agreement or consent by the defendant, a failure to comply with section 29-2022, R. R. S. 1943, by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted. State v. Robbins 226

24. Although by statute marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential, it is not a contract resembling in any but the slightest degree any other contract with which the courts have to deal, except as to the element of consent. What persons establish by entering into matrimony is not only a contractual relation, but also a social status. The interest of the state must always be taken into account. Edmunds v. Edwards 255

25. Title 18 U.S.C.A., section 2518, and section 86-705, R. R. S. 1943, are, in all substantive ways and in wording, virtually identical. They describe the information the

application must contain, what the judge entering the order must be able to find, and what the order must contain, as well as certain other matters. State v. DiMauro and Kessler 275

26. The history of both the federal act and the state statute concerning wiretapping makes clear that the statute must be used with great caution and may not be indiscriminately used by authorities. State v. DiMauro and Kessler 275

27. Statutory authority for wiretapping is to be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures are not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. State v. DiMauro and Kessler 275

28. Disability under section 48-121, R. R. S. 1943, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function. Craig v. American Community Stores Corp. 286
Wolfe v. American Community Stores 763

29. The trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating circumstance as set forth in section 29-2523. State v. Holtan 314

30. An order terminating parental rights under section 43-209, R. R. S. 1943, must be supported by clear and convincing evidence. State v. Burger 340

31. Parental rights may be terminated for any one of the six independent circumstances proscribed by section 43-209, R. R. S. 1943. State v. Burger 340

32. Admissions of a party to the litigation are excepted from the rule that a foundation for admission of inconsistent statements must be laid on cross-examination by affording a witness the opportunity to explain and deny the same. § 27-613, R. R. S. 1943. Fortin v. Hike 344

33. Section 39-669.07, R. R. S. 1943, governs the sentence limits which the court may impose for violations of

that section. State v. Chapman 368
34. In enacting a statute the Legislature must be presumed to have knowledge of all previous legislation upon the subject. Wahlers v. Frye 399
35. Statutes pertaining to the same subject matter should be construed together. Such statutes, being in pari materia, must be construed as if they were one law and effect given to every provision. Wahlers v. Frye .. 399
36. The Legislature having failed to provide for a procedure to determine paternity under section 42-762 et seq., R. R. S. 1943, the Revised Uniform Reciprocal Enforcement of Support Act, it is necessary to look to the general paternity statutes, and in particular section 13-112, R. R. S. 1943, and the alleged father is entitled to a jury trial on the issue of paternity at his request. Wahlers v. Frye 399
37. An action for declaratory judgment brought under section 25-21,149 et seq., R. R. S. 1943, which involves a question of fact, entitles the parties to a jury trial. MFA Ins. Companies v. Mendenhall 430
38. A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion. § 25-2156, R. R. S. 1943. State ex rel. Stansbery v. Schwasinger 457
39. The ultimate decision whether to acquire or accept right-of-way and to establish and/or improve a new road under the provisions of sections 39-1638 to 39-1655, R. R. S. 1943, is vested in the sound discretion of the county commissioners and the exercise of their authority in this respect may not be compelled by mandamus. State ex rel. Stansbery v. Schwasinger 457
40. The authority of the county commissioners to establish new roads or to extend existing roads under the Rural Road Improvement District Act, sections 39-1638 to 39-1655, R. R. S. 1943, depends not only upon compliance with the procedures outlined in the act, but also upon the acquisition by the county in some manner of the necessary right-of-way. § 39-1644, R. R. S. 1943. State ex rel. Stansbery v. Schwasinger 457
41. Legal custody is an essential element of the crime of escape from the legal custody of a law enforcement officer under section 28-736, R. R. S. 1943. State v. Dickson 476

42. An accused who was arrested for violation of a temporary order which had been issued under section 42-357, R. R. S. 1943, and which was not in effect at the time of the arrest, was not in legal custody. State v. Dickson 476
43. No court shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless there is substantial compliance by such claimant with the provisions of section 60-105, R. R. S. 1943. The Cornhusker Bank of Omaha v. McNamara 504
44. An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. R. S. 1943, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to the other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial. Scamperino v. Federal Envelope Co. 508
45. Under either subdivision (1) or (2) of section 48-121, R. R. S. 1943, a determination must be made as to the employee's loss of employability or earning capacity, and loss of bodily function is not an issue. Scamperino v. Federal Envelope Co. 508
46. The Nebraska obscenity statutes are not an impermissible infringement upon freedom of speech. State v. Tara Enterprises, Inc. 516
47. Workmen's compensation awards for disability under the provisions of section 48-121 (2), R. R. S. 1943, are not measured by loss of bodily function, but by reduction in earning power or employability. Sidel v. Travelers Ins. Co. 541
48. "Earning power," as used in subsection (2) of section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired. Sidel v. Travelers Ins. Co. 541
49. Subsections (3) and (6) of section 48-162.01, R. R. S. 1943, when read together mean that the statute authorizes vocational rehabilitation training not only under the circumstances specifically described in subsection (3), but also where the Nebraska Workmen's Com-

pensation Court finds that the employee has suffered a reduction in earning power on account of a compensable injury and also finds that vocational rehabilitation will increase that earning capacity. Sidel v. Travelers Ins. Co. 541

50. A contract to coach is not a contract subject to the procedural and substantive requirements of section 79-1254, R. R. S. 1943. Neal v. School Dist. of York 558

51. In determining whether a proposed settlement is conscionable under section 42-366 (2), R. R. S. 1943, a trial judge has discretion to request production of evidence on that issue, but has no affirmative duty to produce the evidence where the parties have failed to do so. Buker v. Buker 571

52. One who claims a mechanic's lien must clearly bring himself within the terms of a statute allowing a lien on real estate. Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611

53. A person who manufactures, purchases, or keeps for sale materials which enter into buildings, and who sells or furnishes such materials without performing any work or labor in installing or putting them in place is a materialman within the meaning of section 52-101 et seq., R. R. S. 1943. Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611

54. Section 52-101 et seq., R. R. S. 1943, do not extend the right to a lien on real estate to a supplier of a supplier of materials. Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611

55. The provisions of section 45-103, R. R. S. 1943, relating to payment of interest on judgments, refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. Dryden v. Dryden 666

56. Pursuant to the provisions of section 83-151, R. S. Supp., 1978, any money derived from the sale of a hobby or craft item manufactured or produced by an offender is the money of the offender and is to be placed in the offender's individual private account. Randolph v. Department of Correctional Services 672

57. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. R. S. 1943, the court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children, and it appears from the evidence that the parent or parents have substantially and continuously or repeatedly neglected the child or children and refused

to give the child or children necessary parental care and protection. State v. Wedige 687
58. Parental rights may be terminated under section 43-209, R. R. S. 1943, only upon presentation of clear and convincing evidence. State v. Wedige 687
59. The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. State v. Valencia 719
60. Difficulty in determining whether certain marginal offenses are within the meaning of language under attack as vague does not automatically render a statute unconstitutional for indefiniteness; the test is whether the language conveyed a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. State v. Valencia 719
61. Questions of the constitutionality of a statute upon which an information is based may be raised by a motion to quash or a demurrer if the defect is apparent from the face of the statute. State v. Valencia 719
62. If not apparent from the face of the statute, the constitutionality may be challenged under a plea of not guilty. State v. Valencia 719
63. Under the provisions of subsection (b) (1) of section 30-2346, R. R. S. 1943, where a testator has, during his lifetime, sold specifically devised property and at his death an unpaid balance remains owing to him on that sale, the beneficiary of the specific bequest is entitled to receive the unpaid balance. Ademption results only as to the part of the sales price received by the testator in his lifetime. Reed v. McClow 739
64. The common law doctrine of ademption has been modified by statute. § 30-2346, R. R. S. 1943. Reed v. McClow 739
65. In construing a statute, this court will presume that the Legislature intended a sensible rather than an absurd result. Reed v. McClow 739
66. The disciplinary process contemplated by section 83-4,121, R. R. S. 1943, is commenced when written notice of the infraction is served on the inmate. Johnson v. Vitek 745
67. Section 83-4,121, R. R. S. 1943, requires only that a disciplinary process be commenced in 8 days, not that it be completed within that time. Johnson v. Vitek 745
68. The "by accident" requirement of the workmen's compensation law is satisfied either if the cause was of an accidental character, or if the effect was unexpected or unforeseen and happened suddenly or violently. Wolfe

v. American Community Stores 763
69. The objective symptoms of an injury produced at the time of the accident are sufficient to satisfy the requirement of the workmen's compensation law if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. Wolfe v. American Community Stores 763
70. At a hearing on a defendant's motion to quash an attachment under section 25-1040, R. R. S. 1943, the burden is upon the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed. Ceres Fertilizer, Inc. v. Beekman 768
71. Enclosed pastureland planted to grass is cultivated land for the purposes of animal trespass statutes. Fuchser v. Jacobson 786
72. Violation of statutes regarding trespassing livestock and restraining of bulls and other specified male animals is at least evidence of negligence and may be considered as such by the trier of facts. Fuchser v. Jacobson 786
73. To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act: (1) The duty must be imposed by law; (2) the duty must still exist at the time the writ is applied for; and (3) the duty to act must be clear. State ex rel. Nebraska Nurses Assn. v. Board of Nursing 792
74. Statutes imposing a forfeiture or penalty are subject to strict construction and will not be construed to include anything beyond their letter, even though it may be within their spirit. County of Merrick v. Beck 829
75. On appeal from the county or municipal court to the District Court in civil matters under section 24-541, R. R. S. 1943, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county or municipal court. County of Merrick v. Beck 829
Denton v. Nelson 833
76. Where a civil case has been tried in the District Court on appeal from the county court de novo on the record pursuant to section 24-541, R. R. S. 1943, the Supreme Court on appeal examines the evidence and the record. The judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. County of Merrick v. Beck 829
Denton v. Nelson 833
77. One whose property is taken or damaged by a governmental subdivision authorized to institute condem-

nation proceedings, without an award being paid into county court prior to the taking or damaging of the property, is entitled to interest as provided for in section 76-711, R. R. S. 1943, from the date of the taking or damaging in the same manner as if the provisions of sections 76-701 to 76-725, R. R. S. 1943, had been followed. Danish Vennerforning & Old Peoples Home v. State 839

78. A failure to serve a notice of the filing of a lien under the provisions of section 52-103, R. S. Supp., 1978, makes such lien void and unenforceable. Waite Lumber Co., Inc. v. Carpenter 860

79. Under section 29-2022, R. R. S. 1943, the determination of whether or not a jury should be sequestered during the trial of a criminal case is left to the discretion of the court. State v. Myers 867

Streets and Alleys.

Where the dedication of a street is accepted by the city, and the city manifests an interest to use it, or it has been used by the public as a street, then the rights of the city and the public have accrued against the dedicator who cannot thereafter withdraw his dedication. Baker v. Buglewicz 656

Strict Liability.

A manufacturer is not liable for injuries to a user of a product which it has manufactured in accordance with plans and specifications of one other than the manufacturer, except when the plans are so obviously, patently, or glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them. Moon v. Winger Boss Company, Inc. 292

Summary Judgments.

1. When the allegations of the pleadings and the evidence offered at the hearing on a motion for summary judgment show there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law, the motion should be sustained and summary judgment should be granted. McGreevy v. Bremers 554

2. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. State ex rel. Schuler v. Bd. of County Commissioners 647

Pettis v. Lozier 802
3. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. State ex rel. Schuler v. Bd. of County Commissioners 647
4. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Pettis v. Lozier 802

Supreme Court.

1. Under L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. State v. Williams 56
2. Where a death sentence has been imposed, and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis. State v. Williams 56
3. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. Howard v. Chambers 150
4. A question of fact arising in an equitable action is reviewed de novo by the Supreme Court, but in determining the weight to be given the evidence, it will consider the fact that the trial court observed the witnesses and their manner of testifying. Botsch v. Leigh Land Co. 401
5. Where a question of fact arising in an equity action involves the assessment of money damages, the Supreme Court will not set aside such judgment if it is within the range of the evidence and is not arbitrary. Botsch v. Leigh Land Co. 401
6. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of exceptions. State v. Harris . 844
7. Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such re-

marks. State v. Harris 844

Suretyship.

Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for further indebtedness is not a defense to an action upon the guaranty agreement. First State Bank v. Peterson ... 814

Taxation.

1. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is applicable to state tax legislation and imposes restraint upon state taxing power. State ex rel. Douglas v. State Board of Equalization and Assm't 130
2. The requirement of uniformity in taxation is applicable not only to the valuation of property, but also to the rate of taxation thereon. State ex rel. Douglas v. State Board of Equalization and Assm't 130
3. A vendor in a contract for sale of real estate must pay all taxes or assessments for which he is liable by the terms of the contract or the covenants in the deed, and in the absence of an express agreement, generally the vendor must pay all taxes which are a lien at the time of delivery of the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
4. A purchaser in a contract for sale of real estate must pay the taxes and assessments for which he is liable under the provisions of the contract or deed, and the purchaser will ordinarily be liable for all taxes which become a lien after the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
5. Taxes and assessments should, under some circumstances, be apportioned between the vendor and purchaser. Such circumstances would include cases where proration is specifically provided for in the contract or deed or where there is a local custom to that effect; where the contract is silent, statutory provisions may govern; where there is a specific contractual provision, it will govern. Tedco Development Corp. v. Overland Hills, Inc. 194
6. A vendor, sued for specific performance, who has retained possession and received rents and profits of the land, is liable for taxes accruing between the time of contract and the trial. Tedco Development Corp. v. Overland Hills, Inc. 194
7. A mineral interest is real estate and when severed from

the surface ownership must be separately listed on the tax rolls in the name of the owner. State ex rel. Svoboda v. Weiler 799
8. When requested by the owner of surface rights, the county assessor must separately list the severed mineral interests in the names of the owners of such interests. State ex rel. Svoboda v. Weiler 799

Testimony.
1. The length and form of a hypothetical question is a matter within the discretion of the trial court. Kurz v. Dinklage Feed Yard, Inc. 125
2. While it is true that improper comments and questions by the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony, yet a trial court may with propriety interrogate witnesses regarding a fact under investigation when the tendency is only to develop the truth, and is not calculated to influence the jury, save as the testimony will assist them to arrive at a correct conclusion on the questions of fact in issue. Foremost Ins. Co. v. Allied Financial Services, Inc. 153

Time.
1. Under L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R. S. Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. State v. Williams 56
2. A motion for a continuance is addressed to the sound discretion of the trial court, and an order denying a continuance will not be disturbed in the absence of a showing of a clear abuse of discretion. State v. Otey .. 90
3. No capital case in which a final sentence was imposed prior to the effective date of L.B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act. State v. Holtan 314
4. Where a creditor has treated a debtor's account as an open or running account by debiting purchases and crediting payments and showing the balance due after each entry, he may not reconstruct the account after a dispute has arisen by crediting particular payments to particular purchases so as to claim a breach of an agreement by the debtor to pay for purchases within 30 days. Diesel Service, Inc. v. Accessory Sales, Inc. 381
5. The purchase money priority provided for in section 9-312, U. C. C., is an exception to the first to file rule,

and should be applied only in strict accordance with the limitations in the Uniform Commercial Code. Sherman County Bank v. Kallhoff 392

6. Under the Uniform Commercial Code, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, unless otherwise explicitly agreed. Sherman County Bank v. Kallhoff 392
7. In seeking temporary damages as a result of a nuisance, where plaintiffs on a retrial are limited by the trial court in the presentation of evidence to the time period covered by the first trial, there is no prejudice to the plaintiff when the opportunity exists to dismiss the pending suit and refile the same covering the extended time period, or to file a separate action for the alleged later-arising damages. Botsch v. Leigh Land Co. 401
8. In appeals involving eminent domain proceedings, the first party appealing must file a petition on appeal within 50 days from the rendition of the award or judgment of the county court, although the filing of the petition is not jurisdictional. See, Estate of Tetherow v. State, 193 Neb. 150, 226 N. W. 2d 116; City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537. Hornung v. Hatcher 449
9. An accused who was arrested for violation of a temporary order which had been issued under section 42-357, R. R. S. 1943, and which was not in effect at the time of the arrest, was not in legal custody. State v. Dickson 476
10. The disciplinary process contemplated by section 83-4,121, R. R. S. 1943, is commenced when written notice of the infraction is served on the inmate. Johnson v. Vitek 745
11. Section 83-4,121, R. R. S. 1943, requires only that a disciplinary process be commenced in 8 days, not that it be completed within that time. Johnson v. Vitek 745

Torts.

1. A manufacturer is not liable for injuries to a user of a product which it has manufactured in accordance with plans and specifications of one other than the manufacturer, except when the plans are so obviously, patently, or glaringly dangerous that a manufacturer exercising ordinary care under the circumstances then existing would not follow them. Moon v. Winger Boss Company, Inc. 292
2. Findings of the trial court in actions brought under

the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. Brown v. State 332

Trespass.

Enclosed pastureland planted to grass is cultivated land for the purposes of animal trespass statutes. Fuchser v. Jacobson 786

Trial.

1. A defendant is entitled to see and hear the witness and other evidence presented against him at trial. State v. Vail 1
2. The use of a substitute tape recorder was merely a more critical examination of evidence properly before the jury. The defendant's rights of confrontation were not violated. State v. Vail 1
3. Error in the admission of evidence may be harmless if the fact is established by other evidence. State v. Walker 42
   State v. Crouch 781
4. Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses. State v. Williams 56
5. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Williams 56
   State v. Johnson 778
6. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Williams 56
7. If a photograph illustrates or makes clear some controverted issue in a homicide case, proper foundation having been laid, it may be received in evidence even if it is gruesome. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court. State v. Williams .. 56
8. 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 and injuries, and to establish malice or intent. State v. Williams 56

9. The admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made. State v. Williams 56
10. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Williams 56
11. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not affect "materiality" in the constitutional sense. State v. Williams 56
12. In a criminal case the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Williams 56
13. The length and form of a hypothetical question is a matter within the discretion of the trial court. Kurz v. Dinklage Feed Yard, Inc. 125
14. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Howard v. Chambers 150
15. To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury, it being sufficient that there is none that ought *reasonably* to satisfy the jury that the fact sought to be proved is established. Foremost Ins. Co. v. Allied Financial Services, Inc. 153
16. The defense of payment is an affirmative defense and the burden of proving it is on the party alleging it. Foremost Ins. Co. v. Allied Financial Services, Inc. ... 153
17. The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, by inserting other allegations material to the case or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. The trial court may exercise its discretion in granting an amendment to the pleadings at any stage of the proceedings, even after the parties rest. Foremost Ins. Co. v. Allied Financial Services, Inc. 153
18. While it is true that improper comments and questions by the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony, yet a trial court may with propriety interrogate witnesses regarding a fact under investigation when the tendency is only to develop the truth, and is not calculated to influence the jury, save

as the testimony will assist them to arrive at a correct conclusion on the questions of fact in issue. Foremost Ins. Co. v. Allied Financial Services, Inc. 153
19. The trial judge should not participate in plea discussions. State v. Svoboda 175
20. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence when the judge becomes a participant in plea bargaining. State v. Svoboda 175
21. The trial court has broad discretion over the general conduct of a trial. Kenyon & Larsen v. Deyle 209
22. Under section 29-2022, R. R. S. 1943, the determination of whether or not a jury should be permitted to separate during the trial of a criminal case is left to the discretion of the court. State v. Robbins 226
State v. Myers 867
23. Newly discovered evidence must be of such a nature that if offered and admitted at a former trial, it probably would have produced a substantial difference in result. State v. Peery 271
24. In weighing the evidence in an equitable action, we take into consideration the fact that the trial court had the advantage of observing the witnesses and, where the evidence is conflicting, must have accepted the successful party's version of the facts. Stuthman v. Lippert 302
25. This court will dispose of an appeal on the theory on which it was presented to the trial court by the parties. Knoell Constr. Co., Inc. v. Hanson 305
26. Where the evidence is conflicting on the question of "sole proximate cause," the determination of that issue is for the trier of facts. Brown v. State 332
27. A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Remington v. Bryan 372
28. A motion to amend the pleadings to conform to the evidence, made at the close of all evidence, rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment. Remington v. Bryan 372
29. The debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor

may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and a fortiori at the time of the trial. Diesel Service, Inc. v. Accessory Sales, Inc. 381

30. It is the duty of this court on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby to give weight thereto. Delp v. Laier 417

31. Where the record indicates that a case was tried to the court without a jury and there is no indication of protest or objection on the part of either litigant, it will be presumed that a jury was waived. MFA Ins. Companies v. Mendenhall 430

32. Although this appeal is triable de novo in this court, we must give weight to the fact that the trial court saw and observed the witnesses and the attitude of the parties at trial and, likewise, had the opportunity to hear the witnesses and weigh their testimony. Sikes v. Sikes 441

33. Where there are irreconcilable conflicts in the evidence, weight will be given to the fact that the trial court accepted one version of the facts rather than the other. Sikes v. Sikes 441

34. The action of the trial court in excluding testimony of a witness may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. Hornung v. Hatcher 449

35. A motion for a change of venue in a criminal action is addressed to the sound discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Fallis 465

36. In an action in equity where the evidence is conflicting and cannot be reconciled, the Supreme Court will consider the fact that the trial court saw and heard the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484

37. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. State v. Payne 522

38. The trial court may properly refuse a requested in-

struction where the substance of the request is covered in the instructions given. State v. Payne 522
39. In the taking of evidence the Commission of Industrial Relations is required to follow the rules of evidence prevailing in the trial of civil cases. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth 567
40. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Samuels 585
State v. Stewart 626
41. If no standard instruction is available from Nebraska Jury Instructions (NJI) which applies to a subject upon which the jury should be instructed, the trial court must draft one appropriate to the existing conditions. State v. Samuels 585
42. Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Baker v. Buglewicz ... 656
43. Negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it. Porter v. Black 699
44. Evidence which only tends to discredit a witness who testified at trial is not sufficient to justify a new trial. State v. Mays 730
45. 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. Mays 730
46. To qualify as an excited utterance the following must exist: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the exciting event. State v. Red Feather 734
47. Statements to a physician which bear upon the nature

and cause of the injury are admissible under the medical diagnosis exception to the hearsay rule insofar as they are reasonably pertinent to diagnosis or treatment. State v. Red Feather 734

48. The confrontation clause is not violated by admitting out-of-court statements where the declarant testifies and is subject to cross-examination. State v. Red Feather 734

49. Volunteered statements of any kind are admissible without prior explanation of the defendant's rights. State v. Red Feather 734

50. At a hearing on a defendant's motion to quash an attachment under section 25-1040, R. R. S. 1943, the burden is upon the plaintiff to sustain by a preponderance of the evidence one or more of the grounds of attachment claimed. Ceres Fertilizer, Inc. v. Beekman 768

51. The constitutional provisions against double jeopardy are not violated by trial on a second charge which requires different and additional evidence than that in the first, even though both of the offenses charged arise out of the same chain of events. State v. Dinverno 775

52. A motion to reopen a criminal case to allow introduction of further evidence is addressed to the sound discretion of the trial court. State v. Crouch 781

53. Where the evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the trial court and its decision will not be reversed on appeal in the absence of a showing of an abuse of discretion. State v. Harris 844

54. A mechanic's lien is tried by this court de novo on the record, giving 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 other. Waite Lumber Co., Inc. v. Carpenter 860

55. Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at, and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion. State v. Myers 867

Trusts.

1. If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general

intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. Wood v. Lincoln General Hospital Assn. ... 576

2. If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust. Wood v. Lincoln General Hospital Assn. ... 576

3. A general charitable intent of the settlor is a precondition to the exercise of the court's cy pres power. If the trust instrument evidences no general charitable intention, then the trust fails and the devise or bequest lapses. Wood v. Lincoln General Hospital Assn. ... 576

4. The primary rule of construction of wills and trust instruments is that the court must, if possible, ascertain the intention of the testator or creator of the trust. Wood v. Lincoln General Hospital Assn. ... 576

Uniform Commercial Code.

1. The code requirement for a private sale of collateral is that reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. First Nat. Bank & Trust Co. v. Hermann ... 169

2. Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. First Nat. Bank & Trust Co. v. Hermann ... 169

3. Notification under the code does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in ordinary course. First Nat. Bank & Trust Co. v. Hermann ... 169

4. A notice sent by ordinary mail will comply with the statute. First Nat. Bank & Trust Co. v. Hermann ... 169

5. A notification of the sale of collateral sent by certified mail is sufficient under the statute if forwarded to the correct address of the debtor even though it is "unclaimed" by the debtor and returned to the sender. First Nat. Bank & Trust Co. v. Hermann ... 169

6. The purchase money priority provided for in section 9-312, U. C. C., is an exception to the first to file rule, and should be applied only in strict accordance with the

limitations in the Uniform Commercial Code. Sherman County Bank v. Kallhoff 392
7. Under the Uniform Commercial Code, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, unless otherwise explicitly agreed. Sherman County Bank v. Kallhoff 392
8. Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for further indebtedness is not a defense to an action upon the guaranty agreement. First State Bank v. Peterson 814

Vendor and Purchaser.

1. A vendor in a contract for sale of real estate must pay all taxes or assessments for which he is liable by the terms of the contract or the covenants in the deed, and in the absence of an express agreement, generally the vendor must pay all taxes which are a lien at the time of delivery of the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
2. A purchaser in a contract for sale of real estate must pay the taxes and assessments for which he is liable under the provisions of the contract or deed, and the purchaser will ordinarily be liable for all taxes which become a lien after the conveyance. Tedco Development Corp. v. Overland Hills, Inc. 194
3. Taxes and assessments should, under some circumstances, be apportioned between the vendor and purchaser. Such circumstances would include cases where proration is specifically provided for in the contract or deed or where there is a local custom to that effect; where the contract is silent, statutory provisions may govern; where there is a specific contractual provision, it will govern. Tedco Development Corp. v. Overland Hills, Inc. 194
4. A vendor, sued for specific performance, who has retained possession and received rents and profits of the land, is liable for taxes accruing between the time of contract and the trial. Tedco Development Corp. v. Overland Hills, Inc. 194

Venue.

1. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Williams 56

State v. Fallis 465

2. Among the relevant factors considered in determining whether a change of venue should be granted due to pretrial publicity are the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn. State v. Fallis 465

Verdicts.

1. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Williams 56
State v. Samuels 585
State v. Stewart 626

2. A jury verdict will not be set aside on appeal unless it is so clearly against the weight of the evidence as to be clearly the result of passion, prejudice, or mistake. Howard v. Chambers 150

3. To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury, it being sufficient that there is none that ought *reasonably* to satisfy the jury that the fact sought to be proved is established. Foremost Ins. Co. v. Allied Financial Services, Inc. 153

4. Evidence is sufficient to sustain a guilty verdict only when the jury could properly find guilt beyond a reasonable doubt. State v. Doyle 234

5. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Eagle Deer 249
State v. Carter 407
State v. Woodruff 638

6. A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Remington v. Bryan 372
7. A judgment on a fact issue tried to the court alone has the effect of a verdict of a jury and will not be set aside unless clearly wrong. MFA Ins. Companies v. Mendenhall 430
8. Findings of fact made by the Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict and will not be set aside on appeal unless clearly wrong. McCann v. Holy Sepulchre Cemetery Assn. 444
Scamperino v. Federal Envelope Co. 508
Keith v. School Dist. No. 1 631
9. 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. Fallis 465
State v. Matthews 709
10. In reviewing the judgment of the compensation court, we are bound by the findings of fact made by the Workmen's Compensation Court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and may not be set aside on appeal unless clearly wrong. Wolfe v. American Community Stores 763
11. When there is evidence in the record to support the finding of temporary total disability on the date of rehearing, we are bound by that finding. Wolfe v. American Community Stores 763
12. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong and in testing the sufficiency of evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party. Gray v. State 853

Wages.

Experience and longevity are proper matters to be considered in determining the wages to be paid to employees within the same job classification. Plattsmouth

Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth ... 567

Waiver.

1. An issue regarding the constitutionality of a statute must be raised at the earliest opportunity consistent with good pleading or it will be deemed waived. Quiring v. School Dist. No. 91 9
2. Although normally the constitutionality of a legislative act must be raised at the trial or it will be considered to be waived, this court reserves the right to note and correct plain error which appears on the face of the record in furtherance of the interests of substantial justice. Linn v. Linn 218
3. Under section 29-2022, R. R. S. 1943, the trial court may properly permit the separation of the jury after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation. State v. Robbins 226
4. The right to challenge a juror for cause may be waived or lost by a lack of diligence. The failure to make appropriate inquiry as to the qualifications of prospective jurors on voir dire waives later objections based on facts that might have been disclosed by such inquiry. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
5. The defense of former jeopardy, including that form thereof sometimes described as collateral estoppel, may be waived by failure to assert the defense and offer proof thereof in the trial court. State v. Carter .. 407
6. Where the record indicates that a case was tried to the court without a jury and there is no indication of protest or objection on the part of either litigant, it will be presumed that a jury was waived. MFA Ins. Companies v. Mendenhall 430

Waters.

1. The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all the landowners within the district upon fair and equitable terms and conditions. State ex rel. Blome v. Bridgeport Irr. Dist. 97
2. All water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied. An irrigation district has a duty to procure the neces-

sary right-of-way and deliver water on fair and equitable terms and conditions to each tract of land subject to assessment. State ex rel. Blome v. Bridgeport Irr. Dist. 97

3. The Department of Water Resources has original and exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights. State ex rel. Blome v. Bridgeport Irr. Dist. 97
4. An irrigation district has no power to cancel or terminate the water rights of a landowner, nor can it suspend delivery of water except for nonpayment of taxes and assessments as provided by statute and the by-laws of the district. State ex rel. Blome v. Bridgeport Irr. Dist. 97
5. An irrigation district has a duty to deliver water to each tract of land subject to assessment, and the determination of whether one or more than one point of delivery to a tract is required must be made on a case-by-case basis. The point or points of water delivery reasonably required on any given tract of land must be determined upon the basis of what is just and equitable under the facts and circumstances of each case. State ex rel. Blome v. Bridgeport Irr. Dist. 97
6. It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature. Delp v. Laier 417
7. It is fundamental that an owner may not by ditch, dam, or terrace divert surface waters in such a manner as to cast them in volume upon the adjoining lands of another to his damage. Delp v. Laier 417

Wills.

1. No gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses which shall in other respects be valid under the laws of this state shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. Wood v. Lincoln General Hospital Assn. 576

2. The primary rule of construction of wills and trust instruments is that the court must, if possible, ascertain the intention of the testator or creator of the trust. Wood v. Lincoln General Hospital Assn. 576
3. Under the provisions of subsection (b) (1) of section 30-2346, R. R. S. 1943, where a testator has, during his lifetime, sold specifically devised property and at his death an unpaid balance remains owing to him on that sale, the beneficiary of the specific bequest is entitled to receive the unpaid balance. Ademption results only as to the part of the sales price received by the testator in his lifetime. Reed v. McClow 739
4. The most common use of the term ademption is to describe the act by which a devise or bequest of specific property becomes inoperative by the sale or extinction of the property during the testator's lifetime. Reed v. McClow 739
5. The common law doctrine of ademption has been modified by statute. § 30-2346, R. R. S. 1943. Reed v. McClow 739

Wiretaps.

1. Title 18 U.S.C.A., section 2518, and section 86-705, R. R. S. 1943, are, in all substantive ways and in wording, virtually identical. They describe the information the application must contain, what the judge entering the order must be able to find, and what the order must contain, as well as certain other matters. State v. DiMauro and Kessler 275
2. The language of Title 18 U.S.C.A., section 2518 (1) (c) and 2518 (3) (c), is designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. State v. DiMauro and Kessler 275
3. In enacting Title III, Congress did not require the exhaustion of "specific" or "all possible" investigative techniques before wiretap orders could issue. State v. DiMauro and Kessler 275
4. There is no requirement that every investigative methodology be exhausted prior to application for a section 2518 authorization under Title 18 U.S.C.A. Investigators are not obliged to try all theoretically possible approaches. It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion.

State v. DiMauro and Kessler 275
5. The history of both the federal act and the state statute concerning wiretapping makes clear that the statute must be used with great caution and may not be indiscriminately used by authorities. State v. DiMauro and Kessler 275
6. Statutory authority for wiretapping is to be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures are not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. State v. DiMauro and Kessler 275
7. Neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued nor is the government required to use a wiretap only as a last resort. State v. DiMauro and Kessler 275
8. It is not necessary for the State to use all other investigative techniques before making application for the use of a wiretap. The State must, however, show that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried. State v. Trader 282

Witnesses.

1. A defendant is entitled to see and hear the witness and other evidence presented against him at trial. State v. Vail 1
2. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Howard v. Chambers 150
3. The testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. State v. Aby 267
4. Admissions of a party to the litigation are excepted from the rule that a foundation for admission of inconsistent statements must be laid on cross-examination by affording a witness the opportunity to explain and deny the same. § 27-613, R. R. S. 1943. Fortin v. Hike 344
5. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist. 360
6. In proving damages, the law requires not mathematical

certainty but merely the best evidence obtainable under the conditions existing and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Delp v. Laier ... 417

7. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. State v. Payne ... 522
8. An expert witness should not be allowed to express an opinion where the evidence shows there is no adequate basis for the opinion. Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth ... 567
9. Equity cases are heard de novo by this court. In determining the weight to be given to the evidence, however, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Hein v. M & N Feed Yards, Inc. 691
10. Evidence which only tends to discredit a witness who testified at trial is not sufficient to justify a new trial. State v. Mays ... 730
11. 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. Mays ... 730
12. The confrontation clause is not violated by admitting out-of-court statements where the declarant testifies and is subject to cross-examination. State v. Red Feather ... 734
13. A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness' fee. Lockwood v. Lockwood ... 818
14. Nonexpert witnesses who have an intimate personal acquaintance with and an opportunity to observe the actions and demeanor of a person, before, at, and after the time in question, may be permitted to testify as to his sanity or insanity when they have stated the primary facts which support their conclusion. State v. Myers ... 867

Words and Phrases.

1. In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is con-

strued to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed. State v. Williams 56

2. "Feasibility" as used in section 27-407, R. R. S. 1943, means more than capable of being done. It includes effectiveness and practicality. Kurz v. Dinklage Feed Yard, Inc. 125

3. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Aby 267

4. In enacting Title III, Congress did not require the exhaustion of "specific" or "all possible" investigative techniques before wiretap orders could issue. State v. DiMauro and Kessler 275

5. Disability under section 48-121, R. R. S. 1943, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function. Craig v. American Community Stores Corp. 286
Wolfe v. American Community Stores 763

6. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof. Craig v. American Community Stores Corp. . 286

7. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work or work of a similar nature that he is trained for, accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. Craig v. American Community Stores Corp. 286

8. A workman who, solely because of his injury, is unable to perform substantial amounts of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. Craig v. American Community Stores Corp. 286

9. Where the evidence is conflicting on the question of "sole proximate cause," the determination of that issue is for the trier of facts. Brown v. State 332

10. Permission as used in the standard automobile insurance policy is not limited to that expressly granted, but may arise and be implied from a course of con-

duct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of the owner. MFA Ins. Companies v. Mendenhall 430
11. Express permission granted for limited specific purposes on isolated occasions does not imply general permission to use an automobile for purposes wholly unrelated in time, character, or circumstances. MFA Ins. Companies v. Mendenhall 430
12. Implied permission to use an automobile arises from a course of conduct indicating mutual acquiescence or lack of objection under circumstances signifying assent. MFA Ins. Companies v. Mendenhall 430
13. In an equitable adjustment case involving a construction contract a "jury verdict" may be allowed if there is clear proof that the contractor was injured, and there was no more reliable method for computing damages, but only where the evidence adduced was sufficient to enable a court or jury to make a fair and reasonable approximation of the damages. Omaha P. P. Dist. v. Darin & Armstrong, Inc. 484
14. An essential element of a crime, including deliberation and premeditation in a first degree murder case, may be proven circumstantially. Circumstantial evidence may also be used to establish the *corpus delicti* of the crime. State v. Payne 522
15. The *corpus delicti* is the body or substance of the crime, the fact that the crime has been committed without regard to the identity of the person committing it, and is not established until it is proved that a human being is dead, and that the death occurred as the result of the criminal agency of another. State v. Payne 522
16. "Earning power," as used in subsection (2) of section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired. Sidel v. Travelers Ins. Co. 541
17. Subsections (3) and (6) of section 48-162.01, R. R. S. 1943, when read together mean that the statute authorizes vocational rehabilitation training not only under the circumstances specifically described in subsec-

tion (3), but also where the Nebraska Workmen's Compensation Court finds that the employee has suffered a reduction in earning power on account of a compensable injury and also finds that vocational rehabilitation will increase that earning capacity. Sidel v. Travelers Ins. Co. 541

18. A person who manufactures, purchases, or keeps for sale materials which enter into buildings, and who sells or furnishes such materials without performing any work or labor in installing or putting them in place is a materialman within the meaning of section 52-101 et seq., R. R. S. 1943. Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn. 611
19. The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of the workmen's compensation act. Keith v. School Dist. No. 1 631
20. The most common use of the term ademption is to describe the act by which a devise or bequest of specific property becomes inoperative by the sale or extinction of the property during the testator's lifetime. Reed v. McClow 739
21. The "by accident" requirement of the workmen's compensation law is satisfied either if the cause was of an accidental character, or if the effect was unexpected or unforeseen and happened suddenly or violently. Wolfe v. American Community Stores 763
22. Claim of right or of ownership means hostile and these terms describe the same element of adverse possession. Pettis v. Lozier 802

Workmen's Compensation.

1. The relationship of employer and employee, as well as that of employer and independent contractor, arises from the contract between the parties. Stephens v. Celeryvale Transport, Inc. 12
2. There is generally no single test by which the determination may be made of whether or not a workman is an employee as distinguished from an independent contractor. However, the ultimate question is what was the contract between the parties. Stephens v. Celeryvale Transport, Inc. 12
3. The burden of proof is on the claimant employee to prove the nature of the contractual relationship. Stephens v. Celeryvale Transport, Inc. 12
4. If there exists a written contract, it must be considered and may be of prime importance. However, a writing

which merely denominates the relationship may not be used to conceal the true arrangement. Stephens v. Celeryvale Transport, Inc. 12
5. Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Stephens v. Celeryvale Transport, Inc. 12
6. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. Taylor v. Benton 203
McCann v. Holy Sepulchre Cemetery Assn. 444
Scamperino v. Federal Envelope Co. 508
Keith v. School Dist. No. 1 631
7. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Taylor v. Benton 203
Keith v. School Dist. No. 1 631
8. In a workmen's compensation case the plaintiff has the burden of establishing, by a preponderance of the evidence, that the injury sustained by the employee was caused by or related to the accident and was not the result of the normal progression of the employee's preexisting condition which would have been sustained by the employee even in the absence of the accident. Taylor v. Benton 203
9. Where the employee suffers an accident which causes only trivial injury and no loss to the employee either by way of medical expenses or loss of wages related to the trivial injury, the employer is not obligated to compensate the employee. Taylor v. Benton 203
10. Disability under section 48-121, R. R. S. 1943, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function. Craig v. American Community Stores Corp. 286
Scamperino v. Federal Envelope Co. 508
Sidel v. Travelers Ins. Co. 541
Wolfe v. American Community Stores 763
11. In defining total disability, losses in bodily function

are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof. Craig v. American Community Stores Corp. . 286

12. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work or work of a similar nature that he is trained for, accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. Craig v. American Community Stores Corp. 286

13. A workman who, solely because of his injury, is unable to perform substantial amounts of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. Craig v. American Community Stores Corp. 286

14. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted. Craig v. American Community Stores Corp. 286

15. Under the Nebraska Workmen's Compensation Law, the claimant seeking compensation has the burden of proof to establish by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought. McCann v. Holy Sepulchre Cemetery Assn. 444

16. The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means. McCann v. Holy Sepulchre Cemetery Assn. 444

17. An employee suffering a schedule injury falling under subdivision (3) of section 48-121, R. R. S. 1943, is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to the other members or other parts of the body has developed; and the presence or absence of industrial disability is immaterial. Scamperino v. Federal Envelope Co. 508

18. Whether an injury results in an unusual or extraordinary condition affecting other parts of the body ordinarily presents a question of fact. Scamperino v.

Federal Envelope Co. 508
19. 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. Scamperino v. Federal Envelope Co. 508
20. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Scamperino v. Federal Envelope Co. 508
21. "Earning power," as used in subsection (2) of section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired. Sidel v. Travelers Ins. Co. 541
22. Subsections (3) and (6) of section 48-162.01, R. R. S. 1943, when read together mean that the statute authorizes vocational rehabilitation training not only under the circumstances specifically described in subsection (3), but also where the Nebraska Workmen's Compensation Court finds that the employee has suffered a reduction in earning power on account of a compensable injury and also finds that vocational rehabilitation will increase that earning capacity. Sidel v. Travelers Ins. Co. 541
23. Where the record in a case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment for the judgment of the Workmen's Compensation Court. Keith v. School Dist. No. 1 631
24. The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of

the workmen's compensation act. Keith v. School Dist. No. 1 631
25. Under the Nebraska workmen's compensation act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected or unforeseen injury was in fact caused by the employment. Keith v. School Dist. No. 1 631
26. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. Keith v. School Dist. No. 1 631
27. In reviewing the judgment of the compensation court, we are bound by the findings of fact made by the Workmen's Compensation Court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and may not be set aside on appeal unless clearly wrong. Wolfe v. American Community Stores 763
28. When there is evidence in the record to support the finding of temporary total disability on the date of rehearing, we are bound by that finding. Wolfe v. American Community Stores 763
29. The "by accident" requirement of the workmen's compensation law is satisfied either if the cause was of an accidental character, or if the effect was unexpected or unforeseen and happened suddenly or violently. Wolfe v. American Community Stores 763
30. The objective symptoms of an injury produced at the time of the accident are sufficient to satisfy the requirement of the workmen's compensation law if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. Wolfe v. American Community Stores 763
31. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong and in testing the sufficiency of evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party. Gray v. State 853
32. In a workmen's compensation case, the claimant must establish that the injury for which compensation is sought arose out of and in the course of the employment. Gray v. State 853
33. Recreational or social activities are within the course of employment when (1) they occur on the premises

during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.
Gray v. State 853