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OCCIDENTAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION, APPELLEE, V. VENCO PARTNERSHIP, A PARTNERSHIP, AND MIDWEST CRATING AND PACKING SERVICES, A PARTNERSHIP, APPELLANTS.

293 N. W. 2d 843

Filed June 17, 1980. No. 42741.

1. **"Due on Sale" Clauses: Restraints on Alienation.** "Due on sale" clauses are not direct restraints on alienation within the meaning of the law.
2. _____: _____. Generally, "due on sale" clauses are neither direct nor indirect restraints on alienation as a matter of law and, therefore, are not void as such.
3. **Public Policy: Contracts: Void Contracts.** The rules which hold a contract void as against public policy should not be unduly extended. Persons should not be unnecessarily restricted in their freedom to make their own contracts; and, therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy.
4. **Public Policy: Contracts: Courts.** It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.
5. **Mortgages: Acceleration Clauses: Penalties and Forfeitures.** A stipulation in a mortgage, providing that the whole debt secured thereby shall become due and payable upon failure of the mortgagor to pay the interest or any installment of principal upon maturity thereof or to comply with any other condition of the mortgage, is a legal, valid, and enforceable stipulation and is not in the nature of a penalty or forfeiture which a court of equity will refuse to enforce.
6. **"Due on Sale" Clauses: Mortgages: Public Policy.** A "due on sale" clause contained in a mortgage contract is not contrary to the public policy of this jurisdiction and is, therefore, valid and enforceable.
7. **"Due on Sale" Clauses: Acceleration Clauses: Words and Phrases.** A "due on sale" clause is a form of acceleration clause and, as such, should be subject to the same rules as other acceleration clauses, including the protection of equitable defenses.
8. **"Due on Sale" Clauses: Equity: Burden of Proof.** If permitting the lender to exercise the "due on sale" clause in a particular case would be inequitable, a court of equity is not helpless to fashion appropriate relief. However, the burden to plead and prove the

facts in that regard should be upon the mortgagor and not upon the mortgagee.

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

Norman Denenberg, for appellants.

Robert M. Zuber of Zuber & Ginsburg, for appellee.

William A. Tinstman, for amicus curiae Neb. League of Savings Assn.

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

KRIVOSHA, C. J.

The instant appeal presents the court with its first opportunity to consider the validity and enforceability of what is commonly referred to as a "due on sale" clause frequently found in a real estate mortgage. The trial court concluded that the "due on sale" clause was both valid and enforceable and, accordingly, ordered foreclosure of the mortgage containing the questioned clause. We have reviewed the files and records and the law applicable to such matters and conclude that the trial court was correct in its conclusions. Accordingly, therefore, we affirm the judgment of the trial court.

While "due on sale" clauses take a number of forms, essentially they are, in form, similar to the clause involved in the instant case, which provided "[I]n the event of a sale of said premises without the written approval of said [lender], then the whole indebtedness hereby secured shall, at the option of said [lender], immediately become due and collectible without further notice, and this mortgage may then be foreclosed to recover the amount due on said note or obligation . . . ." Another variation on this theme is what is commonly referred to as a "due on encumbrance" clause, which is essentially

the same as a "due on sale" clause, except that the triggering mechanism is the placing of a subsequent lien or encumbrance upon the mortgaged property. We concern ourselves here only with the "due on sale" clause.

While this is our first opportunity to examine the validity of "due on sale" clauses, many other courts have already made such an examination and reached varying results. The clause has also been the subject of numerous articles. Relevant opinions and articles are collected in an appendix to this opinion.

Most of the cases which have considered this issue have started their analysis by concluding without much discussion that the "due on sale" clause is a restraint on alienation. They have then either upheld the clause or struck it down depending on whether they thought that, under the particular facts, the restraint was reasonable. Likewise, appellants herein urge this court to find that the "due on sale" clause is an unreasonable restraint on alienation, absent the mortgagee pleading and proving that the security is impaired; while the appellees urge us to find that the clause is a reasonable restraint on alienation. We believe that the error committed by most jurisdictions in deciding this matter is their willingness to assume that a "due on sale" clause is a restraint on alienation and that the only issue is reasonableness. In our view, the "due on sale" clause is not a restraint on alienation as that concept is legally defined.

Both parties seem to concede that the language in the questioned clause is not, in a technical sense, a direct restraint on alienation but appellants maintain that the clause has the practical effect of a restraint on alienation and, therefore, should be struck down unless necessary to protect the lender's security.

An examination of the law pertaining to restraints

on alienation makes it clear that a "due on sale" clause is not a restraint on alienation and cannot be so considered for any purpose, theoretical or practical.

The Restatement of Property § 404 (1944) defines a restraint on alienation as follows:

> (1) A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance
>
> (a) to be void; or
>
> (b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or
>
> (c) to terminate or subject to termination all or a part of the property interest conveyed.
>
> (2) If a restraint on alienation is of the type described in Subsection (1), Clause (a), it is a disabling restraint.
>
> (3) If a restraint on alienation is of the type described in Subsection (1), Clause (b), it is a promissory restraint.
>
> (4) If a restraint on alienation is of the type described in Subsection (1), Clause (c), it is a forfeiture restraint.

One need simply read the various subparts of § 404 to conclude that a "due on sale" clause does not, in any manner, bring about any of the effects noted there and cannot, therefore, be a direct restraint on alienation.

The questioned clause in no manner precludes the owner-mortgagor from conveying his property. The owner is free to convey without legal restraint and the conveyance does not cause a forfeiture of the title, but only an acceleration of the debt.

It is true that the possibility of acceleration may impede the ability of an owner to sell his property as

he wishes; nonetheless, not every impediment to a sale is a restraint on alienation, let alone contrary to public policy. It is a fact that zoning restrictions, building restrictions, or public improvements may impede the sale and substantially affect the ability of an owner to realize a maximum price. Yet no one suggests that such restrictions or covenants, as a class, are invalid simply because they affect the ease with which one may dispose of one's property. We are somewhat at a loss to understand how or why so many courts have been willing to describe a "due on sale" clause as a restraint on alienation and we are unwilling to do so. Therefore, we begin our analysis by holding that "due on sale" clauses are not direct restraints on alienation within the meaning of the law.

Appellants next argue that, if a "due on sale" clause is not a direct restraint on alienation and, therefore, void, it is, at least, an unreasonable *indirect* restraint on alienation which should be declared invalid and unenforceable as a matter of public policy unless a mortgagee pleads and proves that his security is in jeopardy. That argument may be due, in part, to some overly broad language in our decision in *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 391, 183 N.W.2d 485, 490 (1971), wherein we said:

> A majority of this court, including the writer, has come to the conclusion that the law is the same on direct and indirect restraints on alienation. The authorities are not in accord on the question. While much has been written on the subject, we adopt the following as a proper statement of the law: "As used in this treatise, the expression 'restraint on alienation' refers not merely to the restriction of the legal power of alienation, but also to the restriction of alienability as a practical matter. Any provision in a deed, will, con-

> tract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation." Simes and Smith, The Law of Future Interests (2d Ed.), § 1111, p. 4. "In brief, the law is concerned primarily with practical alienability, not with a theoretical power of alienation." Simes and Smith, The Law of Future Interests (2d Ed.), § 1115, p. 8.

Whatever an indirect restraint on alienation as envisioned by us in *Cast* may be, a "due on sale" clause in a mortgage does not fall within that category. We perhaps were overly generous in our statement in *Cast* that "[*a*]*ny provision* . . . which, if valid, would tend to impair the marketability of property, is a restraint on alienation." *Id.* (Emphasis supplied.) As we have already observed with regard to zoning restrictions and building restrictions, some covenants may impair the marketability of property and yet not be restraints on alienation, direct or indirect, as that concept is known in the law. As an example, a covenant in a deed that requires the dedication of property solely to residential purposes is not a restraint on alienation even if the owner could sell the property at a higher price for commercial purposes. The most that need be said about *Cast* is that the restriction in question affected the validity of title and totally precluded the fee title owner from transferring title for a period of 25 years. There is no similarity between the language of the will in the *Cast* case and a common "due on sale" clause in a mortgage.

The difficulty in attempting to determine the validity of a contract based upon some notion of an indirect restraint on alienation and a concept of "practical inalienability" is that there is no framework within which a court may operate. Parties to a contract can never know, absent litigation, whether the contract is valid or not. Such a result is undesirable

and should be avoided if possible.

Nothing better demonstrates that a "due on sale" clause, in and of itself, is not a practical restraint on alienation than the facts in the instant case. The land in question was unimproved urban land subject to a 30-year mortgage. Unless the owner intended to construct a building for cash (an unlikely event), the property would have to be remortgaged in order to grant to the mortgagee of the improvement a first mortgage on not only the improvement, but on the land as well. It is not realistic to argue that the owner here intended the mortgage to remain in effect for the entire mortgage term, nor is it realistic to argue that the lender could not reasonably expect the mortgage to be prepaid well in advance of its due date.

The facts of the instant case further establish that the clause did not restrain the alienation. The transfer of title was made without any obvious difficulty resulting from the terms of the mortgage. The seller-mortgagor did not even answer the petition to foreclose the mortgage and was declared in default by the court. Moreover, the seller-mortgagor has not appeared in this court and apparently is completely unconcerned with the outcome of this case. How does one argue in light of those facts that the "due on sale" clause was a practical restraint on the alienation of title in this case?

An examination of some of the California cases collected in the appendix best points up the inherent difficulty in attempting to identify an "indirect practical restraint on alienation."

The landmark case involving modern day restraints on alienation is said to be the 1964 case of *Coast Bank v. Minderhout,* 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964). In the *Coast Bank* case, the California Supreme Court concluded that, while a "due on sale" clause was a practical restraint on alienation, it was a reasonable restraint and, therefore, was valid per se. This was then followed by a

series of other California decisions, each of which narrowed the conditions under which a "due on sale" clause would be considered valid. See, *La Sala v. American Sav. & Loan Ass'n,* 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971); *Tucker v. Lassen Sav. & Loan Ass'n,* 12 Cal. 3d 629, 529 P.2d 1169, 116 Cal. Rptr. 633 (1974). California's latest encounter with this problem was the 1978 decision by the California Supreme Court in the case of *Wellenkamp v. Bank of America,* 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). By the time the California court decided the *Wellenkamp* case, it had come full circle from its initial position in the *Coast Bank* case and determined that a "due on sale" clause was invalid and unenforceable unless the lender could demonstrate that enforcement was reasonably necessary to protect the lender against the impairment of its security or the risk of default.

A more interesting aspect of the *Wellenkamp* decision is the basis upon which the court reached its conclusion. Relatively few legal principles are relied upon as authority. The decision is based primarily on considerations of social need and the assumed effect of a "due on sale" clause in the marketplace. The rights and needs of the seller, as seen by the court, are detailed and balanced against the rights and needs of the lender, as seen by the court. The court concludes that the rights and needs of the seller outweigh those of the lender, notwithstanding the fact that the parties have freely entered into a contract to the contrary.

A further difficulty with the *Wellenkamp* decision is pointed up by footnote 9 wherein the author notes, on behalf of the court:

> In the instant case the party seeking enforcement of the due-on clause is an institutional lender. We limit our holding accordingly. We express no present opinion on the question whether a private lender, including

> the vendor who takes back secondary financing, has interests which might inherently justify automatic enforcement of a due-on clause in his favor upon resale.

It is difficult to understand why an institutional lender using private funds of individual depositors should be treated differently than an individual lender using his own funds.

While the immediate result obtained by the California court may seem to be in the best interest of everyone except the lender, one need only give some careful thought to the results which must flow from such a decision to recognize that whatever relief may be provided for the seller is momentary and fleeting. Decisions such as *Wellenkamp* place an unreasonable burden upon lenders and call upon courts to act as periodic arbitrators in the sale of real estate.

If any market hindrance imposed by the lender can be held to be a practical restraint on alienation and, therefore, invalid, no solution to varying market conditions can ever be validated and, ultimately, no one will be able to secure satisfactory financing.

If we conclude that a "due on sale" clause is an unreasonable restraint on alienation and is, therefore, void, it may follow that mortgages of short duration (less than 3 or 4 years) with variable rates are likewise invalid as indirect restraints on alienation. Certainly, whatever arguments are made about the inability to convey property because of a "due on sale" clause, may also be made with regard to a mortgage that must be renegotiated within 2 or 3 years after the sale at a price which the subsequent buyer may not be able to determine. It is true that the current owner of the property will be faced with the same problems whenever a short-term rollover mortgage or variable interest rate is placed upon the property and, therefore, the problems are not unique to a subsequent seller. Nevertheless, if

the rationale for declaring a "due on sale" clause invalid as a restraint on alienation is based upon some notion that buyers will be less willing to buy at a premium property that does not have a long-term fixed mortgage, then one must conclude that short-term variable rates and rollover mortgages will similarly impede the sale of property and constitute indirect restraints on the free conveyance of property, and should, therefore, be held invalid. Certainly courts should not get caught in that thicket. The oft-repeated assumption that a "due on sale" clause restrains the alienation of property is without satisfactory proof.

The difficulty with determining that a "due on sale" clause is an indirect restraint on alienation is that it requires investigations by the court of many different types of conditions and people unrelated to the mortgage document itself. A legal concept should not be established on that basis.

Appellants further argue that the only purpose of the "due on sale" clause is to protect the lender's interest in the security and it should not be used as a device to permit the lender to rearrange its loan portfolio. While there is no evidence in this record to support the former conclusion, there is support for the appellee's position that "due on sale" clauses are the main vehicle for increasing interest rates when money is scarce. See Bernhardt, *The Obligation,* California Real Estate Secured Transactions 185 (J. Hetland. ed. 1970); Senate Comm. on Banking, Housing & Urban Affairs, Federal National Mortgage Ass'n Public Meeting on Conventional Mortgage Forms, S. Doc. No. 92-21, 92nd Cong., 1st Sess. 44-45 (1971).

The restraint, if any, in this case does not attach itself to the title and the conveyance thereof but rather to the mortgage and the assumption thereof. The lender never promised the seller that another could assume the mortgage; as a matter of fact, it

told the seller the contrary. Should we, therefore, ignore the plain terms of the contract and look for some hidden intention, unsupported by evidence?

A further inequity of declaring all "due on sale" clauses invalid occurs when, as in the instant case, the note and mortgage contain no prepayment penalty. In the event that the market should decline below the established mortgage rate, the seller and his subsequent buyer are at liberty to pay off the lender without penalty and adjust their loan by seeking another, lower interest, mortgage. A "due on sale" clause allows a lender to adjust its portfolio in a rising market. The effect of a rising interest market and an invalid "due on sale" clause would be to permit a seller to obtain a premium for the sale of its property at the expense of the lender. We know of no principle in law or equity which would sustain such a position. We must find, as a matter of law, that "due on sale" clauses are neither direct nor indirect restraints on alienation and, therefore, are not void as such.

The only remaining basis for declaring the questioned clauses invalid would be a finding that they are repugnant to public policy. This should not be done lightly or without sufficient compelling reason.

As noted in 17 C.J.S. *Contracts* § 211 (1963):

> The rules which hold a contract void as against public policy should not be unduly extended. Persons should not be unnecessarily restricted in their freedom to make their own contracts; and, therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy.

Id. at 1022-24. Further, we have said:

> It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.

E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 887, 62 N.W.2d 288, 301 (1954).

Not only are we convinced that a "due on sale" clause is not repugnant to public policy but, to the contrary, we recognize that, under certain economic circumstances, they may favor the public interest and, therefore, be supportive of public policy. On the one hand, the assets of savings and loan associations are principally invested in long-term mortgages, while, on the other hand, the funds necessary to make such loans are obtained from short-term and demand savings accounts and certificates. As the cost of obtaining deposits rises, the spread widens between what the association must pay for funds by way of interest and what the association receives from borrowers. Once the spread gets too great, the association will be unable to meet the standards set by government regulations and will fail. The potential failure of savings and loan associations and the loss of their depositors' funds should be of no less a concern to the courts than the inability of a property owner to transfer its mortgage at a premium when selling its property. Balancing portfolio return with cost of money is an important factor in the survival of lending associations. The "due on sale" clause is an important device in maintaining that balance.

It is accepted almost without dispute that a stipulation in a mortgage, providing that the whole debt secured thereby shall become due and payable upon failure of the mortgagor to pay the interest or any installment of principal upon maturity thereof or to comply with *any other condition of the mortgage* is a

legal, valid, and enforceable stipulation and is not in the nature of a penalty or forfeiture which a court of equity will refuse to enforce. *Plummer v. Park,* 62 Neb. 665, 87 N.W. 534 (1901); *Crawford v. Houser,* 115 Neb. 62, 211 N.W. 165 (1926); *Hockett v. Burns,* 90 Neb. 1, 132 N.W. 718 (1911). Although a contrary rule has apparently been applied in some instances, it would seem that, generally, accelerative provisions in mortgages are not viewed with disfavor by the courts but are construed and the intention of the parties ascertained by the same rules as with other contract clauses. Sometimes an agreement for acceleration is even inferred from the terms of a particular mortgage. See 55 Am. Jur. 2d *Mortgages* § 371 (1971).

We are cited to no authority, nor are we able to find any, which would legally justify declaring a contract provision such as the one in the instant case, generally referred to as a "due on sale" clause, to be contrary to public policy and void. Generally, a "due on sale" clause contained in a mortgage contract is not contrary to the public policy of this jurisdiction and is, therefore, valid and enforceable.

A "due on sale" clause is a form of an acceleration clause and, as such, should be subject to the same rules as other acceleration clauses, including the protection of equitable defenses.

We said in our recent decision of *Redding v. Gibbs,* 203 Neb. 727, 736, 280 N.W.2d 53, 59 (1979):

> "It is held, apparently without dissent, that a court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause, when the default of the mortgagor was the result of some unconscionable or inequitable conduct of the mortgagee." [Annot., 70 A.L.R. 993 (1931).]

If permitting the lender to exercise the "due on sale" clause in a particular case would be inequit-

able, a court of equity is not helpless to fashion appropriate relief. But the burden to plead and prove the facts in that regard should be upon the party seeking relief. See *Timmerman v. Hertz,* 195 Neb. 237, 238 N.W.2d 220 (1976); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.,* 195 Neb. 658, 240 N.W.2d 28 (1976).

Accordingly, therefore, we hold that a "due on sale" clause in an otherwise valid mortgage is enforceable, absent pleading and proof by the mortgagor that such enforcement would be inequitable. Accordingly, we affirm the judgment of the trial court directing the foreclosure of the instant mortgage.

AFFIRMED.

APPENDIX TO MAJORITY OPINION

Court Opinions

Alabama: *First So. Fed. Sav. & Loan Ass'n v. Britton,* 345 So. 2d 300 (Ala. Civ. App. 1977). Arizona: *Baltimore Life Ins. Co. v. Harn,* 15 Ariz. App. 78, 486 P.2d 190 (1971), *pet. for rev. denied,* 108 Ariz. 192, 494 P.2d 1322 (1972); *Patton v. First Fed. Sav. & Loan Ass'n, etc.,* 118 Ariz. 473, 578 P.2d 152 (1978). Arkansas: *Tucker v. Pulaski Fed. S. & L.,* 252 Ark. 849, 481 S.W.2d 725 (1972). California: *Coast Bank v. Minderhout,* 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964), *overruled in Wellenkamp, infra.; Hellbaum v. Lytton Sav. & Loan Ass'n,* 274 Cal. App. 2d 456, 79 Cal. Rptr. 9 (1969); *Cherry v. Home Sav. & Loan Ass'n,* 276 Cal. App. 2d 574; 81 Cal. Rptr. 135 (1969); *La Sala v. American Sav. & Loan Ass'n,* 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971); *Tucker v. Lassen Sav. & Loan Ass'n,* 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974); *Medovoi v. American Sav. & Loan Ass'n,* 62 Cal. App. 3d 317, 133 Cal. Rptr. 63 (1976); *DeMey v. Joujou-Rouche,* 63 Cal. App. 3d 178, 133 Cal. Rptr. 570 (1976); *Wellenkamp v. Bank of America,* 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). Colorado: *Malouff v. Mid-*

land Federal, 181 Colo. 294, 509 P.2d 1240 (1973). Florida: *Clark v. Lachenmeier,* 237 So. 2d 583 (Fla. Dist. Ct. App. 1970); *Stockman v. Burke,* 305 So. 2d 89 (Fla. Dist. Ct. App. 1974). Illinois: *Baker v. Loves Park Sav. & Loan Ass'n,* 61 Ill. 2d 119, 333 N.E.2d 1 (1975). Michigan: *Nichols v. Ann Arbor Savings,* 73 Mich. App. 163, 250 N.W.2d 804 (1977). Minnesota: *Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan,* 271 N.W.2d 445 (Minn. 1978). Mississippi: *Sanders v. Hicks,* 317 So. 2d 61 (Miss. 1975). Nevada: *First Commercial Title v. Holmes,* 92 Nev. 363, 550 P.2d 1271 (1976). New Jersey: *Fidelity Land Dev. Corp. v. Rieder & Sons,* 151 N.J. Super. 502, 377 A.2d 691 (1977); *Century Fed. Sav. & Loan Ass'n v. Van Glahn,* 144 N.J. Super. 48, 364 A.2d 558 (1976); *Poydan, Inc. v. Kiriaki,* 130 N.J. Super. 141, 325 A.2d 838 (1974); *Shalit v. Investors Savings & Loan Ass'n,* 101 N.J. Super. 283, 244 A.2d 151 (1968). New York: *Nichols v. Evans,* 92 Misc. 2d 938, 401 N.Y.S.2d 426 (1978); *Mut. Real Estate Inv. Trust v. Buffalo Sav. Bank,* 90 Misc. 2d 675, 395 N.Y.S.2d 583 (1977); *Stith v. Hudson City Sav. Inst.,* 63 Misc. 2d 863, 313 N.Y.S.2d 804 (1970). North Carolina: *Crockett v. Savings & Loan Assoc.,* 289 N.C. 620, 224 S.E.2d 580 (1976). Oklahoma: *Continental Fed. Sav. & Loan Ass'n v. Fetter,* 564 P.2d 1013 (Okla. 1977). Ohio: *People's Savings Ass'n v. Standard Industries,* 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970). Tennessee: *Gunther v. White,* 489 S.W.2d 529 (Tenn. 1973). Utah: *Walker Bank & Trust Company v. Neilson,* 26 Utah 2d 383, 490 P.2d 328 (1971). Washington: *Terry v. Born,* 24 Wash. App. 652, 604 P.2d 504 (1979); *Miller v. Pacific First Federal,* 86 Wash. 2d 401, 545 P.2d 546 (1976); *Bellingham First Fed. v. Garrison,* 87 Wash. 2d 437, 553 P.2d 1090 (1976). Wisconsin: *Mutual Fed. S. & L. Assoc. v. Wisconsin Wire Wks.,* 58 Wis. 2d 99, 205 N.W.2d 762 (1973), 71 Wis. 2d 531, 239 N.W. 2d 20 (1976); *Mutual Federal S. & L. A. v. American Med. Services,* 66 Wis. 2d

210, 223 N.W.2d 921 (1974).

ARTICLES, ANNOTATIONS, AND TREATISES

Bonanno, *Due on Sale and Prepayment Clauses in Real Estate Financing in California in Times of Fluctuating Interest Rates—Legal Issues and Alternatives,* 6 U.S.F. L. Rev. 267 (1972); Flaherty, *Illinois Land Trusts and the Due-on-Sale Clause,* 65 Ill. B. J. 376 (1977); Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests,* 58 Iowa L. Rev. 747 (1973); Bartke and Tagaropulos, *Michigan's Looking Glass World of Due-on-Sale Clauses,* 24 Wayne L. Rev. 971 (1978); ABA Comm. on Real Estate Financing, *Enforcement of Due-on-Transfer Clauses,* 13 Real Prop., Prob. and Trust J. 891 (1978); Comment, *Debt Acceleration on Transfer of Mortgage Property,* 29 U. Miami L. Rev. 584 (1975); Comment, *Mortgages—A Catalogue and Critique on the Role of Equity in the Enforcement of Modern-Day "Due-on-Sale" Clauses,* 26 Ark. L. Rev. 485 (1973); Comment, *The Due-on-Sale Clause as a Reasonable Restraint on Alienation—A Proposal for Texas,* 8 St. Mary's L.J. 514 (1976); Comment, *Mortgage Consent to Sale Clause; A Reasonable Restraint on Alienation?* 8 John Marsh. J. Prac. & Proc. 513 (1975); Note, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability,* 27 Stan. L. Rev. 1109 (1975); Note, *Wellenkamp v. Bank of America: A Victory for the Consumer?* 31 Hastings L.J. 275 (1979); Note, *Wellenkamp v. Bank of America: Exercise of Due-on-Sale Clauses as an Unreasonable Restraint Upon Alienation,* 33 U. Miami L. Rev. 722 (1979); Note, *Deeds of Trust—Restraints Against Alienation—Due-On Clause is an Unreasonable Restraint on Alienation Absent a Showing of Protection of Mortgagee's Legitimate Interests,* 47 Miss. L.J. 331 (1976).

See, also, Simes and Smith, The Law of Future Interests, § 1164 (2d ed. 1956); Annot., 69 A.L.R.3d 713

(1976); Annot., 92 A.L.R.3d 822 (1979).

WHITE, J., dissents.

CLINTON, J., concurring.

I concur in the general holding that a "due on sale" clause, such as is contained in the mortgage in this case, is not an invalid restraint on alienation. The opinion contains considerable dicta and arguments from analogy, concerning the full import of which I am uncertain. I, therefore, limit my concurrence.

MARIAN TORREY, APPELLEE AND CROSS-APPELLANT, V. GLEN W. TORREY, APPELLANT AND CROSS-APPELLEE.

293 N. W. 2d 402

Filed June 17, 1980. No. 42767.

1. **Divorce: Property Division.** In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation irrespective of how legal title is held.
2. **Divorce: Alimony: Child Support: Property Division: Appeal and Error.** Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion.
3. **Divorce: Appeal and Error.** In an appeal from a decree of dissolution of marriage, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite.
4. **Divorce: Property Division.** 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.
5. **Divorce: Property Division: Appeal and Error.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
6. _____: _____: _____. The trial court is not bound in all cases to set aside to one party that property which was inherited or gifted to that party and divide only the remaining property between the parties.

7. _____: _____: _____. The source of property is only one of the factors to consider in the division of property.
8. **Evidence: Relevance: Appeal and Error.** In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at the decision considered only such evidence as was competent and relevant; and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment.

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

George A. Sommer, for appellant.

Van Steenberg, Mullin, Chaloupka, Mullin & Holyoke, for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and WARREN and FUHRMAN, District Judges.

FUHRMAN, District Judge.

This is a proceeding for dissolution of marriage. The District Court for Scotts Bluff County, Nebraska, dissolved the marriage, granted custody of the minor child to the wife, ordered the husband to pay child support and alimony, made a property division, and ordered each party to pay one-half of the fee of the attorney appointed as guardian ad litem for the minor child of the parties. The husband has appealed to this court objecting that the award of permanent alimony, the property settlement, and the requirement that he pay attorney's fees and costs were not fair and equitable. The wife has cross-appealed, claiming that she should have been awarded a more substantial portion of the property and objecting to the requirement that she pay one-half of the fee of the guardian ad litem. We affirm the judgment of the District Court.

The record shows that the parties were married in Torrington, Wyoming, on June 19, 1955. Two children were born of this marriage, Gregory Kent Torrey, 20 years of age and a junior in college at the

time of the trial, and Kurt Torrey, 13 years of age and in 8th grade at the time of the trial. Suit for dissolution was filed on August 15, 1977. Trial was had on July 31 and August 1, 1978.

Marian Torrey, the petitioner herein, was 41 years of age at time of trial. She had completed the 12th grade in school. After her marriage to the respondent, Glen W. Torrey, she worked outside the home during most of the marriage on either a full-time or part-time basis. In 1968-71, she went to beauty school and, in May 1972, she purchased a beauty shop with her sister, Phyllis Chipman.

Glen W. Torrey, the respondent herein, was 43 years of age at the time of the filing of the dissolution proceeding. He had a 12th grade education. After the marriage, he worked as a retail clothing store clerk, a ranch hand, and a grocery store clerk. In 1975, the respondent purchased the inventory in stock of the business known as Wheeler's, a men's clothing store in Scottsbluff.

At the time of the marriage, each of the parties had little personal property. During the marriage the parties have acquired a residence, the men's clothing store, a beauty shop, automobiles, guns, miscellaneous household goods and furnishings, and other miscellaneous items of personal property. In addition, Lillian Peters, a family friend, had conveyed to the respondent during the marriage a farm in Goshen County, Wyoming, a house in Torrington, Wyoming, a town lot in Yoder, Wyoming, her household furniture, a boat and trailer, certificates of deposit, and an undivided 1¼-percent landowner's royalty in a section of land in Sublette County, Wyoming.

The respondent had known Lillian Peters and her husband, George, since he was about 5 years old. This relationship with Mrs. Peters continued throughout the marriage and Mrs. Peters moved into the Torreys' home in Scottsbluff in August or September

of 1971. Mrs. Peters lived with the Torreys until June 1973 when she was taken to a hospital and then put in a rest home where she lived for 2 months before she passed away.

The trial court placed the care, custody, and control of the minor child with the petitioner and ordered the respondent to pay child support of $200 per month. The court also ordered an equitable division of the property and the payment of alimony. Petitioner was awarded the family home; the beauty salon; one of the automobiles; and household goods, furnishings, and appliances, along with alimony of $300 per month for 121 months. Respondent was awarded the farm, the clothing store, the home in Torrington, with furnishings, all guns not the property of the children, all soybeans held in storage, all tools, the royalty interest in the oil and gas well, the other automobile, the residential lot in Yoder, and the burial lots. The court also ordered that each party should have and receive as his or her own property all personal items. The court allowed attorney's fees to the petitioner's attorney, to be taxed as costs, in the sum of $5,369.52. The guardian ad litem was awarded a fee of $1,000, payable $500 by each party.

The net value of the property awarded the respondent amounts to approximately $140,000. The net value of the property awarded the petitioner was approximately $83,000. In addition, she was allowed alimony of $36,300 and attorney's fees of $5,369.52.

The basic dispute between the parties is apparently over the division of property that was given to them by Mrs. Peters. Respondent claims that the property was meant to go only to him, since the deed listed himself and Mrs. Peters as joint tenants. Petitioner introduced evidence that Mrs. Peters wanted the property to pass to both her and her husband as joint tenants, but that the respondent talked her out of this. There is evidence that the petitioner

cared for Mrs. Peters and tended to her needs, which entailed a good deal of work because of Mrs. Peters' incontinent condition. Petitioner contends that the respondent abused Mrs. Peters on numerous occasions. It is apparent that the trial court accepted the petitioner's version of the facts in dividing the property.

In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Cozette v. Cozette,* 196 Neb. 780, 246 N.W.2d 473 (1976). Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. *Van Cleave v. Van Cleave,* 201 Neb. 211, 266 N.W.2d 900 (1978). In an appeal from a decree of dissolution of marriage, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. *Blome v. Blome,* 201 Neb. 687, 271 N.W.2d 466 (1978). 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. *Blome v. Blome, supra.* This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. *Blome v. Blome, supra.*

We hold that the trial court is not bound in all cases to set aside to one party that property which was inherited or gifted to that party and divide only the remaining property between the parties. The source of property is only one of the factors to consider in the division of property. Considering all the circumstances, we have determined that the division of property made by the District Court cannot be said to have been unjust or inequitable and that division must, therefore, be affirmed.

The respondent's next assignment of error goes to that portion of the decree wherein the trial court ordered him to pay $300 a month alimony for a period of 121 months, and specified that this amount shall not terminate upon the death of either party or the remarriage of the petitioner. The trial court indicated in its decree that the payment of alimony was ordered to make the division of property equitable.

The respondent contends that the trial court erred in decreeing that the alimony payable at a monthly rate over a period of years was not subject to modification.

It is apparent from the decree that the trial court treated this alimony as a division of property. Thus, in the true sense, it is not alimony. In the instant case, judgment, in effect, has been entered for $36,300 ($300 for 121 months) against the respondent and, upon its entry, that amount became vested and not subject to modification except that a court may modify its own judgment during the term or after the term if one of the conditions specified in Neb. Rev. Stat. § 25-2001 (Reissue 1975) exists.

Since this decree provided that alimony was not terminable, as permitted by Neb. Rev. Stat. § 42-365 (Reissue 1978), it created an unqualified allowance of alimony in gross. Such an award, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. *Van Pelt v. Van Pelt, ante* p. 350, 292 N.W.2d 917 (1980).

Respondent's final assignment of error contends that the trial court erred in allowing oral testimony about the contents of wills over objections and without a showing that the written documents were

lost, destroyed, or unavailable.

In a case tried to the court, either in law or in equity, the presumption obtains that the trial court, in arriving at its decision, considered only such evidence as was competent and relevant. This court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. *Kockrow v. Kockrow,* 191 Neb. 657, 217 N.W.2d 89 (1974). There is sufficient competent and relevant evidence in the record to sustain the judgment of the trial court herein.

Respondent further contends that the trial court's order requiring him to pay half of the $1,000 guardian ad litem's fee was an abuse of discretion. Under all the circumstances of this case, we cannot find any evidence to support a contention that this requirement was an abuse of discretion.

The judgment of the District Court is correct and is affirmed. Mrs. Torrey is allowed an attorney's fee in this court of $1,500.

AFFIRMED.

LEONARD J. KREIFELS, ALSO KNOWN AS JIMMY KREIFELS, A MINOR CHILD, BY HIS FATHER AND NEXT FRIEND, LEONARD KREIFELS, AND LEONARD KREIFELS, INDIVIDUALLY, APPELLANTS, V. RANDY D. WURTELE AND DONALD WURTELE, APPELLEES.

293 N. W. 2d 407

Filed June 17, 1980. No. 42788.

1. **Gross Negligence.** An oral warning and disregard of the warning when sufficient time exists to avoid the danger constitutes sufficient evidence to submit the issue of gross negligence to the jury.
2. **Implied Consent: Inferences.** The inference of implied approval of use of a family vehicle arises necessarily when prior use of the vehicle is established and when there is no proof or inference of express disapproval.

3. **Gross Negligence: Guest Statute: Vicarious Liability.** The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded for new trial.

Martin A. Cannon of Matthews & Cannon, P.C., and Richard H. Hoch of Hoch & Steinheider, for appellants.

Jeffrey A. Silver, for appellees.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

WHITE, J.

Plaintiff, Jimmy Kreifels, a minor, was injured while riding as a passenger on a motorcycle operated by defendant Randy Wurtele, also a minor, on June 22, 1975. Jimmy was 13 years of age and Randy was 14 years of age on the date of the accident. The motorcycle was owned by the defendant Donald Wurtele, Randy's father.

Leonard J. Kreifels, also known as Jimmy Kreifels, by his father and next friend, Leonard Kreifels, and Leonard Kreifels, individually, brought suit in the District Court for Otoe County, Nebraska, for the injuries sustained in the accident. At the conclusion of the plaintiffs' evidence, the court dismissed their petition. Plaintiffs appeal. We reverse and remand.

Assuming, as we must, the truth of plaintiffs' evidence and giving the plaintiffs the benefit of all inferences arising from the evidence, *Bassinger v. Agnew, ante* p. 1, 290 N.W.2d 793 (1980), the facts are these. On the morning of June 22, 1975, the plaintiff Jimmy Kreifels was helping his father in the shop of the family farm. Five school friends arrived at the

farmstead on four motorcycles. The companions requested the plaintiff Jimmy Kreifels to accompany them to Centennial Lake to determine whether the lake was warm enough for swimming. Jimmy's father gave him permission to accompany the boys and Jimmy mounted the motorcycle of the defendant Randy Wurtele as a passenger. The lake was some 3 to 4 miles from the Kreifels' farm by gravel county roads. The route crossed Highway 128 at an intersection 2 miles west of Paul, Nebraska. The trip to the lake was accomplished without incident and the boys remained about 20 minutes. On the trip to the lake, the motorcycles traveled together. On the return trip, Randy sped ahead of the other cyclists and traveled at a speed of 45 to 50 miles per hour. At the intersection of the county road and Highway 128, the highway was protected by stop signs on each side of the county road. A brush patch interferes with the vision of persons traveling on the county road insofar as their ability to see traffic approaching from the east on the highway. The stop sign was visible for at least ¼ mile by traffic on the county road. A "Stop Ahead" sign is located approximately 100 yards from the intersection. As the motorcycle approached the intersection, Jimmy, who was leaning forward and seated directly behind Randy, yelled to Randy to stop. Randy continued through the stop sign without diminishing his speed and crashed into the passenger side of an automobile traveling west on the highway, operated by Al P. Kreifels, a distant relative of the plaintiffs.

Plaintiffs assign as error: (1) The court erred in failing to find unconstitutional the guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978); (2) The court erred in finding that the plaintiffs had failed in their burden of establishing gross negligence; (3) The court erred in directing a verdict in favor of Donald Wurtele on the ground that the plaintiffs failed to prove the motorcycle was being used as a

family-purpose vehicle; (4) The court erred in finding that Donald Wurtele could not be held liable in the absence of a finding of gross negligence against the driver, Randy Wurtele; and (5) The court erred in failing to submit the plaintiffs' case against Donald Wurtele on the theory of negligent entrustment.

By the first assignment of error, plaintiffs invite us to reconsider our decision in *Botsch v. Reisdorff,* 193 Neb. 165, 226 N.W.2d 121 (1975), upholding the constitutionality of the guest statute. As less than a constitutional majority of this court is willing to reconsider that decision, a discussion of the arguments made by the plaintiffs would be fruitless. We adhere to our previous ruling.

We next consider whether there was evidence of gross negligence. The defendants would have us characterize the negligence of the defendant Randy Wurtele as momentary and, therefore, not gross. See, *Branch v. Wilkinson,* 198 Neb. 649, 256 N.W.2d 307 (1977); *Callen v. Knopp,* 180 Neb. 421, 143 N.W.2d 266 (1966).

The evidence discloses that the stop sign was visible; the vision of traffic approaching from the east was impaired; a warning was given at a time sufficient for the defendant to stop at the stop sign; and the driver disregarded the warning. There was sufficient evidence to submit the issue of gross negligence to the jury. *Robinson v. Hammes,* 173 Neb. 692, 114 N.W.2d 730 (1962). An oral warning and a disregard of the warning, when sufficient time exists to avoid the danger, sufficiently distinguishes the facts in this case from the momentary inattention cases and makes them inapplicable. The assignment is meritorious and requires reversal.

The next assignment of error relates to the family-purpose doctrine. In their petition and amended petition, the plaintiffs alleged:

> The defendant Donald Wurtele is and was at all times relevant hereto, the owner of a 1974

> Yamaha motorcycle. . . . Randy D. Wurtele was the minor son of Donald Wurtele. . . . Donald Wurtele was the head of the household and maintained said motorcycle for the general use, pleasure, convenience, necessity and purpose of said family.

The defendants, by answer and amended answer to the petition, admitted paragraph 2. (There does not appear to be an answer to the amended petition.)

The following direct examination of Randy Wurtele was part of plaintiffs' case:

> Q. And in general did your father give you permission to operate the 125cc on the roads around your farm?
> A. No.
> Q. You used it with his knowledge?
> A. Yes.
> Q. On the roads around your farm?
> A. If he let me — if he said I could, yes.
> Q. And he did from time to time do that I take it?
> A. Once in awhile.

In spite of the pleadings and this testimony, the trial court concluded that the defendant Randy Wurtele was not shown to have operated the motorcycle with the express or implied permission of his father. We disagree. In *Garska v. Harris,* 172 Neb. 339, 109 N.W.2d 529 (1961), an adult residing with his father was involved in an accident while operating the father's pickup. Although the vehicle had, on numerous occasions, been operated by the son in transporting his father, on the date in question "he took the pickup truck without his father's permission," *Id.* at 347, 109 N.W.2d at 534, although he normally requested permission to drive the pickup. The father testified "that the trip made on October 30, 1958, by his son James was for James' own benefit, and with which he had nothing to do." *Id.* at 348, 109 N.W.2d at 534. The court, quoting from *Linch v.*

Dobson, 108 Neb. 632, 188 N.W. 227 (1922), held at 348-49, 109 N.W.2d at 534-35:

> Where the head of a family has purchased or maintains a car for the pleasure of his family, he is, under the so-called "family purpose" doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner.

Under the facts of that case, the question of family purpose was for a jury.

In the instant case, there is at least an inference of approval since Randy testified that he used the motorcycle "If he [his father] let me — if he said I could, yes." The inference of implied approval of use of a family vehicle arises necessarily when prior use of the vehicle is established and certainly when there is no proof or inference of express disapproval. The assignment is meritorious.

By the fourth assignment of error, plaintiffs invite us to reconsider our recent decision in *Wagner v. Mines,* 203 Neb. 143, 277 N.W.2d 672 (1979). We are not persuaded, given the continued constitutional viability of the guest statute, § 39-6,191, that the rationale of that decision is faulty. The assignment is without merit.

As the case must be retried, there is no necessity to pass on the plaintiffs' last assignment of error except to note that, since this is a guest case, in order to prove negligent entrustment against the defendant father, the acts of the entrusted driver must be shown to be grossly negligent.

The case is reversed and remanded for new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

KRIVOSHA, C. J., concurring in part, and in part dissenting.

I wholeheartedly concur with the majority's opinion insofar as it goes. I wish, however, to make comment with regard to the appellants' first assignment of error, to wit, that the guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), is unconstitutional. While the majority has correctly noted that there are, as yet, insufficient votes on this court to reconsider our decision in *Botsch v. Reisdorff,* 193 Neb. 165, 226 N.W.2d 121 (1975), I would not wish to leave the impression that that holding is so firmly supported that it should not continue to be considered. I, for one, would join with the as yet less than constitutional majority who would reconsider our decision in the *Botsch* case and would hold that our guest statute is unconstitutional on the basis of the 14th Amendment to the United States Constitution. It seems clear to me that our guest statute does, indeed, deny to certain persons within our jurisdiction equal protection of the laws.

The history of the guest statute makes it clear that its enactment was intended to accomplish two specific purposes: (1) The protection of host drivers from suits by those to whom the host had extended a courtesy, and (2) The elimination of collusive lawsuits. While those concerns may have been real in the 1930's when guest statutes were adopted by various state legislatures (though I would disagree), the advent of automobile insurance has eliminated the necessity to protect those interests in that manner.

Guest statutes have, in recent years, come under attack from a number of areas, including no lesser an authority than the distinguished Professor Prosser. See, W. Prosser, Law of Torts 186 (4th ed. 1971); 35 ATLA L. J. 46 (1974); Morris, *Gross Negligence in Michigan—How Gross Is It?* 16 Wayne L. Rev. 457 (1970); Lascher, *Hard Laws Make Bad*

Cases—Lots of Them (*The California Guest Statute*), 9 Santa Clara Law. 1 (1968); Gibson, *Guest Passenger Discrimination,* 6 Alberta L. Rev. 211 (1968); Note, *The Case Against the Guest Statute,* 7 Wm. & Mary L. Rev. 321 (1966); Weinstein, *Should We Kill the Guest Passenger Act?* 33 Det. Law. 185 (1965); Allen, *Why Do Courts Coddle Automobile Indemnity Companies?* 61 Am. L. Rev. 77 (1927); *Clark v. Clark,* 107 N.H. 351, 222 A.2d 205 (1966); *Stevens v. Stevens,* 355 Mich. 363, 94 N.W.2d 858 (1959); *Hewlett v. Schadel,* 68 F.2d 502 (4th Cir. 1934). As a result of such questioning and reexamination, no fewer than 10 states have, in recent years, held their guest statutes unconstitutional. See, *Ramey v. Ramey,* ___ S.C. ___, 258 S.E.2d 883 (1979), *cert. denied,* 100 S. Ct. 1028 (1980); *Nehring v. Russell,* 582 P.2d 67 (Wyo. 1978); *Manistee Bank v. McGowan,* 394 Mich. 655, 232 N.W.2d 636 (1975); *Primes v. Tyler,* 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); *Laakonen v. District Court,* 91 Nev. 506, 538 P.2d 574 (1975); *McGeehan v. Bunch,* 88 N.M. 308, 540 P.2d 238 (1975); *Thompson v. Hagan,* 96 Idaho 19, 523 P.2d 1365 (1974); *Henry v. Bauder,* 213 Kan. 751, 518 P.2d 362 (1974); *Johnson v. Hassett,* 217 N.W.2d 771 (N.D. 1974); *Brown v. Merlo,* 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

It is difficult, if not impossible, to understand how one can rationally argue that, if a host driver has two passengers in his car, one of whom is his neighbor on the left who normally contributes $3 a week toward the gas, and one of whom is his neighbor on the right who only occasionally rides with him and, therefore, makes no payment, the neighbor on the left may sue for injuries arising out of ordinary negligence while the neighbor on the right may only recover for gross negligence. That irrational distinction is further blurred when one recognizes that all of these artificial barriers can be eliminated if one simply remembers to hand the driver a dollar before getting

into the car. Neither the alleged protection of the host driver nor the avoidance of allegedly collusive suits can justify the distinction made in upholding the constitutionality of guest statutes.

These are the very same arguments which, for years, were advanced to support the validity of a number of restrictions on the right of recovery by an injured party, including interspousal immunity. This court, however, had little difficulty rejecting these arguments in the case of interspousal immunity. See *Imig v. March,* 203 Neb. 537, 279 N.W.2d 382 (1979).

While courts should be reluctant to overturn acts of the Legislature, where the requirements of the Constitution are violated, we must exercise our duty. As we said in *Imig, supra* at 543, 279 N.W.2d at 386: "The dozen or so state supreme courts that have recently abrogated the immunity doctrine have recognized that an unjust and irrational principle cannot be allowed to persist on the hollow ground that changing an antiquated rule is a job for the legislature." This is particularly true when the antiquated restriction violates one's constitutional right to the equal protection of the law guaranteed under the 14th Amendment.

As noted in *Brown v. Merlo, supra,* "[T]he wholesale elimination of all guests' causes of action for negligence does not treat similarly situated persons equally, but instead improperly discriminates against guests on the basis of a factor which bears no significant relation to actual collision." *Id.* at 860, 506 P.2d at 215, 106 Cal. Rptr. at 391. Little purpose would be served at this time in making a detailed analysis of why the Nebraska guest statute is unconstitutional and I shall, therefore, reserve that for another day. For now, I would simply say that I would join with those other states which have recognized the unfairness of guest statutes and declare it invalid.

I am authorized to state that Judges McCown and White join in this dissent.

JEFFREY M. ADKINS, APPELLANT, V. NORTH PLATTE CIVIL SERVICE COMMISSION, APPELLEE.
LANCE W. WEBSTER, APPELLANT, V. NORTH PLATTE CIVIL SERVICE COMMISSION, APPELLEE.

293 N. W. 2d 411

Filed June 17, 1980. Nos. 42886, 42889.

1. **Civil Service Act: Public Employees: Termination of Employment.** The civil service act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in Neb. Rev. Stat. § 19-1807 (Reissue 1977).
2. _____: _____: _____. The final determination of discharge of an employee under the civil service act rests in the civil service commission.
3. **Civil Service Act: Public Employees: Termination of Employment: Appeal and Error.** If the evidence in the District Court on appeal from an order of the civil service commission is sufficient to show that the order of the commission suspending or discharging an employee was made in good faith for cause, the order of the commission must be affirmed.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

J. Murry Shaeffer, for appellants.

Kay & Satterfield, for appellee.

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

MCCOWN, J.

This is an appeal from orders of the civil service commission of the city of North Platte, Nebraska, discharging the plaintiffs from the police force. On appeal, the District Court for Lincoln County, Nebraska, found that the discharge in each case was made in good faith for cause, was not arbitrary or capricious, and was not motivated by political reasons, and affirmed the orders of discharge. The plaintiffs have appealed and the cases have been consolidated in this court.

Shortly before midnight on May 28, 1978, the plaintiffs, Webster and Adkins, along with several other North Platte police officers, were dispatched to the area of 11th and Jessie Streets in connection with reports of a traffic accident in the area and of a man with a gun. In the course of a search, Webster and another officer found Harold Cummings making a disturbance in the area. Cummings was very intoxicated and was identified by a resident as the man who had carried a gun and broken into a trailer house. Webster and another officer arrested Cummings. When they attempted to handcuff him and place him in a police car, he became violent, and kicked and swore at the officers, and Officer Webster and another officer wrestled him to the ground and handcuffed him. Three officers then lifted Cummings into a police car and Webster took him to the Lincoln County jail. Webster testified that Cummings became violent again on the way to the jail.

Meanwhile, Officer Adkins and another officer had gone ahead to the jail and advised the jail personnel that they were bringing in a violent prisoner. When Officer Webster arrived at the jail with Cummings, Officer Adkins went out to assist him. The officers pulled Cummings out of the car by his arms and bodily carried him, one on each arm, into the elevator to the jail. The officers testified that they had to carry Cummings beneath the arms because he gave them no help whatsoever and was unresponsive to orders to walk or assist them.

All the witnesses at the jail when Cummings was brought in testified that Cummings was not actively resisting in any way nor saying anything. There were no bruises or marks on Cummings' face when he was brought into the jail.

The two officers took Cummings into the receiving area where they removed his boots and the handcuffs and took the property out of his pockets. The jailer testified that they then took Cummings to the

photo room where Cummings was asked to stand against the photo room board. Cummings stood there but had his head down, which made it difficult to get a clear picture. Officer Webster told Cummings to hold his head up and Cummings did not do so. Without any further provocation, Webster hit Cummings four times with his fists in the rib cage. Officer Adkins then choked Cummings and Cummings dropped to the floor unconscious. The two officers then threw Cummings up against the wall, scattering plaster over the room. The two officers then dragged Cummings by his arms from the photo room to the psychiatric cell and attempted to prop him up against the wall. The jailer testified that he left the cell for about 30 seconds to get Cummings' T-shirt and when he returned, blood was gushing out of Cummings' nose; Webster was leaning over the upper portion of Cummings' body; and Adkins was telling Webster to "cool it." Two other prisoners in other cells testified that both officers struck Cummings while he was in the psychiatric cell and the civilian jailer and both prisoners testified that Cummings never struggled or exhibited any violence while he was in the jail, nor did he make any noise at all.

The officers' testimony was that Cummings had sworn at them, threatened to kill one of them, and had also struggled with and kicked them. Their testimony was that, although they had struck Cummings, it was to restrain him and protect themselves. Webster testified that, in the cell, Cummings kicked him with both feet and began to get up. In attempting to hit Cummings in the chest to knock the wind out of him, Webster missed and hit him in the nose and face instead.

Shortly after the incidents on the night of May 28, 1978, an investigation of the events surrounding Cummings' arrest was conducted by the Nebraska State Patrol. Based on that investigation, the North

Platte chief of police suspended Officers Webster and Adkins from duty, and on June 8, 1978, the chief of police filed a written accusation against each officer with the North Platte Civil Service Commission.

The accusations charged that on May 28, 1978, the officers participated in an assault on Harold G. Cummings in the Lincoln County jail in violation of the civil service rules and regulations and in violation of the statute defining the offense of assault with intent to commit great bodily injury. The accusation charged that such conduct was in direct violation of specified sections of North Platte police department policy and procedures dealing with personal conduct, conduct unbecoming an officer, and the use of force. The officers were each served with copies of the written accusations and each requested a hearing.

In the meantime, criminal charges were filed against the officers charging them with assault and battery. The charge against Officer Webster was tried before a jury in the Lincoln County court and the jury found Webster not guilty. The criminal charge against Officer Adkins was then dismissed.

In the proceeding pending before the civil service commission, the parties stipulated that the commission should decide the pending civil service matter on the basis of the record made in connection with the criminal proceedings in the county court and such other evidence as counsel might agree upon.

On September 29, 1978, following a hearing at which the officers were represented by counsel and testified, the civil service commission found that the charges made against each officer were true, were made in good faith for cause, and were not politically motivated. The commission also found that the suspension of each officer should be affirmed, and he should be permanently discharged as a member of the police force as of June 8, 1978,

and entered its order accordingly.

The officers appealed the order of the civil service commission to the District Court. The District Court found that the order of the civil service commission in each case was made in good faith for cause, and that neither the charges nor the findings were in any way influenced by political reasons and it affirmed the order and judgment of the civil service commission. Both officers have appealed to this court and the cases have been consolidated on appeal.

The plaintiffs contend that because of the acquittal of Webster by the county court jury on the criminal charge of assault and battery, the evidence before the civil service commission was insufficient to establish that the discharge was made in good faith for cause. They also contend that the evidence was insufficient to establish that their discharge was not made for political reasons, and that the written accusation by the police chief before the civil service commission did not give them fair and sufficient notice of the charges against them. We disagree.

The civil service act, Neb. Rev. Stat. §§ 19-1801 to 23 (Reissue 1977) and 1824 (Supp. 1979), regulates the hiring, suspension, and discharge of certain employees of the fire and police departments in the cities where it is applicable. It prohibits the suspension or discharge of employees for political or religious reasons, but provides that employees may be suspended or discharged for cause for any of the reasons listed in § 19-1807. Incompetence, inefficiency, dereliction of duty, willful failure to properly conduct oneself, or any willful violation of duly adopted rules and regulations are all reasons for suspension or discharge under that section.

Plaintiffs take the position that, because the county court jury found Webster not guilty of the criminal charge of assault and battery, that finding somehow

becomes res judicata before the civil service commission and precludes a finding that the same conduct constituted good cause for discharge. Plaintiffs cite no authority to support that position and we are unable to find any. It is obvious that an acquittal on a criminal charge against an employee does not preclude an employer from terminating the employment for the identical conduct which constituted the basis for the criminal charge.

Plaintiffs argue that the not guilty finding by the jury establishes that the evidence before the civil service commission as to whether the discharge was made for good cause could not have been conclusive. Section 19-1808 requires that the commission's investigation be confined to the determination of the question of whether or not a discharge was made for political or religious reasons, and whether or not it was made in good faith for cause. If, in the estimation of the commission, the evidence that the discharge was not made for political reasons and was made in good faith for cause is conclusive, the commission may affirm the discharge. The word "conclusive" does not deal with a burden of proof nor the weight of the evidence required to establish specific acts or conduct. It relates only to the issue of whether the discharge was made for political or religious reasons or was made in good faith for cause. Whether the word be "conclusive," as used in the statute, or its synonyms "decisive," "determinative," or "definitive," the evidence in this case is more than sufficient to establish that the discharge was in good faith for cause, and was not made for political or religious reasons.

Plaintiffs contend that, because they were officers of the police union, their discharge was not for good cause but was, instead, for political reasons. As the District Court observed:

> From the evidence adduced, even if one had a vivid imagination, there would be no logi-

> cal reason for drawing an inference that the charges and the findings were in any way influenced by political reasons, or in any way were not made in good faith.

The record here is devoid of any evidence to indicate that the actions of either the police chief or of the commission in these cases were in any way influenced by political or religious reasons.

The contention of the plaintiffs that they did not have sufficient notice of the misconduct charged is almost frivolous. If any complaint could be made in that regard it would be that the charge was too specific. The charge of criminal conduct was pure surplusage.

This court has consistently held that if the evidence in the District Court on appeal from an order of the civil service commission is sufficient to show that the order of the commission suspending or discharging an employee was made in good faith for cause, the order of the commission must be affirmed. *Sailors v. City of Falls City,* 190 Neb. 103, 206 N.W.2d 566 (1978).

The evidence here was more than sufficient to establish that the judgment of the civil service commission of the city of North Platte discharging the plaintiffs was not made for political or religious reasons and was made in good faith for cause.

AFFIRMED.

KRIVOSHA, C. J., participating on briefs.

ROSE L. SELLENS, APPELLANT, V. ALLEN PRODUCTS CO., INC., AND AMERICAN MUTUAL INSURANCE COMPANIES, APPELLEES.

293 N. W. 2d 415

Filed June 17, 1980. No. 42966.

1. **Workmen's Compensation: Damages.** To recover compensation under the Workmen's Compensation Act, the claimant must show

that an unexpected or unforeseen injury was caused by the employment.

2. _____: _____. An injury, disability, or death that is the result of a natural progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable.
3. _____: _____. If it is claimed that an injury was the result of exertion in the employment, the evidence must show that the employment contributed in some material and substantial degree to cause the injury.
4. **Workmen's Compensation: Damages: Burden of Proof.** The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment.
5. **Workmen's Compensation: Damages.** If there is a personal causal contribution in the form of a previously weakened or diseased heart, a heart attack is compensable only if the employment exertion is greater than that of nonemployment life. The comparison is with the exertion present in the normal nonemployment life of the workman or any other person.

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

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff's deceased husband, Paul Dean Sellens, was employed by the defendant, Allen Products Co., Inc., as a truck driver. While unloading a trailer at the Brookshire Grocery Co. warehouse in Tyler, Texas, on April 20, 1978, Sellens suffered a fatal heart attack.

At the hearing before a single judge of the compensation court, the plaintiff recovered an award for the death of her husband. Upon rehearing, the compensation court, one judge dissenting,

found the evidence was not sufficient to show the employee's death arose out of his employment and dismissed the petition. The plaintiff has appealed.

The evidence shows that, at the time of his death, Sellens was handling cases of animal food which weighed approximately 28 pounds per case. The cases were stacked on pallets which had been loaded into the trailer. At the destination, Sellens removed the pallets from the trailer and transferred the cases to different and smaller pallets which were then moved into the warehouse.

Sellens commenced unloading the trailer at the Brookshire Grocery Co. warehouse at about 10 a.m. He worked steadily from 10 a.m. until noon when there was a 30-minute lunch break. He resumed work at 12:30 p.m. and continued working until about 1:40 p.m. when his heart attack occurred. An ambulance was called and, although attempts were made to resuscitate him, he was pronounced dead upon arrival at the hospital. An autopsy performed the next day disclosed the cause of death was a recent thrombosis of the right coronary artery.

The autopsy further disclosed there was severe arteriosclerosis in all three coronary blood vessels and that Sellens had suffered a previous heart attack.

Sellens had been under treatment for hypertension since November 9, 1976. On that date he had been examined by Dr. Wilbur G. Wiedman for complaints of chest pain and shortness of breath. Dr. Wiedman prescribed medication which was continued up until the time of Sellens' death. The evidence shows that in addition to suffering from hypertension, Sellens was overweight, his triglyceride and cholesterol levels were high, and his heart was enlarged. The record as a whole establishes that Sellens was a high-risk heart patient.

The evidence further shows that Sellens led a sedentary life when he was not working. He did not

play golf, jog, mow the lawn, rake leaves, shovel the sidewalk, or engage in other physical activity. The plaintiff testified that the only help he gave her was to carry out the trash when he was at home on weekends. His principal hobbies were reading, playing cards, and watching television. He had no hobbies that involved physical activity.

To recover compensation under the workmen's compensation act, the claimant must show that an unexpected or unforeseen injury was caused by the employment. An injury, disability, or death that is the result of a natural progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable. Neb. Rev. Stat. § 48-151 (Reissue 1978).

In cases under the compensation act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved and the issue must be determined by the facts of each case. *Reis v. Douglas County Hospital,* 193 Neb. 542, 227 N.W.2d 879 (1975).

If it is claimed that the injury was the result of exertion in the employment, the evidence must show that the employment contributed in some material and substantial degree to cause the injury. *Brokaw v. Robinson,* 183 Neb. 760, 164 N.W.2d 461 (1969). The question to be determined is whether the injury was the result of a personal rather than an employment risk. *Hyatt v. Kay Windsor, Inc.,* 198 Neb. 580, 254 N.W.2d 92 (1977). The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. *Brokaw v. Robinson, supra.*

At 1B A. Larson, The Law of Workmen's Compensation § 38.83 (1979), the author points out that the essence of the problem in this type of case is causation and there should be a determination as to

whether the employment exertion was the legal cause as well as the medical cause of the death.

The plaintiff contends the compensation court erred in finding that the employment exertion was not the legal cause of Sellens' death because the finding was based upon a comparison between the exertion involved in the employment and the exertion involved in an average employee's nonemployment life. The plaintiff contends the comparison should be made with the exertion involved in Sellens' nonemployment life.

In *Beck v. State,* 184 Neb. 477, 479-80, 168 N.W.2d 532, 533 (1969), we said:

> In a workmen's compensation case death caused by (1) heart disease that was a personal risk and (2) emotional strain that was an employment risk is not compensable in these circumstances: The strain was no greater than that of nonemployment life. See Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461.
>
> ". . . when the employee contributes some personal element of risk-e.g., . . . a personal disease which figures causally in his injury-the employment must contribute something substantial to increase the risk. The reason is that the employment risk must offset the causal contribution of the personal risk. . . . If there is some personal causal contribution *in the form of a previously weakened or diseased heart,* a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with *this employee's* usual exertion *in his employment,* but rather with the exertions present in the normal *nonemployment* life of this or any other person." Arthur Larson, "The 'Heart Cases' in Work-

men's Compensation: An Analysis and Suggested Solution," 65 Mich. L. Rev. 441 at 469. (Emphasis and elisions in *Beck.*)

As stated in the *Beck* case, the comparison is to be made with the exertions present in the normal nonemployment life of the workman or any other person. The reference is to "the usual wear and tear of life-which certainly includes lifting objects weighing 20 pounds, such as bags of golf clubs, minnow pails, step ladders, and sets of *The Law of Workmen's Compensation* (with Annual Supplement)." Larson, *supra*, at 7-239. The precipitating exertion is to be compared with the exertion of ordinary nonemployment life, not just the nonemployment life of the particular workman.

The compensation court further found that the evidence did not show that Sellens' employment exertion was the medical cause of his death. This was a factual matter and the finding was supported by the testimony of several of the expert witnesses. Although asked several times whether Sellens' employment precipitated or contributed in a material and substantial degree to the thrombosis, Dr. Wiedman testified only that it contributed to his death. Dr. Jerry Reed conceded that, from a medical standpoint, it was "shaky" to say that Sellens' work activity caused his death. Dr. Walt F. Weaver testified that the employment exertion did not substantially increase his risk and contribute in a material and substantial degree to Sellens' heart attack. The finding of the compensation court was one of fact and must be upheld because it was supported by the evidence and not clearly wrong. *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980).

The plaintiff contends it was error to permit Dr. Weaver to testify over objection as to the nonemployment exertion of an average person. Dr. Weaver is a cardiologist and, by training and ex-

perience, was familiar with the daily activities of average persons. We think he was qualified to express an opinion as to whether Sellens' employment activity contributed in a material and substantial degree to his heart attack.

There being no error, the judgment is affirmed.

AFFIRMED.

KRIVOSHA, C. J., participating on briefs.

IN RE INTEREST OF LISA WOLKOW, A CHILD UNDER 18 YEARS OF AGE.

293 N. W. 2d 851

Filed June 24, 1980. No. 42683.

1. **Sentences: Judgments: Appeal and Error.** The imposition of a sentence in a criminal proceeding is essential to create a final judgment from which an appeal may be taken.
2. **Convictions: Appeal and Error.** A finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed.
3. **Convictions: Sentences: Appeal and Error.** A decision in a criminal case is final for appellate purposes only when the litigation between the parties is terminated and nothing remains but enforcement by execution of what has been determined. To create finality in a criminal case, it is necessary that there be a judgment of conviction followed by a sentence.
4. ____: _____: _____. In the absence of a sentence on a criminal contempt finding, the decision lacks the finality which would allow this court to review it.
5. **Judgments: Appeal and Error.** It is fundamental that there can be no appeal to this court until there has been a judgment or final order in the court from which the appeal is taken.

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

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellees.

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

KRIVOSHA, C. J.

This is an appeal by the State Department of Public Welfare from a finding of the Separate Juvenile Court of Douglas County, Nebraska, (per J. Patrick Mullen, Associate Juvenile Court Judge) that the Department of Welfare was in contempt of court for failing to place a minor status offender as ordered by the juvenile court. For reasons set out herein, we must find that no final order was entered by the juvenile court and, therefore, we are without jurisdiction to hear the appeal. Accordingly, we must dismiss the appeal.

This appeal raises a number of important and interesting questions, including how a court of limited jurisdiction, such as the Separate Juvenile Court, may require an executive agency of state government to prepare and submit to the juvenile court for its approval regulations required to be promulgated by the state agency, pursuant to state statute, where such approval by the juvenile court is neither authorized nor required. The authority for such action does, indeed, raise a serious question. Nevertheless, on the state of the present record, this court is without jurisdiction to determine that issue, or any other issue raised by the appeal.

Although the juvenile court found the Department of Welfare in contempt of court, it did not, at any time, impose a sentence and, in fact, ultimately found that the Department of Welfare had purged itself of the alleged contemptuous action by preparing a plan which was approved by the juvenile court. We are, therefore, presented with an appeal in which no sentence has been imposed. In *State ex rel. Beck v. Lush,* 168 Neb. 367, 371, 95 N.W.2d 695, 698 (1959), we said:

> Contempt, being without any particular

> form of action, is not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions. [Citation omitted.] However, we have often said that a prosecution for criminal contempt is governed by, and to be conducted in accordance with, the strict rules applicable in criminal prosecutions.

Likewise, for purposes of criminal contempt, we have frequently followed the strict rules applicable to criminal proceedings. See, *Bahm v. Raikes,* 200 Neb. 195, 263 N.W.2d 437 (1978); *Paasch v. Brown,* 199 Neb. 683, 260 N.W.2d 612 (1977); *Malec v. Malec,* 196 Neb. 533, 244 N.W.2d 82 (1976); *Kasparek v. May,* 174 Neb. 732, 119 N.W.2d 512 (1963); *Muffly v. State,* 129 Neb. 334, 261 N.W. 560 (1935). The question we must first answer herein is whether the lack of a sentence imposed in this case affects our right to assume jurisdiction of the appeal.

The final judgment in a criminal action is not the conviction but the sentence imposed thereon. In *State v. Long,* 205 Neb. 252, 253, 286 N.W.2d 772, 773 (1980), we recently said:

> It is elementary that there can be no appeal except from a judgment or final order and that the judgment in a criminal case is the sentence. [Citations omitted.] A finding of guilty is a conviction, but it is not a judgment or final order, and *there can be no appeal until a sentence has been imposed.*

(Emphasis supplied.) To the same effect, see *State v. Shaw,* 202 Neb. 766, 277 N.W.2d 106 (1979). We are persuaded that the rationale which compels the imposition of a sentence before a criminal matter may be appealed should also be a part of a criminal contempt proceeding; and absent a sentence in a criminal contempt proceeding, no final judgment exists from which an appeal may be taken.

Other jurisdictions which have considered this

issue have reached a similar conclusion and have held that the imposition of a sentence in a contempt proceeding is essential for a final judgment to have been rendered and an appeal permitted. In the case of *West v. United States,* 346 A.2d 504, 505 (D.C. App. 1975), the District of Columbia Court of Appeals said:

> A decision in a criminal case is final for appellate purposes only when the litigation between the parties is terminated and nothing remains but enforcement by execution of what has been determined. To create finality in a criminal case, it is necessary that there be a judgment of conviction followed by a sentence.

Likewise, in the case of *Massengale v. United States,* 278 F.2d 344, 345 (6th Cir. 1960), the Court of Appeals for the 6th Circuit, in dismissing an appeal, said: "In the absence of a sentence on the criminal contempt finding, the decision lacks the finality which would allow this court to review it." For similar authority, see *Harrell v. Peteet,* 134 Ga. App. 210, 214 S.E.2d 5 (1975); *Johnson v. Johnson,* 243 Ark. 656, 421 S.W.2d 605 (1967); *State ex rel. Neal et al. v. Hamilton C. Ct.,* 248 Ind. 130, 224 N.E.2d 55 (1967); *County of Cook v. Triangle Sign Co., Inc.,* 40 Ill. App. 2d 202, 189 N.E.2d 25 (1963); *Waukesha Roxo Co. v. Gehrz,* 244 Wis. 201, 12 N.W.2d 41 (1943); *Estate of Lucy Wortham James,* 64 R.I. 144, 11 A.2d 289 (1940); *Boudwin v. Boudwin,* 162 Wash. 142, 298 P. 337 (1931); *Alexander v. United States,* 201 U.S. 117 (1906).

The finding by the Separate Juvenile Court that the Department of Welfare was in contempt, without a subsequent sentence, did not constitute a final order or judgment and did not create a situation from which the Department of Welfare could appeal. It is fundamental that there can be no appeal to this court until there has been a judgment or final order

in the court from which the appeal is taken. See, Neb. Rev. Stat. § 25-1911 (Reissue 1975); *Essay v. Essay,* 180 Neb. 291, 142 N.W.2d 337 (1966); *Burroughs Corp. v. James E. Simon Constr. Co.,* 192 Neb. 272, 220 N.W.2d 225 (1974); *Fritch v. Fritch,* 191 Neb. 29, 213 N.W.2d 445 (1973).

To be sure, the action taken by the Separate Juvenile Court was, indeed, serious. While we have some serious question about the juvenile court's authority to hold the Department of Welfare in contempt as it did in this case, such a holding should never be adopted lightly, even if authorized. Nevertheless, we may not ignore the rules by which this court acquires appellate jurisdiction regardless of how serious the matter may otherwise be. Having found that no final order was entered, we must dismiss the appeal.

DISMISSED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. FRED A. HERRINGTON, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLEE.

294 N. W. 2d 330

Filed June 24, 1980. No. 42751.

1. **Statutes: Penalties: Vagueness.** Clarity should be particularly demanded of a statute which would impose very substantial penalties on counties violating it.
2. **Statutes: Vagueness.** The established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.
3. **Statutes: Vagueness: Constitutional Law.** Provisions that are so vague, general, and indefinite as to be incapable of practical application are arbitrary and unreasonable and therefore unconstitutional.
4. **Statutes.** In construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should

be rejected as meaningless or superfluous if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will.

5. _____. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

6. _____. When invalid portions are so interwoven with the rest of the act that the act may not be operative with the void portions eliminated, the whole act fails.

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

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

Knudsen, Berkheimer, Beam, Richardson & Endacott, Wallace A. Richardson, and Robert A. Cannon, for appellee.

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

WHITE, J.

This is an appeal from a declaratory judgment action by the State on the relation of the Attorney General against the Tax Commissioner to obtain a determination of the constitutionality of Neb. Rev. Stat. §§ 77-1349 to 1354 (Cum. Supp. 1978), passed in 1977, as part of 1977 Neb. Laws, L.B. 131. The District Court for Lancaster County, Nebraska, held that the sections challenged were constitutional, dismissed the petition, and overruled the relator's motion for a new trial. We reverse.

The Attorney General contends that the challenged statutes are unconstitutional in several respects: That the sections are vague and uncertain, arbitrary and capricious, deny due process of law, authorize the Tax Commissioner to usurp functions of the State Board of Equalization and Assessment, and create unreasonable classifications. We con-

sider the first of these contentions and conclude that the sections are defectively vague and unconstitutional.

A background of the law is necessary. In 1977, the Legislature passed L.B. 131, which became effective September 2, 1977. Sections 1 to 6 of the bill are codified as §§ 77-1349 to 1354. Section 77-1349 states, in part: "The purpose [of L.B. 131] is to achieve equalization between the several counties while not causing undue fluctuations in valuation and taxes." Subsequent sections recognize the duty of every county to annually value for tax purposes property located within its borders; create a statutory planning procedure whereby the county assessor, the county board, and the State Tax Commissioner annually identify the process to be used to achieve a uniform standard of valuation for all property in that county for that year; and impose a penalty upon any county which fails to revalue all property within the county each year.

The Attorney General argues that the provisions of §§ 77-1349 to 1354 are so vague and uncertain as to be unenforceable. We believe the most doubtful of these sections to be § 77-1350(1), which reads: "Each county which has not implemented a revaluation plan shall revalue or implement the revaluation of all lands and improvements in such county on or before January 1, 1978, and each year thereafter."

First, we will consider the assertion that L.B. 131 is unconstitutionally vague and uncertain in that it fails to define the term "revalue," as used in § 77-1350(1), or to state since what date a county must have revalued its property. Since a county must revalue every year and can comply with § 77-1350(1) by: (1) Implementing a "revaluation plan"; (2) Revaluing all property by a statutorily acceptable method; or (3) Implementing the revaluation of all land and improvements in such county, it is necessary to understand the meaning of the term. A pen-

alty is imposed by § 77-1354 against a county for failure to revalue according to § 77-1350(1). In *State v. A.H.,* 198 Neb. 444, 253 N.W.2d 283 (1977), we stated that the vagueness test applies to civil as well as criminal statutes. Clarity should be particularly demanded of a statute which would impose very substantial penalties on counties violating the statute and on taxpayers thereof.

In light of the legislative purpose, expressed by § 77-1349, "revalue" contemplates the process of raising or lowering the total assessments on all the property as between different taxing districts so that the value of the whole tax imposed on each taxing district is justly proportioned to the value of the taxable property within its limits, in order that one county or taxing district will not pay a higher tax in proportion to the value of its taxable property than another. Indeed, the legislative record on L.B. 131 indicates that:

> [T]he intent of the Nebraska Legislature is to get equalization in the area of real estate property taxes. . . . All we do know for sure is that the equalization, the reappraisals haven't been accomplished in terms of putting them into effect, and the properties are, in many cases, being assessed completely differently. . . . [I]f you'll adopt this amendment, you will accomplish what we all claim we want, and that is to the degree that real estate property taxation can be fair, you're going to have at least the equality or close to equality.

Floor Debate at 03509-10. Although the purpose is clear, the method by which it is to be achieved is unclear.

The respondent contends that "revalue" simply means to repeat the process of valuation already established by statute. The trial court concluded that "revalue," as used in § 77-1350(1), refers to the existing duty to determine the actual value of property

for the current year pursuant to Neb. Rev. Stat. § 77-1301 (Reissue 1976). The objective of § 77-1301 is a comprehensive reappraisal of real estate. *Carpenter v. State Board of Equalization & Assessment,* 178 Neb. 611, 134 N.W.2d 272 (1965). Any attempt to define "revalue" in terms of the duty imposed by § 77-1301 would confine the term to a reappraisal. We find no support in the legislative history, or in the statute, for the proposition that the procedures set out in § 77-1301 are the exclusive method of "revaluing." Under the trial court's view, a county which had reappraised its lands and improvements in 1954 and had some values changed by the board of equalization would comply with § 77-1350(1) because it would satisfy the requirements of § 77-1301. Clearly, this was not the Legislature's intent.

William Peters, the Tax Commissioner at the time of trial, testified that "revalue" means to come to current actual value in compliance with the procedures set out in § 77-1350(1). According to § 77-1350(1), only counties which have not implemented a revaluation plan must revalue. The language implies that some counties had implemented revaluation plans before the effective date of the bill, thus satisfying the terms of the statute. The Tax Commissioner would write the words "which has not implemented a revaluation plan" completely out of § 77-1350(1) since he equates such a plan with the procedures set forth in L.B. 131. There were no "revaluation plans" defined before the passage of L.B. 131, but the bill clearly assumed that some counties had implemented revaluation plans. If some counties presumably had implemented revaluation plans prior to the effective date of L.B. 131, it is necessary to ask, since what date must it have implemented a revaluation plan? There is no date specified in the statute. Theoretically, a reappraisal conducted in 1955 might satisfy the terms of the statute, since the statute specifies no date by which the "revaluation

plan" must have been implemented. The established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Lewitus v. Colwell,* 479 F. Supp. 439 (D. Md. 1979). We are unable to determine with any reasonable degree of certainty the meaning of the term "revalue" or "revaluation plan."

Another illustration of the vagueness problem lies in the distinction between "revalue" and "implement a revaluation." As noted, there are three ways by which a county may determine actual value in order to comply with § 77-1350(1): implementation of a revaluation plan, a revaluation, or implementation of a revaluation. The difference between "revalue" and "implement a revaluation" is not defined by statute. The legislative history of L.B. 131 indicates that the Legislature chose to broaden and change its approach by deleting the reference to the duties of counties which had not implemented a *reappraisal* and substituting both the concept and the specifics of the revaluation plan. A reappraisal is completed by an appraisal firm and submitted to the county. It then has to be approved by the Tax Commissioner, according to Neb. Rev. Stat. § 77-1301.01 (Reissue 1976), and implemented for purposes of property taxation, as provided by Neb. Rev. Stat. § 77-1301.06 (Reissue 1976). A reappraisal could thus represent two distinct events, the approval of the reappraisal, which could occur more than a year before it was put into effect, and the implementation thereof. It is impossible to equate "revalue" and "reappraisal" because of the requirement that the revaluation be done each year thereafter.

Under the interpretation of "revalue" given by either the trial court or the Tax Commissioner, the difference between "revalue" and "implementing a revaluation" appears illusory. The statutory proce-

dure requiring the county assessor to notify the county board of his plans, pursuant to § 77-1350(2), and the sending of materials by the county board to the Tax Commissioner, pursuant to § 77-1351, would obviously not constitute revaluing. "Revaluing" could not occur until the county forwarded its abstract of assessments to the State Board of Equalization and Assessment, pursuant to Neb. Rev. Stat. § 77-1514 (Reissue 1976). If some distinction is intended between the terms, the statute would seem to indicate that a county could comply with the law by revaluing, even though the revaluation was not subsequently implemented.

The Legislature has chosen the disjunctive "or," clearly indicating that any one of the alternatives will satisfy the statutory obligation. In *Blue Flame Gas Assn. v. McCook P. P. Dist.,* 186 Neb. 735, 186 N.W.2d 498 (1971), we said that provisions that are so vague, general, and indefinite as to be incapable of practical application are arbitrary and unreasonable and, therefore, unconstitutional.

Finally, we will consider the relator's contentions concerning the use of the date January 1. Section 77-1350 requires counties to revalue or implement a revaluation "*on or before* January 1, 1978." (Emphasis supplied.) A penalty is assessed by § 77-1354 against counties which do not revalue pursuant to § 77-1350 prior to January 2, 1978, and the same date in subsequent years. Section 77-1301 requires all real property to be assessed as of January 1 at 12:01 a.m. Examination of the property might begin before the assessment year commenced, but actual assessment must be within the year itself because, prior to that, the valuation would be speculative. *City of Norfolk v. Bell,* 141 S.E. 844 (Va. 1928). Therefore, the Legislature's authorization of a revaluation "before" January 1, 1978, appears to be a nullity. A revaluation made "before" January 1 would be inconsistent with the present statutes which contemplate notice

to taxpayers of proposed changes pursuant to Neb. Rev. Stat. § 77-1506 (Reissue 1976). It is fundamental that a statute which is incorporated into an existing statutory scheme must be interpreted in light of that statutory scheme to be consistent therewith. *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93, 175 N.W. 531 (1919); *State ex rel. Meyer v. County of Banner,* 196 Neb. 565, 244 N.W.2d 179 (1976).

The respondent attempts to avoid the problem inherent in the use of "before" by amending the statute to provide that the revaluation or implementation of the revaluation shall be made "as of" January 1, ignoring the word "before" in § 77-1350.

> In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will.

Pierce Co. v. Century Indemnity Co., 136 Neb. 78, 84, 285 N.W. 91, 95 (1939), quoting from *Hagenbuck v. Reed,* 3 Neb. 17 (1873).

We cannot assume that the Legislature intended that the revaluation be done "as of" January 1, when it said "on or before." The lack of clarity cannot be corrected by administrative or judicial construction. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Bachus v. Swanson,* 179 Neb. 1, 136 N.W.2d 189 (1965); *Doolittle v. County of Lincoln,* 191 Neb. 159, 214 N.W.2d 248 (1974).

It requires little argument to see that § 77-1350(1)

is not severable and that the whole act must fail. The rule is that when invalid portions are so interwoven with the rest of the act that the act may not be operative with the void portions eliminated, the whole act fails. *City of Scottsbluff v. Tiemann,* 185 Neb. 256, 175 N.W.2d 74 (1970).

In light of the conclusions we have reached, it is unnecessary to discuss the further contentions that have been raised in the briefs. We hold that § 77-1350(1) is so vague and indefinite as to be incapable of practical application. Accordingly, we reverse the decision of the District Court.

REVERSED.

MARY CUNNINGHAM KOSNOPFL, APPELLEE AND CROSS-APPELLANT, V. WILHELM WOLFGANG KOSNOPFL, APPELLANT AND CROSS-APPELLEE.

293 N. W. 2d 854

Filed June 24, 1980. No. 42802.

1. **Divorce: Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under the statute as well as under the former decisions of this court is one of reasonableness. The relevant considerations will vary from case to case.
2. **Divorce: Alimony: Property Division: Appeal and Error.** The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal.
3. **Divorce: Alimony.** The earning capacity of the husband is an element to be considered in the allowance of alimony.
4. **Divorce: Attorney's Fees.** The award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

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

William F. Abell, for appellant.

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

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BUCKLEY and WINDRUM, District Judges.

BUCKLEY, District Judge.

In this action for dissolution of the marriage of the parties, the District Court for Lancaster County, Nebraska, dissolved the marriage, awarded custody of the one minor child to petitioner Mary Kosnopfl (Mary), required respondent Wilhelm Kosnopfl (Wilhelm) to pay $225 per month child support, divided the property of the parties, and awarded Mary alimony in the sum of $12,000, payable at $200 per month for 5 years.

Wilhelm's only contention on appeal is that no alimony should have been awarded.

Wilhelm is a citizen of Austria. Mary, who was a Nebraska citizen working for the United Nations, met and married Wilhelm in Vienna, Austria, in 1973. They lived in Vienna very briefly, then came to Lincoln, Nebraska, in September of 1973. Wilhelm spent 10 days there visiting Mary's family, then left for Saudi Arabia, where he worked for a construction company for about 7 months, whereupon he returned to Lincoln and Mary, where the couple lived until their separation in May 1978.

While Wilhelm was in Saudi Arabia, Mary earned 6 hours of college credit that enabled her to get her degree. She then became employed by the Nebraska Educational Television Network, where she currently is a unit director. Her annual salary has increased gradually to about $10,300.

When Wilhelm returned to Lincoln from Saudi Arabia in May 1974, he worked until the end of that year, then enrolled as a full-time student at the University of Nebraska in January 1975. He obtained

his bachelors degree in 1976 and a masters degree in international marketing in 1978. While working toward his masters degree, he took a full-time job in 1977 with the Nebraska Department of Agriculture at an annual salary of $13,000. At the time of trial, he was about to move to Chicago to begin employment there in agricultural marketing at a beginning annual salary of $22,500, but was already considering employment in the Middle East which would pay substantially more.

Wilhelm very carefully analyzes the six areas of consideration set out in Neb. Rev. Stat. § 42-365 (Reissue 1978) for determining whether alimony is appropriate. He emphasizes the financial contributions of the parties to the marriage and contends they are virtually equal, thus concluding no alimony should be awarded. Mary disputes the amount of his earnings in Saudi Arabia and later in 1978 that he contributed to the marriage and asserts that the resulting difference in their financial contributions about equals the award of alimony.

It is not necessary to set forth the specific financial contributions of the parties or to resolve the dispute as to Wilhelm's.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under the statute as well as under the former decisions of this court is one of reasonableness. The relevant considerations will vary from case to case. *Magruder v. Magruder,* 190 Neb. 573, 209 N.W.2d 585 (1973). Although divorce cases are triable de novo upon appeal to this court, we have said repeatedly that the fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. *Witcig v. Witcig, ante* p. 307, 292 N.W.2d 788 (1980); *Schmer v. Schmer,* 197 Neb. 800, 251 N.W.2d 167 (1977).

Here, the relevant considerations are that Mary contributed her entire earnings to the marriage while Wilhelm got his bachelors and masters degrees from the University of Nebraska. This, in turn, enabled him to gain an earning capacity much greater than that of Mary and one with greater prospects for increase. The earning capacity of the husband is an element to be considered in the allowance of alimony. *Wheeler v. Wheeler,* 193 Neb. 615, 228 N.W.2d 594 (1975); *Sowder v. Sowder,* 179 Neb. 29, 136 N.W.2d 231 (1965). These considerations justify the award of alimony by the trial court, and we, therefore, find no abuse of discretion therein. See *Wheeler v. Wheeler.*

Mary cross-appeals from the trial court's failure to award her an attorney's fee. The award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Brown v. Brown,* 199 Neb. 394, 259 N.W.2d 24 (1977). We find no abuse of discretion in not awarding Mary an attorney's fee in the court below.

The judgment of the trial court is affirmed. Mary is awarded the sum of $500 for the services of her attorney in this court.

AFFIRMED.

GAIL M. WHITLATCH, APPELLEE, V. WILLIAM A. WHITLATCH, APPELLANT. SHIRLEY KRUMM, INTERVENOR-APPELLEE.

293 N. W. 2d 856

Filed June 24, 1980. No. 42850.

1. **Child Custody.** In determining issues of custody of children, the paramount consideration is the best interests of the child.
2. _____. When a controversy arises as to the custody of a minor

between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent.

3. _____. The welfare of a child of tender years is paramount to the wishes of the parent where the child has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent.
4. **Child Custody: Appeal and Error.** The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case.
5. _____: _____. In evaluating the general concept of the best interests and welfare of the children, great weight will be given to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial.

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

Herbert J. Friedman of Friedman Law Offices, for appellant.

Gary J. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

Douglas L. Kluender of Healey, Brown, Wieland & Kluender, for intervenor-appellee.

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

BRODKEY, J.

William A. Whitlatch, respondent below, appeals from a decree entered by the District Court for Lancaster County, Nebraska dissolving his marriage to Gail M. Whitlatch, distributing the personal property of the marriage to the respective parties, awarding the physical and legal custody of the minor child of the marriage to the intervenor, Shirley Krumm, who is the child's maternal grandmother, and awarding child support and attorney's fees. We affirm.

Gail and William were married on October 6, 1974. Difficulties between the parties arose almost imme-

diately after their marriage, and three months later, William entered the United States Navy. One child, Lee Allen Whitlatch, was born as issue of the marriage on September 17, 1975, subsequent to William's entering the armed services. Following Lee's birth, Lee and Gail resided with Gail's mother, Shirley. When Lee was approximately 3 months of age, Gail moved to a residence of her own, leaving Lee with Shirley. Lee has continued residing with Shirley and, in fact, believes Shirley to be his mother.

Gail filed a petition for dissolution of the marriage on April 26, 1976. Since William was in the armed services, nothing was done in this matter until after William's discharge on March 14, 1977. On June 23, 1977, the grandmother, Shirley, intervened in the action, contending that neither Gail nor William were fit and proper persons to have the care, custody, and control of the child. Pursuant to Shirley's request, the court appointed a guardian ad litem for Lee for the purpose of determining his best interests, particularly as among Gail, William, and Shirley. Temporary custody of Lee was awarded to Shirley, subject to reasonable rights of visitation by Gail and William, by agreement of *all* the parties. At the trial held on the dissolution petition, the sole issue in dispute was the question of Lee's custody. Gail testified that William had seen Lee five times since his birth. Shirley testified that William had visited Lee on six occasions since Lee's birth. Of those six occasions, four occurred during the time period from September 1978 until the date of trial, during which time a court order granted visitation to William on 2 days of each week. William testified that he did not visit Lee more often because it was difficult for him to be in the same house with Shirley.

Evidence was also adduced with regard to the living facilities and environment of the parties desiring custody. It should be noted that Gail did not attempt to obtain custody of Lee and, in fact, requested the

court to award the custody to Shirley. The evidence establishes that Shirley resided in a four-bedroom house with her husband and two children from a prior marriage. The guardian ad litem testified that the Krumm residence was new, neat, and clean with plenty of room for Lee to live and be happy. William, on the other hand, testified that he was going to move into another house with a male friend, who had custody of a child. However, at the time of trial, William was still residing with his parents in a residence which was unacceptable, in the opinion of the guardian ad litem, for the rearing of a child. On the basis of the evidence presented, the trial court dissolved the marriage of Gail and William; awarded each party the personal property in his or her possession; awarded the physical and legal custody of Lee to Shirley, subject to reasonable visitation by both Gail and William; ordered that Gail and William each pay the sum of $75 per month as child support; and ordered that Gail, William, and Shirley each pay $300 as fees for the guardian ad litem.

William has appealed to this court, his sole assignment being that the trial court erred in granting permanent custody of Lee to Shirley. Specifically, William claims that a natural parent should have preference over third persons in actions awarding custody, so long as the natural parent is not shown to be unfit. This court has frequently stated that, in determining issues of custody of children, the paramount consideration is the best interests of the child, and we have very recently repeated this general rule. *Elsasser v. Elsasser, ante* p. 128, 291 N.W.2d 260 (1980). In fact, it is so provided by statute. Neb. Rev. Stat. § 42-364 (Reissue 1978) provides, so far as material herein, as follows:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified,

> including placing the minor children in the custody of the court or third parties, or terminating parental rights pursuant to subdivision (4) of this section if the welfare of the children so requires. Custody and visitation of minor children shall be determined *on the basis of their best interests.* Subsequent changes may be made by the court after hearing on such notice as prescribed by the court.
>
> (1) In determining with which of the parents the children, or any of them, shall remain, the court *shall consider the best interests of the children* . . . .

(Emphasis supplied.)

It is true that in *Williams v. Williams,* 161 Neb. 686, 74 N.W.2d 543 (1956), we held that the courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation, or has forfeited that right. However, in that case, we also stated:

> 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 stood in the relation of parents with the parents' approval and consent. This has long been the rule in this state. [Citations omitted.]
>
> We quite agree that the natural right of a parent to the custody of his child is not lightly to be denied. But where it appears, as here, that the father abandoned the care of his child to his parents for 8 years beginning from the day of its birth, with his full ap-

> proval and consent, he has forfeited his natural right to the child's custody. The best interests of the child require that he remain in the custody of the respondents who have occupied the relation of parents throughout the 8 years of the child's life and whose home has been the only home the child has ever known.

Id. at 690-91, 74 N.W.2d at 545.

We have frequently stated the rule to be that when a controversy arises as to the custody of a minor between a parent and a third person, the custody of the child is to be determined by the best interests of the child *with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent.* See, *Bigley v. Tibbs*, 193 Neb. 4, 225 N.W.2d 27 (1975); *Liebsack v. Liebsack,* 199 Neb. 266, 258 N.W.2d 130 (1977); *Jorgensen v. Jorgensen,* 194 Neb. 271, 231 N.W.2d 360 (1975).

This court recently held in *Haynes v. Haynes,* 205 Neb. 35, 286 N.W.2d 108 (1979), which case also involved an intervention by the grandmother to obtain custody of the minor children as against the natural father:

> We have many times said that 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. Liebsack v. Liebsack, 199 Neb. 266, 258 N.W.2d 130; Bigley v. Tibbs, 193 Neb. 4, 225 N.W.2d 27; Kaufmann v. Kaufmann, 140 Neb. 299, 299 N.W. 617.
>
> 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 circum-

> stances. 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. Williams v. Williams, 161 Neb. 686, 74 N.W.2d 543.
>
> . . . .
>
> We therefore affirm the judgment which placed the custody of the children for the present with Grandmother and ordered Father to make child support payments.

Id. at 39, 286 N.W.2d at 110.

Haynes, although recognizing the general rule stated above, makes it clear that the rule is subject to the "best interests of the child" where the facts so warrant.

In *Christensen v. Christensen,* 191 Neb. 355, 215 N.W.2d 111 (1974), this court stated:

> The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disputing an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the children it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed

> the witnesses and the attitude of the parents at the trial.

Id. at 358, 215 N.W.2d at 114.

In the decree entered in this matter, the trial court stated: "Although there is nothing in the record to indicate that the respondent [William] is an unfit parent, there is little evidence from which it can be determined precisely what kind of a parent he is or would be." We must agree with that conclusion. Although William testified that he desired custody of Lee, the record would indicate to the contrary. That he showed little interest in Lee prior to the date of trial cannot be disputed. His record of visitation, or lack thereof, shows little interest in Lee. We note with interest the fact that only following William's retention of new counsel, midway through the trial, did he attempt to exercise his visitation rights on a regular basis. Although William indicated at trial that he would take any actions necessary for Lee's maintenance and support, it is undisputed that William had not then, in fact, made preparations for the rearing and support of a minor child. William had not yet left the residence of his parents, which residence was found unsuitable by the guardian ad litem, nor had William attempted to purchase any clothing or furniture for the use of a minor child. Moreover, we question whether the living environment proposed by William would be in Lee's best interests. William proposed living with a male friend and that person's minor child. Shirley, on the other hand, was living in the more normal and probably more stable family setting.

Likewise, we believe it is in Lee's best interests that he be left with Shirley because of the emotional relationship which she and Lee have established. The record is clear that Lee looked upon Shirley as his mother and that their relationship was close. On the other hand, the record reveals that Lee and William had a strained relationship. Although it is pos-

sible that the relationship of Lee and William will improve in the future, we do not believe that the thrusting of Lee into a relationship which is strained and into an environment which is of uncertain stability would be in Lee's best interests at this time. It is clear from the record that Shirley has afforded Lee a normal, stable environment and normal associations with other children since his birth in 1975. For all practical purposes, Shirley has been Lee's mother for his entire life. We conclude that the trial court's finding that the best interests of Lee would be met by granting custody to Shirley is supported by the evidence, even giving "due regard for the superior rights of a fit, proper, and suitable parent." *Liebsack v. Liebsack, supra* (court syllabus).

Although Gail and Shirley have requested that attorney's fees be awarded them in this action, we conclude that, under the facts of this case, such request should be denied, and that the parties should bear the expense of their respective attorneys. We affirm the award of fees for the guardian ad litem.

AFFIRMED.

WHITE, J., concurs in result.

IN RE APPLICATIONS 15146 AND 15148 OF THE LITTLE BLUE NATURAL RESOURCES DISTRICT.
LITTLE BLUE NATURAL RESOURCES DISTRICT, APPELLANT, V. LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT ET AL., APPELLEES.

294 N. W. 2d 598

Filed June 24, 1980. No. 42853.

1. **Transbasin Diversion: Irrigation.** The unappropriated waters of every natural stream within the State of Nebraska may be diverted from one basin to another, except when such diversion is contrary to the public interest, in which case it shall be denied.

2. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language.
3. _____. In interpreting the meaning of a statutory provision the whole provision should be read in order to arrive at a conclusion as to its proper meaning.
4. _____. Courts should give statutory language its plain and ordinary meaning.
5. _____. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
6. _____. In the construction of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous.
7. **Statutes: Repeal of Statutes.** Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.

Appeal from the Director of the Department of Water Resources. Reversed and remanded.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

George E. Svoboda and Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellees Lower Platte North, Loup River P.P.D., Lower Loup-Platte Water Assn., North Bend, Sanitary Improvement Dist. No. 3, Save the Platte Committee, Dennis Kucera, William D. Ingwersen, Frances M. Creech, William D. Hewit, John G. Tomek, et al.

James I. Shamberg of Cronin, Shamberg & Wolf, for appellees Central Platte N.R.D., Wood River, Marcia Oldfather, Leslie & Charlotte A. Robinson, Spring Creek Citizens Committee, County of Merrick, County of Dawson, Kearney, Harold Green, Jr., James B. Beltzer, John A. Wagoner, Joseph D. Martin, & Herbert F. Mayer, Jr.

William F. Austin, City Attorney, and William G. Blake, for appellee City of Lincoln.

James H. Truell, City Attorney, for appellee City of Grand Island.

Duane A. Burns and Mayer, Burns & Mayer, for appellee Central Nebraska Conservation Assn.

Lyle B. Gill, for appellee City of Fremont.

Patrick A. Parenteau, for appellees National Wildlife Federation, Neb. Wildlife Federation, & Save the Platte Committee.

David C. Nuttleman of Holtorf, Hansen, Kovarik & Nuttleman, for appellee North Platte N.R.D.

Jess C. Nielsen and Richard A. Birch of Jess C. Nielsen Law Offices, for appellees Twin Platte N.R.D. et al.

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

KRIVOSHA, C. J.

The present appeal calls upon this court to decide whether transbasin diversion is prohibited by either the Constitution or the laws of the State of Nebraska. While the resolution of that issue is of great importance, the issue necessary to determine that matter is extremely narrow. We believe that a reading of the pertinent sections of both the Nebraska Constitution and the applicable statutes leads us to the inescapable conclusion that transbasin diversion is not prohibited in Nebraska. We must, therefore, reverse and remand this matter to the director of the Department of Water Resources for further proceedings in accordance with this opinion.

The Little Blue Natural Resources District appeals from the order of the director of the Department of Water Resources dismissing its applications for authority to divert and store water from the Platte River for irrigation purposes.

The applications, which were filed on November

28, 1977, were dismissed without prejudice by the director on January 5, 1978. Pursuant to the rules of the department, the applicant then filed petitions for rehearing. Objections were filed by numerous parties including riparian owners, natural resources districts, and municipalities. After a lengthy hearing, the director denied the applications. From that order, the applicant has appealed to this court.

The applicant is a natural resources district established under Neb. Rev. Stat. § 2-3203 (Reissue 1977). Its territory includes parts of Adams, Webster, Clay, Nuckolls, Fillmore, Thayer, and Jefferson Counties. Much of the farmland within the district is suitable for irrigation but is farmed as dryland because of the lack of a ground water aquifer. An irrigation project was conceived and developed by the district to provide supplemental water to this area.

The project as proposed by the district contains three service areas. The North Service Area would be located generally in southeastern Kearney County, southwestern Adams County, and northwestern Webster County. The Central Service Area would be located generally in northern Webster County south of Campbell, Bladen, and Blue Hill. The East Service Area would be located generally in northeastern Webster County, northwestern Nuckolls County, and southwestern Clay County. The project includes a reservoir to be constructed on the Little Blue River northwest of Campbell, Nebraska, in Franklin County.

Water to supply the project would be diverted from the Platte River and transported through canals to the reservoir near Campbell. The applications which were filed by the district were for authority to divert 450 cubic feet of water per second of time from the river and to store 125,000 acre-feet of water in the reservoir near Campbell.

The Central Nebraska Public Power and Irrigation District, generally known as Tri-County, oper-

ates a supply canal south of the Platte River which transports water from a diversion dam on the Platte River east of North Platte, Nebraska, to a point near Overton, Nebraska, where the supply canal joins the Phelps County canal, a major irrigation canal operated by Tri-County. A wasteway located at this junction is used to return water to the river when it is not to be used for irrigation purposes. A gate located at the junction is used to send water in the supply canal into the Phelps County canal or into the wasteway.

The Little Blue project contemplates taking water at this structure, which would otherwise be returned through the wasteway to the river, and carrying it to the Campbell reservoir for storage for use during the following season. The plan contemplates the use of the Phelps County canal to a point near Axtell, Nebraska, where a new supply canal would be constructed which would connect with the Little Blue River southwest of Minden, Nebraska.

Since the Tri-County district would be using water for irrigation during the months of April through August, the Little Blue project would use the flow in the supply canal from September until January and would take only water which would otherwise be returned to the Platte River through the wasteway.

Although the parties raised some controversy as to the point of diversion, we think it is clear that the point of diversion is the location of the wasteway in the Platte River and it is of no importance that the Little Blue project proposes to take the water at the structure where the supply canal joins the Phelps County canal. It would indeed be wasteful to compel the construction of a new diversion dam to recapture the water after it has been discharged into the river. The plan which the Little Blue project has devised is the legal equivalent of such a method and the point of diversion is the location of the waste-

way where it joins the Platte River.

The director found there was unappropriated water in the Platte River sufficient to meet the demands of the proposed project, but that approval of the applications would result in water for irrigation purposes being taken from the Platte River and applied to land outside the basin of the Platte River, contrary to the rules announced by this court in *Osterman v. Central Nebraska Public Power and Irrigation District,* 131 Neb. 356, 268 N.W. 334 (1936). The director concluded that the *Osterman* case was controlling and, for that reason, the department was without authority to approve the applications. The applicant has appealed from the order denying the applications.

The finding of the director that there was unappropriated water in the Platte River sufficient to meet the demands of the proposed project is sustained by the record. The evidence shows that, after Lake McConaughy became filled in 1941, an average of more than 500,000 acre-feet of water has been discharged into the river through the Johnson wasteway near Overton, Nebraska, each year. In 1956, the year of the lowest discharge, 298,800 acre-feet of water was returned to the river through the wasteway. The average yearly river flow as measured at the Overton gauge downstream from the Johnson wasteway, but not including the discharge from the wasteway, has amounted to over 500,000 acre-feet. This evidence sustains a finding that there is sufficient unappropriated water to satisfy the applicant's appropriation of 125,000 acre-feet per year. If, in any particular year and for any reason, there was not sufficient water to satisfy the applicant's appropriation, the needs of the prior appropriators would be satisfied first, in accordance with the laws and regulations governing the appropriation of water, and the applicant would be restricted to the amount of water available for its use.

The narrow issue we need consider is whether, as urged by the appellees, our previous decision in *Osterman* is correct and transbasin diversion is prohibited in this state; or whether, as urged by the appellant, we should overrule the *Osterman* case and permit transbasin diversion and the instant project.

The *Osterman* case involved applications by the Central Nebraska Public Power and Irrigation District, generally known as Tri-County, to divert and store water from the Platte River for power purposes and to irrigate land in Gosper, Phelps, Kearney, and Adams Counties. Approximately 60 percent of the water to be used for irrigation purposes would have been transported out of the Platte River basin and applied to lands within the basin of the Blue River.

In the *Osterman* case, this court declared that, at common law, the right to use water was limited to the owners of riparian lands and, of necessity, there was "no right to transport waters beyond or over the divide or watershed that enclosed the source from which obtained." *Id.* at 366, 268 N.W. at 339. Then, from an analysis of various sections of the 1889, 1893, and 1895 irrigation statutes and amendments, and without citing any constitutional provisions, this court declared that § 46-620, Comp. Stat. 1929, now Neb. Rev. Stat. § 46-265 (Reissue 1978), was controlling over § 46-508, Comp. Stat. 1929, now Neb. Rev. Stat. § 46-206 (Reissue 1978), and prohibited any irrigation ditch or canal from crossing the divide or watershed so that unused waters applied to the land would be prevented from being returned to the source from which they were taken. The opinion concluded that "water for irrigation and power purposes taken from the Platte river or its tributaries may not be lawfully diverted over and beyond the southern watershed of that stream and applied to lands situated without the basin of the Platte river .

. . ." *Id.* at 370, 268 N.W. at 340-41. The orders appealed from were set aside and the cause remanded to the Department of Roads and Irrigation with directions to grant leave, if desired, to amend the applications to limit the use of the diverted waters to lands within the Platte River watershed.

Following the remand of the proceedings to the Department of Roads and Irrigation, the applications were amended in accordance with the directions of this court and, as amended, the applications were granted. The orders granting the applications provided that the water appropriated should not be "diverted over and beyond the watershed of the Platte River and applied to lands situated without the basin of the Platte River." *Cozad Ditch Co. v. Central Nebraska Public Power & Irrigation Dist.,* 132 Neb. 547, 549, 272 N.W. 560, 561 (1937). Subsequent appeals from the orders of the Department of Roads were dismissed. See, *Cozad Ditch Co. v. Central Nebraska Public Power & Irrigation Dist.; Osterman v. Central Nebraska Public Power and Irrigation District.*

The *Osterman* decision and the problems related thereto have been the subject of several law review articles, all of which have been critical of the conclusions reached therein. See, Doyle, *Water Rights in Nebraska,* 29 Neb. L. Rev. 385 (1950); Comment, *Waters and Water Courses,* 15 Neb. L. Bull. 271 (1937); Yeutter, *A Legal-Economic Critique of Nebraska Watercourse Law,* 44 Neb. L. Rev. 11 (1965); Oeltjen, Harnsberger, & Fischer *Interbasin Transfers: Nebraska Law and Legend,* 51 Neb. L. Rev. 87 (1971).

Our reading of the Nebraska Constitution and statutes applicable thereto, as well as our subsequent decisions in *Ainsworth Irr. Dist. v. Bejot,* 170 Neb. 257, 102 N.W.2d 416 (1960), and *Metropolitan Utilities Dist. v. Merritt Beach Co.,* 179 Neb. 783, 140 N.W.2d 626 (1966), leads us to the conclusion that it

is appropriate for us to reexamine our holding in the *Osterman* case.

The language of the Nebraska Constitution is clear and unambiguous with regard to the use of water. Neb. Const. art. XV, § 4, unequivocally provides: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." The full impact of that provision has, in recent times, become so clear that further or additional reference or citation to support that declaration is unnecessary.

Neb. Const. art. XV, § 5, provides: "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section." It is significant to note that the quoted section refers to the use of the water of *every* natural stream being dedicated to "the people." Nothing in art. XV, § 5, indicates or authorizes limiting the use of the water of every natural stream to *within a particular watershed basin* or dedicating its use to the people living *within a particular watershed basin.* Quite to the contrary, the clear and unambiguous language constitutionally mandates that the use of *every* stream, regardless of its location, be dedicated to *all* of the people of the state, regardless of their location, and not just to those who happen to live within the confines of a particular valley or watershed basin. Nowhere within the Constitution can such limiting words be found.

That fact is further made clear when one looks at Neb. Const. art. XV, § 6, which provides, in part: "The right to divert unappropriated waters of every natural stream for beneficial use shall *never be denied* except when such denial is demanded by the public interest." (Emphasis supplied.)

The very purpose of art. XV, § 6, is to guarantee the right to divert unappropriated waters and to pro-

hibit the denial of such diversion except when demanded by public interest.

The language of art. XV, § 6, makes no distinction concerning a particular watershed district or basin but, quite to the contrary, prohibits denying the right to divert unappropriated waters except when demanded by the public interest. Nothing in the history of the constitutional provisions cited above, nor the language itself, in any manner justifies limiting the use of such waters to a particular basin or watershed.

The *Osterman* decision totally ignored the provisions of the Nebraska Constitution and relied solely upon the provisions of what is now Neb. Rev. Stat. § 46-265 (Reissue 1978) and was formerly § 46-620, Comp. Stat. 1929. It reads as follows:

> The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, *or to the Missouri River.*

(Emphasis supplied.) The *Osterman* court concluded that the phrase "or to the Missouri River" had no application, was not a part of the statute, and should be ignored. The court, therefore, concluded that former § 46-620 prohibited transbasin diversion.

There is no basis, however, to conclude that the phrase "or to the Missouri River" has no meaning. All of the water of the State of Nebraska empties into the Missouri River and, therefore, it must be concluded that diversion may occur so long as the unused portion of the water is not in some manner unnecessarily impounded or wasted and is returned to its natural stream of origin or to the Missouri River.

The *Osterman* decision further concluded that

former § 46-508, now § 46-206, which provides:

> The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, *unless such stream exceeds in width one hundred feet, in which event not more than seventy-five per cent of the regular flow shall be taken.*

(emphasis supplied), was superseded by the provisions of § 46-620 and should be disregarded.

Cardinal rules of statutory construction, however, prohibit us from ignoring entire phrases of a statute or giving the plain meaning of a statute a strained or absurd interpretation. "Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language." *City of Grand Island v. County of Hall,* 196 Neb. 282, 286, 242 N.W.2d 858, 861 (1976).

In interpreting the meaning of a statutory provision, the whole provision should be read in order to arrive at a conclusion as to its proper meaning. *Pettigrew v. Home Ins. Co.,* 191 Neb. 312, 214 N.W.2d 920 (1974). Moreover, courts should give statutory language its plain and ordinary meaning. *State v. One 1970 2-Door Sedan Rambler,* 191 Neb. 462, 215 N.W.2d 849 (1974); *Connors v. Pantano,* 165 Neb. 515, 86 N.W.2d 367 (1957).

The statutory language is clear and unambiguous and does not require us to do more than read its plain meaning. "*A statute is not to be read as if open to construction as a matter of course.* Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning." *City of Scottsbluff v. Tiemann,* 185 Neb. 256, 264, 175 N.W.2d 74, 80 (1970) (emphasis in original). Furthermore, "In the construction of a statute, no sentence, clause, or word should be rejected

as meaningless or superfluous . . . ." *Weiss v. Union Ins. Co.,* 202 Neb. 469, 473, 276 N.W.2d 88, 92 (1979). Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. *City of Grand Island v. County of Hall, supra.*

With these rules of construction in mind, we have no alternative but to recognize that both §§ 46-265 and 46-206 remain in effect and should be given meaning. If transbasin diversion is prohibited entirely, as urged by appellees, then the last clause of § 46-206, permitting the diversion of up to 75 percent of the water from a stream more than 100 feet wide, is meaningless.

When we then give both sections of the statute their plain meaning, we are left with no other conclusion but that, if a stream is more than 100 feet wide, up to 75 percent of the water not otherwise appropriated may be diverted so long as no waste is permitted, the unused portion is returned to its stream of origin or permitted to find its way back to the Missouri River, and the public interest does not otherwise require that such diversion be denied.

We avoided that conclusion in the *Ainsworth* decision by simply holding that the streams in question were in the same watershed district. The distinction was, at best, tenuous and, while it may have avoided for us the need to decide the issue, it did not change the fact that the law, in fact, prohibits denying transbasin diversion unless the public interest demands it.

When finally we reached the *Metropolitan Utilities* case, we were no longer able to make such fine distinctions and were required to face the transbasin diversion issue. In the *Metropolitan Utilities* case, *supra* at 800, 140 N.W.2d at 637, we said: "Where the reasonable use of the riparian landowner is not impaired, the public interest demands that such

waters be applied to a needed public purpose rather than be lost by proceeding unmolested to the sea." We recognize the right of all Nebraskans to share the water of the state.

In *Osterman, supra* at 362, 268 N.W. at 337, we said:

> It would be a sad commentary on our political organization, upon the department of roads and irrigation, and upon this reviewing court, if in rationing this necessity of life this beautiful valley should be left with a dry river bed and ruined farms because of any mistaken theory that the protection of its natural fertility did not constitute a public interest within the policy of our laws.

We agree with that statement and believe that, under the provisions of our Constitution dealing with water, it is applicable to the entire state so long as the public interest does not otherwise demand. Would it not be a far sadder commentary if, in rationing this necessity of life, large areas of the state outside a particular valley were ruined while unappropriated water flowed into the Missouri River and on to other states.

When there is insufficient water to meet all needs, the Director of Water Resources may, under the law, limit the removal of water in accordance with statutorily established priorities similar to the restrictions imposed by the director and set out in *Cozad Ditch Co. v. Central Nebraska Public Power & Irrigation Dist., supra.* Under our present Constitution and statutes, the determination of what constitutes a public interest sufficient to either limit or deny, as the situation may demand, the right to remove unappropriated waters from a stream must, in the first instance, be determined by the director. The Constitution tells us that the desire and need for water for domestic and irrigation purposes is a "natural want" of all our citizens and we should not

unnecessarily deny it to any who can obtain it without doing harm to others.

We are unable to reach any other conclusion than that the *Osterman* decision must be overruled and that it now be the law in this jurisdiction that the unappropriated waters of every natural stream within the State of Nebraska may be diverted from one basin to another, except when such diversion is contrary to the public interest, in which case it shall be denied. Accordingly, we specifically overrule our earlier decision in *Osterman v. Central Nebraska Public Power and Irrigation District, supra.*

Having concluded that the director should no longer apply the prohibitions of the *Osterman* decision, we are required to reverse the director's decision and remand the case back to the director to determine whether the waters which he has already determined to be unappropriated may be taken without damage to the public interest. If they can, the permit should be granted. The judgment is, therefore, reversed and the cause remanded to the Director of Water Resources for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. LARRY E. PACKETT, APPELLANT.

294 N. W. 2d 605

Filed June 24, 1980. No. 42857.

1. **Attorney Misconduct.** It is generally improper for counsel, during the pendency of a proceeding, to communicate ex parte with the judge as to the merits of the case.
2. **Criminal Appeals: Prejudicial Error: Appeal and Error.** In a prosecution for a crime, the only errors which require reversal of a cause are those prejudicial to the rights of the accused, or which constitute the denial of a substantial legal right.
3. **Evidence: Impeachment: Prior Inconsistent Statements.** If a witness, not a party, admits making earlier statements contra-

dictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment.

4. _____: _____: _____. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.
5. **Evidence: Prior Consistent Statements.** Prior consistent statements of a witness are not admissible as corroborative evidence except to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
6. **Assault.** To constitute the offense of assault with intent to do great bodily harm, there must be an unlawful assault coupled with a present ability and intent to injure, but no actual battery need occur.
7. **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.
8. **Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

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

Toney J. Redman, 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.

CLINTON, J.

The defendant was charged in the District Court for York County, Nebraska, with having, on August 8, 1978, assaulted Janice Prater with intent to inflict great bodily injury, with having kidnapped her, and with the use of a firearm in the commission of a felony, all in violation of Neb. Rev. Stat. §§ 28-413, 417, and 1011.21 (Reissue 1975), respectively. He was found guilty by a jury and sentenced to consecutive terms of 16 to 40 years on the kidnapping charge, 6 to 18 years on the assault charge, and 3 to 10 years on the firearm count.

He has appealed to this court and has assigned and

argued the following alleged errors: (1) He was deprived of a fair trial because of out-of-court conversations concerning the trial between the prosecutor and the trial judge without defense counsel being present; (2) The court erroneously excluded testimony and evidence offered to impeach a prosecuting witness; (3) The evidence was insufficient to support the conviction on the assault charge because there was a lack of evidence of intent to inflict great bodily harm upon the victim; (4) The court erred in not granting a new trial on the basis of newly-discovered evidence, to wit, an unsigned, undated, typewritten letter received by defense counsel and addressed to a district judge (not the judge who presided at trial) in which various accusations were made concerning improper conduct by police officers and the prosecutor prior to trial; (5) Refusal of the court to admit surrebuttal testimony by the defendant; and (6) Excessiveness of the sentences. We affirm.

A brief outline of the State's evidence and that of the defendant will give a perspective from which to consider the assignments. Further details as necessary will be recited as each assignment is discussed. At 12:05 p.m. on August 8, 1978, Janice Prater was walking home to lunch from her place of employment in the city of York. As she walked, a male, driving a pickup truck, stopped at the curb near her and asked directions. Janice, a relatively new resident of York, suggested he ask for information at a nearby gas station. As she started to walk away, the man pulled a gun, got out of the vehicle, ordered her to get into the truck, and threatened to shoot her if she did not. She complied. As he drove, he kept the gun, which he had on his lap, pointed toward her. When the truck neared the York airport, traveling at a speed of about 40 miles per hour, Janice opened the door and jumped out, fell to the ground, and then ran to the vehicle of a motorist who had stopped at

an intersection and who had observed her jump from the truck. The matter was immediately reported to the police. Janice gave them a description of the man from which a composite drawing of the abductor was made. This, together with other evidence, particularly a description of the truck, led to the arrest of the defendant. Janice positively identified the defendant in a lineup of five men fitting the same general description.

The defendant denied that he was the perpetrator and presented an alibi defense. This was, to some extent, corroborated by the testimony of Dick Christian, the witness whose testimony relates to the assignment of error with reference to impeachment.

We now consider the assignments in the order in which they were listed.

During the course of the trial, the prosecutor made a telephone call to the trial judge without knowledge or presence of defense counsel one evening after adjournment. The next morning, before the presentation of testimony commenced, the trial judge, in open court, indicated his concern about the call and read a disclosure into the record. The substance of the disclosure was that, after adjournment, the prosecutor appeared ex parte before the court, made complaints as to the extent of cross-examination being allowed the defendant, and argued in favor of more restrictive cross-examination. This process was repeated later in the evening by telephone. The prosecutor responded that the reason for his protest was that prolonged cross-examination permitted the defense made it difficult and burdensome to schedule the appearance of prosecution witnesses and was a burden to the witnesses, some of whom had to come from long distances or leave their employment. The prosecutor also declared that he had expressed to the judge a concern about a defense proposal to call an expert on hypnosis without disclosing his schedule, which might not give the State appropriate time to

respond. The court gave its opinion that nothing discussed provided grounds for a mistrial.

It is generally improper for counsel, during the pendency of a proceeding, to communicate with the judge as to the merits of the case. Code of Professional Responsibility, DR 7-110. It would appear that objections to, arguments about, or evidence affecting the limits of cross-examination ought to be made only in the presence of or after appropriate notice to opposing counsel. In this case, however, there is nothing in the record from which it may be reasonably inferred that prejudice resulted to the defendant. The record does not show that the defense was subsequently improperly restricted in either direct or cross-examination. The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantial legal right. *State v. Atkinson,* 190 Neb. 473, 209 N.W.2d 154 (1973).

The defendant testified that at the time the crimes in question were committed, he was at Christian's service station at Beaver Crossing, Nebraska. This village is about 25 miles from the city of York. The defendant testified that he arrived at the station at about 9:45 a.m. and that he was at the station until at least 12:30 p.m. because it took that long to charge some tractor batteries he had brought to the station. To corroborate the alibi, he called the witness Dick Christian, the operator of the station. Christian testified that he did not know defendant well, but that he had seen him 6 to 10 times over a period of about 6 months. He further testified that defendant was at his station on August 8, 1978. His testimony was substantiated by a station ticket in Christian's handwriting dated "8-8 1978," showing a charge to Larry Packett for 12 gallons of gasoline. The ticket also bore the signature of Larry Packett. This ticket was the means by which Christian was able to recall and verify that the defendant was at

the station on the day in question. The witness also remembered that on that day he "threw a charge" into some batteries for the defendant for which he made no charge. He was asked these questions and gave these answers:

> Q. And then, in any event, the day that you took that ticket, he was there until 12 or 12:30, did you say?
> A. That's what I said on that tape.
> Q. Okay, we'll get to that in just a minute. I apologize, I didn't mean to say that. But your memory at one time was that you visited with him for a long time, being there from 12 or 12:30?
> A. Right.
> Q. Do you remember that time that you visited with him for so long, what time he got there?
> A. No. Having been questioned so many times about this, now they have got me to where I just can't stand on my word and say I remember precisely because there's too much traffic in our place of business and I —

Also introduced was a check signed by Larry Packett, dated August 10, 1978, payable to Christian Service, in the amount of $12. On the memo portion of this check was printed by hand: "Gas & Tom's Battery." Christian acknowledged having received that check some time after August 8. The prior tape recording referred to in Christian's answer above was offered in evidence by the defendant, was objected to as hearsay, and the objection was sustained. The tape was received as an offer of proof. On the tape recording, Christian stated that he charged the batteries until around noon, when he heard the noon whistle blow, and that defendant stayed and talked until about 12:30 p.m.

On cross-examination, it developed that Christian

was less certain about the time consumed in battery charging and the time that the defendant left the station. The gist of his testimony on cross-examination was that it was possible that, depending upon the method that he used to charge the four batteries, the times may have been different. If he charged them in pairs, it would have taken 30 to 45 minutes for each pair. Also by refreshing his recollection by means of a cash payout on a register tape for that date, he testified that a particular payout transaction to a salesman occurred after defendant had left. Since the salesman always called before 11:30 a.m., Christian testified that defendant would have left by then. The $8 transaction with defendant, even though a charge, is recorded on the register tape. The charge is made after the service is rendered. The $8 charge appears on the tape before the cash payment to the salesman. The salesman verified the time of his departure from the station.

Christian acknowledged that what he said on the tape was different from what he was saying on cross-examination.

The court did not err in refusing the tape recording. If the offer of the extrinsic evidence in the form of the tape was offered for impeachment purposes, then it was inadmissible because the witness admitted making the earlier contradictory statements. See Neb. Rev. Stat. § 27-613(2) (Reissue 1975). That section has made only slight changes in the previous rule. It says, in part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.

The prior rule was:

> In order to lay a sufficient foundation for

> the introduction of evidence to contradict *the statement of a witness, as to a statement alleged or denied by him,* it is indispensable that the witness's attention be called to the declaration alleged or denied to have been made, and that the time and place, when and where, and that the person to whom such statement should have been made be cited.

State v. Wilmore, 192 Neb. 807, 812, 224 N.W.2d 756, 759 (1975) (quoting earlier cases) (emphasis in original).

> The difference between that rule and Rule 613 of the Nebraska Evidence Rules is that it is no longer necessary for the impeaching attorney to lay that sort of foundation prior to producing extrinsic evidence. Under Rule 614 he need only afford the witness an opportunity to explain or deny, while affording the opposite party an opportunity to interrogate the witness thereon.

NCLE, Nebraska Rules of Evidence § 6, p. 26 (1975).

If offered as corroborative evidence to support the testimony that defendant left at 12:30 p.m., it was not admissible for that purpose. The rules are: Prior consistent statements are not admissible as substantive corroborative evidence. 31A C.J.S. *Evidence* § 216 (1964); *Anderson v. Evans,* 168 Neb. 373, 96 N.W.2d 44 (1959). The exception to the rule mentioned in that case appears to have been changed by the enactment of Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1975), which states that a prior consistent statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, "and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . ." *State v. Pelton,* 197 Neb. 412, 249 N.W.2d 484 (1977).

See, also, Fed. R. Evid. 801(d)(1)(B); *United States v. Scholle,* 553 F.2d 1109, 1119-20 (8th Cir. 1977). No contention is made in this case that Christian's testimony was the result of recent fabrication or improper influence. The record indicates that it was not. The second assignment is without merit.

The third assignment raises the question whether the evidence is sufficient to support a finding by the jury that the assault was accompanied by an intention to commit great bodily harm. We have concluded on several occasions that a gun or other deadly weapon was sufficient under the circumstances of those cases to support a finding of intent to do great bodily harm. *Vanderpool v. State,* 115 Neb. 94, 211 N.W. 605 (1926); *State v. Sampson,* 203 Neb. 786, 280 N.W.2d 81 (1979); *State v. Lang,* 197 Neb. 47, 246 N.W.2d 608 (1976). In the first-cited case, the pointing of a gun, accompanied by threats, was found sufficient to support a finding of the necessary intent. In that case, we said:

> It is an assault for a person to unlawfully point a loaded revolver at another in a menacing or threatening manner. Whether such act is done with intent to inflict great bodily injury must be determined by all of the facts and circumstances of each particular case. The mere fact that defendant did not shoot when he had the opportunity does not necessarily show that he did not intend to do so. The intent of the assault and not the act in fact committed, provided there was an assault, constitutes the gist of an assault with intent to inflict great bodily injury.

Vanderpool, supra at 97, 211 N.W. at 606. In the second case, the gun was fired, striking the victim's car. The defendant testified he merely intended to frighten. We upheld the evidence as sufficient to support the verdict. In the third case we held:

> [T]o constitute the offense of assault with

> intent to do great bodily harm there must be an unlawful assault coupled with a present ability and intent to injure, but no actual battery need occur.

Lang, supra at 49, 246 N.W.2d at 610. See, also, *State v. Thompson,* 13 Wash. App. 1, 533 P.2d 395 (1975); *Moyer v. People,* 165 Colo. 583, 440 P.2d 783 (1968).

In this case, the evidence shows that, when the defendant ordered the victim into the truck, the order was accompanied by the threat: "or I'll put a bullet right through your tit." Evidence further indicates that, while driving away with the victim, the defendant had on his lap, in addition to the gun, a metal bar. Before the victim escaped, there was a conversation from which the jury was entitled to infer that the defendant intended a sexual assault of some sort and that he would accomplish it by whatever means or force would be necessary.

At the time of the hearing on the motion for a new trial, the defendant amended his previous motion by making reference to the anonymous letter described in the fourth assignment of error. We will treat that part of the motion as one founded upon newly-discovered evidence. Counsel indicated that the letter had been in his possession for about 1½ months. He had been unable to determine its origin despite the fact that material contained in the letter, descriptive of the employment status of the writer, would, in all probability, fit only a very few persons. Disregarding the fact that the letter provided, in and of itself, no ground for a new trial, it is plain that there was no showing in the manner required by statute that there was admissible evidence of the facts alleged in the letter. The motion also was legally insufficient. Neb. Rev. Stat. §§ 25-1142(7) and 1144 (Reissue 1975) together provide that, if the ground is newly-discovered evidence, the motion "must be sustained by affidavits showing their truth." There is no such

showing here. The fourth assignment is lacking in merit.

The fifth assignment relates to the court's rejection of an offer of proof of the defendant's testimony on surrebuttal. After both sides had rested, the defense offered the testimony of the defendant as to the manner in which he had removed the batteries from Tom Bolin's tractor, which was stored at the defendant's place. The purpose of the testimony was to respond to testimony of a rebuttal witness for the State who had purchased the Bolin tractor at about 4 p.m on August 8, 1978. That witness had testified that the battery cables on at least some of the batteries did not appear to have been removed recently. The gist of the offer of surrebuttal testimony was that the defendant had left some of the cables on the batteries when he took them to Christian's for charging earlier in the day.

The offered surrebuttal testimony was, to a large degree, repetitive because it only amplified the testimony as to the removal of the batteries. *State v. Crouch,* 205 Neb. 781, 290 N.W.2d 207 (1980), presented to this court a question under a state of facts which is, in principle, identical to that now presented. We upheld the action of the trial court in denying surrebuttal testimony after both sides had rested, saying: "A motion to reopen a criminal case to allow introduction of further evidence is addressed to the sound discretion of the trial court." *Id.* at 785, 290 N.W.2d at 209. The court did not abuse its discretion in this case.

With reference to the claim of excessiveness of sentence, the rule is: "[A] sentence imposed within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion." *State v. Muniz,* 203 Neb. 206, 208, 277 N.W.2d 712, 713-14 (1979). The statutory limits of the various charges of which the defendant was convicted are: assault with intent to inflict bodily harm, 1 to 20 years; kid-

napping (in the form charged), 3 to 50 years; and use of a firearm in the commission of a felony, 3 to 10 years. On the first two charges, the defendant was sentenced to somewhat less than the maximum. On the third charge, he received the maximum. Our examination of the record, including the presentence investigation, convinces us that there was no abuse of discretion in making all the sentences consecutive. Under the statute, the sentence on the third charge was required by law to be consecutive.

AFFIRMED.

EDITHA OTRADOVSKY, APPELLANT, V. BOARD OF EQUALIZATION OF THE COUNTY OF COLFAX, STATE OF NEBRASKA, APPELLEE.

294 N. W. 2d 334

Filed June 24, 1980. No. 42865.

1. **Tax Assessments: Appeal and Error.** An appeal from a county board of equalization is heard as in equity and is tried de novo in this court.
2. **Tax Assessments: Valuation: Appeal and Error.** In an appeal from a county board of equalization on the ground that the property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property.
3. **Tax Assessments: Presumptions.** There is a presumption that the valuation made by the board of equalization is correct. However, this presumption disappears when competent evidence to the contrary is introduced. The reasonableness of the valuation then becomes a question of fact to be determined from the evidence.
4. **Tax Assessments: Valuation: Burden of Proof.** The burden of proof remains upon the party contesting the valuation to establish that the valuation was incorrect.
5. **Tax Assessments: Valuation.** The classification of the land as irrigated or dryland does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value.

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

L. F. Otradovsky of Otradovsky & Bieber, for appellant.

J. H. Hoppe, for appellee.

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

BOSLAUGH, J.

This appeal involves a dispute over the valuation for tax purposes of 74 acres of farmland in Colfax County, Nebraska, owned by the plaintiff, Editha Otradovsky. In 1978, the plaintiff filed a protest with the County Board of Equalization requesting that the assessed value of the 74 acres be reduced from $60,980 to $58,516. The protest alleged that the land had been erroneously classified as irrigated land because 59 of the 74 acres could not be irrigated from any well on the plaintiff's land.

The County Board of Equalization made no change in the valuation, and on appeal to the District Court for Colfax County, Nebraska, the order of the County Board of Equalization was affirmed. The plaintiff has appealed to this court.

An appeal from a county board of equalization is heard as in equity and is tried de novo in this court. *H/K Company v. Board of Equalization,* 175 Neb. 268, 121 N.W.2d 382 (1963).

In an appeal from a county board of equalization on the ground that the property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property. *Chudomelka v. Board of Equalization,* 187 Neb. 542, 192 N.W.2d 403 (1971).

There is a presumption that the valuation made by a board of equalization is correct. However, this presumption disappears when competent evidence to the contrary is introduced. The reasonableness of the valuation then becomes a question of fact to be determined from the evidence. *Boss Hotels Co. v.*

County of Hall, 183 Neb. 19, 157 N.W.2d 868 (1968). The burden of proof remains upon the party contesting the valuation to establish that the valuation was incorrect. *Leech, Inc. v. Board of Equalization,* 176 Neb. 841, 127 N.W.2d 917 (1964).

The plaintiff produced no direct evidence in this case as to the actual value of the land. The parties stipulated that the 59 acres in dispute had been classified as irrigated land by the J. M. Cleminshaw Co.; 51 acres had been classified 2A and valued at $565 per acre; 8 acres had been classified as 3A and valued at $450 per acre; the county assessor had adopted these classifications and valuations; the plaintiff contended that the 59 acres should be classified as nonirrigated land; 51 acres should be classified as 2DI and valued at $445 per acre; and 8 acres should be classified as 2D and valued at $365 per acre. The stipulation attempted to limit the determination by the trial court to a choice between the two valuations.

The plaintiff called as a witness Roland Langemeier, a real estate broker who has leased the land since 1970. Langemeier and his associates now own adjoining property and farm it as a unit with the plaintiff's land. The land leased from the plaintiff is irrigated by a center pivot system located on the Langemeier land and supplied by a well located on the Langemeier land.

Langemeier testified that the 59 acres was unsuited for gravity irrigation and it was doubtful whether it would be practical to irrigate the 59 acres by a sprinkler system from a well on the land. If the land were to be rented or sold to someone else, it was probable that it would be considered to be dryland.

The problem in this case is that there is no evidence as to the actual value of the land in question or that the value established by the County Board of Equalization was excessive or unreasonable. The

classification of the land as irrigated or dryland does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value.

As we stated in *County of Gage v. State Board of Equalization & Assessment,* 185 Neb. 749, 178 N.W.2d 759 (1970):

> The Constitution requires that such a property tax be "* * * levied by valuation uniformly and proportionately upon all tangible property * * *." Examination of the record discloses extensive divergence among witnesses of all categories in their understanding of the meaning of uniform values in the constitutional tax context. *Many witnesses seem to assume that real property taxes may be equalized if property is classified, and the same values applied to the same classifications of property in all counties. The Constitution itself flatly contradicts such a conclusion.* Art. VIII, § 1, Constitution of Nebraska.
>
> The Legislature has attempted to define "actual value" for purposes of taxation by application of a formula "where applicable." § 77-112, R. R. S. 1943. While the items of the formula are all related to value, those which are factors in determining value are by no means the only factors which enter into the valuation of property for taxation. As this court said in Richards v. Board of Equalization, 178 Neb. 537, 134 N.W.2d 56: "For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Many elements enter into a determination of actual value, some of which are set out in the statute."
>
> We suspect that the legislative attempt to

> define value for purposes of taxation has distorted the relationships of many elements of value, and has intermixed methods of measuring value with elements and factors entering into any proper determination of value. The term "fair market value," while it is an intangible concept, has had a definite and well understood legal meaning over a very long period of years. The attempt to define that concept of value as being readily ascertainable by means of a formula "where applicable," has added to the misunderstanding.

Id. at 750-51, 178 N.W.2d at 761-62 (emphasis supplied).

The evidence in this case failed to establish that the valuation established by the County Board of Equalization was excessive or unreasonable. The judgment of the District Court must, therefore, be affirmed.

AFFIRMED.

BRODKEY, J., concurs in result.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. The majority has characterized the instant case as one in which the property owner is complaining that his property has been valued in excess of its actual value. Reaching that conclusion, the majority then determines that the judgment of the trial court must be affirmed because of the landowner's failure to introduce evidence that would prove that the valuation placed upon the landowner's property was, in fact, in excess of its actual value. If, indeed, this was a case involving solely the issue of excessive valuation, I would agree with the authorities cited by the majority and the conclusion reached therein.

As I see the case, however, the issue of actual value or of value in excess of its actual value is not

involved. Rather, I see this to be a case involving a situation wherein the landowner's property has not been valued equally and proportionately to all other similar property in the county. Under such a circumstance, I believe an entirely different rule must apply. See Neb. Const. art. VIII, § 1.

The property owner maintains that the land in question has been classified by the county assessor as irrigated land and, as such, is valued at $565 per acre when, in fact, the property in question is nonirrigated land and should be so classified by the county assessor and valued at $445 per acre. While neither the stipulation entered into by the parties nor the pleadings in this case are as clear or concise as they might be, they are nevertheless sufficient to create an issue on equalization and not on valuation. The case, therefore, being one involving disproportionate valuation among property owners of like property, the issue of actual value and the introduction of evidence showing actual value is not necessary. What is necessary is a showing that the property has been improperly classified and, thus, assessed in accordance with an improper measure and other or different than similar property in the county. It may very well be that all the property of similar type in the county is undervalued. That does not resolve the issue.

The U.S. Supreme Court, in the now famous case of *Sioux City Bridge v. Dakota County,* 260 U.S. 441 (1923), after determining that appellant's bridge had been assessed at a higher percentage of actual value than other property in the county, though perhaps less than its actual value, said, in part:

> [Our] conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In sub-

> stance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment.

Id. at 446-47.

I, likewise, am of the opinion that the stipulation in this case makes it clear that had the property been classified as nonirrigated land, as opposed to irrigated land, it would have been valued other than it was. Because the evidence, in my mind, establishes that this property is not irrigated but rather, in fact, is nonirrigated, I believe that the appellant has shown that she is being discriminated against by reason of the classification and, therefore, is entitled to the relief sought. I would reverse and remand the case with directions to assess the property as nonirrigated land.

DIPLOMAT INN, INC., A CORPORATION, APPELLANT, V. DON WEINDORF, ALSO KNOWN AS DONALD L. BELL, APPELLEE.

293 N. W. 2d 861

Filed June 24, 1980. No. 42883.

1. **Default Judgments.** The matter of setting aside a default judgment is, to a large extent, within the discretion of the trial court.
2. **Default Judgments: Appeal and Error: Presumptions.** As a discretionary matter, the determination of whether a default judgment should be set aside will, on appeal, be presumed to have been made in proper exercise of that discretion where the contrary does not appear from the record.
3. **Appeal and Error: Presumptions: Burden of Proof.** It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of a district court have been wisely exercised.
4. ——: ——: ——. The burden of showing an abuse of discretion by a trial court rests on the appellant. Such abuse cannot be presumed, but must be made to appear by the evidence before its existence can be found by an appellate court.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Spencer W. Dillon, for appellant.

No appearance for appellee Weindorf.

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

KRIVOSHA, C. J.

Diplomat Inn, Inc., a corporation, the appellant, appeals from an order entered by the District Court for Douglas County, Nebraska, vacating a previous default judgment entered by the same court in favor of appellant and against Don Weindorf, also known as Donald L. Bell, the appellee. The judgment was vacated on the grounds of an irregularity, pursuant to the provisions of Neb. Rev. Stat. § 25-2001 (Reissue 1975). We affirm the action of the trial court vacating the judgment.

Section 25-2001 provides, in part, as follows:

> A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . . .

The record in this case is extremely sparse and consists simply of a transcript and no bill of exceptions. The transcript discloses that on July 5, 1978, the appellee filed a motion to vacate a judgment previously entered by default and noticed the motion for hearing on July 19, 1978, at 10:30 a.m., before the Honorable John Clark, one of the district judges in and for the 4th judicial district (Douglas County). On July 19, a journal entry was made by the court reciting as follows: "Parties appeared by counsel. Arguments heard. Defendant's motion to vacate judgment on the grounds that it was obtained irregularly is sustained. Judgment entered herein on

August 23, 1977 is vacated and set aside. Order to be submitted. JOHN E. CLARK, JUDGE."

On July 21, 1978, a formal order generally setting out the same facts as the journal entry of July 19 was signed by the court and filed with the clerk of the District Court. We are not provided with any information as to what evidence was submitted to the trial court or what arguments were made to support the court's finding that the earlier judgment was irregularly obtained. We have no way of determining from the record before us what it was that the District Court relied upon to determine that the judgment had been irregularly obtained.

On July 28, 1978, appellant filed a motion for rehearing on the vacation of the judgment and, on August 3, 1978, after argument, the appellant's motion for rehearing was sustained and a rehearing was set at a time to be agreed upon by counsel. The transcript then discloses that such rehearing was held before the Honorable John Burke, then one of the judges in and for the 4th judicial district, on June 25, 1979. A journal entry contained in the transcript states that, on June 25, 1979, the motion for rehearing was overruled by Judge Burke. Again, we have no bill of exceptions indicating what evidence was considered by either Judge Clark when he sustained the motion for rehearing, or by Judge Burke when he overruled it. The record contains a notation by the court reporter indicating that no testimony was taken. This entry does little to clear up the mystery.

It is, however, uniformly recognized that the matter of setting aside a default judgment is, to a large extent, within the discretion of the trial court. See *Commercial Sav. & Loan Assn. v. Holly Development, Inc.,* 182 Neb. 335, 154 N.W.2d 510 (1967).

Further, as a discretionary matter, such determination will, on appeal, be presumed to have been made in the proper exercise of that discretion where the contrary does not appear from the record. An

appellant who claims an abuse of discretion has the burden of proving that claim. 5 Am. Jur. 2d *Appeal and Error* § 775; *Sutton v. State,* 163 Neb. 524, 80 N.W.2d 475 (1957). In *Sutton,* we reaffirmed our earlier holding, as stated in the syllabus to *Waldron v. First Nat. Bank of Greenwood,* 60 Neb. 245, 82 N.W. 856 (1900), that "It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of the district court have been wisely exercised."

We further held in *Sutton* that the burden of showing an abuse of discretion rests on the appellant and that such claimed abuse cannot be presumed, but must be made to appear by evidence before its existence can be found by an appellate court.

As we have already indicated, there is no record before us which would indicate how or in what manner the trial court abused its discretion, either in initially setting aside the judgment, or in overruling the motion for rehearing once granted. We must, therefore, presume that the District Court properly exercised its discretionary power and we cannot rely solely upon argument of appellant, unsupported by evidence, to find the contrary. We are, therefore, left with no basis upon which to disagree with the trial court and must affirm its judgment.

AFFIRMED.

LESTER A. JOHNSON, APPELLANT, V. HOLDREGE COOPERATIVE EQUITY EXCHANGE AND MAYNARD ORTEGREN, APPELLEES.

293 N. W. 2d 863

Filed June 24, 1980. No. 42909.

1. **Summary Judgment.** Summary judgment is an appropriate remedy when only a question of law is presented and there is no genuine issue of material fact.
2. **Summary Judgment: Burden of Proof.** The burden is upon the party moving for a summary judgment to show that no issue of

fact exists, and unless he can conclusively do so, the motion must be overruled.

3. **Sales: Delivery of Goods.** If there has been an actual delivery and the price is capable of being made definite, delivery of goods may be sufficient to constitute a sale.
4. **Sales: Acceptance of Goods.** An alteration in the condition of the goods may constitute an act inconsistent with seller's ownership, amounting to an acceptance under Nebraska U.C.C. § 2-606(1)(c) (Reissue 1971).

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Reversed and remanded.

William H. Sherwood and Charles J. Cuypers of Sherwood Law Office, for appellant.

Kent E. Person of Person, Dier, Person & Osborn, for appellees.

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

WHITE, J.

The appellant, Lester A. Johnson, filed suit in the District Court for Phelps County, Nebraska, against appellees, Holdrege Cooperative Equity Exchange and Maynard Ortegren (Equity), for an alleged breach of an oral contract to purchase wheat at market and a premium based on the protein content of the delivered wheat. Equity answered, alleging that Johnson's wheat was delivered for storage and denying any agreement for the payment of a protein bonus. Equity filed a motion for summary judgment. The trial court sustained the motion and dismissed Johnson's petition. Johnson appeals. We reverse and remand.

Summary judgment is an appropriate remedy when only a question of law is presented and there is no genuine issue of material fact. Neb. Rev. Stat. § 25-1332 (Reissue 1975); *Farmland Service Coop, Inc. v. Klein,* 196 Neb. 538, 244 N.W.2d 86 (1976).

In the order sustaining the motion, the trial court held: "(2) That the delivery of wheat to the defend-

ant Coop did not constitute a delivery contemplated under U.C.C. § 2-201 (1943) . . . ."

Johnson assigns that the trial court erred in its findings. To resolve this matter, it is necessary to review the facts shown by the evidence received by the court on the motion.

Johnson testified by deposition that, in late June and early July 1976, he spoke with Maynard Ortegren, manager of Equity, and was assured by him that "I'd receive the protein premium." Approximately 10,000 bushels of wheat were delivered to Equity and a sample was taken from each load for protein testing. Johnson was charged for the testing. The delivery was completed by July 5, 1976. Johnson did not sell the wheat before delivery, but later in July, returned to Equity intending to sell the wheat. Maynard Ortegren informed Johnson that Equity would not pay market plus an individual protein premium, but would, instead, pay Johnson, and all others who sold wheat, a "station average" premium on all wheat delivered to Equity during the season. Johnson refused to sell the wheat and later accepted a warehouse receipt for the wheat and paid storage charges on the wheat.

Maynard Ortegren, the manager, testified by deposition and denied that he agreed to pay Johnson an individual protein premium but that all wheat would be purchased on a "station average" basis. He confirmed that all individual loads were tested and the tests billed to the customers. Then the loads were commingled with other wheat in the elevators. Later, in another conversation with Johnson, after delivery, he again told him that he would be paid only "station average." Johnson became quite angry and did not sell the wheat. No witness testified that Johnson discussed storing his wheat prior to the last discussion with Maynard, merely that the Public Service Commission rules require that grain not settled for in 30 days after delivery must be considered

stored and a warehouse receipt must be issued. Nebraska U.C.C. § 2-201 (Reissue 1971) provides, in part:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable . . . unless there is some writing . . . .
>
> . . . .
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> . . . .
>
> (c) with respect to goods for which payment has been made and accepted or *which have been received and accepted* (section 2-606).

(Emphasis supplied.)

Was there a receipt and acceptance of the wheat to remove the bar of the statute of frauds? We do not make judgment on the truth of the conflicting versions of the conversations in reviewing the grant of a motion for summary judgment. We merely determine whether there is a conflict and, accepting the version most favorable to the nonmoving party, whether an action thereon would lie. 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. *Farmland Service Coop, Inc. v. Klein, supra.* There is an obvious issue of fact, and if the jury should believe that Johnson delivered the wheat for sale for market plus an individual protein premium, the failure to state the price and premium would not be fatal and Johnson would be entitled to recover his damages.

If there has been an actual delivery and the price is capable of being made definite, delivery of goods may be sufficient to constitute a sale. *Rotterman v. General Mills, Inc.,* 245 Iowa 229, 61 N.W.2d 718 (1953). Nebraska U.C.C. § 2-606 (Reissue 1971) provides as

follows: "(1) Acceptance of goods occurs when the buyer . . . (c) *does any act inconsistent with the seller's ownership*; but if such act is wrongful as against the seller it is an acceptance only if ratified by him." (Emphasis supplied.)

The testing of the grain by single loads and the commingling so as to make the particular wheat unrecoverable were acts consistent with Equity's ownership and inconsistent with Johnson's ownership. The protein content of the commingled grain was less than that of Johnson's grain alone. Such an alteration in the condition of the goods may constitute an act inconsistent with the seller's ownership, amounting to an acceptance under the U.C.C. *Chemical Corp. v. Paint Co.*, 31 N.C. App. 221, 229 S.E.2d 55 (1976); *Mazur Bros. and Jaffe Fish Co., Inc.*, 3 U.C.C. Rep. Serv. 419 (Veterans Administration Contract Appeals Board 1965).

The judgment of the trial court is reversed and remanded for proceedings not inconsistent herewith.

REVERSED AND REMANDED.

BLANCHE LUSCHER, APPELLEE AND CROSS-APPELLANT, V. FRANK EMPKEY ET AL., APPELLANTS AND CROSS-APPELLEES.

293 N. W. 2d 866

Filed July 1, 1980. No. 42666.

1. **Fraud.** The elements of a cause of action for fraudulent misrepresentation are (1) 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; (2) That it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and (3) That such party did, in fact, rely on it and was induced thereby to act to his injury or damage.
2. **Fraud: Reliance.** The test of whether a party relied upon the other party's representations is generally whether he would have acted in the absence of the representations.

3. **Fraud: Damages.** The false representations must have been the proximate cause of the damage before a party may recover.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions to dismiss.

Harvey B. Cooper of Abrahams, Kaslow & Cassman, for appellant Alexander & Alexander, Inc.

Spencer W. Dillon, for appellee.

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

CLINTON, J.

This is an action by Blanche Luscher, against the defendant, Alexander & Alexander, Inc., a corporation, for damages for fraudulent representations which allegedly induced her to enroll in a group health and accident insurance policy procured on her behalf by her employer, Four Seasons Heating and Air Conditioning, Inc. The damage allegedly resulted from the fact that, after the policy went into effect, the plaintiff incurred expenses for chiropractic adjustments for which the group policy paid no benefits. The action was commenced in the municipal court of Omaha, Nebraska, and the court found for the defendant and dismissed the action. Upon appeal to the District Court for Douglas County, Nebraska, the court found for the plaintiff and entered judgment for the sum of $1,019, the amount incurred up to that time for chiropractic services.

On appeal to this court, the defendant assigns as error and argues that the evidence is insufficient to sustain the verdict. We find the assignment meritorious and reverse with directions to dismiss.

The elements of a cause of action for fraudulent misrepresentation are: (1) 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; (2) That it was made with in-

tent to deceive and for the purpose of inducing the other party to act upon it; and (3) That such party did, in fact, rely on it and was induced thereby to act to his injury or damage. *Negus-Sweenie, Inc. v. Beaver Lake Corp.,* 202 Neb. 671, 276 N.W.2d 668 (1979); *Cook Livestock Co., Inc. v. Reisig,* 161 Neb. 640, 74 N.W.2d 370 (1956).

The evidence indicates that, during the year 1976, the employees of Four Seasons were covered by a group health and accident insurance policy issued by Washington National Life Insurance Company. The evidence further shows that James Tappero, the president of Four Seasons, upon receiving notice that the premium would be increased by Washington National, asked Frank Empkey, an employee of Alexander & Alexander, Inc., the defendant, an independent insurance broker, to "shop the market for us to get us as cheap as coverage as could without losing value of our insurance." This same type of service had been performed by Empkey at Tappero's request in previous years, Empkey having procured for Four Seasons the Washington National policy then in force.

On this occasion, Empkey, after a survey, recommended placement with Blue Shield and presented an analysis sheet, highlighting the benefits of the Blue Shield proposal and the present insurance. Tappero elected to take the Blue Shield policy which would become effective January 1, 1977. This election was made some time late in 1976. In December of 1976, at Tappero's request, Empkey appeared at a meeting of the Four Seasons employees to explain policy differences and to answer questions. Each employee was given a copy of the analysis sheet which had been previously furnished to Tappero.

The plaintiff, Luscher, was present at that meeting. She and other witnesses testified that Empkey said that the Blue Shield policy has the "same" coverage or better than Washington National. She tes-

tified that, although she had never used the services of a chiropractor, she knew that Washington National provided benefits for chiropractic adjustments because Mr. Tappero's wife had, during 1976, used such services and Washington National had paid benefits.

The plaintiff relies upon this alleged representation made at the meeting as well as upon representations allegedly made by Empkey to Tappero as agent for the employees at the time Tappero made the selection of the policy. There is a direct conflict in the evidence as to what Empkey said at the meeting. Tappero and other witnesses testified that the representation was in substance that the coverage was "as good," if not better. The plaintiff's position seems to be that the representation was that the policy benefits were identical or better than Washington National's coverage. It is clear from the record that the municipal court resolved the issue of the misrepresentation on the basis of the credibility of witnesses. The District Court, on trial of the case de novo, found for the plaintiff without making any specific findings other than the amount of damages.

In January of 1977, the plaintiff began to have pains in her back and lower limbs. At Tappero's suggestion, she consulted Dr. Sawyer, a chiropractor who, during the term of the Washington National policy, had provided chiropractic treatments for Mrs. Tappero. The plaintiff made a claim under Blue Shield for Dr. Sawyer's services. The insurer paid for the X-ray services, but declined payment for subsequent adjustments.

The Blue Shield policy contained an exclusion which read as follows:

> 21. Services for the detection and correction by manual or mechanical means of structural imbalance, distortion or subluxation in the human body for the purpose of removing nerve interference and the effects

> thereof where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column.

After reviewing the record and the applicable law, and assuming that the plaintiff's version of the facts establishes the material false representation, we find that the record shows, as a matter of law, that the plaintiff was not induced to enroll in the group policy as a consequence of reliance on any representations made by Empkey.

In order to recover for fraud, a party must have acted on the other party's misrepresentations. The test of whether he relied thereon is generally whether he would have acted in the absence of the representations. If he would have acted in the same way even in the absence of the representation, then he has not relied thereon. *Lindholm v. Resnick,* 132 Neb. 682, 272 N.W. 913 (1937); *Spencer et ux v. Ellis,* 216 Ore. 554, 339 P.2d 1116 (1959); *Pacific Royalty Company v. Williams,* 227 F.2d 49 (10th Cir. 1955); *Rein v. Dvoracek,* 79 N.M. 410, 444 P.2d 595 (1968); *Able v. Equitable Life Assur. Soc. et al.,* 186 S.C. 381, 195 S.E. 652 (1938); *Finance Co. v. Smith,* 15 Ohio App. 2d 208, 240 N.E.2d 106 (1968).

The plaintiff's own testimony establishes that, when she enrolled in the new group policy, she did not take into account in any way whether the policy covered the adjustment services of a chiropractor. She had never used the services of a chiropractor. She did not then suffer from any condition which caused her to contemplate using one. No questions were asked about payment for such services at the time of the meeting. She testified positively that she would have "stayed in the group" and would have "signed up" even if she had been aware that benefits would not be paid for chiropractic adjustments. This testimony conclusively establishes that she did not rely upon "benefits" being the same under the 1977 group policy as the one for 1976. It is

to be noted in passing that coverage, in the sense of the risks included, was provided to the extent provided for in the contract, i.e., there was no exclusion for the particular ailment from which plaintiff suffered.

The plaintiff's petition is subject to the interpretation that, when she engaged the services of a chiropractor, she was relying upon the alleged misrepresentations and now claims that the defendant is estopped from denying benefits. The evidence shows without contradiction that, in engaging the services of the chiropractor, she relied upon the recommendation of Tappero. Her first symptoms appeared shortly before January 21, 1977. Tappero's testimony was that he assumed that such services were covered. However, he testified that in selecting the group policy, he did not rely on representations of Empkey that benefits or coverage were the "same" or identical. He relied on his own judgment that, overall, the benefits were better for the same amount of money. In particular, the major medical benefits were much better. He did not take into consideration benefits for chiropractic services.

False representations must be the proximate cause of the damage before a party may recover. *Kosmos Portland Cement Co. v. D. A. Y. Const. Co.,* 101 F.2d 893 (7th Cir. 1939). Any reliance the plaintiff placed upon Tappero's recommendation to engage chiropractic services cannot be said to be proximately caused by representations made by Empkey about such services because none were made. There is no evidence to sustain a finding that Tappero's advice upon which the plaintiff relied was in any way founded upon anything said by Empkey as to the precise contents of the new contract. Tappero's suggestion to the plaintiff came after the policy had been issued and the plaintiff had already been enrolled. There is no evidence to sustain a finding that Tappero was authorized to make any

representations, direct or implied, as to policy contents.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

ROLAND F. WAITE, APPELLANT, V. RONALD SALESTROM AND PHILIP GARDNER, APPELLEES.

– N. W. 2d –

Filed July 1, 1980. No. 42712.

1. **Limited Partnerships: Partnerships.** A general partner of a limited partnership has, with certain exceptions, all the rights and powers and is subject to all the restrictions of a partnership without limited partners.
2. **Partnerships: Partnership Agreements.** A partner is an agent of the partnership for the purpose of carrying out its business in the usual way. He has, however, no authority to unilaterally modify the agreement by which the partnership was created. A partnership agreement may be modified only by the unanimous consent, express or implied, of all the partners.
3. **Partnerships: Contracts.** When the partners are disclosed and known to a party contracting and the contract is signed by only one partner who contracts on his own behalf, the other partners are not bound thereby.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Abrahams, Kaslow & Cassman, for appellant.

Thomas C. Emery, for appellees.

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

CLINTON, J.

This is an action by the plaintiff, Roland F. Waite, one of a number of limited partners in Ozark Skyrise, Ltd., against Ronald Salestrom and Philip Gardner, the general partners in Ozark, to recover a money judgment of $18,500 upon a promise signed by

Salestrom only. The promise was in letter form and, insofar as it is pertinent to our purposes, was as follows:

> Mr. Roland F. Waite
> 10345 Broadmoor Court
> Omaha, Nebraska
> Re: Ozark Skyrise, Ltd.
> Dear Mr. Waite:
> This letter is intended to confirm our discussions concerning your investment as a Limited Partner of Ozark Skyrise, Ltd. I represent to you as follows:
> . . . .
> 2. In the event the project is not completed, the full amount of your investment will be refunded less expenses incurred not to exceed the sum of $1,500.00.
> 3. Except as to the amount of your investment, I agree to indemnify and save you harmless from any personal liability arising out of or in connection with said limited partnership including, but not limited to, any violation of the State or Federal Securities Act.
> . . . .
> Very truly yours,
> /s/ Ron Salestrom
> Ron Salestrom

The petition alleged that the letter was delivered as an inducement to Waite to make a $20,000 investment in Ozark, and the evidence indicated that the letter was delivered at the time Waite made the second of two $10,000 payments.

At the close of the evidence, the court, trying the case without a jury, found that Waite had failed to sustain his burden of proof as to a cause against Gardner and dismissed Waite's petition as to Gardner. Pursuant to a stipulation made during the course of the trial, the court entered judgment for

$18,500 against Salestrom. Waite appeals from the dismissal as to Gardner.

His argument here is that, as a general partner, Salestrom had authority to bind Gardner. He relies upon the general principle: "Whatever one partner does in the course and scope of the partnership business is the act of the firm and all the partners and is binding on them, notwithstanding it is done without the knowledge or consent of the other partners." 68 C.J.S. *Partnership* § 137 (1950).

We sustain the action of the trial court and affirm the judgment for the reason that the evidence is sufficient to sustain a finding by the court that Salestrom, in executing and delivering the letter to Waite, bound only himself and not the partnership.

Salestrom testified that, in executing the letter agreement, he was acting on behalf of the partnership. He acknowledges, however, and the evidence otherwise shows without contradiction, that the agreement was made without the consent or knowledge of Gardner, the other general partner. There is no evidence from which it may be inferred that the promise was made with consent or knowledge of the other limited partners. The partnership agreement and certificate of limited partnership, among other things, provided: "The character of the business is to develope [sic], own, and manage a Sheraton Resort Complex in Lake of the Ozarks, Missouri." The agreement also named the two general partners and listed the limited partners and the amount of their contributions.

The instrument contained the following provision: "It is hereby agreed by the general partners that if the projected occupancy of the hotel is not above SIXTY-FIVE PER CENT (60%) [penned correction] according to the Real Estate Research Study all funds will be returned to the limited partners minus Phase I expenditures or a minimum of EIGHTEEN [penned correction initialed "RS"] THOUSAND

DOLLARS ($18,000.00) [penned correction initialed "RS"] returned per individual." The uncontradicted evidence shows that the "Real Estate Research Study," referred to in the paragraph quoted above, projected an occupancy rate of 71 percent. The agreement and certificate contain other provisions related to the operation of the partnership which are not pertinent to the issue to be decided.

The evidence shows that the enterprise was to be carried out upon land purchased by the partnership from Waite under a land contract. The partnership was unable to pay for the property and foreclosure occurred. The partnership is without assets.

The principles which govern the disposition of this case are the following: "A general partner [of a limited partnership] shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners . . . ." Neb. Rev. Stat. § 67-209 (Reissue 1976). The statute above cited contains certain exceptions not pertinent to this case.

"A certificate [of limited partnership] shall be amended when (a) There is a change . . . in the amount or character of the contribution of any limited partner, . . . (j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them." Neb. Rev. Stat. § 67-224(2) (Reissue 1976).

"A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until (a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them . . . ." Neb. Rev. Stat. § 67-216(1) (Reissue 1976).

The scope of a general partner's authority as limited by § 67-209 is defined by Neb. Rev. Stat. §

67-309(1) (Reissue 1976) of the Uniform Partnership Act as follows:

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

" 'Where the partners are disclosed and known to a party contracting, and the contract is signed by only one partner who contracts in his own behalf, the other partners are not bound thereby.' " *Ogallala Fertilizer Co. v. Salsbery,* 186 Neb. 537, 540, 184 N.W.2d 729, 731 (1971), quoting 68 C.J.S. *Partnership* § 146 (1950).

A partnership agreement may be modified only by the unanimous consent of all the partners express or implied. *Appeal of Jennings,* 16 A. 19 (Pa. 1888); *Alaska Pac. Salmon Co. v. Matthewson,* 3 Wash. 2d 560, 101 P.2d 606 (1940); Crane & Bromberg, Law of Partnership 276 (1968).

Applying the foregoing principles to the evidence before the trial court, its findings for the defendant Gardner were justified on at least two grounds. First, the letter agreement was not executed in the course of carrying out the partnership business which was that of developing, owning, and managing a recreational complex. The letter agreement providing for a unilateral refund of a partnership contribution amounted to a modification of the partnership agreement which would require the consent of all the partners. The making of the letter agreement was not within the scope of a general partner's

authority and, therefore, did not bind the defendant Gardner, the other general partner, who knew nothing about it.

Secondly, the letter agreement, on its face, purported to be an individual obligation and not that of the partnership. Waite, one of the limited partners who signed the partnership agreement and certificate, must be deemed to have known its contents and the identity of the other partners. There was no proof that the other partners consented to the change. The issue, therefore, under the evidence is also governed by the principle stated in *Ogallala Fertilizer Co. v. Salsbery, supra.*

It is unnecessary to consider other matters discussed in the briefs.

AFFIRMED.

LAURIE A. MAZANKOWSKI, APPELLANT, V. VAUGHN D. HARDERS AND RICHARD HARDERS, APPELLEES.

293 N. W. 2d 869

Filed July 1, 1980. No. 42768.

Negligence: Turning Vehicles: Proper Lookout. When a collision occurs where the driver of a motor vehicle turning left across a highway between intersections fails to look to the rear for approaching traffic at a time and place when so looking would be effective, and where such driver fails to signal his intention to make such a left turn, such a driver is guilty of negligence as a matter of law.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded.

Neal E. Stenberg, for appellant.

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

Heard before MCCOWN and WHITE, JJ., and COLWELL, KORTUM, and GRANT, District Judges.

GRANT, District Judge.

This is an action for personal injuries and property damages suffered by plaintiff as the result of a collision between an automobile in which plaintiff was riding as a passenger and a farm tractor towing a ditcher, operated by defendant Vaughn Harders, who was acting within the scope of his employment by his uncle, defendant Richard Harders. The accident happened on June 25, 1977, on Route 11, a paved public highway, at a point about 4 miles north of Cairo, Nebraska. The jury returned a verdict for defendants. Plaintiff's motion for a new trial was denied and this appeal followed. Plaintiff alleges that the trial court erred in overruling plaintiff's motion for a directed verdict on the issue of defendants' liability. We agree and, accordingly, reverse and remand the case.

On June 25, 1977, plaintiff's husband was driving an automobile owned by plaintiff and her father from Lincoln, Nebraska, to a wedding at Loup City, Nebraska. Plaintiff was the only passenger in the car. Plaintiff's car was going north on Route 11 and the driver, plaintiff's husband, first saw the tractor and ditcher from the top of a hill about 1 mile south of a lane going west from Route 11 and leading to the farmhouse of defendant Richard Harders. It was about 1/8 of a mile from the top of the hill to the bottom, after which Route 11 is straight and flat for 2 miles. Plaintiff's car approached the tractor, and, according to the testimony of plaintiff and her husband, he slowed down, checked for traffic coming from the other direction, signalled the intention to move into the passing lane, pulled into the passing lane, and began to pass the tractor-ditcher rig at a speed of about 55 miles per hour. As plaintiff's vehicle was overtaking the tractor-ditcher rig, defendant Vaughn Harders made a sharp, almost 90-degree, left turn into the farm lane and the collision resulted. Testimony offered by defendants differed generally

only in that the wife of defendant Richard Harders and a friend testified that, at the time the plaintiff's automobile was passing the tractor, its speed was 75 to 80 miles per hour.

Defendant Vaughn Harders testified that, shortly before the accident, he was traveling at 18 miles per hour. At a point about 100 feet south of Richard Harders' farm lane he saw plaintiff's car an estimated 1/4 mile behind him. Vaughn was not able to form an estimate of the speed of plaintiff's car and he did not look to the rear again before beginning his left-hand turn. Vaughn further testified that, when he was 50 feet from the farm lane, he idled the tractor down to 6 miles per hour and proceeded toward the farm lane at that speed. Vaughn testified he did not give any signal and that, as he reached the farm lane, he made a 90-degree left turn into the lane and the collision resulted. At the time of impact, the tractor was facing nearly straight west with its front wheels 4 or 5 feet off the pavement and with the ditcher behind the tractor, at a slight angle and approximately in the center of the paved portion of the 24-foot paved highway. The tractor and the attached ditcher were each slightly longer than 12 feet.

Aside from the speed of plaintiff's car at the moment of the attempted passing maneuver, there is essentially no dispute in the evidence. It is clear that Vaughn Harders' actions in failing to look again to the rear after seeing plaintiff's car approaching and in failing to give any signal of his intention to make a left-hand turn, constitute negligence as a matter of law. This case fits almost squarely into the fact situation set out in *Keller v. Wellensiek,* 186 Neb. 201, 204-05, 181 N.W.2d 854, 857 (1970), where the court stated:

> The plaintiff moved at the close of the evidence for a directed verdict against Lee Wellensiek on the issue of negligence as a matter of law. This motion should have

> been sustained. The undisputed facts show that the tractor was proceeding north on its right-hand side of the highway. Plaintiff came up behind the tractor and turned into the left-hand lane for the purpose of passing the tractor. The driver of the tractor, without indicating any intention to turn, turned left across the highway between intersections to enter a private lane. The tractor was not equipped with a signaling device and its operator gave no signal of his intention to turn. The result was he drove the tractor into plaintiff's oncoming car and the accident occurred. This is negligence on the part of the driver of the tractor as a matter of law.

It is clear that if testimony presented by defendant be assumed as true, plaintiff's husband, driving the car, was speeding at the time of the collision; but it is settled law that any negligence of the driver-husband could not be imputed to the passenger-wife under the facts presented in this case. See *Bartek v. Glasers Provisions Co., Inc.,* 160 Neb. 794, 71 N.W.2d 466 (1955). Additionally, defendants' counsel, at the instruction conference, candidly stated, "Judge, I don't think that we can get an Instruction on contributory negligence with these facts."

This leaves only the question of causation. Plaintiff need not prove that the negligence of defendant Vaughn Harders was the sole proximate cause of the accident, but only that such negligence either concurred with the negligence of the other driver to cause the accident or that defendant's negligence proximately contributed to the accident. It has long been the law of Nebraska, as stated in *Stark v. Turner,* 154 Neb. 268, 274-75, 47 N.W.2d 569, 573 (1951), "Where the independent tortious acts of two persons combine to produce an injury indivisible in

its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." Here, the admitted independent tortious acts of defendant Vaughn Harders in failing to look for traffic which he knew was approaching him from the rear during the last 100 feet of an extremely slow traffic movement and in failing to signal a left turn into a private drive between intersections, is, as a matter of law, at least a proximately concurring cause of the resulting collision.

There being no dispute that defendant Vaughn Harders was acting within the scope of his employment with defendant Richard Harders at the time of the collision, plaintiff's motion for a directed verdict against both defendants on the issue of liability should have been granted. This disposition of the case makes determination of the other alleged error presented by plaintiff unnecessary.

This case is remanded for determination of the issue of damages only.

REVERSED AND REMANDED.

GERALDINE M. LISS, APPELLEE, V. PETER J. LISS, APPELLANT.

294 N. W. 2d 341

Filed July 1, 1980. No. 42813.

Divorce: Alimony: Property Division. In a proceeding for dissolution of marriage, the fixing of alimony or distribution of property rests in the sound discretion of the trial court and, in the absence of an abuse of discretion, will not be disturbed on appeal.

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

Louis M. Leahy of Leahy & Render, for appellant.

Charles I. Scudder, for appellee.

Heard before McCOWN and WHITE, JJ., and COLWELL, STANLEY, and SPRAGUE, District Judges.

STANLEY, District Judge.

This is an action for dissolution of marriage. The District Court for Douglas County, Nebraska, entered its decree dissolving the marriage, granting custody of the minor child to the wife, dividing the property, and granting alimony to the wife. The husband has appealed, challenging the property division and alimony provisions of the decree.

The parties were married on July 28, 1955. They had two children, only one of whom was still a minor at the time the wife filed the petition for dissolution of the marriage on January 5, 1979. The minor child, Corey, was born October 1, 1968.

The husband, who was 55 years old at the time of trial, is physically disabled from cardiac disease and has not worked since October 21, 1976. He has received disability payments under the Social Security Act since May 1977. During the course of the marriage, the wife was a homemaker and mother and handled the family finances.

The wife, who was 45 years old at the time of trial, has a high school degree and, at the time of trial, was enrolled in a CETA financial business course in order to qualify herself for a job. She had gross earnings of $416 per month from the CETA job. At the time of trial, the husband's fixed income was $385.40 derived from Social Security disability and $116 from his pension at Swift & Company, for a total of $501.40 per month.

During the marriage, the parties acquired a residence and personal property. The assets accumulated were from the husband's wages, social security benefits, and a pension income. At the

time of trial, the residence was valued at approximately $28,900, subject to a mortgage of $9,090. Accumulated savings amounted to $32,146.70.

The decree of the District Court granted custody of the minor child to the wife and relieved the husband of any obligation to make child support payments, due to his disability, but preserved the minor child's right to receive payments of $161.60 per month under the Social Security Act based on the husband's disability.

The decree also made a division of the property which awarded to the wife the parties' residence, subject to the encumbrance and a lien in favor of the husband in the amount of $9,000 with interest at 8 percent per annum. This divided the equity in the home equally between the parties. The decree also awarded the wife the household furnishings valued at $1,500, cash of $14,800, a 1970 Valiant automobile worth $1,000, and alimony of $2,850 payable $125 per month for 18 months and, thereafter, $100 per month for 6 months.

The decree awarded the husband cash of $18,146.70, an interest in the residence of $9,000, and a 1974 Pinto automobile purchased by the husband after the petition for dissolution was filed.

The record establishes that the net value of the property distributed in kind was approximately $55,256. Of that total net value, the wife received $28,110 and the husband received $27,146. In addition to the property division, the wife received $2,850 alimony which increases her net share to $30,960.

It seems obvious that, in making the award of alimony, the trial court felt it would provide for a retraining period for the wife. Also, where the husband was relieved from any obligation to make child support payments, the wife had the responsibility of adequately providing for the minor child until he reaches majority. To provide this care, it would be necessary for her to be adequately prepared in

the job market.

The division of property and the issue of alimony may be considered together. They are to be determined upon a consideration of all the facts and circumstances. *Sullivan v. Sullivan,* 192 Neb. 841, 224 N.W.2d 542 (1975).

In the present case, excluding alimony, the trial court divided the property as equally as possible. The alimony award is fair under the facts and circumstances of this case.

The fixing of alimony or distribution of property rests in the sound discretion of the trial court and, in the absence of an abuse of discretion, will not be disturbed on appeal. *Rinderknecht v. Rinderknecht,* 204 Neb. 648, 284 N.W.2d 569 (1979). The award of alimony and division of property in the present case were not patently unfair on the record, nor was there any abuse of discretion on the part of the trial court.

The judgment of the District Court is affirmed. The wife is awarded a fee of $500 for the services of her attorney in this court.

AFFIRMED.

ELDON FRICKE, APPELLANT, V. HAROLD HART AND MILDRED L. HART, DOING BUSINESS AS HART CONSTRUCTION COMPANY, APPELLEES.

294 N. W. 2d 737

Filed July 1, 1980. No. 42825.

1. **Sales: Express Warranty.** A positive statement by a seller of the condition of personal property made during the negotiations for its sale which indicates an intention to be bound by the truth thereof and which was so understood and relied upon by the other party, is an express warranty.
2. **Rescission: Breach of Warrant: Fraud.** Where a purchaser receives what he purchased, and bases his right to rescind upon a false representation of its quality or condition, or another matter

affecting its value, he must show that the representation was material and that he was misled thereby to his damage.

3. **Fraud: Reliance: Presumptions.** If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if it is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of a showing to the contrary, that the transaction was induced by the misrepresentation.
4. **Fraud: Reliance.** A person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth.
5. **Summary Judgment.** The moving party is not entitled to summary judgment except where there exists no genuine issues as to any material fact in the case and where, under the facts, he is entitled to a judgment as a matter of law.
6. **Summary Judgment: Burden of Proof.** 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.
7. **Summary Judgment.** 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.
8. _____. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom; if when so viewed, reasonable men might draw different conclusions, the motion should be denied and the case tried on its merits.
9. ____. A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict.
10. _____. The purpose of a motion for summary judgment is to pierce the allegations of a pleading and to show conclusively that the controlling facts are otherwise than as alleged.

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

Edward Asche and Ray C. Simmons, for appellant.

Tessendorf, Milbourn, Fehringer & Bothe, P.C., and Otradovsky & Bieber, for appellees.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BUCKLEY and WINDRUM, District Judges.

WINDRUM, District Judge.

This action prayed that a sale of heavy equipment from the defendants to the plaintiff be canceled and decreed to be null and void and that, upon such cancellation, plaintiff have judgment against the defendants and each of them for the purchase price of said heavy equipment. The defendants filed a motion for summary judgment which was sustained by the District Court for Colfax County, Nebraska, and the plaintiff has appealed.

Plaintiff's petition alleged that, on May 7, 1978, the plaintiff and defendants entered into an oral contract under the terms of which plaintiff purchased from the defendants an M. L. 309 Lorain loader without the cab and paid the defendants $30,000. That, at the time of the sale, the defendants represented and warranted to the plaintiff: (a) That said machine was in good shape and ready to go to work; (b) That the same did not use any oil; (c) That a new machine would cost $160,000; and (d) That the purchaser would be furnished the names of 20 persons who were desirous of having work done by said machine.

In the petition and in a deposition, the plaintiff claimed that, right after he purchased said loader and paid for the same, he requested the names of the 20 persons who sought work but was unable to receive said list. Furthermore, right after the purchase, he discovered that the machine was leaking more oil than he expected; the handbrake did not work; the cylinders were not operational; the bucket kept dropping; the hoist was difficult to control; the right-hand rear wheel was wobbling back and forth; and the steering cylinder was wobbling in and out. Plaintiff further claimed, in his petition, that the machine was unsafe to operate.

The separate answers of each of the defendants consisted of general denials.

It is undisputed that, in the early part of May 1978,

plaintiff heard that the defendants had a loader for sale. He called to inquire concerning same and talked to defendant Mildred Hart. Shortly thereafter, defendant Harold Hart called the plaintiff from Greeley, Colorado, and they discussed the sale. Harold told the plaintiff that the machine was "in good shape and ready to go to work, except for the cylinders"; that one cylinder leaked oil a little bit and just needed a little packing and that the defendant would supply the packing. The next day, Harold Hart called again and, in that conversation, stated that he would give plaintiff 20 names of well-paying customers he could go to work for.

When the plaintiff went to the home of the defendants to look at the machine, Mildred Hart stated that the machine was a "good old faithful machine in good condition." On May 7, 1978, plaintiff paid the defendants $30,000 and asked for the names of the 20 people to go to work for. Mildred Hart said she had already turned the names over to Ernest Sayers, who leased another machine belonging to the defendants. Mildred suggested that he could get work in his own area and he wouldn't have to drive so far. Nevertheless, there is no dispute that the 20 names were not then given to the plaintiff and, as a matter of fact, had already been given to Mr. Sayers.

Up to this time, the plaintiff had examined the machine, but had never started the engine. On May 10, he and his son went back to the home of the defendants to pick up the machine. The plaintiff started the machine and raised the hoist. He noticed that the brake was unhooked and he had some trouble with the bucket of the machine. While the plaintiff was driving the machine, his son, who was following behind in a car, noticed that the right rear wheel and the steering cylinder were wobbling. Nevertheless, the plaintiff did a day's work with the machine during which time he had trouble with the bucket. He then unsuccessfully attempted to sell

the machine at a profit. On May 13, he returned the machine to the home of the defendants and demanded return of the purchase price.

None of the above facts are in dispute.

A motion for summary judgment is not a substitute for a demurrer or a motion for a directed verdict. *Jirka v. Prior,* 196 Neb. 416, 243 N.W.2d 754 (1976). Therefore, one must examine the evidence to determine whether or not the plaintiff is able to prove the allegations of his petition.

The motions for summary judgment of the two defendants did not state the basis therefor, nor did the summary judgments entered by the court. Broadly speaking, in order to sustain the motions for summary judgment in this case, the trial court had to find that there was no genuine issue of fact concerning three areas, and that the plaintiff would be unable to prove any of three basic allegations, to wit, (1) That the defendants represented and warranted to plaintiff as to the condition and usability of the machine and its value and the furnishing of names; (2) There was a breach of the representation and warranties as to the condition and usability of the machine and its value and the furnishing of names; and (3) Because of such breach of representation and warranties, the plaintiff attempted to cancel the sale and offered to return the loader and did, in fact, return it and demanded that the defendants return to plaintiff the $30,000 he had paid for the machine.

There would be sufficient evidence to support a finding that an express warranty was made by the sellers when they stated to the buyer that the machine was "a good old faithful machine in good condition" and that the machine was "in good shape and ready to go to work." Nebraska U.C.C. § 2-313 (Reissue 1971). Similarly, there is sufficient evidence that plaintiff was told he would receive 20 names of prospective customers and that a similar new machine would cost $160,000.

A positive statement of a seller of the condition of personal property made during negotiations for its sale which indicates an intention to be bound by the truth thereof and which was so understood and relied upon by the other party, is an express warranty. *Garbark v. Newman,* 155 Neb. 188, 51 N.W.2d 315 (1952).

Where a purchaser receives what he purchased, and bases his right to rescind on a false representation of its quality or condition, or another matter affecting its value, he must show that the representation was material and that he was misled thereby to his damage. *Garbark v. Newman, supra.*

If a representation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if it is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of a showing to the contrary, that the transaction was induced by the misrepresentation. *Garbark v. Newman, supra.*

A person is justified in relying upon the representation made to him in all cases when it is a positive statement of fact and if an investigation would be required to discover the truth. *Garbark v. Newman, supra.*

It is undisputed that the plaintiff attempted to cancel the sale, offered to return the loader, and demanded the purchase price therefor.

The remaining broad issue then, is whether or not there was a breach of representation and warranty as to the condition and usability of the machine and its value and as to furnishing the names.

This case would seem to be controlled by *Green v. Village of Terrytown,* 189 Neb. 615, 204 N.W.2d 152 (1973). In that case, the court said at 617-19, 204 N.W.2d at 154-55:

> The moving party is not entitled to summary judgment except where there exists no gen-

uine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. § 25-1332, R. R. S. 1943; Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244. The burden is upon the party moving for the summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Johnson v. Metropolitan Utilities Dist., 176 Neb. 276, 125 N. W. 2d 708. 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. Johnson v. Metropolitan Utilities Dist., *supra*. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. Johnson v. Metropolitan Utilities Dist., *supra*.

The motion for summary judgment was improperly sustained for at least two reasons. First, although there were before the court no conflicting evidentiary facts, the ultimate inferences to be drawn from those facts are not clear. Second, since those inferences are not conclusively established it cannot be determined whether the defendant is entitled to judgment as a matter of law.

. . . .

What we have said before disposes of the contention of the defendants that it was the duty of the plaintiff to present some evidence to contradict that of the defendants, otherwise the motion should be sustained. This position overlooks the nature of the moving party's burden. It is only where the mo-

> vant's evidence establishes, taken at its apparent face value, that there is no genuine issue of fact and that under the evidence he is as a matter of law entitled to judgment, that the party against whom the motion is made has some duty of coming forth with contradictory evidence. See Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

The defendants adduced no evidence whatsoever as to the effect of the wobbling wheel, the wobbling of the steering mechanism, and the disrepair of the handbrake. Therefore, plaintiff was not required to adduce any evidence concerning those issues. While the evidence was clear the machine was sold with the express understanding by all that a hydraulic cylinder leaked and needed repacking, there is a total lack of evidence that the leaking was the sole cause of the difficulty in operating the bucket on the loader, both at the time the plaintiff picked up the machine, and during the one day's dirt work accomplished by the plaintiff. Defendants merely assume that, because the cylinders were leaking, the leak was the sole cause of all the difficulty. It is possible that the plaintiff could adduce evidence sufficient to convince a jury otherwise.

As the plaintiff states in his brief:

> Summary judgment was entered against the plaintiff, based upon the depositions. For such a judgment to be justified it would be necessary for the record to show that in spite of the petition allegations the deposition testimony showed that plaintiff could not prove his case. Either that the representation and warranties claimed were not made to him, contrary to the petition; or that the representations and warranties were not breached, contrary to the petition allegations. The only way that the defendants would be entitled to a summary judg-

> ment would be if the deposition testimony showed that the plaintiff would be unable to prove one or more of the foregoing essential features.

The defendants have not shown that the plaintiff would be unable to prove either that there were representations and warranties made on which the plaintiff relied to his detriment, or that they were not breached. Therefore, the plaintiff has no duty to come forth with evidence that he can prove those allegations. *Green v. Village of Terrytown, supra.*

Defendants' brief raises an issue of inspection which would eliminate the issue of implied warranty and raises the issue of acceptance. If said matters are germane, suffice to say that the evidence adduced on the motions for summary judgment did not establish that plaintiff could not prove the allegations of his petition, and overcome any evidence concerning inspection and acceptance. Likewise, defendants allude to a written memorandum, call it a contract of sale, and argue that since it did not contain language relative to an express warranty, express warranty cannot be relied upon by the plaintiff. If germane, the question of whether the written memorandum was merely a bill of sale, a receipt, or the full agreement is for a jury to determine. Defendants did not conclusively establish that the memorandum was a contract between the parties.

The motions for summary judgment should have been overruled. The cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

IN RE APPLICATION OF AMERICAN STATE BANK. SOUTHWESTERN BANK & TRUST COMPANY, APPELLANT, V. DEPARTMENT OF BANKING AND FINANCE, STATE OF NEBRASKA, ET AL., APPELLEES.
IN RE APPLICATION OF SOUTHWESTERN BANK & TRUST COMPANY. SOUTHWESTERN BANK & TRUST COMPANY, APPELLANT, V. DEPARTMENT OF BANKING AND FINANCE, STATE OF NEBRASKA, ET. AL., APPELLEES.

294 N. W. 2d 343

Filed July 1, 1980. No. 42864.

Bank Charters: Administrative Orders. The director of the Department of Banking and Finance has the discretion to compare two applicants for bank charters and select the one that can best promote the public necessity, convenience, and advantage.

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

Schmid, Ford, Mooney & Frederick, for appellant.

Acklie & Parker, for appellee American State Bank.

No appearance for appellee Department of Banking and Finance.

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

WHITE, J.

This case involves two applications originally filed with the Department of Banking and Finance (hereafter Department) for a charter to operate a commercial bank in McCook, Nebraska. The Department, after a hearing on both applications, issued a charter to American State Bank (hereafter American) and denied a charter to Southwestern Bank & Trust Company (hereafter Southwestern). Southwestern appealed to the District Court for Lancaster County, Nebraska, for a reversal of both orders. The District Court found generally for the Department and American.

Appellant makes two principal contentions: (1) That the Department has no authority to concurrently consider two or more applications for a commercial bank; and (2) That the Department's findings are arbitrary, capricious, and not supported by the evidence. We find the appellant's contentions are not meritorious and affirm.

The record shows that Southwestern filed an application with the Department for a bank charter to operate a bank in McCook, Nebraska, on March 13, 1978. American filed with the Department on March 27, 1978. The Department granted the application of American and denied that of Southwestern. Southwestern appealed both orders of the Department. The cases were consolidated on appeal and the orders of the Department were affirmed.

We do not review the decisions of the Department and the District Court de novo on the record. Neb. Rev. Stat. § 84-917 (Reissue 1976) provides that a person aggrieved by a final decision in a contested case is entitled to judicial review. It provides for the initial review in the District Court, without a jury, on the record of the agency. The aggrieved party may secure a review of a District Court's decision by appeal to this court pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1976). We have held that review of a District Court's decision is governed by the same criteria controlling review by the District Court. *The 20's, Inc. v. Nebraska Liquor Control Commission,* 190 Neb. 761, 212 N.W.2d 344 (1973). Section 84-917(6) provides:

> (6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:
>
> (a) In violation of constitutional provisions;

(b) In excess of the statutory authority or jurisdiction of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

(f) Arbitrary or capricious.

Under the criteria set out in (6)(e), when there is "substantial evidence" which would support a finding either way, neither a District Court nor this court should disturb the administrative body's findings. *The 20's, Inc. v. Nebraska Liquor Control Commission, supra.* We review the decision of the District Court and the Department to determine whether the proper criteria have been applied and to determine if the evidence of record justifies the Department's ruling.

The threshold question on appeal is whether the director and the Department have the discretion to compare two applicants and select the one that can best promote the public necessity, convenience, and advantage.

The appellant contends that the Department exceeded its authority when it held a full separate hearing on each party's application for a charter in the same trade area, and then compared the two and selected American as better qualified to meet the public's need, even though its application was filed 2 weeks later than Southwestern's. Neb. Rev. Stat. § 8-122 (Reissue 1977) provides:

> 8-122. Bank organization; conditions precedent; charter; issuance; fees. After the examination and approval by the department of the application required by section 8-120, if the department upon investigation and after the public hearing on the application shall be satisfied that the stockholders and officers of the corporation applying for such charter are parties of in-

> tegrity and responsibility, that the requirements of section 8-702 have been met, *and that the public necessity, convenience, and advantage will be promoted by permitting such corporation to engage in business as a bank,* the department shall, upon the payment of the required fees, and, upon the filing with the department of a statement, under oath, of the president, secretary, or treasurer, that the paid-up capital stock, surplus and undivided profits have been paid in, as determined by the department, issue to such corporation a charter to transact the business of a bank in this state provided for in its articles of incorporation. On payment of the required fees and the receipt of the charter, such corporation may begin to conduct a bank.

(Emphasis supplied.)

The appellant contends that § 8-122 mandates that the Department grant a charter whenever the applicant *who files first* meets the statutory standards. We do not agree with this restrictive interpretation of the statutory authority of the Department and its director. While there is no specific legislative provision which delineates what the director should do when two applications are filed, there is a legislative requirement that he take that action which serves the best interests of the public involved, specifically in this case, the action which promotes the public necessity, convenience, and advantage in the McCook area. We agree with the cogent analysis of this issue by the District Court:

> [T]he adoption of a "first in time" priority rule in these cases would unduly restrict the Department and its Director's discretion and authority implied by the general terms of the statute, and that its authority and obligation to compare two competing bank

> charter applicants to determine which one is best suited to provide the needed banking service in the community concerned is the better rule and is supported by legislative and case law authority.

The appellant argues that the issue of the director's discretion is controlled by the case of *State, ex rel. Woolridge, v. Morehead,* 100 Neb. 864, 161 N.W. 569 (1917). There, the banking board refused to issue a charter to the Nebraska State Bank at Sidney, Nebraska, on the ground that conditions and existing business in Sidney dictated that the public convenience and necessity did not require an additional bank. The statute then in effect, Neb. Rev. Stat. § 295 (1913), did not require that the Department find that the public necessity, convenience, and advantage would be promoted by permitting an additional bank in the community. In reviewing the language of the statute, this court held that the statute was mandatory and that, if the applicant satisfied the statutory requirements, the Department had no discretion to withhold the issuance of a charter. The statute in effect at the time of *Morehead* and the statute in effect at the present are significantly different. Under the present statute, the director is required to determine whether the public necessity, convenience, and advantage will be promoted by permitting each applicant to engage in business as a bank. This provision distinguishes the court's prior decision in *Morehead* and renders it inapplicable to the case at bar. We considered the statutory requirement of "public necessity, convenience, and advantage" in *First Nat. Bank of Bellevue v. Southroads Bank,* 189 Neb. 748, 750, 205 N.W.2d 346, 347-48 (1973):

> [T]he determination of public necessity, convenience, and advantage has been committed to the discretion and expertise of the Department of Banking. This court is not a

> super-regulatory body to review the policy or wisdom reflected in determinations made by the Department of Banking as to such issues. Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed.

While this appears to be a question of first impression in this state, other jurisdictions have decided the issue as to whether priority should be given to one qualified applicant on the basis of first to file. In *Stafford State Bank v. Schaub,* 143 N.J. Super. 145, 362 A.2d 1209 (1976), both competing applicants for a bank charter met the statutory requirements. The board determined the applicant with priority in filing should be granted the charter. The appellate court held that it was error not to compare the two charter applications and that it was the state banking commissioner's obligation to determine which of the two applicants will best serve the public interest.

In *Brown v. Banking Board,* 579 P.2d 1267 (Okla. 1978), the court stated that the granting of a bank application, when mutually exclusive applications are pending, is a legislative matter and that the court does not have the power to independently substitute its judgment for that of the Department. The court did not adopt a first to file rule as urged by one of the applicants. In *Schaake v. Dolley,* 85 Kan. 598, 118 P. 80 (1911), the court held that where both applicants met the statutory qualifications, the charter board was correct in granting the first one filed.

In 1 Michie on Banks and Banking 162-64 (rev. ed. 1973), a Nebraska case is cited as support for the proposition, discussed in the section entitled "Discretion and Power in State Offices and Boards," that:

> It has been held, however, that under the

> statutory provisions in certain states the commissioner of banking or other banking authority is vested with discretionary power to approve or reject applications for chartering a bank. And under such statutory provisions the refusal of the commissioner of banking to approve an application for a charter in a proper exercise of such discretionary power is not subject to judicial review on the ground that a different decision should have been made, unless it clearly appears that he has willfully and arbitrarily disregarded his duty, or that his decision was due to caprice, passion, partiality or corruption.

We conclude that the existence of public necessity and convenience provisions, as are now in effect in § 8-122, vests the Department with the discretion to consider two applications and determine which would best serve the public interest.

Having concluded that the Department did not act beyond its jurisdiction, we will consider whether there is competent evidence to sustain its findings. In finding that public necessity, convenience, and advantage would be best promoted by the granting of a charter to appellee and that the public necessity, convenience, and advantage would not be promoted by permitting the appellant to engage in business as a bank, the Department premised its holding on three major findings of fact: (1) That the appellant would not have the ability to provide as viable and effective competition to the existing banking institutions as would the appellee; (2) That the stockholders of appellee will be more representative of the McCook area; and (3) That the proposed capital structure of the appellee is greater than that of the appellant.

In considering factors which evidence viable and effective competition, the Department had a record

which contained competent and substantial evidence as to the experience of the primary incorporators and the construction and the location of the proposed banking facilities. All of the officers of appellee's proposed operation had executive banking experience and hold executive officers' licenses. In contrast, the proposed chief operating officer of appellant's bank had no previous experience as a chief operating officer of a commercial bank. The evaluation of principals is a matter for the Department to weigh and consider. *Voss v. Banking Board,* 483 P.2d 731 (Okla. 1971).

The construction and location of the proposed banking facility were important factors in the charter proposal. The evidence demonstrated that appellee proposed to construct a new facility, whereas appellant proposed to remodel a building. On the location issue, there is evidence to suggest appellee's facility would be located in a more heavily traveled area.

On the second finding of fact, the Department found that the stockholders of the appellee will be more representative of the McCook area. The evidence shows that of 47 stockholders in American, all but 2 are from the McCook area. Pursuant to a condition precedent to the issuance of a charter, 50 percent of American's stock is owned by individuals from the McCook area. The record suggests a greater percentage of American stockholders than Southwestern stockholders are from McCook.

The third major finding of fact concerns the capital structure of American as compared to that of Southwestern. The record indicates that American filed its application with proposed capitalization of $850,000, which could be increased to $1,000,000 if the Department so directed. On the other hand, appellant proposed a capital structure of $500,000 which would be increased upon request by the director of the Federal Deposit Insurance Corporation.

We are satisfied that the Department's findings are supported by substantial evidence.

AFFIRMED.

LILLIE B. MEYER, APPELLANT AND CROSS-APPELLEE, V. FIRST UNITED METHODIST CHURCH, APPELLEE AND CROSS-APPELLANT.

294 N. W. 2d 611

Filed July 1, 1980. No. 42897.

1. **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 employment.
2. **Workmen's Compensation: Course of Employment.** 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.
3. **Workmen's Compensation: Appeal and Error.** 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.

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

Thomas E. Ferneau, for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

BRODKEY, J.

Lillie B. Meyer has appealed an order entered by the Nebraska Workmen's Compensation Court on re-

hearing which dismissed her petition for workmen's compensation benefits. We affirm.

The facts giving rise to this action are undisputed. On July 9, 1977, Lillie B. Meyer was employed as a "local pastor" by the Cornhusker Circuit of the United Methodist Church, a group of churches in Nebraska consisting of the Atlanta, Bertrand, Loomis, and Mascot-Bethel churches. A local pastor is a lay person who has a license to preach and who must meet certain educational requirements established by the General Conference of the United Methodist Church, the national governing body. The General Conference determines the rules and regulations which govern the actions of the churches, conferences, districts, bishops, and directors of ministry, as well as the qualifications and requirements for the various types of pastors within the United Methodist Church. Pursuant to those rules, Meyer was attending a 4-week-long continuing education course for local pastors which was conducted at the St. Paul School of Theology in Kansas City, Missouri, and which educational requirement was known to the Cornhusker Circuit at the time they engaged Mrs. Meyer. Although Mrs. Meyer received her usual salary and was granted a leave of absence during her attendance at the school, neither the school nor the named defendant contributed financing for her tuition, books, or board while attending the school.

The educational emphasis was such that students at the school were required to reside in dormitories located on campus during the term of the continuing education course, including weekends. Furthermore, all matriculated students were generally required to eat their meals in the school's dining halls from Monday until Saturday noon. During those periods when the school's meal facilities were closed, the students were permitted to obtain their food off campus. However, in addition, Mrs. Meyer had requested and received a special dispensation

from the school to eat in her dormitory room because of a diabetic condition from which she suffered. On Saturday, July 9, 1977, since the dining room was to close at noon, Mrs. Meyer left the St. Paul campus to purchase her food for the weekend. While on her way to the grocery store, she started to cross a street with the light in her favor, when an automobile struck her. Initially, Mrs. Meyer felt no pain, but within a few hours her back commenced to ache. It was determined that she had suffered a back injury, necessitating medical care and, eventually, corrective surgery. She thereafter filed a petition in the Nebraska Workmen's Compensation Court to recover compensation for the aforementioned injuries which she alleged arose out of and in the course of her employment.

After a hearing before a single judge of the Nebraska Workmen's Compensation Court, that court dismissed her petition, finding that the named defendant, First United Methodist Church, Inc., of Bertrand, neither required Mrs. Meyer to attend the school nor paid any of her expenses while she was in attendance. It found the injury Mrs. Meyer sustained did not occur within the scope and course of her employment. On rehearing before a three-judge panel of the court, the order of dismissal was affirmed. The panel found that, since the named defendant had neither paid for nor required Mrs. Meyer's attendance at the school for the course of study, she was in pursuit of a personal goal at the time of her injury, and it did not occur in the course of her employment.

Furthermore, the court found that Mrs. Meyer undertook the course of study in order to comply with the mandate, not of her employer, but of the Conference; and that she needed to undertake it in order to remain certified as a local pastor. The court specifically stated: "[P]laintiff's obligation to continue her education arose out of her status as a

local pastor and not out of her services to the defendant or to any particular church. Accordingly, the primary beneficiary of her continued education was, of course, herself and the Conference as a whole."

One of the judges dissented on the ground that the distribution of authority in the United Methodist Church, while of doctrinal significance, was immaterial to this dispute and, therefore, the actions of both the General Conference and the Cornhusker Circuit, as well as the named defendant, First United Methodist Church, Inc., of Bertrand, were, in fact, the actions of her employer. He found that Mrs. Meyer's attendance at continuing education courses was at the request of her employer and made Mrs. Meyer a better trained and educated pastor; hence, her employer received a direct benefit from her attendance and her injury was one which arose out of and in the course of her employment.

Mrs. Meyer has appealed to this court, contending that, on rehearing, the Nebraska Workmen's Compensation Court committed reversible error. Mrs. Meyer's first, and principal, contention is that the Nebraska Workmen's Compensation Court was in error in holding that she was not within the scope and course of her employment at the time of her injury. In *Gray v. State,* 205 Neb. 853, 857, 290 N.W.2d 651, 653 (1980), we stated the rule as follows:

> 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 require-

> ment 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.

Larson states, with reference to education and training programs for employees:

> When an employee, by undertaking educational or training programs, enhances his own proficiency in his work, he does in a sense benefit his employer. On the other hand, self-improvement is primarily the employee's own concern; obviously the ambitious clerk who is burning the midnight oil to become an accountant cannot expect workmen's compensation if his lamp blows up. In some situations, however, it may be found that, either by the contemplation of the contract or by custom, the educational activity is part of the employment.

1A Larson, The Law of Workmen's Compensation § 27.31(a) (1979).

While not involving fact situations identical to those involved in the instant case, the following cases are instructive and helpful in resolving the issues in this case and we are persuaded by their reasoning. In *Chamberlain v. Camillus Jr. High School,* 53 A.D.2d 732, 384 N.Y.S.2d 40 (1976), the court had before it a case involving a school teacher who was injured in an automobile accident as he was returning to his home from the state university where he was taking a course to meet requirements imposed

by the state education department for permanent certification of school teachers. In affirming the decision of the Workmen's Compensation Board denying compensation, the court stated: "An examination of the record reveals that the employer exercised no control over claimant's studies, which he was pursuing for his own personal benefit so that he could be permanently certified. Such being the case, compensation was properly disallowed [citation omitted]." *Id.* at 733, 384 N.Y.S. 2d at 41.

In *McQuerrey v. St. John Mfg. Co. and Liberty Ins. Co.*, 240 Mo. App. 720, 216 S.W.2d 534 (1948), the court had before it the situation where an association of which the employer was a member entered into an apprenticeship agreement with the union which required classroom instruction before an apprentice would become a journeyman cabinetmaker-millman. The joint apprenticeship committee of the union and the employer association made an arrangement with the board of education of Kansas City for the claimant to attend a course in vocational training at a local high school two evenings each week between 7 p.m. and 9 p.m., which classes were conducted under the supervision of the board of education. Claimant was injured during his training and recovered compensation from his employer. In reversing the award of compensation, the court stated:

> We are of the opinion the employer in this case was not required to furnish claimant with the *classroom* work referred to. That was a requirement or condition imposed on every apprentice by the Association and the Union, before he could become a Journeyman Cabinet Maker-Millman. Such outside instruction was for the benefit of the apprentice and not for any particular employer. The parties themselves recognize the distinction to be made between *working* for and *training* under the direction of an

> employer and that of *classroom instruction.* These were treated as separate items or duties in all the written instruments defining the relationship. The time spent on each project was recorded under separate headings. We do not agree with claimant's contention that, at the time of his injury, he was at a place he was required to be by his employer. The contract of employment obligated the employer to provide *employment* and *training opportunities.* We think these obligations refer to the time spent and the work done in the employer's plant and while the apprentice is under the control and guidance of the designated foreman "in the shop", and not to the time and place of classroom instruction.

Id. at 725, 216 S.W.2d at 537 (emphasis in original). See, also, *Hammond v. Keim,* 128 Neb. 310, 258 N.W. 478 (1935).

In the instant matter, the Nebraska Workmen's Compensation Court found that the injury arose during the course of an activity which the Cornhusker Circuit, Mrs. Meyer's employer, neither required nor had authority to require. It is now a well-established rule 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 District No. 1,* 205 Neb. 631, 289 N.W.2d 196 (1980); *Scamperino v. Federal Envelope Co.,* 205 Neb. 508, 288 N.W.2d 477 (1980); *Newbanks v. Foursome Package & Bar, Inc.,* 201 Neb. 818, 272 N.W.2d 372 (1978). From our review of the record, we conclude that the Nebraska Workmen's Compensation Court was correct in finding that the Cornhusker Cir-

cuit did not make the attendance at continuing education courses a condition of employment, although it was cognizant of the requirement of further education for local pastors and Mrs. Meyer's intention to take the courses. The principal impetus for her taking the course was to comply with the mandate of the General Conference. The record indicates, moreover, that it is primarily to the local pastor's benefit to complete such courses as, upon completion of sufficient courses, the local pastor becomes an ordained minister and receives a salary increase due to increased status within the church. While the increase in education does benefit the employer in an indirect manner, it is apparent from the record that the activity was not a part of the contract of employment. That being so, it follows that any injury resulting therefrom was not within the course and scope of the employment relationship. We conclude that the Workmen's Compensation Court was correct in dismissing Mrs. Meyer's claim.

In view of this determination, we need not examine the other errors assigned by Mrs. Meyer. The First United Methodist Church has filed a cross-appeal herein contending that the Nebraska Workmen's Compensation Court erred on rehearing by failing to make certain fact findings.

In *Sarraillon v. Stevenson,* 153 Neb. 182, 43 N.W.2d 509 (1950), we stated the rule to be that, in the absence of an express finding by the District Court on an issue adverse to the appellee, a cross-appeal in reference to such issue may not be had in this court.

In this case, the Nebraska Workmen's Compensation Court did not make findings or decide the issues raised in First United Methodist Church's cross-appeal and the claim of error set forth in its cross-appeal is without merit. We affirm the judgment of the Workmen's Compensation Court.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

CENTRAL CONSTRUCTION COMPANY, APPELLANT, V. REPUBLICAN CITY SCHOOL DISTRICT NO. 1, A POLITICAL SUBDIVISION, APPELLEE.

294 N. W. 2d 347

Filed July 1, 1980. No. 42911.

1. **Motor Vehicles: Negligence.** Conditions affecting the visibility of a motorist impose upon a driver the duty to exercise a degree of care commensurate with the existing circumstances.
2. **Motor Vehicles: Negligence: Turning Vehicles.** A turn across a highway between intersections is a particularly dangerous maneuver.
3. **Motor Vehicles: Negligence: Turning Vehicles: Proper Lookout.** The operator of a dirt scraper upon a highway which is under construction but not closed to traffic, who turns to the left without giving a turn signal and at a time when his vision is so obscured by dust that he cannot see whether other traffic is approaching, is guilty of negligence more than slight as a matter of law.

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

J. Marvin Weems, Law Offices L. W. Cronk of Counsel, J. Marvin Weems and Curtis A. Sikyta, for appellant.

Ronald E. Strasburger, for appellee.

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

BOSLAUGH, J.

This was an action under the Nebraska Political Subdivisions Tort Claims Act for damages sustained by the plaintiff when the defendant's schoolbus collided with a dirt scraper being operated by an employee of the plaintiff. The trial court found that both drivers were negligent and the plaintiff was barred from recovering its damages. The plaintiff has appealed. The principal assignments of error relate to the sufficiency of the evidence to sustain the judgment.

The record shows the accident happened at about 3:30 p.m. on October 8, 1975, on U.S. Highway 136,

approximately 1.2 miles east of Republican City, Nebraska. The weather was clear and the sun was shining. The highway at that point runs east and west and is a two-lane highway approximately 25 feet wide surfaced with blacktop. The highway had been resurfaced and the defendant was engaged in "shouldering" the highway. The scraper, which was being operated by Michael Norman in a westerly direction, was dumping dirt along the north edge of the pavement. A grader was then used to spread the dirt so that the shoulder of the highway would be level with the surface of the pavement.

Although the highway was not closed to traffic, barricades had been placed to the east and west of the construction area and at intersections in the construction area. Flagmen were stationed on Highway 136 at the east and west ends of the construction area to warn traffic entering the construction area. Neb. Rev. Stat. § 39-609(5) (Reissue 1978), relating to highways closed for construction, was not applicable in this case.

The defendant's schoolbus, which was being operated by Norman Kerr, had delivered its passengers and was returning to Republican City. The bus had turned onto Highway 136 at the Naponee junction and was proceeding in a westerly direction toward Republican City. Since the flagman at the east end of the construction area was stationed east of the Naponee junction, the bus did not pass that flagman. Kerr, however, was familiar with the highway, saw the barricade at the junction, and knew the highway was under construction.

The bus approached the scraper at a speed of approximately 45 miles per hour but slowed down to 15 to 20 miles per hour and followed the scraper for "a ways." The bus was attempting to pass the scraper when the scraper commenced a U-turn across the highway in front of the bus. The front of the bus struck the left side of the tractor pulling the scraper

resulting in substantial damage to the tractor, the scraper, and the bus.

At the time the accident happened, there was a strong wind blowing from the north. The dirt which the scraper was dumping was dry clay which created a very dusty condition around the scraper. Mr. Norman testified that, before he commenced the left turn across the highway, he looked to the rear. Because of the dust he could see only "about to the end of my machine." He gave no signal but started the turn and looked again. At that time he could see, "Not very far. No further than I could the first time." When he first saw the bus it was about 3 or 4 feet away coming out of the dust. When the impact occurred, the tractor was across the highway headed slightly to the southeast.

On cross-examination Mr. Norman admitted that, when it was dusty, he did not wait until he could see before making a turn. When he could not see, "You just hoped that you didn't get hit. You couldn't see, you had to turn."

The dust was a condition which imposed a duty upon Mr. Norman to exercise a degree of care commensurate with the circumstances. *Thompsen v. Miller,* 177 Neb. 530, 129 N.W.2d 498 (1964); *McClellen v. Dobberstein,* 189 Neb. 669, 204 N.W.2d 559 (1973). The turn across the highway between intersections to change direction was a particularly dangerous maneuver. See *Petersen v. Schneider,* 153 Neb. 815, 46 N.W.2d 355 (1951). Mr. Norman had a duty to wait until he could see whether there was other traffic approaching before attempting the turn.

The evidence which has been summarized established as a matter of law that Mr. Norman was guilty of negligence which was more than slight. See *Eden v. Klaas,* 165 Neb. 323, 85 N.W.2d 643 (1957). Mr. Norman knew the highway was not closed to traffic and that other vehicles might ap-

proach and attempt to pass the scraper. Without giving any signal of his intention to turn, and at a time when he could not see whether there was any traffic approaching, he turned across the highway in front of the bus.

Although there was evidence of negligence on the part of Mr. Kerr in that he attempted to pass the scraper at a time when the maneuver could not be made with safety, in operating the bus at a speed which was excessive under the circumstances, and in failing to maintain reasonable control over the bus, the trial court could find that this negligence was less than gross in comparison to the negligence of Mr. Norman, which was more than slight.

The remaining assignment of error relates to the refusal of the trial court to compel the defendant, during the trial, to produce a photograph of the barricade which was placed at the Naponee junction on the day of the accident. So far as the record shows, the plaintiff made no attempt to secure the production of the photograph before trial.

Under the circumstances in this case, it is unnecessary to determine whether the ruling of the trial court was correct. At most, the evidence was cumulative. Mr. Kerr admitted that he knew the road was under construction and saw the barricade at the Naponee junction before turning onto the highway. The ruling did not prejudice any substantial right of the plaintiff.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID G. KOLAR, APPELLANT.

294 N. W. 2d 350

Filed July 1, 1980. No. 43058.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial filed in a criminal case after the trial court has announced its decision but before judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.
2. **Appeal and Error.** This court may, at its option, note a plain error not assigned.
3. **Blood, Breath, and Urine Tests: Evidence: Foundation: Drunk Driving.** Before the results of a Breathalyzer test may be offered in evidence for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements.

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

Richard Gee, 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, David Kolar, appeals from a judgment of the District Court for Merrick County, Ne-

braska, which affirmed an earlier conviction by the county court of Merrick County, Nebraska, finding Kolar guilty of violating Neb. Rev. Stat. § 39-669.07 (Reissue 1978). For reasons more particularly set out in the opinion, we must reverse the action of the District Court and order the complaint dismissed.

The first issue raised herein is whether the appeal was timely filed. Each party agrees that the notice of appeal was filed within 1 month after the order of the District Court overruling appellant's motion for new trial. The issue, however, is whether the motion for new trial was timely filed. The record reflects that the District Court advised the appellant by mail on September 13, 1979, that the court had affirmed the judgment and sentence of the county court and directed the county attorney to prepare an appropriate journal entry for the court's signature. On September 21, 1979, and within 10 days of receipt of the letter from the district judge, the appellant filed a motion for new trial directed at the judgment referred to in the district judge's letter of September 13, 1979. The record discloses, however, that the formal journal entry was not signed by the district judge until September 26, 1979, after the motion for new trial was filed. We are, therefore, presented with the question of whether a motion for a new trial in a criminal case filed *prior* to the formal entry of judgment but within 10 days after formal written notice by the trial court, satisfies the requirements of Neb. Rev. Stat. § 29-2103 (Reissue 1975).

The filing of the motion for new trial is important in this case insofar as it relates to the provisions of Neb. Rev. Stat. § 25-1912 (Reissue 1975) which require that an appeal to this court must be filed within 1 month after the rendition of the judgment or decree *or within 1 month from the overruling of a motion for new trial.* (Emphasis supplied.)

As we have already indicated, the appeal was filed within 1 month after the overruling of the motion for

new trial. However, if by reason of the motion for new trial having been filed prior to the formal entry of judgment, the motion for new trial was a nullity, the appeal should have been filed within 1 month after the rendition of the judgment or decree and it was not.

We recently had the occasion to consider this issue in the case of *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 137, 277 N.W.2d 572, 574 (1979), wherein we said:

> [A] notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates.

On the same day we decided the *Dale Electronics* case, we also decided the case of *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 141-42, 277 N.W.2d 575, 578 (1979), wherein we said:

> We now hold that a motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.

We perceive no reason why we should not adopt a similar rule with regard to a motion for new trial in

a criminal case as well, and we now hold that a motion for new trial filed in a criminal case after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity, if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates. We, therefore, hold that the motion for new trial was timely filed in this matter. Therefore, the appeal was, likewise, timely filed, and this court did acquire jurisdiction.

The second error assigned by appellant is that, under the provisions of Neb. Rev. Stat. § 39-669.09 (Reissue 1978), the sheriff was required to transport the appellant to a facility where a physician or qualified technician of appellant's choice could draw a blood sample, if so requested, and that, upon failure by the sheriff to so transport the appellant so that an additional test could be taken, the original test results obtained by the sheriff were inadmissible in evidence. Before we reach that issue, however, we are compelled by the record herein to note a plain error not raised by the parties.

While the provisions of Neb. Rev. Stat. § 25-1919 (Reissue 1975) and Neb. Ct. R. 8.a.2.(3) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit this court to note, at its option, a plain error not assigned. See, *Cockle v. Cockle,* 204 Neb. 88, 281 N.W.2d 392 (1979); *Zych v. Zych,* 165 Neb. 586, 86 N.W.2d 611 (1957). We find in this case such a plain error which must be considered. In order to consider this error it is necessary that we first set out certain of the relevant facts.

On August 22, 1978, at approximately 10 a.m.,

Deputy Sheriff Clayton Erickson of the Merrick County sheriff's office was dispatched to an accident which had occurred on Highway 30 about 2½ miles east of Clarks, Nebraska. It appeared that appellant had struck another vehicle in the rear. The deputy conducted an investigation at the scene. During the course of the investigation, appellant assisted the deputy and held the tape measure for him. Appellant did not stagger or show any other signs of being intoxicated, although appellant was emotionally upset and crying about having seriously damaged his vehicle. While there is some conflict in the evidence, it appears that the deputy did not, at the time the investigation was being conducted, believe appellant to be intoxicated, and did not, at that time, place appellant under arrest. The deputy offered appellant a ride to town because of the fact that the appellant's vehicle was disabled. The record discloses that, while traveling from the scene of the accident to town, the deputy detected what he believed to be the aroma of alcohol on appellant's breath and, for the first time, advised appellant that he would have to take a Breathalyzer test when they arrived at the sheriff's office. The deputy maintains that, when they arrived at Central City, he advised appellant that he was then under arrest and had to take a breath test. Appellant indicated that he would do so but requested that he also be afforded an opportunity to obtain a blood test by a physician of his own choice. Appellant attempted to contact his own personal physician in Grand Island but was unsuccessful in getting him to come to Central City. Appellant, nevertheless, took the Breathalyzer test and recorded a reading of .20.

Testimony at trial disclosed that appellant had been drinking the night before the accident but had not had anything to drink after about 2 a.m. of the morning of the accident, approximately 8 hours prior to the time of the accident.

At the time of the trial, the deputy testified that he held a valid permit authorizing him to use the type of equipment which, in fact, was used to administer the breath test on appellant. He did not, however, produce any evidence of that permit at trial but rather advised the court that the permit "was at the office." Likewise, the record is totally devoid of any evidence that the test administered to appellant was of a type previously approved by the Department of Health, as required by the provisions of Neb. Rev. Stat. § 39-669.11 (Reissue 1978).

After the complaint was filed in the county court, appellant sought to suppress the test results by motion but on different grounds than the fact that the test had not been of the type approved by the Department of Health. The motion was subsequently overruled by the county court.

At the time the county court overruled the motion to suppress, we had not yet issued our opinion in *State v. Gerber, ante* p. 75, 291 N.W.2d 403 (1980). In *Gerber*, we held that, before the results of a Breathalyzer may be offered in evidence for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. There is no evidence that the Breathalyzer test administered on appellant was obtained in accordance with the provisions of § 39-669.11. Therefore, it was not competent

evidence which a court could consider. There was no evidence in the record that the method employed by the deputy was ever approved by the Department of Health as required by law. See, also, *State v. Scott, ante* p. 451, 293 N.W.2d 114 (1980).

The record further discloses that, absent the result of the Breathalyzer test, there was no evidence to indicate that appellant was either operating a motor vehicle while under the influence of alcohol, or had an excessive alcohol content in his body fluid contrary to law. The State, therefore, failed to produce evidence sufficient to convict the appellant and we are required to reverse the action of the trial court in affirming the judgment of the county court. We remand the matter back to the District Court with instructions to dismiss the complaint.

Having reached that conclusion, it is not necessary that we consider the other assignment of error raised by appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

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

294 N. W. 2d 354

Filed July 1, 1980. No. 43137.

1. **Sexual Assault: Evidence.** The slightest penetration is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for first degree sexual assault, and such element may be proved by either direct or circumstantial evidence.
2. _____: _____. It is not essential that the victim be corroborated by other witnesses as to the particular act or acts which constitute the offense of sexual assault. It is sufficient if the victim is corroborated as to material facts and circumstances which tend to support the victim's testimony as to the principal fact in issue.
3. _____: _____. In a prosecution for sexual assault, after the victim has testified to the commission of the offense, it is competent to

prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged outrage, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made.

4. **Criminal Law: Verdicts.** In a criminal case, 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 Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Giese & Butler, Buffalo County Public Defender, for appellant.

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

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

MCCOWN, J.

The defendant was charged with sexual assault in the first degree, found guilty by a jury, and sentenced to a term of not less than 8 nor more than 12 years imprisonment.

The victim testified that at approximately 1 a.m. on September 12, 1979, she was reading in bed in her apartment in the front portion of a house in Kearney, Nebraska. She got up and opened the door to the kitchen and saw a man standing in the kitchen smoking a cigarette and holding a knife. She moved toward the front door and the man stepped in front of her and blocked the way. The woman attempted to take the knife from the man but he pulled it away from her and put it at the base of her throat and backed her into the bedroom. The man reeked of alcohol and had a very strong, distinctive body odor. He forced her to lie on the bed, opened her bathrobe, attempted to have sexual intercourse with her while holding the knife at her throat, and managed to achieve a slight penetration. She continued to protest but was too frightened to resist. She persuaded the man that she ought to check the front door.

When he sat up, she got up and ran to the front door. She unlocked the front door and the screen, ran out of the house, and stopped a passing car a short distance from the apartment. She told the three occupants of the car that a man had raped her and they took her to the police station. The occupants of the car all testified that she was very frightened and told them that a man was trying to rape her.

At the police station, the woman told the officers on duty what had happened. The officers took her to her apartment and began the initial investigation. They found a window screen in the living room of her apartment had been forced and the screen was ajar. They verified some of the details of the woman's story, removed several items of property for testing, and took the woman to a local hospital, where she was examined by a doctor.

The victim identified the defendant from a book of photographs provided by the police, and the defendant was arrested at approximately 6 a.m. on September 12, 1979. The police noticed a very strong, distinctive body odor at the time of his arrest. They searched his room but were unable to find the knife. The defendant was taken to jail and later identified by the victim in a lineup.

At the trial, the doctor who had examined the victim testified that he found no evidence of any contusions or abrasions on the woman's body, and no medical evidence to establish whether or not she had had recent sexual intercourse. He testified that the victim told him that there had been only slight penetration, and that from his examination, he could not determine whether or not there had been penetration.

The defendant testified at the trial and admitted that he was in the apartment, but denied that he had ever touched the victim or had any sexual contact with her. His testimony was that he was drunk and had come into the apartment for help because he

was unable to get home. He said that the victim at first refused to let him stay, but then lay down on the bed, opened her robe, and removed her panties. When he turned off the lights, the victim began crying and ran out the front door. He was afraid he would be charged with breaking and entering, and he fled.

The jury found the defendant guilty and this appeal followed.

The defendant contends that the testimony of the victim was uncorroborated and the evidence is insufficient to sustain the jury verdict.

Sexual penetration is defined by statute, among other things, as "any intrusion, however slight, of any part of the actor's body . . . into the genital or anal openings of the victim's body . . . . Sexual penetration shall not require emission of semen . . . ." See Neb. Rev. Stat. § 28-318(5) (Reissue 1979).

This court has consistently held that the slightest penetration of the sexual organs is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for first degree sexual assault, and such element may be proved by either direct or circumstantial evidence. *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976); *State v. Atkinson*, 190 Neb. 473, 209 N.W.2d 154 (1973).

It is not essential that the victim be corroborated by other witnesses as to the particular act or acts which constitute the offense of sexual assault. It is sufficient if the victim is corroborated as to material facts and circumstances which tend to support the victim's testimony as to the principal fact in issue. *State v. Ferguson*, 188 Neb. 330, 196 N.W.2d 374 (1972).

Immediate complaint is directly relevant on the issue of corroboration. In *State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969), we held that in a prosecution for sexual assault after the victim has testified

to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged outrage, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made.

In the case at bar, the victim made immediate complaint to the occupants of the car and again to the police. The testimony of these witnesses corroborated the victim's testimony as to the nature of the complaint and they testified that she appeared to be terrified. The evidence also established that pubic hairs were found in the victim's sheets microscopically similar to those of the defendant, which were very unusual and relatively uncommon.

In the case at bar, while the evidence was conflicting and was, in some respects, circumstantial rather than direct, it was sufficiently corroborated to submit it to the jury. A verdict of guilty should not be overturned unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a reasonable doubt.

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 his sentence was excessive. The statutory penalty for first degree sexual assault is not less than 1 year nor more than 50 years imprisonment. The defendant was 22 years old at the time of this offense, has an extensive history of juvenile offenses, and one prior adult

felony conviction for burglary. Where the punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears. *State v. Ferguson, supra.* There was no abuse of discretion here.

AFFIRMED.

DELORES E. WILLIAMS, ALSO KNOWN AS DELORES E. GROWCOCK, APPELLANT, V. PAUL F. WILLIAMS, APPELLEE.

294 N. W. 2d 357

Filed July 8, 1980. No. 42778.

1. **Summary Judgment.** Under Neb. Rev. Stat. § 25-1330 (Reissue 1975), the granting of a summary judgment is authorized only where the moving party is entitled to judgment as a matter of law and no genuine issues of fact exist.
2. ———. The question presented on a motion for summary judgment is not whether the evidence is sufficient to support a finding by a fact finder in favor of the moving party, but rather whether there exists no genuine issue as to any material fact so that, under those facts, the moving party is entitled to a judgment as a matter of law.
3. ———. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
4. **Equitable Estoppel.** Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to that party's injury, detriment, or prejudice.
5. ———. The gist of equitable estoppel is that a party who has, by his statements or conduct, asserted a claim based on the assumption of the truth of certain facts whereby he has obtained a benefit from another party cannot later assert that those facts are not true if, by reason of that assertion, the other party will be prejudiced. Equitable estoppel is, to that extent, like fraud and cannot be confined within any strict definition.
6. ———. The essential elements of equitable estoppel are, as to a party estopped: (1) Conduct which amounts to a false representa-

tion or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) The intention or, at least, the expectation that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) Knowledge, actual or constructive, of the real facts; and, as to the other party, (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Good faith reliance upon the conduct or statements of the party to be estopped; and (3) Action or inaction based thereon of such a character as to change the position or status of that party to his injury, detriment, or prejudice.

7. _____. The essential element of equitable estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice.

8. _____. An essential element of equitable estoppel is the entire good faith and innocence of the party imposed on. Estoppel cannot be claimed by one acting on a representation, if he knows or should know of its falsity. Where one with a convenient opportunity to ascertain the real facts by the exercise of reasonable diligence neglects to do so after having been put upon inquiry, he will not be permitted to defeat another's just rights by urging an equitable estoppel based on his having acted to his disadvantage in relying upon that other's innocently mistaken representation regarding those facts, where such representation was not made for the purpose of inducing him so to act.

9. **Equitable Estoppel: Child Support.** While equitable estoppel may be applicable in delinquent child support cases, the mere execution of a document consenting to the adoption of a child, standing alone, is insufficient to justify imposing the doctrine of equitable estoppel to deny to a parent with custody of a minor child the benefits of a previously entered order of the court regarding the payment of child support.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with directions.

Richard L. Kuhlman, for appellant.

Ray C. Simmons, for appellee.

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

KRIVOSHA, C.J.

The appellant, Delores Growcock, formerly Delores

Williams, appeals from a judgment of the District Court for Dodge County, Nebraska, sustaining a motion for summary judgment filed by Delores' former husband, Paul Williams. The effect of the judgment was to relieve Mr. Williams of any obligation to pay child support for the parties' minor child, Stacy Ann Williams, from and after October 20, 1967. We find that the judgment of the trial court must be reversed and remanded for further proceedings in accordance with this opinion.

All of the evidence presented initially to the trial court, and to this court on appeal, was by way of documents, including interrogatories, requests for admissions, affidavits, and stipulations. From those documents, it is established that the parties were married on September 24, 1962. The parties' only child, Stacy, was born early in 1963. On July 24, 1963, the marriage of the parties was dissolved by the District Court for Dodge County, Nebraska, and the custody of Stacy was awarded to her mother. Mr. Williams was ordered to pay as child support for Stacy $12.50 per week until certain other expenses of the parties had been paid by him, at which time he was then to pay $15 per week as child support.

In May of 1964, the appellant was remarried in Omaha, Nebraska, to one Harlan E. Growcock and they moved to Milwaukee, Wisconsin, where, in June of 1967, they initiated proceedings for the adoption of Stacy by Mr. Growcock. Mr. Williams apparently had, in the meantime, moved to Portland, Oregon, where he continued to reside. Shortly after June 13, 1967, Mr. Williams received a letter in Portland, Oregon, from Lawrence G. Wickert, an attorney in Milwaukee, Wisconsin, representing the Growcocks. The letter advised Mr. Williams that Mr. Growcock desired to adopt Stacy and requested Mr. Williams to sign the necessary consent forms included in the letter. Specifically, the letter from Mr. Wickert said, in part:

> We wish to point out that under the judgment of divorce dated July 24, 1963, . . . you were required to pay support money. We have been informed that a considerable arrearage has occurred in relationship to these payments. *If* the adoption is consummated, your obligation to support the child would terminate.
>
> . . . .
>
> We shall also notify you when the adoption is complete.
>
> If you have any questions in this matter, feel free to contact me.

(Emphasis supplied.)

The record indicates that the suggestion by Mrs. Growcock's attorney that Mr. Williams was substantially in arrears in his child support payment was correct. Mr. Williams had not made any child support payments since December of 1964, except for one payment in 1965. He resumed making child support payments in December 1976.

Harlan and Delores Growcock separated late in June of 1967 and Mrs. Growcock returned to Fremont, Nebraska, in July. The Growcocks' marriage was dissolved on July 9, 1971, by decree of the District Court for Dodge County, Nebraska. The record does not establish whether the anticipated adoption was ever completed in Milwaukee. There are several letters which were offered in evidence which would indicate that the adoption was not, in fact, completed, even though Mr. Williams had signed all the documents which were requested of him.

The record further reflects that, in September of 1967, a letter was sent by Mr. Wickert, the Milwaukee counsel who had obtained the consent from Mr. Williams, addressed to Guaranty Escrows of Portland, Oregon. Apparently, Guaranty Escrows had sought information about the proposed adoption of Stacy. The letter read, in part, as follows:

> We regret that we are unable to contact either Mr. or Mrs. Growcock in connection with the adoption of Stacy Ann Williams. We have proceeded to file the petition for adoption and the Adoption Division in Milwaukee County was eager to make its investigation so as to consummate the adoption, however, they also have been unable to contact either Mr. or Mrs. Growcock. *Under the circumstances, the adoption remains at a standstill and if the Adoption Division is unable to locate them, they may in all likelihood dismiss the adoption proceedings.*

(Emphasis supplied.) While the evidence does not make it clear whether Mr. Williams ever received a copy of the letter addressed to Guaranty Escrows, it does seem, from the record, that he may have been made aware of the fact that the adoption had not been completed by reason of that letter. What is clear from the record is that Mr. Williams never received any official indication that the adoption *had* been completed, nor was he ever made aware that the situation had changed from that reflected in Mr. Wickert's letter to Guaranty Escrow.

On June 1, 1978, soon after our decision in the case of *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978), Mr. Williams filed a petition in the District Court for Dodge County, Nebraska, to terminate his child support payment obligations as of June 27, 1967. In response to that petition, Mrs. Growcock cross-applied for a modification of the divorce decree to increase the amount of child support. Both parties moved for summary judgment and the court, on April 6, 1979, after hearing, entered an order granting Mr. Williams' motion for summary judgment and overruling that of Mrs. Growcock. In his motion for summary judgment, Mr. Williams relied upon our holding in the *Smith* case. It is from the order granting that motion which Mrs. Growcock now appeals.

In reviewing this matter, we must keep in mind that the District Court's determination was made upon the parties' respective motions for summary judgment. Under Neb. Rev. Stat. §§ 25-1330 to 1336 (Reissue 1979), the granting of a summary judgment is authorized only where the moving party is entitled to judgment as a matter of law and no genuine issues of fact exist. *Hall v. Hadley*, 173 Neb. 675, 114 N.W.2d 590 (1962). The question presented on a motion for summary judgment is not whether the evidence is sufficient to support a finding by a fact finder in favor of the moving party, but rather whether there exists no genuine issue as to any material fact so that, under those facts, the moving party is entitled to a judgment as a matter of law. "Where reasonable minds may differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted." *Blue v. Champion International Corp.*, 204 Neb. 781, 785, 285 N.W.2d 511, 513 (1979). Therefore, in order to affirm the action of the trial court sustaining Mr. Williams' motion for summary judgment, we must find that there is no genuine issue as to any material fact and that Mr. Williams is entitled to judgment as a matter of law.

Mr. Williams bases his claim upon our holding in *Smith v. Smith, supra*, and argues that, in *Smith*, we found that the securing of the consent of the father to an adoption by another of his child is such action which, by its nature, should terminate further liability for child support under the doctrine of equitable estoppel.

It is true that a quick reading of *Smith* could lead one to the conclusion that we have declared that, if a father executes a consent to the adoption of his child, he is thereafter relieved of any further obligation to pay child support. We believe, however, that such a conclusion ignores both the legal basis for our decision in *Smith* and the specific facts of that case.

To begin with, we based our decision in *Smith* not on the fact that the signing of the consent by the father relieved him of any further liability for child support, but rather, that the signing of the consent under the circumstances in *Smith* precluded the mother from collecting the child support because of the doctrine of equitable estoppel. We specifically pointed out in *Smith* that courts are without authority to forgive accrued child support and that such payments continue to accrue in accordance with the court's previous order until paid in full or otherwise modified by the court. See *Ruehle v. Ruehle*, 169 Neb. 23, 97 N.W.2d 868 (1959).

In *Smith*, however, unlike the instant case, the trial court that had granted the divorce approved the proposed adoption and the former wife and her new husband actually took the child into their home, supported her, cared for her, raised her, and treated her just as if the adoption had been completed. Under such facts, we found it would be inequitable to permit the mother to subsequently seek to enforce the payment of the accrued, but unpaid, child support and, therefore, applied the doctrine of equitable estoppel.

We continue to believe that the doctrine of equitable estoppel may apply in such cases if the facts support it. The question here, however, is whether there is a genuine issue of any material fact necessary to establish Mr. Williams' right to invoke that doctrine. There is more required to invoke the doctrine of equitable estoppel than just the father's signing of a consent to adoption form.

The authorities who have attempted to explain the doctrine of equitable estoppel have pointed out that it is a doctrine based upon the principle that one who has previously taken a position with reference to a transaction and thereby obtained a benefit from the other party cannot thereafter take an inconsistent position which would result in prejudice to the party

who relied on the original position. See *Smith v. Smith, supra*. The gist of equitable estoppel is that a party who has, by his statements or conduct, asserted a claim based on the assumption of the truth of certain facts whereby he has obtained a benefit from another party, cannot later assert that those facts are not true if, by reason of that assertion, the other party will be prejudiced. Equitable estoppel is, to that extent, like fraud and cannot be confined within any strict definition. See H. McClintock, Equity, § 31 (2d ed. 1948).

In *Chappelear v. Grange & Farmers Ins. Co.*, 190 Neb. 589, 592, 210 N.W.2d 921, 924 (1973), we set out the necessary elements of equitable estoppel:

> As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

See, also, *County of Scotts Bluff v. Hughes*, 202 Neb. 551, 276 N.W.2d 206 (1979); 28 Am. Jur. 2d *Estoppel and Waiver* § 35 (1966).

Further in *Chappelear v. Grange & Farmers Ins. Co., supra* at 592, 210 N.W.2d at 924, we said: "The

essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice." In *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 80, 54 N.W.2d 392, 401 (1952), we quoted from the case of *W. E. Richmond & Co. v. Security Nat. Bank*, 16 Tenn. App. 414, 64 S.W.2d 863 (1933), wherein it was said:

> An essential element is the entire good faith and innocence of the party imposed on. An estoppel by representation cannot be claimed by one acting thereon, if he knows of, or has been put upon inquiry as to its falsity; and where one with a convenient opportunity to ascertain the real facts by the exercise of reasonable diligence neglects to do so after having been put upon inquiry, he will not be permitted to defeat another's just rights by urging an equitable estoppel based on his having acted to his disadvantage in relying upon that other's innocently mistaken representation regarding those facts, where such representation was not made for the purpose of inducing him so to act.

We believe that there is a genuine issue of fact with regard to whether the requisite elements necessary to invoke the doctrine of equitable estoppel exist in this matter and, in particular, whether Mr. Williams was put on notice that the adoption had not been completed and that he remained liable for child support. On the basis of the record before us, reasonable minds could differ as to the conclusions to be reached on these issues and, therefore, summary judgment should not have been granted.

While we believe, as we have already indicated, that equitable estoppel may be applicable in child support cases, we do not believe that the mere execution of a document consenting to the adoption of a child, standing alone, is sufficient to justify im-

posing the doctrine of equitable estoppel and denying to a parent with custody of a child the benefits of a previously entered order of a court. To the extent that our holding in *Smith v. Smith, supra*, is to the contrary, it is modified. For that reason we believe that the matter must be remanded to the District Court for further proceedings consistent with this opinion. At that time, the parties may introduce evidence in order to permit the trial court to determine whether Mrs. Growcock should be equitably estopped from collecting the delinquent child support which the court had ordered, or whether, under the circumstances, Mr. Williams should be required to continue paying child support for Stacy at this time. For that reason, we are compelled to reverse and remand with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLEE, V. LARRY WOZNY AND CLARK M. WASHBURN AND JUANITA WASHBURN, APPELLANTS.

294 N. W. 2d 363

Filed July 8, 1980. No. 42870.

1. **Insurance Contracts: Contracts.** 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 the plain, ordinary, and popular sense.
2. **Insurance Contracts: Insurance Premiums.** The acceptance in the past by an insurer of overdue premiums from an insured will not constitute a course of dealing upon which the insured may rely in failing to pay a premium when due, unless the previous acceptance of overdue premiums had become a custom, a habit, or a practice.

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

H. Jerome Kinney, for appellants Washburn.

Thomas A. Otepka, for appellee.

No appearance for Wozny.

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

BRODKEY, J.

The defendants Clark M. and Juanita Washburn have appealed to this court from a judgment entered by the District Court for Douglas County, Nebraska, in an action brought by the plaintiff, Farm Bureau Insurance Company of Nebraska, to obtain a declaratory judgment against the defendants, Larry Wozny, Clark M. Washburn, and Juanita Washburn, requesting that the court declare that a policy of insurance issued by the plaintiff to Clark M. Washburn did not provide coverage to the Washburns at the time Juanita was involved in an accident which resulted in an action brought by defendant Larry Wozny to recover for damages sustained in the accident. We affirm.

On October 4, 1969, Farm Bureau issued to Clark an insurance policy captioned "Five Star 5 Year Guaranteed Renewable Self Rating Non-Assessable Family Automobile Policy." The policy contained the following provision with regard to payment of premiums:

> This policy shall remain in full force and effect for each renewal payment that the insured shall pay such cash premium as may be required by the company to renew the same, in advance of the expiration date of the policy, or within ten days after such expiration date. Should the insured fail to pay such cash premium as is required to renew the policy within the time so limited, the insurance shall no longer be in force and all cash premiums paid by the insured shall be considered as fully earned and the policy terminated. Failure of the insured to make

> any required payment to the company, on or before the due date, shall automatically void this policy without notice of cancelation or notice of any other kind. If the insured after failing to pay such cash premium in advance, or within 10 days after the due date thereof, as is required by the company to renew the policy, subsequently pays the same, such payment *if then accepted by the company* shall reinstate the policy and insurance for the balance of the term of the renewal premium that payment is accepted, at the end of which period such premium shall be considered as fully earned, but the reinstatement of such policy and insurance and the acceptance of such payment shall not render the company liable for any loss or damage occurring after the expiration date of renewal term of the policy at the end of which such payment was due and prior to *the acceptance of such payment by the company*. If such payment is not made within thirty days after the expiration of the renewal term at the end of which such payment was due, *but is accepted by the company*, a new policy of insurance will be issued to the insured which will expire in accordance with the cash premium paid six months or 12 months from its effective date as hereinabove provided.

(Emphasis supplied.)

Clark made premium payments on a semiannual basis to the office of the Farm Bureau agent in Wahoo, Nebraska, which payments were made either prior to the expiration date of the renewal term of the policy or within the 30-day period following such due date, until April 4, 1977. The premium due on April 4, 1977, was not paid by Clark until May 9, 1977, which was after the expiration of the 30-day

renewal term. Pursuant to the policy condition, Farm Bureau thereupon issued Clark a new policy of insurance with the effective date of May 9, 1977. Although Clark made the next semiannual premium payment, due on November 9, 1977, on November 16, 1977, he failed to make the next premium payment, due on May 9, 1978, until some time after the 30-day period had expired. The date of acceptance of this premium payment is the principal question presented for our review.

At trial, evidence was adduced with regard to Farm Bureau's procedures dealing with the renewal and reinstatement of policies. This procedure was that, approximately 20 days prior to the expiration date of any renewal term or of the original policy term, a premium-due notice is printed in Lincoln and sent to the insured. The only addresses contained thereon are the address of the insured and the address of the Lincoln office of Farm Bureau. Should the premium payment not be received by Farm Bureau by the date specified, a second statement of premium due, also known as a "lapse notice," is sent to the insured. The "lapse notice" informs the insured that he has a 10-day grace period in which to pay the renewal premium, which payment provides the insured retroactive coverage from the expiration date of the renewal period. On the same date that the "lapse notice" is mailed to the insured, a statement of premium due, referred to as a "backdoor lapse notice," is mailed to the local agent by the Farm Bureau Lincoln office. Such "backdoor lapse notice" is for the purpose of having the local agent remind the insured that he has not paid the premium due on the insurance policy and that the policy will lapse should the premium not be paid. This reminder is generally given within a few days of the termination date of the renewal period, but prior to the end of the 10-day grace period. Upon receipt of the premium payment by the Farm

Bureau Lincoln office, a document entitled "county receipt" is mailed to the local agent so that he has a record of the premium payment for his files.

The evidence establishes that, while the local agents do have authority to bind Farm Bureau on insurance polices, subject to certain limitations and requirements, they have no authority to reinstate policies which have lapsed due to nonpayment following the expiration of the 10-day grace period. Decisions with regard to whether insurance should be reinstated, or a new policy issued, are made by the underwriting department of Farm Bureau in its Lincoln office. Insurance policies are not automatically reinstated if payment of the premium is made after the 10-day grace period has expired, but prior to 30 days following the expiration date of the renewal term; in fact, it appears that applications for reinstatement have been rejected by Farm Bureau in the past.

On June 21, 1978, Clark discovered that the insurance premium had not been paid. He thereafter obtained a cashier's check for the premium due and, as was his custom, mailed that check to the office of the Farm Bureau agent in Wahoo on June 22, 1978. The cashier's check was received in Wahoo the following day, which was Friday, June 23, 1978, recorded in the local agent's log, and mailed to the home office in Lincoln. Farm Bureau did not receive mail on Saturdays and, therefore, the cashier's check was not received by the Lincoln office until Monday, June 26, 1978. The premium payment was transmitted to the underwriting department of Farm Bureau, which department accepted the risk as of June 26, 1978, and issued a new insurance policy with an effective date of June 26, 1978.

It appears that Juanita was involved in an automobile accident with defendant Wozny on Sunday, June 25, 1978. Wozny then sued Juanita, following which Farm Bureau instituted this declaratory judgment

action for a determination of whether coverage existed at the time of the accident. The trial court, after hearing the foregoing evidence, found: (1) That no policy of insurance was in force on the date of the accident; (2) That the terms of the insurance policy were clear and unambiguous; and (3) That payment of the premium by Clark more than 30 days after the expiration date of the renewal term, even though accepted by Farm Bureau's local agent, did not provide insurance until a new policy was issued, which did not occur until June 26, 1978. The trial court rendered judgment for Farm Bureau and taxed the costs of the action to Clark and Juanita. Clark and Juanita have appealed that judgment to this court, assigning several errors to the proceedings below, which we now consider.

It is first contended that the trial court committed error by not advising Clark and Juanita, before trial commenced, of statutory grounds for the disqualification of the trial judge. During the trial, the trial judge advised the parties that he was insured by Farm Bureau. Neb. Rev. Stat. § 24-315 (Reissue 1979) provides, in pertinent part: "A judge or justice is disqualified from acting as such in the county, district or Supreme Court, *except by mutual consent of the parties*, in any case wherein he or she is a party or interested . . . ." (Emphasis supplied.) While it is true that the trial judge could have been more prompt in giving notice of his interest in the matter to the parties, it is likewise true that neither party objected to his hearing the matter, after being advised of such interest. We, therefore, conclude that the parties mutually consented to the trial judge's hearing this matter, and reject the first assignment of error.

Clark and Juanita next contend that the trial court committed error in finding that no insurance policy was in existence on the date of the accident. Specifically, they contend that receipt of the premium

payment at the office of the agent in Wahoo was "acceptance" by Farm Bureau under the contract terms and such "acceptance" resulted in a reinstatement of the policy as of June 23, 1978. We do not agree.

> [C]ontracts 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. Cordes v. Prudential Ins. Co., 181 Neb. 794, 150 N.W.2d 905.

Sampson v. State Farm Mut. Ins. Co., 205 Neb. 164, 167, 286 N.W.2d 746, 749 (1980).

The language used in the insurance policy issued to the Washburns is clear and unambiguous. The insurance policy provides that if a premium payment is made more than 30 days after the expiration date for the renewal term, and *is accepted by the company*, a new insurance policy will be issued to the insured. It is true that an insurance agent who receives and receipts for money for the renewal of an insurance policy by authority of the insurer is deemed to be an agent of the insurer. See, Neb. Rev. Stat. § 44-328 (Reissue 1978); *Zukaitis v. Aetna Cas. & Sur. Co.*, 195 Neb. 59, 236 N.W.2d 819 (1975); *Squires v. Implement Dealers Mut. Ins. Co.*, 188 Neb. 590, 198 N.W.2d 469 (1972).

However, it does not necessarily follow that the mere receipt of a premium payment, without more, amounts to "acceptance." The record reveals that the underwriting department of Farm Bureau customarily determines whether the company will accept or reject premium payments made after either

the 10-day grace period has expired or after the policy has automatically lapsed. Had Farm Bureau chosen not to accept the tendered premium payment and had, instead, returned the cashier's check to Clark, it is clear that coverage would not have existed at the time of the accident, as no policy of insurance would have been in existence at the time. We see no difference between that situation and the one presented for this court's review. While the local agent in Wahoo received the premium payment on June 23, 1978, and forwarded it to Farm Bureau that day, it is clear that the premium was not "accepted" by the company as payment until June 26, 1978. Of interest in this connection is the case of *Farm Bureau Mutual Cas. Co. v. Stein*, 284 Minn. 407, 170 N.W.2d 334 (1969), which involved a situation where, after the expiration of the previous policy and prior to reinstatement, the premium was sent in but not received by the insurer until approximately 6½ hours after the accident. The court held that there was no policy in effect at the time of the accident, stating:

> Finally, it is possible (perhaps probable) that the letter in which the premium check was enclosed was delivered to the insurer before the accident happened. In this sense, it was "received" before May 31. But to effect reinstatement, the policy requires that the premium be both "received" and "accepted." No coverage is afforded for events occurring "prior to the acceptance of such payment by the Company." We cannot see how a premium can be accepted by an insurer until it has exercised some dominion or control over it. According to the evidence, this did not happen until about 8 a.m. on May 31, 1960.

Id. at 410, 170 N.W.2d at 337. We conclude that the trial court was correct in finding that no contract of

insurance was in existence as of the date of the accident, June 25, 1978.

It is further contended that, in any event, Farm Bureau was equitably estopped from asserting a policy defense because its actions amounted to a waiver of the pertinent policy provisions. We do not agree. The Washburns contend that they had been paying the premiums on their insurance for approximately 8 years directly to the local agent's office in Wahoo, Nebraska, and that they have been making the premium payments on the policy covering the automobile in question in this case to such office for a period of approximately 2 years. The record reveals that, since the commencement of the relationship of the Washburns and Farm Bureau, the Washburns had paid premiums on their various insurance policies after the due date on said policies on several different occasions, all of which payments, with the exception of three, were made within the 10-day grace period. Of the three exceptions noted above, one is the subject of this appeal; in another, the payment was made after the 10-day grace period but before the 30-day period; and, in one case only, was payment made after the expiration of the 30-day period when the policy had lapsed. In all cases except the one referred to, the company followed its policy provisions and obligations. By these actions, the Washburns contend that a course of dealing or custom arose which estops Farm Bureau from asserting the policy defense of nonpayment of premiums. The general rule is stated in 43 Am. Jur. 2d *Insurance* § 1140 (1969) as follows:

> To warrant a recovery on the basis of a course of dealing or custom, where a premium is not paid when due, it is necessary to prove that the course of dealing between the insured and the insurer in reference to the acceptance of overdue payments amounted to a custom or habit; that by rea-

> son of this course of dealing, the insured was justified in believing that the insurer would not insist on a forfeiture for failing to pay subsequent premiums; that the insured believed he could postpone the payment of premiums without risking a forfeiture; and that he acted on this belief, and therefore did not pay the premium at its maturity.
>
> Unrelated acts or forgiveness of the occasional delinquencies of a policyholder do not ordinarily constitute a course of dealing.

See, also, 6 Couch on Insurance 2d, § 32:369 (1961); *McFarland v. Mutual Auto. Ins. Co.*, 201 Md. 241, 93 A.2d 551 (1953); *State Farm Mutual Automobile Ins. Co. v. Robison*, 11 Ariz. App. 41, 461 P.2d 520 (1969); *Safeco Insurance Company of America v. Oehmig*, 305 So. 2d 52 (Fla. App. 1975).

This issue was considered in *Aetna Life Ins. Co. v. Kepler*, 116 F.2d 1 (8th Cir. 1941). In that case, an insurer's acceptance of three overdue annual premiums on a disability insurance policy in the course of 12 years was held not to constitute a course of dealing, custom, habit, or practice which would "estop" the insurer from claiming default in payment of a subsequent premium. In so holding, the court stated:

> The applicable substantive law is that of Nebraska. It is a rule of law of that State that if an insurer has, by a course of dealing, induced an insured reasonably to believe that prompt payment of premium in accordance with the terms of a policy will not be required, and the insured acts upon that belief, the insurer will be estopped to claim a lapse of the policy for a failure of the insured strictly to comply with the provisions of the policy relative to prompt payment of premiums. But occasional indulgences

> shown by an insurer to a policyholder with respect to prompt payment of premium do not, under the law of Nebraska, create an estoppel and do not have the effect of varying the terms of the policy with respect to the time when future premiums must be paid. How many indulgences shown by an insurer to an insured with respect to the payment of premiums after they are due will constitute a course of dealing upon which an insured may reasonably rely or will justify a finding of the existence of such a course of dealing, is uncertain, but we think that language used by the Supreme Court of Nebraska in the case of Van Dahl v. Sovereign Camp, W.O.W., 130 Neb. 181, 264 N.W. 454, 458, 459, decided in 1936, indicates that the acceptance by an insurer of three overdue annual premiums in the course of twelve years, under the circumstances disclosed by the evidence in the instant case, would not constitute a course of dealing, a custom, a habit, or a practice which would estop an insurer from claiming a default in the payment of premium.
>
> The acceptance in the past by an insurer of overdue premiums from an insured will not constitute a course of dealing upon which the insured may rely in failing to pay a premium when due, unless the previous acceptance of overdue premiums had become a custom, a habit or a practice. Unrelated acts of forgiveness of the occasional delinquencies of a policyholder do not ordinarily constitute a course of dealing. 29 Am. Jur., § 860, pages 657-659, and cases cited. Compare, Van Dahl v. Sovereign Camp, W.O.W., supra.

Id. at 5-6.

It should be further noted in this case that the policy in question contains a specific provision with reference to waiver and estoppel. That provision reads as follows:

> Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized representative of the company.

Under the above provision it is clear that there can be no waiver or estoppel of the company to claim the right of prompt payment of premium, or to issue a new policy in the event of the later acceptance of past due premiums. It is clear that there was no endorsement made to the policy in question which would permit that course of action.

The sole evidence upon which a claim of waiver may possibly be based was Clark's testimony that he dealt solely with the local agent's office in Wahoo. However, with the one exception, the evidence is undisputed that Farm Bureau always followed the policy provisions. According to the record, the local agent had no authority to reinstate policies after lapse for nonpayment of premiums. Any premium payments which were received by the local agent's office in Wahoo were transmitted to the home office in Lincoln. Upon receipt by the home office, the underwriting department of the company made all decisions with regard to the acceptance or rejection of the premium payment and the reinstatement of policies which had lapsed. In fact, the record reveals that 1 year prior to the expiration and lapse of the policy in question, *a new policy* was issued to the Washburns for the same reason, to wit, nonpayment

of premiums within the periods allowed by the policy. We, therefore, conclude that no waiver of the policy provisions occurred and no policy of insurance was in effect on the date the accident occurred, Sunday, June 25, 1978.

We affirm the judgment of the District Court.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

FARMERS MUTUAL HOME INSURANCE CO., HOOPER, NEBRASKA, A CORPORATION, APPELLANT, V. ROBERTS & DYBDAHL, INC., A FOREIGN CORPORATION, APPELLEE.

294 N. W. 2d 369

Filed July 8, 1980. No. 42877.

1. **Contracts: Negligence.** When the parties to a dispute have defined by contract the nature and extent of a particular duty, what constitutes an unreasonable or negligent performance of that duty cannot be ascertained without reference to the contractual definition.
2. **Appeal and Error: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong.
3. _____: _____. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inference reasonably deducible from it.

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

Hurt & Gallant, for appellant.

Michael F. Kinney of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

WHITE, J.

The plaintiff brought an action in the District

Court for Douglas County, Nebraska, against the defendant, Roberts & Dybdahl, for damages suffered by plaintiff's assignor to a building as the result of a windstorm. The building was manufactured by the defendant and erected under its direction and control. After trial to the court, a jury being waived, the district judge found for the defendant. The plaintiff, Farmers Mutual Home Insurance Co., appeals. We affirm.

Wylene Hasemann purchased a building, described as a pole shed, from the defendant. The building was erected by the Farmers Coop of Scribner, Nebraska, the defendant's dealer, who is not a party to this action. The building sold by the defendant was 36 feet wide, 75 feet long, and 12 feet high. It was open on one side and sheltered on three sides. The primary function of the shed was to protect cattle from the weather. Part of a sales brochure for the building supplied by the defendant contained the following statement: "To prevent resettling, they [the poles] are set on 12" x 5" concrete footing pads, 4' in the ground, and then firmly tamped." On April 16, 1976, the building blew over in what the evidence described as near tornado strength winds. The building was attached to the ground by 6-inch by 6-inch timbers. The timbers on the back, or north, side of the building were 7 feet 6 inches on center, and in the front, or open, end, the timbers were located approximately 15 feet on center for the length of the structure. After the destruction of the property, it was determined, and not disputed in the evidence, that the poles were not placed 4 feet in the ground as required by the sales brochure but varied from a depth of 21 inches to 32 inches for the deepest pole.

In its petition, the plaintiff, after alleging that it was the insurer of Wylene Hasemann, that it had paid Hasemann for the loss and secured an assignment from him of the cause of action against the

defendant, pled causes of action on two theories. The first cause alleged that the statements in the sales brochure were an express warranty and that the failure to construct according to the warranty specifications was the proximate cause of the injury to the building. In the second cause of action, the plaintiff alleged that the defendant was negligent in the construction of the building, that the negligent construction consisted, as previously indicated, of not placing the treated timbers 4 feet in the ground as required by the sales brochure, and that this failure was the proximate cause of the damage. Two additional causes of action, one on warranty and one in negligence, alleged damage to another building on which the pole shed fell. A demurrer to the causes of action in negligence was sustained by the trial court. The plaintiff assigns as error: (1) That the court erred in sustaining the defendant's demurrer to the negligence causes of action; and (2) That the judgment is not supported by the evidence and is contrary to the law and facts.

Essentially, the plaintiff's causes of action against the defendant and its evidence were limited to the breach of the express conditions in the sales brochure, i.e., that the poles were to be placed 4 feet in the ground on a concrete pad with the soil firmly tamped. The negligent acts relied on are identical to those alleged as grounds for breach of the contract. We held in *Fuchs v. Parsons Constr. Co.*, 172 Neb. 719, 111 N.W.2d 727 (1961), that, where one contracts to perform a given undertaking in accordance with prescribed plans and specifications, he is not permitted to vary from the prescribed plans and specifications. If he performs the work in accordance with the prescribed plans and specifications, he cannot be held as a guarantor that it will be free from defects or withstand the action of the elements or accomplish the purpose intended. In such a situation, the engagement of the contractor is fulfilled

by compliance and he remains liable only for defects resulting from improper workmanship or other faults on his part.

In *Lincoln Carpet Mills, Inc. v. Singer Co.*, 549 F.2d 80 (8th Cir. 1977), the court said:

> [U]nder the *Fuchs'* test, the proper form of redress is in contract. The sense of the *Fuchs'* test is that when the parties to a dispute have defined by contract the nature and extent of a particular duty, what constitutes an unreasonable or negligent performance of that duty cannot be ascertained without reference to the contractual definition. To claim that Singer owed an independent duty in tort to perform by the date completion would have occurred but for the fire is to totally ignore the parties' contractual aims and bargained for duties.

The defendant's duty was defined by the contract. It is the breach of the contract to erect in accordance with the plans and specifications on which the plaintiff must rely if he wishes to obtain relief. The trial court properly sustained the demurrer to the plaintiff's second and fourth causes of action.

In its judgment, the trial court found that the statement in the brochure constituted an express warranty, that the plaintiff's assignor relied on the warranty, and that the defendant breached the warranty. However, the trial court further found that the plaintiff failed to prove that the breach of the warranty proximately caused the damages claimed by the plaintiff. The evidence on the point was conflicting. Two civil engineers, each with extensive experience in building design, testified, one on behalf of the plaintiff and one on behalf of the defendant. The testimony of the plaintiff's witness was to the effect that, if the building had been constructed according to specifications, the structure would have resisted the winds of 60, 70, 80, and 90 miles an hour.

The civil engineer as a witness for the defendant testified that a wind of 60 miles an hour would have exerted far more force than the building was designed to withstand and that the building could have fallen in any event. Even if constructed as designed, the building would have fallen at the higher wind speeds also. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 204 Neb. 248, 281 N.W.2d 778 (1979). In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inference reasonably deducible from it. *Burgess v. Curly Olney's, Inc.*, 198 Neb. 153, 251 N.W.2d 888 (1977). Resolving the controverted evidence most favorably to the successful party, the trial court's judgment is sustained by sufficient evidence and the plaintiff's second assignment of error is also without merit. Therefore, the trial court's action is affirmed.

AFFIRMED.

ROBERT G. ANDERSON, APPELLANT, V. WANDA B. ANDERSON, APPELLEE.

294 N. W. 2d 372

Filed July 8, 1980. No. 42928.

1. **Alimony: Divorce.** Orders for the payment of alimony may, in some instances, be modified for good cause shown.
2. _____: _____. In order to warrant the modification of a decree of dissolution providing for the payment of alimony, there must be evidence of changed circumstances supporting such action.

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

Les Seiler, for appellant.

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

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

HASTINGS, J.

This is an appeal from the order of the District Court for Adams County, Nebraska, denying petitioner's application to terminate an alimony award previously entered in favor of the respondent wife in the original dissolution action. We affirm.

A decree was entered on March 5, 1976, dissolving the parties' marriage of nearly 34 years' duration. As part of that decree, the petitioner was ordered to make monthly alimony payments of $200 to the respondent for a period of 10 years. At the time of the decree, the parties had incurred substantial indebtedness which the petitioner was ordered to pay. The property of the parties was divided between them.

Petitioner's application to modify the decree by ordering the balance of alimony payments terminated was filed on July 12, 1978, alleged that he was forced to seek different employment at approximately one-half of his former pay, and that the debts which he was ordered to assume were of such magnitude that it was impossible for him to continue making the alimony payments.

Hearing on the application was held on June 8, 1979. The evidence revealed that, at the time of the dissolution, petitioner was the sheriff of Adams County and received total gross income of $2,600 per month. This figure included a salary of approximately $850 per month, a Veterans' Administration disability pension of $121 per month, and the balance in the form of mileage expenses and food expenses for the feeding of jail prisoners. Additionally, living quarters were furnished to the petitioner and respondent at no cost. At the same time, respondent was employed, earning a gross salary of $525 per month

with take-home pay of approximately $400. It is not clear whether this was included in the $2,600 figure, but it is assumed that it was not. In regard to the mileage and food allowances, it is not clear how much, if any, of this amount resulted in additional actual income.

The petitioner, in response to questions, stated that the costs which he incurred for mileage and food did not exceed the amounts which he was paid for those items, and that he actually made money from the allowances. However, no figures were ever quoted.

Presently, the petitioner is employed as a deputy sheriff in the state of Wyoming, and is paid a monthly gross salary of $1,150, which results in net income of $908.31. He is also furnished an automobile to be used in discharging his duties. He still receives the pension of $121 per month. His present wife is employed, earning approximately $600 per month. Since the filing of the application, petitioner has "taken bankruptcy," although the debt secured by his automobile was not discharged. The respondent is currently employed in Omaha, earning approximately $600 per month, with a net income of $477. Her expenses have gone up approximately $100 per month since the original decree.

The trial court denied the application for modification, but suspended the installments which petitioner had not paid for the months of August 1978 through June 1979, pending hearing on his application, but extended the payments into the future so that a total of 120 months is required to be paid.

Neb. Rev. Stat. § 42-365 (Reissue 1978) provides that "orders for alimony may be modified or revoked for good cause shown." In order to warrant the modification of a decree of dissolution providing for the payment of alimony, there must be evidence of changed circumstances supporting such action. *Benedict v. Benedict, ante* p. 284, 292 N.W.2d 565 (1980).

In this case, the only real evidence of any change in circumstances is the fact that petitioner now has a total income, including gross salary and pension, of approximately $1,271 per month, as opposed to $971 at the time of the original decree. This, of course, eliminates any consideration of his former allowances as there was no evidence to support any conclusion as to what that totaled in real income. Additionally, petitioner has, through the process of bankruptcy, been relieved of the responsibility for a large number of obligations previously existing. The respondent's change in income and expenses has approximately kept pace with each other.

Considering the entire record, we agree with the trial court that there was no change in circumstances shown to support a conclusion that there was "good cause" to terminate the payment of alimony. Its judgment is affirmed and the petitioner is ordered to pay the respondent $500 to apply on her attorney's fees.

AFFIRMED.

MELVIN T. HUTSON AND LOU HUTSON V. THE RUSH CREEK LAND AND LIVESTOCK COMPANY, A CORPORATION, ET AL., APPELLEES, AND JOHN H. CHAIN, APPELLANT.

294 N. W. 2d 374

Filed July 8, 1980. No. 42956.

1. **Adverse Possession: Burden of Proof.** The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period.
2. **Adverse Possession.** In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations.
3. ——. Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years.

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

Wright & Simmons and Roy Hahn of Atkins, Ferguson, Hahn, Zimmerman & Carney, for appellant.

C. Kenneth Spady and J. A. Lane of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellee.

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

BOSLAUGH, J.

This was an action to quiet title to a tract of land along the north bank of the North Platte River in Morrill County, Nebraska. The plaintiffs, Melvin T. Hutson and Lou Hutson, are the owners of the land in Sections 7 and 8, Township 18 North, Range 47 West of the 6th P.M. which lies along the south bank of the North Platte River. The defendant Rush Creek Land and Livestock Company is the record owner of the land in Sections 5 and 6 which is along the north bank of the river and directly opposite the plaintiffs' land. The appellant John H. Chain is a contract purchaser of the plaintiffs' land.

Some time in the 1930's, Rush Creek erected a fence along the north bank of the river for the purpose of keeping cattle on its land from straying into the river. The fence did not run in a straight line but was built through timber and brush generally along the north bank of the river. After the fence was constructed, Rush Creek did not use the land south of the fence for pasturage but continued to use the land for hunting purposes and executed written hunting leases annually to hunters who used the land for hunting and occasionally for fishing and trapping.

The plaintiff Melvin Hutson and his predecessor in title and their tenants used the land south of the fence for pasturage during the summer season. The area was inclosed by a fence on the plaintiffs' land

south of the river and fences across the river that connected with the Rush Creek fence on the north side of the river. Cattle grazing on the plaintiffs' land were allowed to enter the river and graze on the islands and the land on the north bank south of the fence. The plaintiffs also claimed to have made some use of the disputed land for hunting. This use was the basis for the plaintiffs' claim that they had acquired title to the land south of the fence from Rush Creek by adverse possession.

The plaintiffs prayed that title to the land south of the fence be quieted in them. By cross-petition, Rush Creek prayed that the land north of the thread of the river be quieted in it.

The trial court found that the plaintiffs' possession of the disputed land had not been exclusive and quieted title to the land north of the thread of the river in Rush Creek. Chain has appealed.

The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period. *Rasmussen Farms v. Gove*, 201 Neb. 432, 267 N.W.2d 764 (1978).

In order to create title by adverse possession, the possession must be exclusive for the statutory period. In *Ohm v. Clear Creek Drainage District*, 153 Neb. 428, 45 N.W.2d 117 (1950), we said:

> It is virtually undenied by any authority, and is asserted by a great majority of cases, that an essential element of adverse possession is that it shall be exclusive. In Hanlon v. Union P. Ry. Co., 40 Neb. 52, 58 N.W. 590, this is affirmed: "In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations." In Smith v. Hitchcock, 38 Neb. 104, 56 N.W. 791, this

> court said: "To constitute an adverse possession of land, such as, if it continued for ten years, would establish title in the occupant, it is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor." See, also, Hoffine v. Ewings, 60 Neb. 729, 84 N. W. 93; Knight v. Denman, 64 Neb. 814, 90 N. W. 863; Annotation, 15 L. R. A. N. S. 1196; 2 C. J. S., Adverse Possession, § 47, p. 566; 1 Am. Jur., Adverse Possession, § 141, p. 875.

Id. at 436-37, 45 N.W.2d at 122.

Oliver v. Thomas, 173 Neb. 36, 112 N.W.2d 525 (1961), involved a similar factual situation. Oliver owned land along the south bank of the North Platte River in Morrill County, Nebraska. Thomas owned land along the north bank of the river and a fence had been constructed along the north bank. Oliver had pastured his cattle on the land south of the fence and claimed the land by adverse possession. Both parties had used the disputed land for hunting. Since Oliver had not had exclusive possession of the land for hunting purposes, his possession was not sufficient to obtain title to the disputed land by adverse possession. We said:

> In Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57, it was said: "The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted."
>
> An inescapable corollary to this rule is that title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a

> purpose to which the land is adapted for the statutory period of 10 years.
>
> In the light of these rules, while on the record it may well be said that the plaintiff did establish actual, open, exclusive, and continuous possession for use over the area as pasturage for much more than 10 years, he did not however establish exclusive possession against the other purpose for which it was adapted, that is hunting.

Id. at 42-43, 112 N.W.2d at 529.

We think the rule stated in *Oliver v. Thomas, supra*, is controlling here. The evidence shows that the plaintiffs did not have exclusive possession of the disputed land for hunting, a purpose to which it was adapted. Their claim of adverse possession, therefore, was not established.

The judgment of the District Court is affirmed.

AFFIRMED.

JERRY BRANNEN, DOING BUSINESS AS ALMA JACK & JILL, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

294 N. W. 2d 376

Filed July 8, 1980. No. 42957.

1. **Alcoholic Liquors: Licenses and Permits.** The recommendation of the local governing body to the Nebraska Liquor Control Commission that an application for a liquor license be denied affords a sufficient evidentiary basis for an order of the commission denying the license.
2. **Alcoholic Liquors: Licenses and Permits: Burden of Proof.** Where the Nebraska Liquor Control Commission intends to rely upon a recommendation of denial by the local governing body to support its refusal to grant a liquor license, the burden is upon the commission to furnish evidence of that action.
3. ——: ——: ——. Evidence furnished by the Nebraska Liquor Control Commission of the action of a local governing body which lacks sufficient clarity to enable one to determine what action the local governing body has taken in regard to a recommen-

dation as to an application for a liquor license, is ineffective to prove a recommendation of denial of the application.

4. **Alcoholic Liquors: Licenses and Permits.** The absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license.

Appeal from the District Court for Harlan County: BERNARD SPRAGUE, Judge. Affirmed as modified.

Edward F. Carter, Jr. of Barney & Carter, P.C., 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.

The Nebraska Liquor Control Commission denied plaintiff's application for an off-sale beer license for the reason that "the local governing body was opposed to the issuance of this license." On appeal by the plaintiff to the District Court for Harlan County, Nebraska, that court reversed the decision and remanded the matter back to the Commission for further proceedings "to determine by competent evidence the specific nature of the action taken by the Alma City Council." The plaintiff has appealed that decision.

Plaintiff's application for the license involved was in all respects regular. At the hearing before the Commission, he was the only witness to testify and from that testimony it could be concluded that he was a fit and proper applicant to hold such a license. The proceedings before the Alma, Nebraska, city council were received into evidence as one exhibit. Included within the exhibit was a copy of the published legal notice advising of the plaintiff's application and a hearing date, and several letters which simply objected to the issuance of additional licenses. Also received as a part of that exhibit was

a letter from the city clerk addressed to the Commission, reciting in narrative form the testimony given by several citizens repeating the same general objection contained in the letters. Finally, the letter reported the action of the city council to be that "a majority of the members voted against the approval of the Off-Sale beer application." The record as made before the Commission was the only evidence introduced on appeal to the District Court.

We stated in *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 738-39, 261 N.W.2d 614, 619 (1978), "that the recommendation of the city council to the commission that a license be denied affords a sufficient evidentiary basis for an order of the commission denying the license." We have also stated that a resolution of a city council recommending approval of a license which is defeated because of failure to receive a majority vote is ineffective to constitute any official action and amounts to no recommendation at all upon which the Commission may deny a license. *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 277 N.W.2d 693 (1979).

Finally, in *Hadlock v. Nebraska Liquor Control Commission*, 193 Neb. 721, 228 N.W.2d 887 (1975), we held that the Commission "must base its findings and orders on a factual foundation in the record . . . and the record must show some valid basis on which . . . [an] order may be premised." *Id.* at 727, 228 N.W.2d at 891. We acknowledge that the Commission had found in that case that the local governing body had recommended denial of the application. We further agreed that the Commission had based its own decision on that fact which, if true, would have constituted valid grounds for its action. However, we found that the purported recommendation of denial by the city council, because of a requirement of the local ordinances, was "wholly ineffective to constitute official action by the city." *Id.* at

728, 228 N.W.2d at 892. We, therefore, concluded that there was no evidence to support the conclusion reached by the Commission nor was there "any other evidence in the record which could have constituted valid grounds for denial." *Id.* at 728, 228 N.W.2d at 892.

On the basis of *Hadlock*, we have no hesitancy in saying that, where the Commission intends to rely upon a recommendation of denial by the local governing body to support its refusal to grant a liquor license, the burden is upon the Commission to furnish evidence of such action in the record. If it fails to adduce any evidence of that action, or if the evidence lacks sufficient clarity to enable one to determine what that action was, the Commission has failed to satisfy the burden of proof in that regard and it is not entitled to another opportunity to satisfy that deficiency.

We agree with the trial judge that the evidence makes it unclear whether the Alma city council failed to pass a resolution to approve the license application or passed a resolution recommending denial of the same, and, therefore, the Commission failed to satisfy its burden of proof to support a recommendation of denial. The only other evidence unfavorable to the granting of the license was statements of citizens questioning the need for an additional license in the community. That is not a sufficient reason to deny an otherwise proper application for a license. *Joe and Al's IGA, Inc., supra.*

The District Court was correct in reversing the decision of the Commission which had denied plaintiff's application for an off-sale beer license. However, the District Court should not have remanded the cause to the Nebraska Liquor Control Commission for further proceedings, but rather with directions that the Commission cause an off-sale beer license to be issued to the plaintiff in the manner provided by law. We order the cause re-

manded to the District Court accordingly.

The judgment of the District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

CLINTON, J., dissents.

STATE OF NEBRASKA, APPELLEE, V. STEVEN A. AUGER, APPELLANT.

294 N.W. 2d 379

Filed July 8, 1980. No. 42998.

1. **Post Conviction Act.** 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.
2. **Criminal Appeals: Assistance of Counsel.** The decision to object or not to object is part of trial strategy and, accordingly, we grant due deference to the discretion of defense counsel to formulate trial tactics. Effectiveness of counsel is not to be judged by hindsight.

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

Steven Van Ackeren, for appellant.

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

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

BRODKEY, J.

The defendant, Steven A. Auger, has appealed to this court from a denial of his motion for post conviction relief. The District Court for Douglas County, Nebraska, found that the issue raised in the defendant's motion had been raised on direct appeal and denied the motion without an evidentiary hearing. We affirm.

Auger was convicted, following trial to a jury, of the crimes of robbery, assault with intent to inflict

great bodily harm, and auto theft. He was thereafter sentenced to 5 to 10 years on the robbery count, 5 to 10 years on the assault count, to be served consecutively with the previous sentence, and 1 year on the auto theft count, to be served concurrently with the previously mentioned sentences. Auger appealed the convictions to this court following sentencing, raising as error that he had been denied effective assistance of counsel due to counsel's failure to object to certain testimony with regard to the use of mug shots. We affirmed the convictions and sentences. See *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978).

Thereafter, Auger filed his motion for post conviction relief, in which he contended that he was denied effective assistance of counsel because of his counsel's failure to object to the introduction of certain items of physical evidence because of failure to establish a chain of custody. The District Court, "after having read the bill of exceptions and transcript of proceedings of the defendant's original trial," denied Auger's motion without an evidentiary hearing. In so ruling, the District Court stated:

> Although the specific issues now raised with regard to incompetency of counsel are different than those raised in the direct appeal, the defendant cannot on a subsequent appeal change factual matters when the entire issue as now raised for the basis of defendant's charge of incompetency were known at the time the defendant filed his direct appeal.

Auger has appealed to this court, assigning a single error to the proceedings below. He contends that the failure of the State to furnish him an attorney for the direct appeal wherein the issue of effective assistance of counsel was determined amounted to a denial of his right to counsel as granted by the sixth amendment to the United States Constitution.

We are admittedly at a loss to understand how this issue arose. Nevertheless, for the reasons set forth below, we affirm the decision of the District Court.

In his motion for post conviction relief, Auger contended that he was denied effective assistance of counsel because his counsel failed to object to the introduction of certain evidence on "chain of custody" grounds. "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. Lincoln*, 186 Neb. 783, 784, 186 N.W.2d 490, 490-91 (1971). See, also, *State v. Oziah*, 198 Neb. 423, 253 N.W.2d 48 (1977). As he did on his direct appeal, Auger contends that his counsel was ineffective because he failed to object to the introduction of certain evidence. On direct appeal, we found his contention to be without merit, stating that Auger had the burden of proof to establish incompetence of counsel.

> The failure of defendants' counsel to object to the single reference to mug shots by officer Haley does not rise to the standard enunciated in State v. Bartlett, *supra* [199 Neb. 471, 259 N.W.2d 917 (1977)], and State v. Leadinghorse, *supra* [192 Neb. 485, 222 N.W.2d 573 (1974)], so as to constitute ineffective assistance of counsel.

Auger & Uitts, supra at 56, 262 N.W.2d at 190. We believe that the District Court was correct in finding that the issue of effective assistance of counsel was fully litigated in the direct appeal and properly denied Auger relief.

However, even assuming *arguendo* that a new issue was raised by his motion for post conviction relief, we do not believe that Auger is entitled to relief. Auger's sole claim for relief is that his counsel failed to object to the introduction of certain evidentiary items. "The decision to object or not to object is part of trial strategy and, accordingly, we grant due

deference to the discretion of defense counsel to formulate trial tactics. 'Effectiveness of counsel is not to be judged by hindsight.' State v. Phillips, 186 Neb. 547, 184 N. W. 2d 639 [1971]." *State v. Bartlett,* 199 Neb. 471, 476, 259 N.W.2d, 917, 921 (1977). See, also, *State v. Ondrak*, 186 Neb. 838, 186 N.W.2d 727 (1971). We have reviewed the record of the trial in this matter and have concluded that the defense counsel provided effective assistance, especially in light of the above rule.

Our review of the record convinces us that no break in the chain of custody occurred in this matter. The items of which Auger complains were shown to have been placed in the evidentiary locker of the Omaha police department, removed and transported to Lincoln for testing, transported from Lincoln to the evidentiary locker, and removed from the evidentiary locker and taken to the trial in substantially the same condition. Care and custody over the items was established at all times. The record is devoid of any break in the chain of custody of the items introduced and accepted as evidence at trial. Auger's claim is simply without merit. The District Court was correct in denying Auger relief in this matter.

As previously mentioned, Auger assigned as error the failure of the State to furnish him counsel on direct appeal of his conviction and sentence. Assuming *arguendo* that the issue was properly presented below, we hold that Auger was not denied effective assistance of counsel on appeal. The transcript of the direct appeal reveals that counsel was appointed for Auger following his request for the same. Subsequently, the court-appointed counsel filed a motion to withdraw pursuant to Neb. Ct. R. 1.e.(1), together with a brief in support thereof which concluded that the appeal was frivolous and without merit. Auger was notified of the motion to withdraw, served with copies of the motion and the brief, and given 30 days

to respond. His sole response was to request an extension of the brief date for the reason that he was preparing his own brief on appeal. He did not challenge the motion, nor did he request the appointment of new counsel, but chose instead to handle his own appeal on its merits.

It is well recognized that an indigent defendant has a right to receive the assistance of counsel on direct appeal as well as at trial of a criminal proceeding. See, *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976); *Douglas v. California*, 372 U.S. 353 (1963), *rehearing denied*, 373 U.S. 905 (1963); *Anders v. California*, 386 U.S. 738 (1967), *rehearing denied*, 388 U.S. 924 (1967). However, it is also true that a defendant can waive his right to counsel. See *Johnson v. Zerbst*, 304 U.S. 458 (1938). We believe that such a waiver occurred herein. Auger had opportunity to request the appointment of further counsel and failed to do so. He also had opportunity to object to the withdrawal of his first counsel, which he failed to do. Instead, Auger requested an extension of brief date and filed a brief, prosecuting the appeal *pro se*. We conclude that such actions amounted to a knowing and intelligent waiver of his right to counsel on appeal.

Having found no ground upon which the relief requested should be granted, we affirm the action of the District Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVE SCHLOTHAUER, APPELLANT.

294 N. W. 2d 382

Filed July 8, 1980. No. 43187.

1. **Arrests: Constitutional Law.** Absent exigent circumstances, the police cannot make a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

2. **Escape.** Legal custody is an essential element of the crime of escape from legal custody of a law enforcement officer.

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

James T. Hansen and Douglas Warner, for appellant.

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

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

WHITE, J.

The defendant, Steve Schlothauer, was sentenced to 3 to 5 years less 83 days for the time he spent in the Scotts Bluff County jail following a conviction of escape from custody. He has appealed to this court assigning errors pertaining to the lawfulness of his arrest, the sufficiency of evidence, the refusal of the court to excuse a prospective juror for cause, the instructions given to the jury, and the sentence given to the defendant. We consider only the first assignment of error since it is dispositive of the case.

The evidence shows that on August 28, 1979, at 8 p.m., Gary Renner and James Robinson, criminal investigators with the Nebraska State Patrol, and Richard Yeager, a detective from the Scotts Bluff County sheriff's office, went to arrest the defendant at his residence in Gering, Nebraska. The officers maintained they had reasonable cause to believe the defendant had committed the crimes of sexual assault with penetration and abduction with intent to commit a felony. No arrest warrant was obtained by the officers. Two of the three officers went to the front door of the residence and knocked. The third waited at a side door. The defendant answered the door and Investigator Robinson told him he was under arrest for sexual assault and kidnapping. All

three officers then went into the house. The defendant was permitted to go into the basement of his residence to change clothes. Robinson and Yeager accompanied him to the basement and Renner remained upstairs. After dressing and while walking up the basement stairway, the defendant grabbed a large brown dog, pushed the dog toward Yeager, who was behind him on the steps, and ran out a side door of the house. Schlothauer was apprehended and arrested in Greeley, Colorado, on August 31, 1979. A hearing was held, before trial, to determine what evidence of other crimes, wrongs, and acts committed by defendant should be admissible at trial. The court ruled the State would make a prima facie case by presenting evidence that defendant had been arrested for a felony and that probable cause for arrest or ultimate guilt or innocence regarding the felony were not at issue. The defendant moved to quash the arrest as being without a warrant and an unreasonable arrest. The State characterized the motion as one to suppress evidence. The court overruled the motion to quash the arrest. The court found, as a matter of law, that probable cause existed for the arrest.

Defendant was charged with the crimes of sexual assault with penetration, abduction with intent to commit a felony, felon in possession of a firearm, and unlawful removal of himself from official detention after being placed under arrest on a charge of a felony. Count III was dismissed on the motion of the defendant. Counts I and II were dismissed with prejudice prior to trial on the motion of the State. Defendant was tried only on Count IV, i.e., removing himself from official detention after being placed under arrest on a charge of a felony.

The threshold question is whether police officers can enter a private residence without a warrant to make a routine felony arrest. Since defendant has appealed, the United States Supreme Court has ad-

dressed the issue of the constitutionality of warrantless felony arrests within one's residence. *Payton v. New York, Riddick v. New York,* 445 U.S. 573 (1980). In each of those cases, police officers, acting with probable cause but without warrants, had gone to the defendant's residence to arrest the defendant on a felony charge and had entered the premises without the consent of any occupant. The court held that the fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest absent exigent circumstances. The language of the fourth amendment applies equally to seizures of persons and seizures of property. Indeed, as noted in *United States v. Watson,* 423 U.S. 411 (1976), the arrest of a person is "quintessentially a seizure." *Id.* at 428 (Powell, J., concurring).

In the case at bar, the defendant was charged with escape under Neb. Rev. Stat. § 28-912(1) (Reissue 1979). The statute provides: "A person commits escape if he unlawfully removes himself from official detention . . . following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest . . . ."

In *State v. Dickson,* 205 Neb. 476, 288 N.W.2d 48 (1980), we said that legal custody is an essential element of the crime of escape from legal custody of a law enforcement officer under Neb. Rev. Stat. § 28-736, (Reissue 1975). Neb. Rev. Stat. § 28-912 (Reissue 1979), replaced § 28-736. A person commits escape if he unlawfully removes himself from official detention.

The primary question presented is whether the defendant was lawfully arrested at the time of his escape. It is not a crime to depart from custody for which there is no authority. 30A C.J.S. *Escape* § 5 (1965); Annot., 70 A.L.R. 2d 1430, 1440 (1960); *People v. Tedesche,* 3 App. Div. 2d 220, 159 N.Y.S.2d 486

(1957); *People v. Paul*, 147 Cal. App. 2d 609, 305 P.2d 996 (1957). If there was no legal arrest, defendant was not in "official detention" within the meaning of the escape statute so that he could not be convicted of the crime of escape.

In overruling the motion to quash the arrest, the court found that probable cause existed for the arrest, under Neb. Rev. Stat. § 29-404.02 (Reissue 1979). That section provides: "A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed: (1) A felony . . . ." Since the United States Supreme Court's decision in *Payton*, absent exigent circumstances, the police may not make a warrantless and nonconsensual entry into a suspect's home in order to make a felony arrest, regardless of the officer's reasonable belief. The record indicates the defendant was told he was under arrest when he answered the door. One officer testified he did not hear the conversation when the defendant came to the door, but it is undisputed that the defendant was not free to go. The circumstances appear to be within the perimeters of *Payton*. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton* at 590.

Absent exigent circumstances, the arrest is unlawful and the defendant must be discharged and the information dismissed; but while it is clear the officers did not have an arrest warrant when they went to the defendant's residence, it is not clear whether exigent circumstances existed which would have justified the warrantless entry into the home for the purpose of an arrest. The trial court ruled that the lawfulness of the arrest was a question of law, not to be submitted to the jury. The State was foreclosed

from presenting evidence as to whether exigent circumstances existed by the trial court's ruling that exigent circumstances were immaterial to the lawfulness of the arrest. We do not determine whether probable cause and "exigent circumstances" existed so as to justify a warrantless entry into defendant's home for the purpose of arrest. In an escape offense where the existence of lawful custody is an essential element of the crime, those questions are to be decided by the jury on proper instructions by the trial court.

The case must be reversed and remanded for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS FOR A NEW TRIAL.

CLINTON, J., concurring in the result.

I concur in the result only. A new trial is required because the court should have submitted to the jury, under proper instructions as to the law, the question of whether or not the defendant was in "legal custody" at the time of the "escape." It is not for the trial court to make any factual determination of the elements of the crime. In this case, one of the elements is the requirement that the defendant be in legal custody. That is for the jury in every case after they have been properly instructed on the law.

I agree with the principles of law as stated in the syllabi of the majority opinion. However, as applied to the evidence in this case, I believe that the majority has carried the principles of *Payton v. New York, Riddick v. New York*, 100 S. Ct. 1371 (1980), beyond their proper application.

As indicated in the majority opinion, the officers did not make a physical entry into the home to make the arrest. They rapped on the door. The defendant responded and opened the door. The officers then, after identifying themselves, told the defendant that he was under arrest and described the charge. No physical intrusion was made into the

home up to that time. After this, the defendant asked to be allowed to change his clothes and invited the officers into the home. Officer Robinson's testimony was: "He invited us into the home." At this point, the evidence would support the conclusion that he had submitted to the arrest. He might have closed the door and refused to submit. The officers could not then have entered without a warrant.

Payton says that the chief evil against which the fourth amendment is directed is the unconsented to physical entry of the home. Absent exigent circumstances, "that threshold may not reasonably be crossed without a warrant." *Payton* at 1382. Nothing said in *Payton* prohibits an officer from notifying a person who responds to a rap on the door that he is under arrest. If the person submits and either comes out or invites the officers in, then there has been no intrusion barred by the fourth amendment. *Payton* does not, even by inference, prohibit an entry by consent after the officers have identified themselves and announced their purpose. There is nothing in *Payton* which prohibits the person from surrendering at his doorway.

DOROTHY H. DANIELSEN, APPELLEE AND CROSS-APPELLANT, V. RICHARDS MANUFACTURING COMPANY, INC., APPELLANT AND CROSS-APPELLEE, AND MISDOM-FRANK CORPORATION ET AL., APPELLEES.

294 N. W. 2d 858

Filed July 15, 1980. No. 42840.

1. **Circumstantial Evidence.** Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.
2. _____. Conjecture, speculation, or choice of possibilities is not proof. However, where there is evidence which will lead a reason-

ing mind to one conclusion rather than another, the evidence will be held to support the verdict. The circumstantial evidence must be such as to make plaintiff's contention as to the fact reasonably probable, not merely possible.

3. **Expert Witnesses.** There is no exact standard for fixing the qualifications of an expert or skilled witness. Such a witness will be deemed qualified if and only if he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value.
4. **Expert Witnesses: Appeal and Error.** A trial court has a wide range of discretion in determining whether or not the witness' qualification to state his opinion has been established. That decision will not be disturbed on appeal absent an abuse of that discretion.
5. **Expert Witnesses: Foundation.** If an expert witness is permitted to render an opinion without prior disclosure of the underlying facts or data upon which his opinion is based, then the expert must establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render an opinion; and likewise that experts within the specific field would rely upon the data or information relied upon by the testifying expert in rendering the opinion.
6. _____: _____. Expert testimony should not be received, or if received should be stricken, if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
7. _____: _____. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken. However, where the expert testified concerning the information that was the basis of his opinion, and was subject to cross-examination on that matter, the trial court does not ordinarily abuse its discretion in allowing the opinion testimony.

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

Harold L. Hadland of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Abrahams, Kaslow & Cassman, for appellee Danielsen.

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

CLINTON, J.

Plaintiff, Dorothy H. Danielsen, brought this action against the defendant, Richards Manufacturing Company, Inc., a supplier of surgical instruments, and others, to recover damages for personal injuries suffered when a 7-inch straight pituitary rongeur, belonging to and used by the plaintiff's surgeon, Dr. Gerald E. Ries, fractured during a partial hemilaminectomy, leaving a portion of the jaw of the instrument embedded in a vertebral disc. The broken part was removed in later surgery also performed by Dr. Ries. It was alleged that the instrument was defective and unnecessarily dangerous when sold to the Orthopedic Clinic, a professional corporation of which the surgeon was a member. The cause was submitted to a jury which was unable to agree upon a verdict. A mistrial was declared and the jury discharged. The defendant Richards, having made a motion for a directed verdict at the close of all the evidence, which was denied, made a timely motion under the provisions of Neb. Rev. Stat. § 25-1315.02 (Reissue 1979) for judgment in accordance with its prior motion. The motion for judgment was denied and a new trial ordered. Richards has appealed under the provisions of Neb. Rev. Stat. § 25-1315.03 (Reissue 1979). We affirm.

The motion of Richards for judgment was founded upon the following premises: (1) The evidence was insufficient to establish that the fractured rongeur was supplied by the defendant Richards; and (2) The expert opinion of one Norris Yonker, a witness for the plaintiff, as to the existence and cause of the alleged defect which resulted in the fracture of the rongeur was inadmissible. As a consequence, there was no proof of the existence of a defect making the instrument unreasonably dangerous for the purpose for which it was to be used. The defendant's five assignments of error resolve into those two issues. We discuss the issues in the order listed.

Richards maintains proof that the rongeur used in the operation was supplied by it is supported only by evidence which is wholly circumstantial and is insufficient to sustain the verdict because it is equally inferable that the rongeur used during the surgical procedure was supplied by some other, unknown, supplier. The defendant cites and relies upon such cases as *Popken v. Farmers Mutual Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966); *Barkalow Bros. Co. v. Floor-Brite, Inc.*, 188 Neb. 568, 198 N.W.2d 329 (1972); and *So Soo Feed & Supply Co. v. Morgan*, 192 Neb. 277, 220 N.W.2d 25 (1974).

The surgery involved in this suit was performed on October 28, 1976, at St. Joseph Hospital in Omaha. The evidence shows that at that time and for some time prior thereto, doctors using the hospital facilities for surgery furnished their own surgical instruments which were stored and cared for at the hospital. The hospital personnel marked the instruments by stamping or etching thereon the name or names of the owner. In this instance, the rongeur which fractured while being used by Dr. Ries bore the following markings: "12-20-72 Jensen-Ries-Tribulato-Kinney." These names are the surnames of the four orthopedic surgeons who were members of the Orthopedic Clinic.

Dr. Ries testified that in searching the clinic records, he determined that during 1972 the clinic purchased only two 7-inch straight rongeurs of the general type used in this particular surgery. One was purchased from the defendant Richards and the other from another supplier named Zimmer. Both suppliers purchased their instrument from the same manufacturer. Dr. Ries produced from the office records of the clinic an invoice from Richards to the clinic dated December 12, 1972, which described a 7-inch straight pituitary rongeur. He testified that the broken rongeur was the one listed in the invoice. He stated that shortly after the delivery of the instru-

ment, he personally took it to St. Joseph Hospital where he gave it to hospital personnel, whose identity he could no longer remember, and that it was marked as above described in accordance with the usual practice. Dr. Ries identified the particular rongeur by associating the time of the invoice and the date of the markings.

Dr. Ries also identified an invoice from the office records dated September 20, 1972, which indicated the purchase from Zimmer of a stainless steel straight rongeur identified on the invoice as number 3363. A page from the Zimmer catalogue identified number 3363 as a 7-inch straight pituitary rongeur. The Zimmer rongeur could not be found at the time Dr. Ries first testified, but later during the trial he located such a rongeur at another hospital after a search. This instrument bore the logo "Z" and the number 3363. It also had imprinted thereon the name, "Ortho Clinic." On the opposite side it bore the imprint, "Ortho Associates, LFT." Dr. Ries testified that the words "Ortho Clinic" identified the Orthopedic Clinic of which he was a member in 1972. In 1975, two of the doctors left the clinic to practice in another association and the surgical instruments were divided among the parties. Dr. Ries testified that "Ortho Associates" was the name used by Drs. Tribulato and Kinney after they left the Orthopedic Clinic. He stated that the initials "LFT" stood for Louis F. Tribulato. He testified that the Orthopedic Clinic had purchased that instrument and that he had also taken it to St. Joseph Hospital for marking, but not at the time he took the one purchased from Richards. This instrument bore no date.

Dr. Ries testified that all Zimmer rongeurs, when received, bore the "Z" logo. This testimony was corroborated by other testimony.

Richards admitted that it had sold an unmarked pituitary rongeur of the type in question to the Orthopedic Clinic in December 1972. However, it main-

tained that all of its rongeurs were dull or satin finish and did not have the bright finish of the rongeur which fractured during surgery. There was evidence in the record which tended to contradict that claim.

In *Popken, supra,* cited by Richards, we said:

> The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.
>
> However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Mullikin v. Pedersen, 161 Neb. 22, 71 N. W. 2d 485.
>
> The evidence must be such as to make the plaintiff's theory of causation reasonably probable, not merely possible.

Popken at 255, 142 N.W.2d at 313. Applying that principle to the present case, and assuming that the evidence is wholly circumstantial, the evidence was sufficient to make the identification of the source of the broken rongeur reasonably probable and not merely possible. We hold that the evidence was sufficient to permit the jury to find, with reasonable certainty, that Richards was the supplier of the rongeur used in the surgery performed on the plaintiff. We have closely examined the cases cited by Richards. The differences in the nature of the foundational evidence in the cases cited and that in the case before us are evident. We will not discuss them.

Norris Yonker, a metallurgical engineer, testified on behalf of the plaintiff. He described his education and experience, which included analysis and determination of the causes of cracking and breaking

of metals in thousands of cases, including metal of the type of which the rongeur was made. He made an examination of the broken rongeur by use of a stereoscopic binocular microscope. He found no evidence that indicated the instrument had been physically abused in any way that would be a cause of breaking. His examination indicated that there were "two distinct modes of fracture": The "pre-existing fracture prior to the final fracture of the movable jaw," and the final fracture which occurred at the time of surgery.

The "pre-existing fracture" emanated from the pinhole which was the pivot pinhole of the movable jaw. The pre-existing fracture covered 62 percent of the cross-sectional area; the final fracture, the remaining 38 percent. The difference between the modes of fracture was indicated by the granular appearance of the pre-existing fracture. He explained various tests he had made, including hardness tests, and described the process used in the manufacture of the instrument, including heating, quenching, reheating, and the tempering by means of which the metal is given its strength. At a later time, after the tip of the broken jaw was removed in the second surgery, he examined that part also. His conclusion was that because of the pre-existing crack, the load required for final separation was much less than normally would be withstood by the instrument.

Yonker stated his opinion as follows:

> [A]s a result of my initial examination and the observance of the pre-existing crack, was that the pre-existing crack was a forging or heat-treating crack initiated during the manufacture of the rongeur, or it was a stress-corrosion crack, resulting from assembly and/or residual stresses in the movable jaw.

He first concluded that the pre-existing crack was a

stress-corrosion crack and the final fracture was the result of a sudden failure. His opinion of the cause of the pre-existing crack was that during the manufacture of the product, machine marks were left on the instrument instead of a proper polish. He observed the machine marks in the course of his examination and explained how he identified them. He testified that such a mark "lowers the corrosion resistance tremendously."

He also measured the hardness of the fractured portion of the instrument, i.e., the upper jaw. It showed a hardness described as 50 to 51 Rockwell C. He tested the hardness of the lower jaw. It tested Rockwell C46 to 47. His opinion was that the upper jaw was insufficiently tempered during the heating process. This made it more susceptible to stress-corrosion cracking. His final opinion was: "[T]he stress corrosion cracking, which was present, was the result of manufacturing defects which were namely the excessive hardness of the movable jaw and the poor surface finish, and the assembly stresses at the pinhole were most likely a contributing factor." He further stated that if the instrument were properly manufactured, it "would exhibit wear at the hinge pinhole as a result of wear of the pin itself through usage for a considerable period of time." Wear at the pinhole itself would not result in a fracture. It would merely make the moving parts loose.

Yonker stated that visual examination before the operation would not disclose the pre-existing crack. It might, however, have been discovered by a functional test immediately before the operation by using the instrument to bite down on a hard piece of rubber.

Richards attacks the admissibility of Yonker's testimony on several grounds: First, the qualifications and competency of the witness; Second, the competence of the opinion in that the basis therefor was

not disclosed in the evidence.

Richards cites and relies upon our opinions in *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979); and *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

The attack on the qualifications of the witness is based upon the fact that Yonker had no specific experience in the testing of surgical instruments. In contrast, Richards' expert, whose qualifications and experience were similar to Yonker's, had some experience in testing surgical instruments, especially materials used in bodily implants. The record does establish, however, that Yonker had experience in testing the type of metal of which the rongeur was made.

An examination of Richards' arguments in its brief discloses that its real argument is that its expert is better and more competent than the plaintiff's expert. This may be true, but it was a matter for the jury to decide in weighing the testimony. It might be noted in passing that Richards' expert testified that Yonker was competent, but he felt that Yonker was not thorough enough in his examination. Richards' expert was of the opinion that the stress-corrosion crack was caused by failure to clean the instrument properly, thus leaving corrosive residues, such as blood, on it.

> There is no exact standard for fixing the qualifications of an expert or skilled witness. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., 189 Neb. 247, 202 N. W. 2d 191. Such a witness will be deemed qualified if and only if he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value. Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601. . . .

> A trial court is given large discretion in determining whether or not the witness' qualification to state his opinion has been established, and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion. Whittington v. Nebraska Nat. Gas Co., 177 Neb. 264, 128 N. W. 2d 795; Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., supra.

Northern, supra, at 306, 275 N.W.2d at 81. The trial court did not abuse its discretion in determining that Yonker's qualifications as an expert were sufficient.

The attack on the competency of the opinion is grounded upon the contention that Yonker did not disclose its basis. Neb. Rev. Stat. § 27-705(1) (Reissue 1979) provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

From our reading of both *Northern, supra,* and *Clearwater, supra,* we conclude that they do not support the position of Richards. In *Clearwater, supra,* we discussed the factual basis for the opinion of the experts, saying:

> The witness Strawn based his opinion upon three principal factors: The value of the gravel deposits upon the property; sales of lots in developed recreational areas; and comparable sales of real estate. None of these factors supported the conclusion testified to by the witness. . . . A similar situation existed as to the testimony of the witness Warren.

Clearwater at 804-05, 277 N.W.2d at 241-42.

In *Northern, supra,* the trial court rejected the

opinion of the witness. We upheld that ruling, saying:

> If an expert witness is to be permitted to render an opinion without prior disclosure of the underlying facts or data upon which his opinion is based, then the expert must at least establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render an opinion. Moreover, when requested by the trial court, such expert should be required to produce sufficient evidence to establish that the underlying facts or data are of such a nature that an expert in the particular field would use or would rely upon such facts to reach a conclusion. Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686; Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321.
>
> A trial court may, either on its own motion or in response to an objection, require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion. Unless it is shown that there has been an abuse of discretion the action of the trial court, in either requesting such underlying data or information or refusing such request, will not on appeal be disturbed.

Northern at 306-07, 275 N.W.2d at 81.

In *Clearwater, supra,* we said:

> Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. Gil-

> bert v. Gulf Oil Corporation, 175 F. 2d 705 (4th Cir., 1949). See, also, Horton v. W. T. Grant Co., 537 F. 2d 1215 (4th Cir., 1976); Wilson v. Volkswagen of America, Inc., 561 F. 2d 494 (4th Cir., 1977); Polk v. Ford Motor Co., 529 F. 2d 259 (8th Cir., 1976); Omaha Indian Tribe, Treaty of 1854, Etc. v. Wilson, 575 F. 2d 620 (8th Cir., 1978); Tabatchnick v. G. D. Searle & Company, 67 F. R. D. 49. Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken. Arkansas-Missouri Power Co. v. Sain, 262 Ark. 326, 556 S. W. 2d 441.

Clearwater at 804, 277 N.W.2d at 241.

In this case, both the basis of the opinion and the facts on which it was based were before the jury. Yonker did testify to the information on which his opinion was based. We further note that the defendant had an opportunity to and did cross-examine Yonker, both as to his competence and as to the basis of his opinion. The trial court did not abuse its discretion in admitting Yonker's opinions.

AFFIRMED.

BRIAN L. HALBERT, DOING BUSINESS AS BICO'S CAFE, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

294 N. W. 2d 864

Filed July 15, 1980. No. 42856.

1. **Alcoholic Liquors: Licenses and Permits.** The Nebraska Liquor Control Commission is vested with the discretion of the granting or denial of liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically or capriciously.
2. **Alcoholic Liquors: Administrative Hearings.** After an administrative hearing, the Nebraska Liquor Control Commission must

base its findings and orders on the factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised.

3. _____: _____. Where the record of the proceedings contains no evidence to justify the order, the action of the Nebraska Liquor Control Commission must be held to be unreasonable and arbitrary.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions.

Jacobsen, Orr & Nelson and Jerry N. Stehlik, 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.

KRIVOSHA, C.J.

The appellant, Brian L. Halbert, doing business as Bico's Cafe (Halbert), appeals from a judgment of the District Court for Buffalo County, Nebraska, affirming the denial of Halbert's application for a bottle club liquor license by the Nebraska Liquor Control Commission (Commission). Based upon the record in this case and the applicable law, we reverse the decision of the trial court and remand the matter with directions to issue the license.

The record reflects that Halbert has, since September 1, 1976, been the owner and operator of Bico's Cafe, located just west of the city limits of Kearney, Nebraska. During all of that time, Halbert held and operated under both an on-sale and off-sale beer license as prescribed by Neb. Rev. Stat. § 53-124(5)B and F (Reissue 1978) and issued by the Commission. Halbert's business consists of a dining area seating approximately 66 people with a combination game and party room of approximately 2,400 square feet connected to it. Halbert operates both his on-sale and off-sale beer business and his restau-

rant from Tuesday through Sunday of each week, being closed on Monday. While no off-sale beer sales are permitted within the city of Kearney on Sunday, Halbert is able to sell beer, both on-sale and off-sale, because he is located within the County of Buffalo but outside of the city limits of Kearney.

The record reflects that 77.7 percent of Halbert's beer sales were sold for off-premises consumption while 22.3 percent of his beer sales were sold for on-premises consumption. With regard to his Sunday operations, the record reflects that 91.9 percent of the beer sales were off-sales and 8.1 percent were on-sales. Halbert testified that 72.2 percent of his total beer sales were made on Sunday, whereas 27.8 percent of his beer sales were made during the remainder of the week in which he was open.

On June 5, 1978, Halbert filed with the Commission an application for a bottle club liquor license (Neb. Rev. Stat. § 53-124(9) (Reissue 1978)) which, if granted, would allow him to sell and serve beer, liquor, and wine for consumption on the premises in connection with his restaurant operation.

On June 29, 1978, a hearing was held before the county board of Buffalo County, Nebraska, and a resolution was passed by the county board recommending approval of Halbert's application. This resolution was then filed with the Commission on July 3, 1978. A form protest was filed by an agent for the Commission, dated July 14, 1978. The record reflects that, other than this protest, no other protests were filed by either the city of Kearney or any establishment doing business within the city of Kearney.

By letter dated August 1, 1978, the Commission advised Halbert that two issues would be considered at the hearing. The first issue was whether there was a need for an off-sale beer license, combined with a bottle club license, at Halbert's location, and, second, whether the combining of a bottle club li-

cense with an off-sale beer license defeated the purpose of the no off-sale provision of the bottle club law.

Thereafter, a hearing was held before the Commission with Halbert and his wife being the only witnesses in attendance. The Commission stipulated that Halbert was a good and well-qualified applicant to possess a liquor license at any time.

On August 30, 1978, following the hearing on August 23, 1978, the Commission denied the license. The basis for the denial was that the Commission felt that the combining of an off-sale beer license with a bottle club license defeated the purpose of a bottle club license having no off-sale privileges. Thereafter, Halbert perfected an appeal to the District Court for Buffalo County, Nebraska. At the hearing in the District Court, the transcript and bill of exceptions from the Commission hearing were offered in evidence. In addition, the parties offered in evidence a stipulation which provided that the records of the Commission indicated that there were currently issued to some nine other licensees in the State of Nebraska both a bottle club license and an off-premises beer license.

On December 28, 1978, the District Court remanded the matter back to the Commission for further hearing and determination, specifically on the question as to whether a policy of the Commission prohibiting a combination of off-sale beer and bottle club licenses applied as a continuing policy of the Commission or applied only to Halbert.

On January 17, 1979, Halbert received a letter from the Commission advising him that the issues to be considered at the second hearing would concern themselves with the basic question of whether a bottle club and an off-sale beer license should be combined. At the second hearing, held on January 24, 1979, Halbert was the only witness who testified. No one appeared in opposition at the hearing and no

evidence was offered by the Commission. At the second hearing, evidence was introduced to the effect that, in addition to Halbert's license authorizing off-sale beer on Sundays, there were at least two other licensees in the area offering off-sale beer, one being located approximately 4 miles south of Kearney and the other located approximately 6 miles west of Kearney.

On February 14, 1979, the Commission again denied Halbert's application for a bottle club license. This time, the Commission's order of denial cited 14 reasons for its decision, all of which, in essence, maintained that if the requested license was granted to Halbert, he would obtain a "competitive edge" on the sale of beer over the other licensees located within the city of Kearney because of his ability to sell on Sunday. The order further provided that the Commission was generally disposed to promote equality of competition when possible, and because the Commission did not have control over whether beer would be sold within the city limits of Kearney on Sunday, to grant the requested application would be to further increase the disparity of the basis of competition between licensees in the area and to grant to Halbert a competitive edge on Sunday.

Thereafter, Halbert perfected his appeal to the District Court which, on the basis of the record made before the Commission, entered its decision on May 21, 1979, affirming the action of the Commission denying Halbert's application.

It appears that there are two issues requiring our consideration. One issue is whether Halbert was sufficiently advised of the issues in advance of the hearing so as to afford him an opportunity to prepare to meet those issues and to produce evidence. The other issue is whether the action of the Commission in denying the license because of its concern about competition was arbitrary and capricious.

Turning to the first issue, we find that our pre-

vious decision in *J K & J, Inc. v. Nebraska Liquor Control Commission,* 194 Neb. 413, 231 N.W.2d 694 (1975), fairly well disposes of the issue in favor of Halbert and against the Commission. In *J K & J, Inc.* at 417, 231 N.W.2d at 697-98, we said:

> The Nebraska Liquor Control Commission is an agency within the provisions of the Administrative Procedures Act. . . . Section 84-913, R. R. S. 1943, provides, among other things, that not only must there be an opportunity for hearing, but the notice shall state the time, place, "and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. Opportunity shall be afforded all parties to present evidence and argument with respect thereto."

It appears to us that Halbert was at no time advised that the issue of "unfair competition" would be considered by the Commission, even when the matter was remanded by the trial court to the Commission to determine whether it had a policy prohibiting the combining of bottle club licenses and off-sale licenses. The order made no mention that "unfair competition" was to be included in the issues to be decided. It was not until the Commission entered its order on February 14, 1979, that the matter of "unfair competition" was ever mentioned and, to that extent, Halbert was clearly denied the opportunity to meet that issue by presenting evidence. The action of the trial court in affirming the Commission's actions concerning the issue of "unfair competition" was without previous notice that "unfair competition" was an issue.

If the matter of failing to give Halbert sufficient notice of an issue was all that was involved in this case, our holding in *72nd Street Pizza, Inc. v. Ne-*

braska Liquor Control Commission, 199 Neb. 729, 261 N.W.2d 614 (1978), might simply direct us to remand the proceedings back to the Commission for further hearings on the issue. We are compelled, however, to go further because of the fact that the remand, in our opinion, cannot produce any reasonable basis for denying the license due to the Commission's concern about competition as raised in this matter. The Commission is vested with the discretion of the granting or denial of liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically or capriciously. *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission,* 203 Neb. 176, 277 N.W.2d 693 (1979). "After an administrative hearing the Nebraska Liquor Control Commission must base its findings and orders on the factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised." *72nd Street Pizza Inc. v. Nebraska Liquor Control Commission* at 738, 261 N.W.2d at 618.

The sole question presented by this matter is whether the Commission may deny a license to one otherwise admittedly qualified, solely on the basis that by granting such license to an individual, the individual may, because of permitted business practices, obtain a particular "competitive edge" over others not afforded the same business options. We can find no basis in the law for permitting the Commission to engage in such determination and thereby to withhold licenses based upon their notion of whether one is receiving an unfair edge not related to the public interests. On that basis, the Commission may very well be permitted to deny a license to an individual who has succeeded in obtaining a favorable lease at a favorable location, thereby granting to him a "competitive edge."

Apparently, the competitive edge which the Commission concerned itself with in this matter, and the

basis upon which it denied the license to Halbert, was the fact that Halbert would be permitted to sell beer off-sale on Sunday, whereas other licensees within the city limits could not. The reasoning relied upon by the Commission in reaching its conclusion is patently fallacious in several respects and results in the Commission's reaching an arbitrary and capricious result.

In the first place, the type of competition with which the Commission is to be concerned must, in some manner, affect the general public. As we noted in *Allen v. Nebraska Liquor Control Commission,* 179 Neb. 767, 140 N.W.2d 413 (1966), the purpose of limiting the number of licenses in a certain community must be related in some manner with furthering the interest of law and order and the well-being of the general public. In the instant case, however, Halbert already had a license to sell beer off-premises on Sunday. Nothing that the Commission did in denying to Halbert a bottle club license affected that situation and Halbert continues today, as he did in the past, to maintain a "competitive edge," if one in fact exists, in connection with the off-sale of beer on Sunday. Denying to Halbert the right to serve not only beer, but also wine and whiskey to his food customers on Sunday will not "equalize" his right to continue selling beer off-sale on Sunday.

Moreover, the record makes it clear that even if Halbert discontinued selling beer off-sale on Sunday, the consumption of off-sale beer in Buffalo County would not very likely be affected and, in fact, the competitive edge would simply be shifted from Halbert to the other two county licensees who now sell beer off-sale on Sunday. How could the license holders within the city limits of Kearney be any better off by having Halbert's competitors sell more beer on Sunday than Halbert? In denying to Halbert a bottle club license the Commission did not, in any

manner, eliminate the public's ability to acquire beer for consumption off-premises on Sunday within Buffalo County.

And finally, the record in this case discloses that the Commission does not have a policy against granting both a bottle club license and an off-sale beer license to the same establishment in that in at least nine other instances it has done so. The Commission's refusal to grant a bottle club license in this case had nothing to do with either Halbert's qualification or the general public's need, but rather was thought to be required because of a restriction imposed upon license holders within the city of Kearney. That restriction, however, was imposed by the city of Kearney and not by either the Commission or state law. If such an inequity exists, the city officials can easily enough remedy the situation. We doubt that such inequity does exist. Certainly, neither the county board nor Halbert's city competitors thought it a problem. They made no protest.

We have frequently said that where the record of the proceedings contains no evidence to justify the order, the action of the Nebraska Liquor Control Commission must be held to be unreasonable and arbitrary. *J K & J, Inc. v. Nebraska Liquor Control Commission, supra; Hadlock v. Nebraska Liquor Control Commission,* 193 Neb. 721, 228 N.W.2d 887 (1975). This record contains no evidence to justify the Commission's action, nor does it indicate how or in what manner any evidence might be offered that would justify denying a license to Halbert because it would grant to him an "unfair edge" over other license holders inside the city of Kearney. That being the case, it becomes clear that the action of the trial court in affirming the order of the Commission must be reversed and an order entered by the trial court granting to Halbert the requested license.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissents.

IN RE VALUATION AND EQUALIZATION OF REAL AND PERSONAL PROPERTY IN THE STATE OF NEBRASKA FOR 1979.

BOX BUTTE COUNTY ET AL., APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

295 N. W. 2d 670

Filed July 15, 1980. Nos. 42917, 42919, 42923, 42924.

1. **Administrative Hearings.** A procedure which might be suitable for a hearing involving relatively few parties would not be practicable where the parties are numerous and the issues complex.
2. **Tax Commissioner: Delegation of Authority: Tax Assessments: Valuations.** The authority authorized to be granted to the State Tax Commissioner by the State Board of Equalization and Assessment under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976) to hold hearings to enable him to advise and assist the board and to expedite the equalization hearings, may be delegated to the deputy state tax commissioner during the absence or disability of the State Tax Commissioner.
3. **State Equalization Board.** The State Board of Equalization and Assessment, in performing its equalization functions, acts in a quasi-judicial capacity.
4. **Tax Commissioner: Administrative Hearings.** The State Tax Commissioner, in holding hearings authorized under Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976), gathers evidence only and does not decide disputes of adjudicative fact, and therefore does not act in a quasi-judicial capacity.
5. **Tax Commissioner: Administrative Hearings: Delegation of Authority.** The State Tax Commissioner can hold only an administrative hearing, and not a discretionary or a quasi-judicial one, because the power of the State Board of Equalization and Assessment cannot be delegated to the State Tax Commissioner.
6. _____: _____: _____. The State Tax Commissioner, when authorized by the State Board of Equalization and Assessment to act as a hearing officer under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976), is not acting as a member of the State Board, but is acting in his capacity as State Tax Commissioner.
7. **Tax Assessments: Valuation: Notice.** The purpose of the notice provided for in Neb. Rev. Stat. § 77-508 (Reissue 1976) is to give the affected counties an opportunity to appear and meet the challenge to their property valuations for tax purposes.
8. **Tax Assessments: Valuation: Administrative Hearings: Burden of Proof.** The burden of proof is on the appellant to establish that the action of the State Board of Equalization and Assessment was erroneous.

9. **State Equalization Board.** The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing assessment of property.
10. **State Equalization Board: Presumptions: Burden of Proof.** The presumption is that the State Board of Equalization and Assessment performed its duties and the burden is upon the party objecting to such action to prove that it was erroneous, capricious, and contrary to law.
11. **State Equalization Board: Appeal and Error.** The order of the State Board of Equalization and Assessment ordinarily will not be reversed unless it utterly failed to follow a reasonable course of action.
12. **State Equalization Board: Tax Assessments: Valuations.** Where different methods or factors are used to equalize various kinds of property, the record of the State Board of Equalization and Assessment hearings must demonstrate some reasonable degree of correlation between and among the various methods and factors.
13. **Tax Assessments: Valuation: Constitutional Law.** The consistent use of reasonably current reappraisals, done under uniform conditions and regulations approved by the State Tax Commissioner, meets the constitutional test of uniformity.
14. **Tax Assessments: Valuation.** When it is shown that different methods of appraisal applied to different classes of property result in a determination of fair market value for each class of property, reasonable correlation has been demonstrated between the several methods of appraisal.

Appeal from the State Board of Equalization and Assessment. Affirmed.

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

William L. Howland, County Attorney, for appellant Dawes County.

Laurice M. Margheim of Bayer & Margheim, for appellant Box Butte County.

Brian C. Silverman, County Attorney, and Michael Javoronok, for appellant Scotts Bluff County.

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

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

HASTINGS, J.

These are appeals from the action of the State Board of Equalization and Assessment (State Board), ordering increases in the assessed valuations of real estate throughout the state. The counties involved in these appeals and the percentage increases are as follows:

County	Irrigated	Dryland	Pasture	Range and Meadow	All Other Property
Sheridan	23	62	NA	10	132
Dawes	23	62	NA	10	64
Box Butte	53	92	NA	53	172
Scotts Bluff	23	75	NA	10	84

By way of further explanation, the "All Other Property" designation includes all urban real property, rural improvements, suburban homesites, improvements on leased land, and commercial and industrial property. The appealing counties have assigned 25 errors alleged to have been made by the State Board, but they consist generally of claims of improper procedures followed by the State Board and incorrect methods employed to achieve equalization and complaints that the order of the State Board was not supported by the record and was erroneous, arbitrary, and capricious. We shall deal generally with the asserted errors as they were presented in the appellants' argument portion of their brief. It should also be noted that these four cases were consolidated for briefing and argument and were based on the same record as and argued together with *Banner County v. State Board of Equalization & Assessment, post* p. 715, 295 N.W.2d 682 (1980), and *Great Western v. State Board of Equalization & Assessment, post* p. 721, 295 N.W.2d 686 (1980).

The State Board was convened by Governor Charles Thone at 9 a.m., July 2, 1979, pursuant to a notice contained in a news release dated June 19, 1979. All members were present with the exception

of Fred Herrington, State Tax Commissioner, who because of a medical problem was confined to a hospital at that time. At that meeting testimony was given by various counties, none of which are the appellants herein, and by individual citizens and employees of the Nebraska Department of Revenue. The evidence presented by the counties appearing consisted generally of complaints of lack of equalization when compared with the valuations of their various neighbors. The state employees presented evidence of the lack of equalization as demonstrated by the investigations and audits carried on by the Department of Revenue. These employees explained how they used the Nebraska Department of Revenue Land Valuation Manual (1976 ed.), applying a plus 20 percent factor to update it to 1979, to check agricultural land, and employed assessment/sales ratios, verifications, benchmark appraisals, and Marshall and Swift's Residential Cost Handbook (1978) to compare valuations of all other classes of property.

The State Board then passed a resolution appointing the State Tax Commissioner or deputy state tax commissioner to review the county abstracts of assessments and to apply the standards and procedure to be determined by the State Board to effect statewide equalization. If such review indicated that any county's valuation should be changed, the State Board directed the scheduling of hearings for such county to show cause why such change should not be made. A second resolution was passed, directing that all agricultural land be equalized to the county which has the highest level of value for each class of land, uniformly utilizing the Land Valuation Manual, and that all other property be equalized to the average assessment/sales ratio for urban real property of the eight counties having the highest such ratios.

Pursuant to those directions, the State Department of Revenue, applying the formulas approved by the State Board, calculated the required changes

in the valuations of each of the 93 counties. The deputy tax commissioner then sent a notice of such proposed changes to each of the counties and directed that such counties appear and show cause why such changes should not be implemented. Various dates for such hearings were set, but in the case of the appealing counties herein, the hearing date was set for July 12, 1979. Notice of the proposed changes and of the hearing date was mailed on July 5, 1979. However, because of a misunderstanding on the part of the deputy tax commissioner, the amounts of the proposed changes were in error so they were recalculated, notices were mailed to the affected counties to disregard the previous notices as to the amount of change and a new notice, containing the correct change, and again setting the hearing for July 12, was mailed on July 6.

At the various show cause hearings conducted by the deputy tax commissioner as hearing officer, the representatives of many of the counties appeared and gave oral testimony. In some cases, written exhibits were offered and received, and in others, arrangements were made to submit written exhibits at later dates. Employees of the Department of Revenue were available for purposes of cross-examination by representatives of the counties. The counties seemed nearly unanimous in their opposition to the proposed changes, but were at a variance as to why. There was a consensus that each county felt it was internally equalized, and they agreed that sales of agricultural land were not a good indicator of value because of speculators and those who would pay anything for the once-in-a-lifetime opportunity to enlarge their existing farm or ranch. Many counties testified that the proposed increases would put their urban properties above the actual sale value of those parcels. Other counties complained only of the increase to commercial properties, especially in the small towns where there is little or no market.

Many counties complained that increase of valuation of rural improvements at the same rate as urban was inequitable and that many farm outbuildings were not being used and should not have their valuation increased. Some counties criticized the assessment/sales ratio as being inaccurate, or taking into consideration only one factor of valuation. Some counties criticized the use of the 1976 Land Valuation Manual, stating that it would increase values of agricultural land above the guideline level that they would have to use in 1980, as required by the 1979 Land Valuation Manual, and would therefore require an increase this year and a decrease next year. Several counties advocated that the State Board wait 1 year before implementing the 1979 Land Valuation Manual until the bugs could be worked out of it, and use 100 percent of the reappraisal values this year and adjust only those counties who have not been reappraised. Much of the evidence was offered in the form of exhibits rather than as oral testimony.

The State Board next met en banc on July 25, 1979, at 10:30 a.m., pursuant to notice given by news releases and letters to each county dated July 16, 1979. Additional hearings were held on July 26 and 30, and August 1, 6, and 13, 1979, each as authorized and directed by the State Board in open meeting at the conclusion of the preceding session. Testimony was offered by various county officials and individual citizens as well as by several Department of Revenue employees who were subjected to cross-examination by the State Board and the county representatives. Exhibits consisting of assessment/sales ratio statistics for the year 1978, average mill levies and aggregate assessed valuations for all counties, abstracts of assessments, reappraisal questionnaires returned by each county, reports of the actual valuation determination plans employed by each assessor, statistics on Nebraska farm real estate market developments in 1978-79 as furnished by the Uni-

versity of Nebraska, various land and construction cost service manuals, basic data and worksheets pertaining to verification of sales, benchmark appraisals, graphs showing comparisons among the 93 counties as to valuations for both raw farmland and other forms of property, to name a few, and letters and resolutions from individuals and counties protesting their increases or the failure of the valuations of neighboring counties to more adequately increase, were received into evidence.

Generally speaking, the recommendations made by the Department of Revenue to the State Board were formulated as to raw farm land on the basis of the 1976 Land Valuation Manual and those as to all other kinds of property, on the basis of assessment/sales ratios of urban real estate. As to the latter category, where records of actual sales were insufficient, field verifications were performed and benchmark appraisals were done, employing the Marshall and Swift Handbook for adjustments between comparables. The Land Valuation Manual was developed by the Department of Revenue after extensive research and is based generally on soil types and geographical locations. To be more explicit, agricultural land is classified as irrigated cropland, dryland cropland, rangeland and meadow, and pasture. These in turn are subclassified into valuation groups 1, 2, 3, and 4, based on the productivity of the particular soil, and, when necessary, are further subdivided. Finally, recognizing the decrease in rainfall and growing days when moving from the southeast corner of the state to the northwest corner, the state has been divided into seven land valuation areas. Each land classification and subclassification has a calculated per-acre dollar value, differing in each of the seven land valuation areas. In arriving at these valuations, information was obtained from various farm management companies, county agents, and others as to cash rent data, graz-

ing fees, crop yield data, and share rental information in the various areas, and with that information, a net return to the landlord for the various classes and subclasses was determined to which was applied a capitalization rate to arrive at a value.

We next turn to the individual complaints of error made by the appealing counties. The counties contend that they were not afforded sufficient notice of the show cause hearings, the same having been mailed on the 5th and 6th of July relating to a July 12 hearing date. Neb. Rev. Stat. § 77-508 (Reissue 1976) requires that "the board shall issue a notice to the counties which the board deems either undervalued or overvalued, and shall set a date for hearing at least five days following the mailing of such notice." The date set for hearing (July 12) was "at least five days following the mailing of such notice" (July 5). Part of the counties' complaint is that the July 5 notice was cancelled and, therefore, the next notice, dated July 6, did not give the necessary 5 days. However, the original notice of the hearing was not cancelled, only the notice of the amount of proposed increase. Clearly, the notices construed together complied with the spirit and letter of that statutory provision.

This second or corrected notice was mailed out because of an error or misunderstanding of the State Board's instructions given to the deputy tax commissioner at the board meeting of July 2. The deputy director testified that he was in attendance at a meeting of the State Board held on July 3 regarding the sales and income tax rate settings and, as a result of informal visits with the board at that time, discovered his error. The appealing counties would have us hold that somehow this constituted an additional meeting of the State Board regarding equalization without proper notice in violation of the open meetings law, Neb. Rev. Stat. § 84-1414 (Cum. Supp. 1978). This is a hyper-technical and invalid applica-

tion of that law to the existing facts and circumstances and the contention is without merit.

Quite apart from the requirements of notice, it is contended that as a matter of fair play, the 5-day notice was insufficient for the counties to adequately prepare their evidence. In this regard, it must be remembered that the State Board may not meet until the "abstracts of assessment have been submitted by the county assessors," Neb. Rev. Stat. § 77-505 (Reissue 1976); that the county assessor need not forward the abstract of assessment before July 1 of each year, Neb. Rev. Stat. § 77-1514 (Reissue 1976); and that the State Board must enter its order as to equalization of valuations and certify the same to the various counties not later than August 15, Neb. Rev. Stat. § 77-509 (Reissue 1976). From a consideration of the totality of the circumstances viewed against the backdrop of such a Herculean requirement imposed upon the State Board, we cannot say that there was a lack of substantial due process in this case.

The notices of hearing are further criticized because the proposed changes were substantially higher than the ultimate adjustments adopted by the State Board. It is difficult for us to comprehend how a party is prejudiced in its preparation for defense because it has to prepare for more dire consequences than those which actually accrue. This complaint, as it is framed, borders on the frivolous.

The counties argue that there were additional procedural defects, including the failure to permit cross-examination by each county of the witnesses presented by every other county; that the notices referred only to proposed increases in real estate valuations, but that inquiry was also made as to the valuation of personal property; and that after the Department of Revenue had presented its evidence, there was no opportunity given the counties to respond.

As it was, the oral evidence consisted of almost 2,000 pages of testimony, to say nothing of five transfer cases full of documentary evidence. The practical limitations of time and the enormity of the task to be accomplished simply could not permit unfettered cross-examination of every witness as to every minuscule detail.

> It is apparent that a procedure which might be suitable for a hearing involving relatively few parties would not be practicable where the parties are numerous and the issues complex. There are practical difficulties which prevent a strict and literal application of the Administrative Procedures Act to the proceedings of the state board where the board is attempting to equalize the valuation of real estate in all 93 counties.

County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 474, 143 N.W.2d 880, 883 (1966).

As to the complaint that inquiry was made as to personal property, without notice, there was no prejudice shown. No change was made by the State Board in the valuations of personal property in any of the counties appealing. In fact, only Lancaster County had any change in personal property valuations.

The second complaint, that the counties were not permitted to respond to the testimony given by Department of Revenue employees, is not supported by the facts. The contention refers to the August 1 State Board meeting when certain testimony was presented to the board. No county requested such opportunity and there is no evidence that anyone appearing before the State Board was denied the opportunity to be heard. A special county attorney representing Box Butte County was specifically told that if he wanted time for rebuttal after the Department of Revenue had presented its case, he would be

afforded that opportunity. As a matter of fact, he and other representatives of several counties did participate at the July 26 hearing which, for all intents and purposes, completed the presentation of the evidence by the Department of Revenue.

The counties insist that Neb. Rev. Stat. § 77-507, which provides that "The board shall direct the Tax Commissioner to hold such hearings as are necessary to enable him to advise and assist the board in the performance of its duties under the provisions of this section," and Neb. Rev. Stat. § 77-508, which states that "The board may direct the Tax Commissioner to hold such [show cause] hearings to expedite the equalization process," are unconstitutional and, further, that the delegation of that authority of the deputy tax commissioner was improper and unlawful. It seems to be the position of the counties that, because the function of the State Board is quasi-judicial in nature, any activities performed by the Tax Commissioner or anyone else in furtherance of that function are also quasi-judicial in nature. This is not true. We have no quarrel with the position of the counties that the State Board acts in a quasi-judicial capacity because it does in fact hear evidence and "decides a dispute of adjudicative fact." *Richardson v. Board of Education, ante* p. 18, 24, 290 N.W.2d 803, 808 (1980). However, the officer conducting the hearings, in this case the deputy tax commissioner, only gathered evidence and made recommendations to the State Board. He decided no "dispute of adjudicative fact."

The counties cite *County of Sioux v. State Board of Equalization & Assessment,* 185 Neb. 741, 178 N.W.2d 754 (1970), in which we said:

> Without reference to the constitutionality, which has been argued strenuously herein, we state that the State Tax Commissioner can hold only an administrative hearing, and not a discretionary or a quasi-judicial one,

> because the power of the state board cannot be delegated to the State Tax Commissioner. Because of the result we reach herein, it is not necessary to discuss the constitutionality of the acts or whether the hearings held by the State Tax Commissioner were quasi-judicial ones.

Id. at 742-43, 178 N.W.2d at 755-56.

The hearings held here by the deputy tax commissioner were not quasi-judicial, but were administrative and, therefore, did not constitute a delegation of the power of the State Board.

The counties also complain that the delegation of the duty to hold hearings to the deputy tax commissioner was improper. The counties cite Neb. Rev. Stat. § 84-802 (Reissue 1976), which provides that a deputy shall perform the duties of his principal pertaining to his own office when the principal is absent or disabled but "when an officer is required to act in conjunction with or in place of another officer, his deputy cannot supply his place." The answer to that contention is simply that the Tax Commissioner, when authorized to conduct fact-finding hearings under the statutory scheme previously mentioned, is not acting as a member of the State Board, but is acting as the Tax Commissioner. It was, therefore, proper for his deputy to carry out those functions.

The counties object that, prior to holding the show cause hearings, the State Board failed to find that equalization could not be made without increasing or decreasing property values. The statute, Neb. Rev. Stat. § 77-508, merely states that "In the event it shall appear to the State Board of Equalization and Assessment that a just, equitable and legal assessment . . . cannot be made without increasing or decreasing the valuation . . ., the board shall issue a notice to the counties which the board deems either undervalued or overvalued . . . ." At its original

hearing, the State Board determined the guidelines for equalization and, on the basis of the preliminary information furnished by the Department of Revenue, instructed the deputy director to send out the notices. Certainly it is implicit in that action that a finding of non-equalization had been made. Quoting from *County of Blaine v. State Board of Equalization and Assessment, supra* at 472, 143 N.W.2d at 882: "Section 77-508, R. R. S. 1943, provides that if the state board finds that it is necessary to change the valuation . . . , the board shall issue a notice to the county and set a date for hearing." The purpose of such notice is to give the affected counties an opportunity to appear and meet the challenge to their valuations. Of course, a final determination in that regard could not be made until and unless such hearings are first held. We hold that there was substantial compliance with this statutory requirement.

The counties challenge the correctness of the assessment/sales ratios employed by the Department of Revenue and finally accepted by the State Board. Dennis Donner, systems analyst supervisor of the Department of Revenue, testified that each of the 93 counties furnished to the Department of Revenue the basic information as to sales from which the assessment/sales ratio was computed. This information was found on Forms 521, Confidential Real Estate Transfer Statements, which were filed by the grantees at the time of recording the various deeds, reflecting the consideration paid by them. The forms were then compiled by the county assessors under directions from the Department of Revenue, which required that unreliable sales that were non-indicative of true value, such as sales of undivided interests and sales between relatives, be eliminated. This information was placed into a computer and assessment/sales ratios were constructed for each individual sale as well as for the

aggregate sales. A copy of its printout was sent to each county for correction. Field verifications of sales were made in those counties where the number of sales was less than 3 percent of the total properties in existence. Where necessary because of the 3 percent requirement, benchmark appraisals were also made. All corrections and additions were incorporated into the data on hand and final assessment/sales ratios for non-agricultural land and all improvements in the aggregate and for urban residences only were computed.

The appealing counties complain that there was no attempt by the State Board to further verify the figures furnished to it by the county assessors and the employees of the Department of Revenue. However, this overlooks the important question of who has the burden of proof. "We have consistently affirmed the rule that the burden of proof is on the appellant to establish that the action of the State Board of Equalization and Assessment was erroneous, arbitrary, and capricious." *County of Sioux v. State Board of Equalization & Assessment, supra* at 202, 207 N.W.2d at 221. "The State Board has a wide latitude of judgment and discretion in equalizing assessment of property." *City of Omaha v. State Board of Equalization & Assessment,* 181 Neb. 734, 738, 150 N.W.2d 888, 891 (1976). "We do not pass upon the relative merits or the probative force of the evidence in the record. . . . [The presumption is that the Board faithfully performed its duties and the burden is upon the appellant to prove that the action of the Board was erroneous, arbitrary, capricious, and contrary to the law." *Carpenter v. State Board of Equalization & Assessment,* 178 Neb. 611, 617-18, 134 N.W.2d 272, 277 (1965). "In order to reverse the order of the Board, we would be required to hold the Board utterly failed to follow a reasonable course of action . . . ." *Id.* at 629, 134 N.W.2d at 283. We can make no finding from the record before

us that the method utilized by the State Board to compute the assessment/sales ratios utterly failed to follow reasonable standards.

The appealing counties' final assault against the State Board's action relates to its claimed arbitrariness in dividing real estate into two divisions and the utilization of different methods of equalization without showing any correlation between and among the various procedures.

Historically, although both damned and praised, the assessment/sales ratio has been employed as an accepted tool of equalization. However, as we have previously pointed out, both the county representatives and the Department of Revenue officials were practically unanimous in expressing their opinions that, at the present time at least, sales were a poor indicator of actual value of farmland. This was described as being the result of practically all farm sales being made to adjoining owners who were anxious to take advantage of the rare opportunity to add a contiguous tract to their present operating units. Consequently, there was general agreement that the prices actually paid for many farms exceeded their true value. Frank Frost, administrator of the property tax division of the Department of Revenue, in his testimony, supported those findings. Additionally, he said that "years of investigation of the market would lead us to believe that the earning capacity is probably the only common denominator you have in the analysis of rural sales." Mr. Donner testified that there were not sufficient farm sales to establish where the agricultural land ratios would set as opposed to the actual residential ratio. Finally, Herbert Kollmorgen, graduate soil scientist, agronomist, and conservationist for over 40 years, and the man primarily responsible for the 1976 Land Valuation Manual, ventured the opinion that utilization of the income capitalization approach was about the only way that "you can actually get real equali-

zation." He also told how in 1973, when the manual was first developed, he had obtained the actual selling prices of farms from the confidential transfer statements, and after plotting them on sectionalized maps of the counties, "found we were fairly close to the income approach that we used in the manual."

We feel that there was ample justification for the State Board to utilize different methods of equalization in what we feel were logically distinguished kinds of property.

The State Board rejects the contention of the counties that there was no correlation between the two methods of equalization, i.e., income approach as to farmland and assessment/sales ratios supplemented by verifications and benchmark appraisals as to the remaining property, and insists that the burden of proof is upon the counties to show a lack of correlation in the record. We are not in agreement with this position. In *City of Omaha v. State Board of Equalization & Assessment, supra* at 737, 150 N.W.2d at 891, we said:

> The record here shows that the foundation for the State Board's equalization order was an assessment-sales ratio in more than a third of the counties; scientific appraisals in some counties; and was indefinite in other counties. The record does not reveal the basis of correlation, or the basis of application, of the methods used for measuring and testing uniformity.

As pointed out above, there was evidence in the record from which the State Board could conclude that the income capitalization or land manual approach established reasonably accurate valuations of farmland.

What evidence is there of accurate valuations of property other than farmland? In *County of Gage v. State Board of Equalization & Assessment,* 185 Neb.

749, 753, 178 N.W.2d 759, 762 (1970), we said that the "consistent use of reasonably current reappraisals, done under uniform conditions and regulations approved by the State Tax Commissioner . . . meet the constitutional test of uniformity." According to Mr. Donner, Jefferson, Thayer, Johnson, Douglas, Dodge, and Saunders Counties all had reappraisals during the years 1977, 1978, or 1979. These counties had consistently the highest assessment/sales ratios and also were at or near the high point of 120 percent of manual for agricultural lands. Perhaps more graphically demonstrating the correlation existing between the two methods of equalization is the following listing of counties showing the dates of reappraisals and the percentage changes found necessary by the State Board to achieve equalization:

County	Year of Appraisal	Irrigated	Dryland	Pasture	Range and Meadow	Other
Jefferson	1977	0	0	0	0	0
Thayer	1978	0	0	0	0	-12
Johnson	1976-77	4	4	4	4	- 4
Dodge	1978	8	8	8	NA	- 6
Saunders	1977-78	9	5	0	NA	0
Adams	1977-78	20	20	NA	10	29
Boone	1978	8	8	8	8	4
Douglas	1978	NA	5	5	NA	0
Polk	1978	10	10	0	0	10
Sarpy	1978	9	5	0	NA	5
York	1978	0	0	8	0	16

As stated in *County of Sioux v. State Board of Equalization & Assessment, supra* at 747, 178 N.W.2d at 758: "It is possible, and probably necessary, to use different methods for some of the counties, but the record must show the correlation between the various methods used in the attempt to achieve a reasonable degree of uniformity." We believe that such correlation has been shown and that the action of the State Board has achieved a reasonable degree of uniformity.

Perhaps one further point deserves comment. The Department of Revenue, in presenting its evidence, made reference on several occasions to the assumption that there existed in the state good intracounty equalization, as a justification for its recommendation of the use of different tools in attempting to achieve statewide equalization. It is not entirely clear from the record whether the reference was to all classes of property, agricultural and nonagricultural alike, or only to and within the class of nonagricultural alone. If it was in regard to all property, it was an invalid assumption and one discarded by the State Board because, very obviously, by authorizing different rates of increases to the two main classifications of property, it recognized a lack of equalization. If the assumption was limited to nonagricultural property only and the use of the assessment/sales ratio for urban residences to adjust all nonagricultural property, the Department's position might be more tenable. We say that because, if all nonagricultural land was equalized within a particular county, the application of the same percentage increase to that category would maintain the same degree of equalization within the class. However, even without regard to any such assumption, reference to the following statistics taken from State Board meeting exhibits 11 and 16, respectively, showing first the aggregate ratios for all nonagricultural property and then those for urban residential only, will demonstrate the soundness of the action taken by the State Board.

County	Aggregate All Property	Urban Residential Only
Banner*	7.70	7.70
Box Butte	11.00	11.62
Dawes	18.21	17.76
Morrill	13.81	13.09
Scotts Bluff	16.22	16.39
Sheridan	12.89	12.83

(* No sales. Based on benchmark appraisals for all types.)

It is apparent that the differences between the two ratios are so negligible as to have little if any effect on the ultimate figure. Extending these comparisons statewide is even more convincing. Of the remaining 87 counties, 3 showed ratio disparities of 2.1, 2.4, and 6.2 percent; 10 disclosed differences of from 1.1 to 2 percent; 24 revealed diversities of from 0.6 to 1 percent; and 44 manifested dissimilarities of 0.5 percent or less. Six counties had no nonagricultural aggregate ratios which could be compared.

In the final analysis, after utilizing the assessment/sale ratios for urban residential property of the eight highest counties as a starting point in order to attempt to achieve equalization throughout the state, the Department of Revenue tested the resultant average ratio of 35 percent. Its surveys disclosed that using such a ratio would place more than 50 percent of all properties over 35 percent of actual value. Therefore, it recommended use of an assessment/sales ratio of 30 percent which in its opinion would achieve 35 percent of actual value for the vast majority of nonagricultural land in Nebraska. Likewise, the beginning point for agricultural land was 30 percent over the 1976 Land Valuation Manual. However, after further research, the Department of Revenue offered evidence that an increase of only 20 percent over the manual was necessary to equalize that division of property with all other classes of property at actual value. We have previously referred to the correlation which existed between the two methods.

Considering all of the evidence, the State Board perceived these recommendations as forming a reasonable basis to achieve equalization of all classes of property throughout the state at 35 percent of actual value. The evidence supports the action of the State Board and the appealing counties have failed to prove that its action was erroneous, arbitrary, or contrary to law.

The orders of the State Board of Equalization and Assessment setting the values of the various classifications of property in the appealing counties are supported by the record, were correct, and are affirmed.

AFFIRMED.

IN RE VALUATION AND EQUALIZATION OF REAL AND PERSONAL PROPERTY IN THE STATE OF NEBRASKA FOR 1979.

BANNER COUNTY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

295 N. W. 2d 682

Filed July 15, 1980. No. 42916.

1. **Tax Assessments: State Equalization Board.** The State Board of Equalization and Assessment is a factfinding body vested with a wide latitude of judgment and discretion in arriving at equalization of values.
2. **State Equalization Board: Administrative Orders: Appeal and Error.** This court, in reviewing the action of the State Board of Equalization and Assessment, will not sit as a super board of equalization and pass upon the merits of the evidence presented to the State Board.
3. _____: _____: _____. Where the record contains some evidence to justify the order of the State Board of Equalization and Assessment, it will not be considered arbitrary and capricious.
4. **Tax Assessments: Valuation: Statutes.** It is only when the appraisal made by the Tax Commissioner under proper statutory provisions fails to reflect current values to use in an assessment/sales ratio that Neb. Rev. Stat. § 77-508.01 (Reissue 1976) requires that the necessary "appraisals" be "conducted by qualified appraisers."
5. **Tax Assessments: Valuation.** The Tax Commissioner is not limited to the use of one method in valuing property, although the record must show correlation between the various methods used in an attempt to achieve a reasonable degree of uniformity.

Appeal from the State Board of Equalization and Assessment. Affirmed.

Robert G. Simmons, Jr., County Attorney, Wright & Simmons, and Peters & Chunka, 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.

HASTINGS, J.

Banner County, Nebraska, has appealed from an order of the State Board of Equalization and Assessment (State Board) increasing the assessed value of real property in Banner County. The State Board ordered an increase in valuation in Banner County of all property other than farmland by 200 percent, of irrigated farmland by 23 percent, of dryland farms by 62 percent, and of range and meadowland by 10 percent. The county sets forth 17 assignments of error, many of which overlap, and most of them have been determined by this court in *Box Butte County v. State Board of Equalization & Assessment, ante* p. 696, 295 N.W.2d 670 (1980). Those errors not discussed in that case will be dealt with here. For the reasons to follow, the order of the board as it affects Banner County will be affirmed.

Banner County assigns as error that the board used a different method of valuation of property in Banner than in any other county. One of the specific findings of the board, as set forth in its findings and order, is as follows:

> 6(b) In Banner County, there were no sales by which a sales assessment ratio could be computed. Thus, bench mark appraisals conducted by the Department of Revenue were used to determine the sales assessment ratio for that county. This method provides an accurate sales assessment ratio for Banner County.

Banner County is a rural county at the west edge of Nebraska with only one town, the unincorporated village of Harrisburg. There are approximately 20 houses in Harrisburg and between 250 and 300 houses on farms and ranches throughout the county. Harrisburg is 4 miles west of State Highway 71, has no municipal services such as sewer or water systems, and the nearest railroads are in Kimball and Gering, Nebraska.

The board found that there were no sales by which an assessment/sales ratio could be computed for Banner County, and so the Nebraska Department of Revenue sent in a staff to do benchmark appraisals from which to compute an assessment/sales ratio. This is a method of selecting at random properties within the subject county and comparing them with other similar properties that have been sold in that county, or if no sales have been had, then comparing them with sales in a surrounding county having a comparable community and property. This will establish a level of value which, in turn, will establish a level of assessment.

Two houses were selected in Harrisburg and compared to one house in Dix, Nebraska, and one house in Bushnell, Nebraska. Both towns are in Kimball County, are on U.S. Highway 30, are on the Union Pacific Railroad mainline, and are adjacent to Interstate 80. Both towns also have municipal sewer and water systems. No location adjustment was made when valuing the Harrisburg houses. The Department of Revenue staff gave as its opinion that an adjustment was not necessary, because they spoke to people in Kimball County who felt that the lack of municipal sewer and water systems was insignificant, especially since Harrisburg was closer to Scottsbluff and away from the Interstate.

The appraisal manager for the property tax division of the Department of Revenue testified that he supervised the staff who did the benchmark apprais-

als and that they were trained by the department. The staff appraisers used the information which the county assessor had already obtained concerning the interior of the properties and placed on the property record card. The appraisals were performed under the cost approach and market approach, using the Marshall Valuation Service Manual, a nationally recognized manual. Adjustments for economic and location factors were made when the staff felt the adjustment was warranted. There was further testimony that an appraisal requires a great deal of judgment on the part of the appraiser, since an appraisal is an opinion of value.

Had we been seeking to value these properties ourselves, we may very well have used outside appraisers, visited with more people in all communities to aid in establishing the validity of our "comparables," or made location adjustments, none of which was done in this case. However, the State Board is a factfinding body and is vested with a wide latitude of judgment and discretion.

> Perhaps, this court sitting as a super board of equalization would have evaluated the evidence differently and made some adjustments, but we may not, as was said in Laflin v. State Board of Equalization & Assessment, *supra* [156 Neb. 427, 56 N.W.2d 469 (1953)], sit as a super board of equalization and pass upon the merits of the evidence.

Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 629, 134 N.W.2d 272, 283 (1965).

We have stated that "Where the record of the proceedings before the State Board of Equalization and Assessment contains no evidence to justify an order, the action must be held to be unreasonable or arbitrary." *County of Sioux v. State Board of Equalization & Assessment,* 185 Neb. 741, 747, 178 N.W.2d 754, 758 (1970). It follows that where the record does contain some evidence to justify an order, then it

will not be considered to be arbitrary and capricious. We cannot second-guess the judgment of the State Board, which found sufficient evidence offered by the Department of Revenue that an adjustment for location in the Banner County benchmarks was not necessary in the appraisal of those properties.

Banner County assigns as error that the board did not comply with Neb. Rev. Stat. § 77-508.01 (Reissue 1976). That statute states, in pertinent part:

> In those counties or jurisdictions where the number of valid or bona fide sales of real estate are not considered sufficient to furnish conclusive evidence as to the ratio of assessed values to sales values, the Tax Commissioner shall have authority to conduct and use an appraisal to determine sales assessment ratio. In addition to the authority to conduct and use an appraisal in any ratio determination, the Tax Commissioner shall have authority to employ transfers of comparable real estate in surrounding counties as indicators of value in the sales assessment ratio. When an appraisal does not reflect current values to use in such ratio computation, the Tax Commissioner shall have the necessary appraisals conducted by qualified appraisers, and such appraisals shall be used in the ratio computation. The Tax Commissioner may use any other relevant matter in considering intercounty equalization.

It is the position of Banner County that, where there are insufficient sales to furnish evidence of value, the board is required to use qualified appraisers to make an appraisal of the subject properties. According to the appellant, this applies to all agricultural lands in the state and to all urban property in Banner County.

The statute authorizes the Tax Commissioner to

conduct an appraisal to determine an assessment/sales ratio, and also to employ transfers of comparable real estate in surrounding counties as indicators of value in the assessment/sales ratio, i.e., benchmark indicators. It is only when these appraisals do not reflect current values that the statute requires that the Tax Commissioner "shall have the necessary appraisals conducted by qualified appraisers." It was the position of the Department of Revenue staff that the benchmark appraisals were an accurate indication of actual value in Banner County. Any further appraisal was not required.

The statute further authorizes the Tax Commissioner to use *any other relevant matter* in considering intercounty equalization. The use of the Land Valuation Manual certainly comes within the definition of "other relevant matter." The Tax Commissioner is not limited to the use of one method of valuing property. "It is possible, and probably necessary, to use different methods for some of the counties, but the record must show the correlation between the various methods used in the attempt to achieve a reasonable degree of uniformity." *County of Sioux, supra* at 747, 178 N.W.2d at 758. The question of correlation is dealt with in *Box Butte County v. State Board of Equalization and Assessment, supra.*

The remaining assignments of error, relating to the use of hearsay evidence in achieving equalization, the claimed unintelligibility of the State Board's order, and the omission of the State Board's seal from its order, require no comment.

The order of the State Board of Equalization and Assessment in raising the valuations of the various classes of property in Banner County, as previously set forth herein, is affirmed.

AFFIRMED.

IN RE VALUATION AND EQUALIZATION OF REAL AND PERSONAL PROPERTY IN THE STATE OF NEBRASKA FOR 1979.

GREAT WESTERN SUGAR COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

295 N. W. 2d 686

Filed July 15, 1980. No. 42920.

1. **State Equalization Board: Standing: Appeal and Error.** An individual taxpayer may have standing to appeal from a final order of the State Board of Equalization and Assessment if such taxpayer has made a showing before that board requiring some affirmative action by it.
2. _____: _____: _____. It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals and a taxpayer who requests such action of the board has not made a showing requiring affirmative action by the board so as to have standing to appeal to this court.

Appeal from the State Board of Equalization and Assessment. Affirmed.

J. Murry Shaeffer, 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.

HASTINGS, J.

In this proceeding, Great Western Sugar Company, the owner of sugar beet processing plants in Scotts Bluff and Morrill Counties, Nebraska, has appealed from the action of the State Board of Equalization and Assessment in ordering the following percentage increases in valuations of various classes of real estate:

	Morrill County	Scotts Bluff County
Farmland		
Irrigated	23	23

Dryland	62	75
Pasture	NA	NA
Meadow and range	10	84
All other property*	38	84

(*This includes urban real property, rural improvements, suburban homesites, improvements on leased land, and commercial and industrial property.)

The basis of Great Western's complaint was that the State Board, by ordering a greater percentage increase in the valuations of nonagricultural property than in those of raw farmland, will cause the owners of the former class of property to pay a disproportionately higher share of local taxes than the latter. Its assignment of errors, although not as numerous, paralleled and overlapped those of *Box Butte County v. State Board of Equalization & Assessment, ante* p. 696, 295 N.W.2d 670 (1980), and its appeal is supported by the same record as *Box Butte County, supra.*

At the outset, however, we are met with one different issue, and that is the one of the standing of Great Western to maintain this appeal. Neb. Rev. Stat. § 77-510 (Reissue 1976) permits the appeal from a final decision of the State Board by "any person . . . affected thereby." In *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 430, 56 N.W.2d 469, 473 (1953), we said that "It was evidently the intention of the Legislature to afford relief to any person . . . from a final order of the Board which denied relief to one who had made a showing requiring the affirmative action of the Board." In *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 370, 278 N.W.2d 619, 622 (1979), we denied standing to the plaintiff because the evidence which he had offered at the meeting of the State Board "fell far short of a 'showing requiring the affirmative action of the Board.' " Similarly, in this case, the representative of Great Western appeared after the hearing on this phase of the business of the State Board had been concluded, *but while the State*

Board was still in session and before any formal order had been entered, and was properly permitted to testify. However, the full import of his testimony and request for "affirmative relief" is contained in the following excerpt from his testimony:

> For example, in Scotts Bluff County you're recommending an 84 percent increase. This is basically on the resale of urban residential property. It has nothing to do with the operations of a sugar beet refinery. Even though we are in a period of higher inflation, many properties, such as our own, through no fault of ours or the areas that they're located in are declining in value, rather than increasing in value. Some of these values I know a lot of places you could buy a lot of sugar refineries. There's five sitting idle in the state of Utah that I'm sure they would be very happy to sell. An across the board percentage type increase we feel would lead to inequality rather than equality.

On the surface, at least, it appears that the witness was complaining that his particular property had been valued too high with reference to other property within that class, considering the depressed condition of the sugar beet industry. If so, the only available relief would be to apply to the county board of assessment to lower the valuation of its particular property or to raise that of the others. That the State Board cannot do. "It should be stated here that it is not the function of the State Board to deal with assessments of individuals either directly or as a board of review; that is the function of the county board of equalization." *County of Howard v. State Board of Equalization & Assessment*, 158 Neb. 339, 349, 63 N.W.2d 441, 447 (1954).

If it is the position of Great Western that the use of an urban residential assessment/sales ratio to support a raise in valuation of its and others' business

and commercial property was improper, we pointed out in *Box Butte County, supra*, the high degree of correlation between the ratios of the two classes of property.

Great Western also argues that the action of the State Board has the effect of destroying the existing intracounty equalization. This argument was dealt with adversely to the appellant's position in *Box Butte County, supra.*

The order of the State Board of Equalization and Assessment in raising the valuations of the various classes of property in Scotts Bluff and Morrill Counties is affirmed.

AFFIRMED.

W. H. WEISETH, APPELLEE, V. MERRILL KARLEN, DOING BUSINESS AS THE KARLEN FAMILY RANCH, APPELLANT.

295 N. W. 2d 103

Filed July 15, 1980. No. 42944.

Negligence: Jury Instructions. The jury must be instructed upon the rights and liabilities of the parties under the theory of concurrent negligence if the evidence warrants, even though the issue is not pleaded and no instruction is requested.

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

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

Curtiss & Baird, for appellee.

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

WHITE, J.

The plaintiff, a veterinarian residing in Plainview, Nebraska, brought an action in the District Court for

Pierce County, Nebraska, for the value of liquid protein supplement furnished to the defendant's cattle in Pierce County, Nebraska, in December 1976. The defendant answered and cross-petitioned against the plaintiff, acknowledging that the plaintiff had agreed to supply liquid protein supplement to the defendant's cattle but alleging that the plaintiff had also promised that he would supervise the feeding of the liquid protein. The defendant further alleged that the failure to properly supervise the feeding of the liquid protein led to the death of two cows and to 194 calves being aborted or born dead. The defendant prayed for damages. The trial court sustained the plaintiff's motion for summary judgment against the defendant on the plaintiff's cause of action for the value of the liquid supplement and the cause proceeded to trial on the defendant's cross-petition. The trial was had to a jury and the jury returned a verdict in favor of W. H. Weiseth, the plaintiff in the original action and the defendant on the cross-petition. Merrill Karlan, the defendant and cross-petitioner, appeals.

The defendant cross-petitioner assigns five errors. They essentially relate to three jury instructions that the court gave on its own motion: Instructions 12A, 12B, and 12C, dealing with the possible negligence of a party other than the plaintiff. We affirm.

Merrill Karlen was a rancher with his residence at Reliance, South Dakota. By reason of drought, Karlen contracted, through an agent and banker, with Leonard Wostrel of Plainview, Nebraska, to care for 850 cows through the winter months of 1976-77. The cattle were delivered and grazed on standing cornstalks and stover, which is chopped and stacked cornstalks. Wostrel agreed in writing to care for the cattle, feed them stover when they could not graze, furnish water tanks and equipment, and check the water, and further, to guarantee the count of the cattle when removed from the Wostrel farm

back to South Dakota. Weiseth, a retired veterinarian, met Karlen at the Wostrel place in November 1976 and discussed with him a proposal to feed liquid protein feed to Karlen's cattle for an agreed price per pound. Karlen agreed to purchase the feed and Weiseth agreed to furnish some lick tanks and to check on consumption of the feed. Weiseth delivered approximately 19,000 pounds of the liquid feed on December 1, 1976, and refilled the tanks on December 11 with approximately 18,500 pounds. According to his testimony, Weiseth frequently checked on the tanks and tested the feed levels with a dip stick. During two of his periodic inspections, he observed dry water tanks.

On one of his inspection visits to the Wostrel farm, Weiseth discovered a dead cow and reported it to Karlen. A veterinarian from South Dakota was contacted and autopsied the cow discovered by Weiseth and another cow found dead at about the same time by one of Wostrel's employees. On examination, the veterinarian, Richard B. Autrie, discovered that the cows' rumens were completely full of corn shucks coated with a brown gelatinous material, like a great popcorn ball. The impaction prevented the normal digestive system of the cows from functioning. The rumen is the main portion of the stomach, where fermentation bacteria are present and cellulose is broken down into carbohydrates. There was an almost complete absence of water in the rumen. It was Autrie's opinion that the cause of the impaction was the improper method in which the liquid protein, consisting of a great deal of sugar and molasses, was fed to Karlen's cows. "[T]hese cattle had overloaded on corn shucks and protein, a liquid protein and it just glued it together to form what I referred to as a big popcorn ball." Autrie further observed that a great many of Karlen's remaining cattle were humpbacked and gaunt, which led him to believe that they, too, were suffering from

impaction. On his suggestion, the liquid protein feed was discontinued and the remainder of the cows recovered.

The cows started to calf in the middle of April and, according to Karlen's testimony, he had an unusually high death loss from cows that had wintered on the Wostrel farm. The Wostrel cows produced only 628 live calves and 194 calves were either aborted or born dead to cows who had been pregnant when tested in the fall. It was the opinion of Autrie that the impaction in the herd and poor digestion, which he attributed to the improper feeding of the liquid protein, created a toxin as a by-product of the decomposition of the impacted material which was absorbed through the placenta membrane and into the calf, causing a weak and sick, or dead, calf.

There was a substantial dispute in the evidence with respect to the level at which the liquid protein was absorbed by the cattle, but the parties agreed that approximately 2 to 3 pounds a day for each animal would be normal and healthful for the cows. Karlen's evidence indicated that the consumption was substantially in excess of this and that Weiseth was negligent in not diluting the liquid protein or cutting down the number of lick wheels that fed the protein to the cows. Testifying for Weiseth, Raymon A. Anderson, a veterinarian from Pierce, Nebraska, disputed the rate at which the cattle were fed and said that he would have expected impaction in pregnant cows to result in death of the cows or in quite uneventful recoveries with no resulting effect on the calves. Further, the method of feeding the cows by free choice lick tanks without any limitations was a reasonable, ordinary way to feed.

Both Autrie, on behalf of Karlen, and Anderson, on behalf of Weiseth, testified that a deprivation of water would cause some impaction in cattle eating stover. Wostrel, testifying on behalf of Karlen, stated that an adequate supply of water was always

present during the entire time that the cattle were in his care and he generally disputed the testimony of Weiseth that there were dry tanks on two occasions when Weiseth inspected the water tanks.

Essentially, Karlen urges that there was not sufficient evidence to submit Instruction 12A to the jury since there was no evidence of negligence of a third party, i.e., Wostrel.

Instruction 12A followed NJI 3.42 and read:

> Where the independent acts or omissions to act of two or more persons combine to proximately cause an injury indivisible in its nature, each such act or omission to act is itself a proximate or concurrent cause, and any one or more of such persons may be held responsible for the entire injury. This is true even though one may have been more negligent than the other. It is no defense that all those who might have been held responsible are not made parties to this action.

There was evidence from which the jury could have concluded that Wostrel, who had the obligation to see than an adequate water supply was present at all times for the Karlen cattle, failed in that duty. There was also evidence from expert witnesses that, with the feeding of stover and/or liquid protein, an adequate water supply is essential. There was further evidence that there was little if any water in the rumens of the dead cattle. As a Comment to NJI 3.42 said, "The jury must be instructed upon the rights and liabilities of the parties under the theory of concurrent negligence if the evidence warrants, even though the issue is not pleaded and no instruction is requested. Barry v. Moore, 172 Neb. 57, 108 N.W.2d 401 (1961)." There was evidence from which a jury could have concluded that a third party, Wostrel, was negligent. Therefore, the trial court was correct in submitting the issue to the jury.

The assignment is without merit.

The court's Instruction 12B was as follows:

> One of the issues in this case is whether the occurrence giving rise to the death of defendant's cattle and calves was caused by the conduct of Leonard Wostrel. If you find the sole proximate cause of the occurrence was the conduct of Leonard Wostrel then your verdict should be for the plaintiff.
>
> The burden of proof on this issue is on the defendant; that is, the defendant has the burden to prove that some negligence of plaintiff as set forth in Instruction 3, was the proximate cause or a proximately-contributing cause of the occurrence and that therefore, the negligence of Leonard Wostrel was not the sole proximate cause thereof.

The instruction is consistent with, and derived from, the language of NJI 2.01A (1975 Pocket Part). The defendant does not argue that Instruction 12B is not a correct statement of the law but, essentially, argues the same point as in his first assignment of error: That there was no evidence whatever that the conduct of Leonard Wostrel in any way contributed to the death of the cattle or to the loss of the calves. As before discussed, there was evidence from which a jury could have concluded that Wostrel was negligent and that his negligence was the proximate cause of the defendant's loss. The assignment is without merit.

The court's Instruction 12C, drawn from NJI 3.43, read as follows:

> An efficient intervening cause is a new and independent act, itself the proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. A person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient

> intervening cause, which he should not have reasonably anticipated.
>
> It is usually difficult to distinguish between that which is a cause and that which is only a condition. An alleged cause may be merely a condition and not a real cause. It is not sufficient if the conduct charged, whether wrongful or not, does nothing more than furnish a condition by which an injury is made possible. If a condition permits injury through the subsequent independent act of another, the condition is not a proximate cause of the injury.
>
> Ordinarily, the normal actions of animals are not causes, but are conditions which, if present, affect only the required standard of conduct.

Again, Karlen argues there was insufficient evidence to justify the instruction. Karlen contends that Wostrel's conduct could not have, in any circumstance, consisted of an efficient intervening cause. There was evidence from which the jury could have believed that, even if Weiseth was negligent and somehow caused the impaction to the cattle, such negligent feeding would have no effect on the cows that recovered (and all except two did recover) and no effect whatever on the production of live calves.

Karlen's contentions are without merit and the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOYCE L. TIPTON, APPELLANT.

294 N. W. 2d 869

Filed July 15, 1980. Nos. 42948, 42949, 42950, and 42951.

1. **Arrests.** An officer may arrest a suspect in a public place without a warrant when it appears that a felony has been committed and there are reasonable grounds to believe that the person arrested is guilty of the offense.
2. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether, at the moment, the facts and circumstances within the knowledge of the officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.
3. **Sentences.** Where a sentence is within the statutory perimeters, it will not be disturbed absent an abuse of discretion by the trial court.

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

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

WHITE, J.

Defendant, Joyce L. Tipton, was prosecuted on three counts of first degree sexual assault, one count of attempted sexual assault, four counts of use of a knife in commission of a felony, and one count of robbery. The defendant waived his right to a jury trial and was found guilty on all counts charged. The defendant was sentenced to a term of 15 to 20 years on each of the first degree sexual assaults and 5 to 10 years on the attempted sexual assault, to run concurrently. In addition, he was sentenced to terms of 5 to 10 years on each of four charges of use of a knife in commission of a felony and a term of 15

to 20 years on the charge of robbery. Those sentences are to be served consecutively to each other and to the 15 to 20 year sentences imposed for first degree sexual assault. The defendant was further found to be a treatable mentally disordered sex offender and ordered to be confined in the Lincoln Regional Center. The cases were consolidated for appeal. We affirm.

Tipton appeals to this court, assigning as error that there was no probable cause for his warrantless arrest and that any identification testimony or statements of the defendant should have been suppressed as the fruit of an unconstitutional arrest. Defendant also contends that the sentence imposed by the District Court was excessive.

On March 29, 1979, Sgt. Dennis Howard of the Omaha police department questioned Joyce L. Tipton at the Walking Cane Tavern about several sexual assaults. Officer Howard was investigating a number of sexual assaults in the Park Avenue area, and an informant pointed out the defendant. Officer Howard told Tipton he wanted to talk to him since he matched the description of a suspect that had committed four rapes. Tipton answered that he had already been interviewed by Officer Joe Nepodal and cleared and that he was on parole for sexual assault. Returning to the police station, Officer Howard checked with Officer Nepodal about his interview with Tipton. Nepodal told Howard that he did not interview Tipton about the sexual assaults; that their discussion concerned a robbery case Nepodal was investigating. Howard's supervisor, Lt. Robert K. Olson, reviewed the records of the defendant's previous conviction and found that there were a number of similarities between the 1976 sexual assault and the assaults investigated in 1979. All of the assaults had occurred in the same geographical area and it appeared the crimes had the same modus operandi. The victim's physical description

of the suspect in the 1976 case matched the physical descriptions of the suspect in the later cases. In all the assaults, the suspect wore a mask, either a ski mask or a nylon stocking. A knife was used in all 1976 and 1979 assaults.

Based on the initial street stop and the information concerning the defendant's previous sexual assault conviction, three police officers and Tipton's parole officer went to his apartment with the intention of arresting him. The officers made no attempt to get an arrest warrant before the arrest. The officers discovered the defendant had moved but the parole officer knew his new address. The officers went to the apartment they believed belonged to the defendant, knocked on the door, and no one answered. While they were standing in the hall, the defendant and a female companion were observed coming back to the apartment. While in the hallway, the officers advised the defendant who they were and that they wanted to talk to him at the police station about recent sexual assaults in that area. Tipton agreed to accompany the officers to the station and talk to them and consented to a search of his premises at that time. The defendant was brought to the police station and interrogated. Between periods of interrogation, a lineup was held. The defendant was identified by one of the victims by sight and later by voice. The defendant later admitted to the commission of three of the sexual assaults.

At trial, the state produced the victims of the several sexual assaults. The first victim identified the defendant as the assailant. The second victim was not able to positively identify the defendant as the assailant; the third and fourth victims identified the defendant as the assailant. The taped statement of the defendant, in which he confessed to three of the crimes charged, was received in evidence. The defendant, after the taped confession, admitted to the interrogating officer the fourth assault, having

first denied it because of his reluctance to admit that the victim was praying as he assaulted her.

The first issue before this court is whether probable cause existed to arrest Tipton. If not, then evidence as fruit of the unlawful arrest must be suppressed.

Nebraska statutes do not distinguish between warrantless arrests on the basis of where the arrest took place, but they provide that an officer may arrest without a warrant when it appears that a felony has been committed and there are reasonable grounds to believe that the person arrested is guilty of the offense. Neb. Rev. Stat. § 29-404.02 (Reissue 1979). The Supreme Court of the United States held that, absent exigent circumstances, a warrantless felony arrest within one's residence violated the fourth amendment. *Payton v. New York*, 100 S. Ct. 1371 (1980). Since the statute does not explicitly prohibit a warrantless arrest for a felony within the suspect's home, this provision must be implicitly incorporated into the statute. However, this is not a case where the police made a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. See *State v. Schlothauer, ante* p. 670, 294 N.W.2d 382 (1980). In the case at bar, the defendant was arrested outside his apartment. The United States Supreme Court has held valid a warrantless arrest made in a public place, establishing that a personal seizure alone does not require a warrant if probable cause exists. *United States v. Watson,* 423 U.S. 411 (1976). The Supreme Court emphasized that the necessary inquiry was not whether the officers had time to obtain a warrant, but only whether there was probable cause for the arrest. The court there held that the power to make such a warrantless arrest in a public place is not dependent upon proof of any exigent circumstances which made it impracticable to obtain a warrant.

In Nebraska, the test of probable cause for a war-

rantless arrest is whether, at the moment of arrest, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was commiting an offense. *State v. Russ,* 193 Neb. 308, 226 N.W.2d 775 (1975). The officers knew that four sexual assaults had been committed and that the defendant was on parole for sexual assault. The defendant matched the general descriptions provided by the victims. At the first interview, the defendant lied to the officer and claimed that he had previously been checked and cleared by Officer Nepodal. The lie was decisive. Lieutenant Olson testified: "It was important in the sense that it [a robbery] happened just after the suspect had fled on the 36th and Jackson sexual assault, and of course, thinking like a policeman the possibility was in my head that this was a cover-up report." When Lieutenant Olson reviewed the records of the defendant's previous conviction, he found that there were a number of similarities between the incident and the crimes under investigation such as the suspect's description, clothing, and knife. On this information, Olson ordered that the defendant be arrested. "It is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts." *State v. Anderson,* 204 Neb. 186, 195, 281 N.W.2d 743, 748 (1979). The facts and circumstances known to the officers at the time of arrest were clearly sufficient to constitute probable cause justifying the arrest. See *State v. Irwin,* 191 Neb. 169, 214 N.W.2d 595 (1974). Since there was probable cause to arrest the defendant, the motions to suppress the confession and lineup identification were properly overruled.

The defendant next contends that his confession

must be suppressed because it was obtained as a result of an unreasonable detention. Defendant claims that there was an unreasonable delay in bringing him before a magistrate, that he was unreasonably detained by the police, and that the interrogation should have ceased after the lineup when one of the victims identified him as the person who had assaulted her.

The continued detention following the lineup was justified and, since the identification that resulted from the lineup involved only one case, it was prudent that the police continue their investigation to determine the defendant's involvement in the remaining assault cases. The defendant does not contend that his statements were involuntary, nor that he asserted his right to remain silent. The length of the interrogation was not unreasonable nor inherently coercive. Prior to giving the taped confession, the defendant was interrogated three times for a total of 4 hours. The assignment is without merit.

The defendant argues that the in-court identification and the testimony of the witnesses must be suppressed as fruit of his illegal arrest. It is not suggested that the police lineup was impermissibly suggestive, nor that the witnesses lacked an independent basis for an in-court identification. Defendant contends that identification and testimony of witnesses were an exploitation of his illegal arrest. Since we have concluded that the police had probable cause to arrest the defendant, the defendant's contentions are clearly without merit.

Finally, the defendant contends his sentence was excessive. It is well established that where a sentence is within the statutory perimeters, it will not be disturbed absent an abuse of discretion by the trial court. *State v. Davis*, 200 Neb. 557, 264 N.W.2d 198 (1978). No abuse of discretion appears here.

We affirm the judgment of the trial court.

AFFIRMED.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. BERNARD WALSH, JR., RESPONDENT.

294 N. W. 2d 873

Filed July 22, 1980. No. 41636.

1. **Attorneys: Disciplinary Proceedings.** A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitutes grounds for suspension or disbarment.
2. _____: _____. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment.
3. _____: _____. An attorney may be subject to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, if such conduct might have been found to be illegal.
4. _____: _____. Cumulative acts of misconduct are more cause for concern than an isolated instance of negligence or misconduct, and justify more severe sanctions.

Original action. Judgment of disbarment.

Edward F. Fogarty of Guilfoyle, Fogarty & Lund, for respondent.

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

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

CLINTON, J.

This is a disciplinary action brought in this court by the State of Nebraska, ex rel. Nebraska State Bar Association, against Bernard Walsh, Jr., respondent, an attorney and member of the association. The disciplinary proceedings were initiated as a result of complaints made to the Counsel for Discipline, an in-

vestigation by that officer, followed by a hearing before the Committee on Inquiry, 4th Judicial District, and a review by the Advisory Committee. Upon filing of the charges in this court, we appointed a referee who, pursuant to a stipulation of the relator and the respondent, heard the matter on the record made before the Committee on Inquiry. The referee found the charges to be true and recommended disbarment. Exceptions to the report of the referee were filed by the respondent and the matter was then argued in this court. We concur in the recommendation of the referee and enter an order of disbarment.

The respondent is charged with violations of the Code of Professional Responsibility, DR 1-102(A)(1), (3)-(6); DR 6-101; and DR 7-101(A)(2), (3), and of his oath as an attorney taken under Neb. Rev. Stat. § 7-104 (Reissue 1977). The contents of the pertinent disciplinary rules will later be discussed as necessary.

The specific conduct involved in the charges relates to two transactions. The first involves the respondent's representation of James Paul Hale in a workmen's compensation case before the Nebraska Workmen's Compensation Court in the years 1972 and 1973, and the rather bizarre aftermath of that matter, continuing until 1976. The second transaction involves the making and delivery by the respondent of a $3,500 insufficient funds check to June Bowman in October of 1976.

Hale is a deaf mute. Practically all of the communication between Hale and the respondent took place through Hale's wife. In 1972, Hale was an employee of the Packaging Corporation of America. His job was that of "stripper." His work involved the removal of excess material from boxes by use of a hammer and apparently required more or less continuous pounding. In September of 1972, the respondent accepted employment by Hale. On Sep-

tember 20, 1972, the respondent filed with the Workmen's Compensation Court a petition alleging that Hale had, in the course of and arising out of his employment, suffered an injury, referred to as a carpal tunnel syndrome. The record shows that, as a consequence, surgery described as a "release of transverse carpal ligament" was performed. The matter was heard by a judge of the Workmen's Compensation Court on November 6, 1972, and on December 6, 1972, an award was made for 7 weeks' temporary total disability and for medical, hospital, and pharmaceutical bills. The court found that the evidence was insufficient to sustain a finding of permanent disability. On or about February 8, 1973, respondent met with Mr. and Mrs. Hale and a check for the award of $434, which had been made payable to Hale and the respondent, was endorsed; respondent received an attorney's fee; and Hale received the balance. At the same time, a satisfaction of the award was signed by Hale and the respondent and the latter filed the same with the court immediately thereafter. At the same conference, Mrs. Hale, on her own initiative, paid Walsh $20 in addition to the fee requested.

The basic nature of the charge in connection with the above transaction is that the respondent did not explain to Mr. and Mrs. Hale that the award of the Workmen's Compensation Court, made on December 6, 1972, would be final unless an appeal was taken within 14 days, and that he did not advise them that their exclusive remedy against the employer was in the Workmen's Compensation Court.

In the latter part of 1973 and in 1975, the respondent prepared various petitions captioned for filing in the District Court for Douglas County, all of which related to the injuries alleged to have been suffered by Hale in the course of his employment. None of these petitions were ever filed and the purpose and reason for their preparation is the subject of a

conflict in the evidence.

There are some very sharp conflicts in the evidence which will be mentioned as necessary. We note, however, that the referee resolved these conflicts on essential matters in favor of the Hales. In disciplinary proceedings, the findings made by the referee are given special consideration on matters that are in irreconcilable conflict. *State ex rel. Nebraska State Bar Assn. v. Jensen,* 171 Neb. 1, 105 N.W.2d 459 (1960).

A basic conflict in the case is whether respondent explained to the Hales the nature of the workmen's compensation proceeding, the limited rights which an employee has against the employer, and the necessity of a timely motion for rehearing or appeal if the workman is dissatisfied with the award made by one judge of the Workmen's Compensation Court. Related thereto is the question of whether the respondent ever gave timely advice that a motion for rehearing before the Workmen's Compensation Court or, alternatively (under the statute in effect at that time), an appeal to the District Court, had to be made within 14 days of the date of the award.

The referee specifically found that the respondent did not inform the Hales promptly after the award was made or advise them of their right of appeal. The respondent adduced no evidence to show that he did. He testified that he informed them of the right of appeal on February 8, 1973, at the time the satisfaction of the award was signed and the proceeds of the check in payment of the award were divided. This, of course, was long after the time for review had passed. Respondent testified that the Hales were satisfied with the award made and then knew that the award was final.

The respondent's version of the voluntary payment by Mrs. Hale of $20 was that it was a "tip" because the Hales thought he had done such a good job. Mrs. Hale testified that it was given to Walsh

to hurry the litigation along. If the Hale testimony is to be believed, this tends to support the conclusion that the respondent never explained to the Hales the finality of the award and that they did not understand it. The testimony on this point is sharply conflicting. The conclusion that the respondent did not explain to them the right of appeal is corroborated by his own explanation that he felt Hale had no case worthy of appeal because the treating surgeon could find no organic basis for the complaints. Respondent seems to have been totally unaware that, even if a disability is functional, it is nonetheless compensable if it arises from an injury in the course of employment. *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966). The record indicates that respondent did not get a second medical opinion on his client's condition. At the hearing before the workmen's compensation judge, the medical reports introduced indicated that the condition of Hale's arm and hand and the ultimate outcome were uncertain. These facts alone would have made prudent a further review at which time more evidence might have been available and the unfavorable progressive nature of the injury might have been more clearly supportable.

The Hales' lack of understanding of the nature of workmen's compensation proceedings is further evidenced by their independent inquiry to the Workmen's Compensation Court in September of 1973, to which the court responded:

> I am enclosing a copy of the award entered on December 6, 1972, by Judge Wiles of our Court. As you did not appeal this through your attorney, this case is completed.
>
> If you have any further questions concerning this case, you should contact Mr. Walsh, as he represented you at the hearing.
>
> Very truly yours,
> NEBRASKA WORKMEN'S

COMPENSATION COURT
/s/ TKC
Thom K. Cope
Agency Legal Counsel

The respondent's own evidence in the form of memoranda given him by Mrs. Hale indicates that the Hales did not understand the nature of a workman's rights under the Workmen's Compensation Act, e.g., we "Want to sue for $75,000 damage." Another such memorandum which respondent introduced indicated that he knew even before the workmen's compensation case was filed that the Hales regarded the disability as serious and permanent. This apparently ultimately proved to be the case. He was also informed by the same memorandum that they were dissatisfied with the services of their surgeon.

Although the evidence was disputed as to whether respondent, during 1972 and 1973, explained the nature of the award, that it was final, and that no appeal had been taken, the referee found: "A review of the entire record and respondent's actions subsequent to February 8, 1973 (as set forth below in the findings) leads the referee to find that Mrs. Hale's testimony is to be accepted over respondent's." He specifically found: "[F]rom the date of the award (December 6, 1972) until a few days after September 24, 1973 the Hales had no such advice prior thereto." The evidence supports such finding by the requisite standard. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Hollstein,* 202 Neb. 40, 274 N.W.2d 508 (1979).

In the latter part of 1973, the respondent prepared a petition captioned In the District Court of Douglas County, Nebraska, in which Hale was named as the plaintiff and Packaging Corporation of America was

named as the defendant. This petition asserted a claim for personal injuries to the right wrist and hand, including a claim for pain and suffering, and prayed for damages in the sum of $435,000. Hale signed the petition before the respondent as notary public and the respondent affixed his signature thereto. At or about the same time, the respondent prepared another petition, likewise captioned In the District Court of Douglas County, Nebraska, in which Hale was the plaintiff and the surgeon who had attended Hale was named as the defendant. This petition alleged slander by the surgeon in that he "falsely and maliciously did speak and publish the following false and defamatory words, that is to say: '. . . the condition of Mr. Hale's hand at this time is a psychological response, and is not on any organic basis.' " This petition prayed for damages in the sum of $28,000. The verification on the instrument was signed by Hale but was not notarized.

Some time prior to November 13, 1975, the respondent prepared a third petition also captioned "In the District Court of Douglas County, Nebraska." In this pleading, Mrs. Hale was the plaintiff and the Packaging Corporation of America was the defendant. The petition asked damages for loss of consortium and prayed for judgment in the sum of $265,000. This petition was never signed. None of the petitions was ever filed.

At a later time, the respondent prepared an incomplete notice to take depositions in the case of James P. Hale v. Packaging Corporation of America. It gave notice of the proposed taking of the depositions of unnamed witnesses at the Douglas County Courthouse on May 17, 1976, at 2 p.m.

The respondent's explanation for the preparation of these instruments was that, although he explained to Mrs. Hale such suits were without legal basis and groundless and he could and would not file them, that he did so for the Hales' convenience so that they

might prosecute the actions either through another attorney or pro se. Mrs. Hale's testimony, however, was that the respondent represented to her that the petitions had been filed and that the matters were going to be tried.

As we have previously noted, the referee resolved the factual disputes in favor of the Hales and found that the respondent's explanation was not credible, that if respondent had unequivocally informed the Hales that the suit was groundless and the respondent would not represent them, the Hales would have been unlikely to have been making the repeated calls at respondent's office. Both sides agree that the Hales were in the respondent's office at least 500 times between 1972 and 1976. The referee found:

> An attorney who prepares documents, such as the petitions and the notice to take depositions, knowing that they are without legal validity which might be filed by another, such as his clients, is destructive of the integrity of the legal profession, is tantamount to acts prejudicing the administration of justice and definitely shows a lack of fitness to practice law.

The check transaction is uncomplicated. There is little conflict in the evidence because the only witnesses were Walsh and the president of the bank in which the check in question was deposited. Walsh testified that he made an agreement to purchase a boat from Don Bowman, one of his clients. At Bowman's request, Walsh made a check in the sum of $3,500, payable to June Bowman, Don's wife. The check, which does not appear in the record, was, according to the respondent, made and delivered on October 13, 1976, but dated October 15, 1976. The respondent acknowledged that at the time the check was written, he did not, and knew he did not, have sufficient funds in the account on which the check was drawn to pay it. He did not inform June Bow-

man of the fact although he claims that the fact that the check was post-dated should have made her aware of it. He testified that he intended to pay the check by borrowing money, giving the boat as security. His excuse was that Bowman did not deliver to him a bill of sale in time, so he was unable to arrange a loan before the check cleared. The issuance of the post-dated check did constitute a representation that the money would be in the bank on October 15th. It was not deposited until that day.

June Bowman deposited the check in a bank account in the name of their daughter, Christine, on which Don Bowman could draw. The depository bank gave immediate credit to the depositor for the check and the Bowmans then drew checks against the deposit. When the check was later returned unpaid, the depository bank did not charge the check back to the depositor's account, but held it as a cash item and made a demand on Walsh for payment. It made repeated demands upon Walsh for payment and then engaged the services of a law firm to make collection. After numerous promises, about November 1, 1976, Walsh made arrangements for the money and the depository bank appeared at Walsh's bank and received a certified or cashier's check in payment.

Although Walsh seeks to excuse his conduct in the transaction by reason of Don Bowman's alleged failure, not only did he make the check without getting the bill of sale, he also testified rather inconsistently regarding his plans for borrowing, stating that he was aware that because of possible title difficulties (inferably encumbrances), Bowman might not be able to deliver a bill of sale. At the hearing before the Committee on Inquiry, Walsh agreed to produce and place into the record within 10 days the bill of sale that he had by that time purportedly received from Bowman. He did not produce the bill of sale. At the same time, he agreed with the commit-

tee to produce the bank statements for the months of October and November *1976* of the account on which the check was drawn. He furnished for the record after the hearing bank statements for October and November *1973*. These showed a maximum balance of $715.11 for the month of October 1973. Walsh had testified that in 1976 when the check was written, he had a balance of $2,600 or $2,700 in the account. The failure of Walsh to produce the pertinent records contrary to his promise weighs against him. Whether he had an actual intent to defraud is not decisive because, according to his own testimony, he knew that he did not have sufficient funds to pay the check. He claimed to be aware that Bowman might not be able to produce a bill of sale. He might have stopped payment on the check but he did not. He was quite willing, apparently, to let someone — in this case the depository bank — run the risk of loss.

The record establishes that the respondent has once previously, upon complaint and investigation by the Committee on Inquiry, been reprimanded for neglecting the affairs of a client.

Canon 1 of the Code of Professional Responsibility pertains to maintaining the integrity and competence of the legal profession. Certain disciplinary rules promulgated thereunder, namely DR 1-102 (A)(4), (5), and (6), prohibit, among other things: engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; engaging in conduct prejudicial to the administration of justice; and any other conduct adversely reflecting on the fitness of the lawyer to practice law. Canon 6 pertains to competent representation. DR 6-101 (A)(2) and (3) mandate that a lawyer shall not handle a legal matter without preparation adequate to the circumstances and shall not neglect a legal matter entrusted to him. Canon 7 pertains to zealous representation of the client within the bounds of the law. DR 7-101 (A)(3) provides that a lawyer shall not in-

tentionally damage his client during the course of the professional relationship. Interpretative ethical consideration EC 7-8 under the latter canon provides that the lawyer should exert his best efforts to insure that the decisions of his client are made only after the client has been informed of the relevant considerations. Ethical consideration EC 7-11 provides that the responsibilities of a lawyer may vary according to the intelligence, experience, mental condition, or age of the client.

It is clear from the record that Mr. and Mrs. Hale had very unrealistic expectations. It is also clear that they were difficult clients, partly because of the difficulty in communication and partly because of their lack of understanding. At the heart of this matter is Walsh's failure to make a timely explanation to them of the nature of a workmen's compensation claim, the limits of recovery allowed thereunder, and the right to and the necessity of a timely appeal. The record supports, by a clear preponderance of the evidence, a conclusion that Walsh failed grossly in this matter. With reference to the events which transpired after the judgment became final, that is, the preparation of the groundless pleadings, nothing can be said to excuse such conduct.

We have said a license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession constitute grounds for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Ledwith,* 197 Neb. 572, 250 N.W.2d 230 (1977). Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust

which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Jensen, supra.* Respondent's conduct in connection with the workmen's compensation matter clearly constituted deceit and misrepresentation, conduct prejudicial to the administration of justice, the handling of a matter without sufficient preparation, conduct which reflected upon his fitness to practice law, and failure to represent a client.

The knowing issuance of the insufficient fund check at the very least involved a deception and a false representation, namely, that the money would be in the account on October 15, the day the check was dated. The evidence clearly supports the conclusion that respondent knew he could not have the loan arranged at that time. An attorney may be subject to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, if such conduct might have been found to be illegal. *State ex rel. Nebraska State Bar Assn. v. Ledwith, supra.* Cumulative acts of misconduct are more cause for concern than an isolated instance of negligence or misconduct, and justify more severe sanctions. *State ex rel. Nebraska State Bar Assn. v. Hollstein, supra.*

JUDGMENT OF DISBARMENT.

THE NEBRASKANS, INC., APPELLANT, V. JAMES A. HOMAN AND ELIZABETH A. HOMAN, APPELLEES.

294 N. W. 2d 879

Filed July 22, 1980. No. 42791.

1. **Contracts: Merger.** A contract complete in itself will be conclusively presumed to supersede and discharge another made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together.
2. **Summary Judgment.** Summary judgment is an appropriate remedy only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

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

Bruce D. Vosburg of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

George A. Thompson of Robinson, Thompson & Hovey, for appellee.

Heard before MCCOWN and WHITE, JJ., and COLWELL, KORTUM, and GRANT, District Judges.

KORTUM, District Judge.

This is an action for recovery of a real estate brokerage commission on the sale of real estate. The District Court for Sarpy County, Nebraska, granted summary judgment for the defendants. We affirm this judgment.

The defendants, James A. Homan and Elizabeth A. Homan, were owners of an apartment building in Bellevue, Nebraska. The Homans were contacted by an employee of the plaintiff, The Nebraskans, Inc., who knew the Homans were interested in selling.

On January 28, 1978, the parties signed a brokerage agreement with a stated price of $255,000 and a commission of 6 percent to the plaintiff. This brokerage agreement referred to the prospective (and eventual) buyers by their initials only.

On February 19, 1978, the Homans signed a purchase agreement with Hinton Lampley, Jr., and Ernest R. Wade which provided for a purchase price of $220,000, a $5,000 down payment, and a realtor's commission "as agreed." This agreement was signed by The Nebraskans, Inc., and was conditioned upon the purchasers' ability to obtain financing.

At the same time, the Homans and The Nebraskans, Inc., signed a Uniform Listing Contract giving Nebraskans the exclusive right to sell the Homan's property through February 20, 1978. This contract provided that Nebraskans were to receive the 6 percent commission, if within 6 months after expiration of the listing (through August 20, 1978), a sale was made due to Nebraskans' efforts.

The purchasers, Wade and Lampley, did not obtain the necessary financing and the $5,000 down payment was returned. On August 23, 1978, the Homans, without the participation of Nebraskans, signed a purchase agreement with Wade and Lampley for a price of $210,000 and the property was sold on October 17, 1978.

The trial court held that the written brokerage agreement of January 28, 1978, was merged with the listing and purchase agreement of February 19, 1978; that the listing contract expired on February 20, 1978, with the 6-month extension expiring on August 20, 1978.

The trial court further held that no sale was made by the plaintiff in conformance to the listing contract and plaintiff was not entitled to a real estate commission upon the defendants' sale of the property after expiration of the 6-month extension period.

Plaintiff first contends that there was no merger of the two agreements and that the trial court erred in so finding.

For a merger to take place, the same parties and the same subject matter must be involved and

there must be some showing of intent to merge the two agreements.

The brokerage agreement of January 28, 1978, and the listing agreement of February 19, 1978, cover the identical property to be listed. Both agreements are between the plaintiff and defendants. The inconsistency between them is a reduction in the sale price and a different time limit with a 6-month extension. Also, the latter agreement was an exclusive listing for the benefit of the plaintiff. These constitute material changes.

The pertinent rule is as follows: "A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former, so they cannot subsist together." *In re Estate of Wise,* 144 Neb. 273, 13 N.W.2d 146 (1944) (syllabus of the court); *Goings v. Gerken,* 200 Neb. 247, 263 N.W.2d 655 (1978) (syllabus of the court).

The language of this court in the *Goings* case, *supra*, is applicable here. At 251, 263 N.W.2d at 658, this court said, "It is obvious the parties made a new agreement. The second option agreement varied material terms of time and price, created a new agreement, and discharged the previous one."

The trial court was correct in holding that a merger of the agreements had occurred.

Plaintiff further contends that a material question of fact exists as to when the final purchase agreement was made.

Summary judgment is an appropriate remedy only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Farro v. Rubottom,* 202 Neb. 120, 274 N.W.2d 149 (1979).

Plaintiff raises the issue that perhaps the purchasers of the property had contacted the defendant

James A. Homan prior to August 23, 1978, when the agreement was executed. Plaintiff now states in its brief that it is not unreasonable to assume that the terms were agreed to before August 20, 1978, when the extension of the listing agreement expired.

Assumptions are not facts. The affidavit of defendant James A. Homan is unequivocal that he received a purchase agreement from Wade and Lampley on August 23, 1978. This assertion of fact is not controverted by any evidence in the record. Plaintiff would have us infer that something took place between the defendants and purchasers or that the defendants were contacted by the purchasers prior to August 20, 1978. There was nothing presented to the trial court to support this inference.

Plaintiff asserts that defendants are not entitled to judgment as a matter of law and cites *Peters v. Dreger,* 146 Neb. 670, 21 N.W.2d 436 (1946) and *Dunn v. Snell,* 124 Neb. 560, 247 N.W. 428 (1933), in support of this position. Both cases cited are clearly distinguishable.

In the *Peters* case, *supra*, the brokerage contract was to run "30 days months from date and thereafter until _____ days written notice is given of withdrawal from market." The contract in that case was signed on April 20, 1942, and on November 2, 1942, the plaintiff broker submitted an offer to purchase to the defendants. The defendants did not accept the offer and, on November 21, 1942, the defendants gave notice of the termination of the listing and brokerage agreement. On January 4, 1943, some 44 days later, defendants sold the property to the same buyer procured by the plaintiff for the amount as previously offered and submitted by the plaintiff.

In the *Dunn* case, *supra,* the brokerage contract was open ended, without a termination date. It appears that the defendant seller, after rejecting a purchase offer procured by the realtor, immediately terminated the brokerage contract and sold the

property to the purchaser obtained by the realtor upon terms identical to the former contract.

It is apparent that both cases cited by plaintiff were determined on the issue of when termination of the agency relationship occurred and the good faith of the seller in relation to the revocation of the agency agreement.

Such is not the fact in this case. The listing agreement is clear and unambiguous. The agreement expired on February 20, 1978, with a 6-month extension for the benefit of the plaintiff.

It is further uncontradicted that no sale was consummated through efforts of the plaintiff during the life of the agreement or by the defendants during the 6-month extension thereof.

There was no genuine issue of material fact presented to the trial court and defendants were entitled to judgment as a matter of law. The judgment for the defendants is affirmed.

AFFIRMED.

PETERSON & VOGT, A PARTNERSHIP, APPELLEES, V. CLAUDE J. LIVINGSTON, APPELLANT.

295 N. W. 2d 106

Filed July 22, 1980. No. 42904.

1. **Statute of Frauds: Real Estate Brokers: Promissory Notes.** While an oral promise to pay a commission to a broker for the sale of real estate is unenforceable because of the statute of frauds so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission.
2. **Statute of Frauds: Real Estate Brokers.** Delivery of a promissory note to pay a commission for the sale of real estate amounts to an effective renouncement of the benefit of the protection afforded by the statute of frauds, and delivery of the note transforms the agreement to pay a real estate commission from an unenforceable obligation into a collectible debt.
3. **Real Estate Brokers: Promissory Notes: Broker's Licenses.**

A promissory note given by a vendor of real estate to a corporate real estate broker in Nebraska and accepted by the broker in payment for brokerage services previously rendered in the sale of certain real estate located in Colorado, which the vendor subsequently acknowledged, reaffirmed, and promised to pay for such services, is supported by a valid and lawful consideration and action may be brought upon said note and recovery had thereon, notwithstanding the fact that, at the time of the transaction in question, said corporate broker did not hold a valid and current Nebraska real estate broker's license as required at that time by Neb. Rev. Stat. §§ 81-885.06 and 885.16 (Reissue 1976), but all of the officers and salesmen of said corporation involved in the transaction held current Nebraska and Colorado broker's licenses, and the corporation also held a current Colorado corporate broker's license.

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

Arlan G. Wine, for appellant.

Richards & Richards, for appellees.

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

BRODKEY, J.

Defendant below, Claude J. Livingston (hereinafter referred to as "Livingston"), appeals to this court from a judgment entered by the District Court for Hayes County, Nebraska, awarding Peterson & Vogt (hereinafter referred to as "Partnership") the sum of $12,140 in its action to recover amounts allegedly due it on two promissory notes executed by Livingston and payable to Peterson & Vogt, Inc. (hereinafter referred to as "Corporation"). We affirm.

By way of background, it appears that in 1946 a real estate brokerage partnership was formed by Chester A. Peterson (hereinafter referred to as "Chester") and Leonard A. Vogt (hereinafter referred to as "Vogt"). Chester secured a Nebraska real estate broker's license in 1939; and Vogt be-

came a licensed real estate broker in Nebraska in 1946, and in Colorado in 1964. The partnership license was kept current, and was in effect at all times involved in this litigation from the date of their issuance until the date of the trial. Harold C. Peterson (hereinafter referred to as "Harold"), Chester's son, joined the Partnership and became a partner therein in 1954. Harold was licensed as a real estate broker in Nebraska in 1955, and was also licensed in Colorado as a real estate broker in 1964. Vogt's and Harold's licenses were kept current and were in effect until the time of the trial. The Partnership secured a real estate broker's license in Nebraska in 1947, and was registered as a licensed broker in Colorado in 1964.

On December 31, 1972, the Partnership, which at that time consisted of only Harold and Vogt, for tax reasons changed the form of their business enterprise to a corporate entity, and became Peterson & Vogt, Inc. The Corporation was registered in Colorado as a licensed broker from January 1, 1973, until January 12, 1976, but apparently did not receive a broker's license in Nebraska until July 2, 1974, the license to the Partnership being in effect until that date. On January 1, 1976, the Corporation again became a partnership, and remained such until the time of trial.

On February 11, 1974, after the Partnership became incorporated, but prior to its receipt of a corporate broker's license in Nebraska, Livingston and Harold had conversations with regard to the listing and sale of certain land in Colorado which was owned by Livingston. Although there is a conflict in the evidence as to which party initiated the conversations, it is clear that the parties agreed that the sales commission for the sale of the land was to be $10,000 in the event that the land sold for $300 per acre. No written listing agreement was entered into by the parties, but the land was advertised by the Corpora-

tion and was subsequently sold for $300 per acre. All conversations with regard to the sale of the land were held in the state of Nebraska, as was also the preparation and execution of the deeds conveying the property. The closing of the transaction, however, occurred in Colorado on April 9, 1974.

For reasons not revealed in the record, the commission to the Corporation on the sale of the property was not deducted from the monies paid to Livingston at the closing. However, on that date, the Corporation requested Livingston to execute a promissory note to it for the amount of the commission on the transaction, but Livingston chose not to do so. Subsequently, however, after conversations between them, on August 20, 1974, Livingston executed two promissory notes to the Corporation for the amount of $5,000 each, the first note bearing a due date of October 20, 1974, and the second note bearing a due date of April 20, 1975. When, as stated above, the Corporation was again changed to a partnership entity, the notes, being assets of the Corporation, were transferred to the Partnership. These are the notes involved in this litigation.

The record reveals that plaintiff made numerous attempts to collect on the notes, but with little success. However, it appears that Livingston made a payment of $500 on each note on July 23, 1976, but made no further payment thereafter, although he acknowledged the existence of the indebtedness on numerous occasions thereafter. Following Livingston's failure to make a payment on March 4, 1978, the plaintiff brought this action on June 13, 1978, to recover on the notes. After a trial to the court sitting as the trier of facts, the court entered judgment for the plaintiff Partnership, as set out above.

Livingston has appealed that decision to this court, assigning several errors as grounds for reversal. He first contends that the trial court erred in holding that the execution of the notes and the acknowledg-

ment of the indebtedness in several letters avoided the requirements of the statute of frauds as to the necessity of written contracts with brokers for the sale of lands and also avoided the requirements of the Nebraska statutes with reference to the recovery of compensation by unlicensed brokers, and thus that the notes subsequently sued upon were legally collectible.

At this time, it will be helpful to review the pertinent Nebraska statutes. Neb. Rev. Stat. § 36-107 (Reissue 1978), relied upon by Livingston, provides, so far as applicable, as follows: "Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent."

The history of the various Nebraska statutes requiring the licensing of real estate brokers as a condition to recovering compensation for their services, is more extended and complicated. It must be remembered that the transactions involved in this case occurred in 1974, although this action was not commenced until June 13, 1978, and the judgment rendered on January 10, 1979. On the date of the transaction in question, it is clear that the Corporation did not hold a broker's license in Nebraska, although both Harold and Vogt had individual licenses in effect both in Nebraska and Colorado, and the Corporation was duly licensed in Colorado.

The entire statutory law relating to the Real Estate Commission, and the licensing of brokers, was rewritten in 1973 in 1973 Neb. Laws, L.B. 68, and that statutory provisions applicable at the time of the transaction in question were as set out below. Neb. Rev. Stat. § 81-885.02 (Reissue 1976) was as follows:

> After September 2, 1973, it shall be unlawful for any person, directly or indirectly, to engage in or conduct, or to advertise or hold

> himself out as engaging in or conducting the business, or acting in the capacity, of a real estate broker, associate broker, or real estate salesman within this state without first obtaining a license as such broker, associate broker, or salesman, as provided in sections 81-885.01 to 81-885.47, unless he is exempted from obtaining a license under section 81-885.04.

Likewise, Neb. Rev. Stat. § 81-885.06 (Reissue 1976) provided:

> No action or suit shall be instituted, nor recovery be had, in any court of this state by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provision of sections 81-885.01 to 81-885.47, to other than licensed brokers, licensed associate brokers, or licensed salesmen unless such person, partnership, or corporation was duly licensed under sections 81-885.01 to 81-885.47 as broker, associate broker, or salesmen prior to the time of offering to perform any such act or service or procuring any promise to contract for the payment of compensation for any such contemplated act or service.

The new statute enacted in 1973 also provided:

> After September 2, 1973, no original broker's license shall be granted to a corporation or partnership unless the corporation or partnership designates a qualifying broker who is an officer of the corporation or a member of the partnership and who shall have more than a nominal interest in or be an active participant in the management of the corporation or partnership, and every member or officer of the corporation or partnership, who actively participates in the real estate

> brokerage business of the corporation or partnership, shall obtain a license as a real estate broker and every employee, who acts as a salesman for such partnership or corporation, shall hold a license as an associate broker or a real estate salesman.

See Neb. Rev. Stat. § 81-885.16 (Reissue 1976).

It should be noted, however, that the statutes were again amended in 1978 by 1978 Neb. Laws, L.B. 361, effective July 22, 1978, and § 81-885.06 was amended to read as follows:

> No action or suit shall be instituted, nor recovery be had, in any court of this state by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of sections 81-885.01 to 81-885.47, to other than licensed brokers, licensed associate brokers, or licensed salespersons. *A licensed broker may bring an action in the name of a partnership or corporation if the broker operates under either of such business organizations.*

See Neb. Rev. Stat. § 81-885.06 (Cum. Supp. 1978) (emphasis supplied). Likewise, former § 81-885.16, as set out above, was repealed. See Neb. Rev. Stat. § 81-885.16 (Cum. Supp. 1978).

It seems clear that the very actions of which appellant complains would be valid and proper at the present time; but under the statutes in effect at the time of the transactions involved herein, would have been sufficient to bar an action for the recovery of *commissions*. We emphasize, however, that the action involved in this case is not an action to recover commissions as such, but is an action to recover on promissory notes subsequently executed in a separate transaction, although indirectly arising from services rendered by the broker. While we recognize that other jurisdictions have held in similar situa-

tions that recovery cannot be had upon the subsequently executed notes because the consideration for such notes, being in violation of law, was illegal, we do not believe such is the law in Nebraska, by analogy to previous decisions of this court.

In *Mohr v. Rickgauer,* 82 Neb. 398, 117 N.W. 950 (1908), we held that while an oral promise to pay a commission to a broker for the sale of real estate is unenforceable because of the statute of frauds so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission. In that case, we stated:

> The statute in question has been sustained, and it has been frequently held that, where the employment is oral, there can be no recovery upon the contract (*Allen v. Hall,* 64 Neb. 256; *Baker v. Gillan,* 68 Neb. 368; *Covey v. Henry,* 71 Neb. 118; *Danielson v. Goebel,* 71 Neb. 330); nor upon a *quantum meruit* for services performed (*Blair v. Austin,* 71 Neb. 401; *Rodenbrock v. Gress,* 74 Neb. 409; *Barney v. Lasbury,* 76 Neb. 701). Now, we have presented the question whether such services constitute a sufficient consideration for a written promise to pay. Like the statute of frauds, of which it is a virtual extension and enlargement, it was designed to exclude oral testimony as a means by which the rights of litigants could be determined in certain cases where experience has been shown that it was particularly liable to abuse. *Baker v. Gillan, supra.* To make a concrete application of the reason for the law, the legislature, premising that a liability might be wrongfully imposed upon a defendant by false testimony if it were permitted to be established by oral evidence, has provided that he shall not be charged except upon a written contract subscribed

by himself. When, however, the defendant, after receiving the benefit of services, executes a written promissory note in payment thereof, it would seem that the reason of the law was fulfilled. The contract is then established by his own signature.

The object of the statute is, as we have seen, to prevent frauds and perjuries; and, while certain contracts are by the terms thereof declared void, the uniform construction placed upon the statute by the courts renders it not void, but merely unenforceable. *Riley v. Bancroft's Estate,* 51 Neb. 864. It is within the principle laid down by Baron Parke in *Earle v. Oliver,* 2 Exch. (Eng.) *71, that "where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." This doctrine has been applied to cases where the consideration of a contract made by a *feme sole* was an unenforceable contract made by her while *covert*, as well as to cases where the consideration was an oral promise to answer for the debt of a third person unenforceable by reason of the statute of frauds. *Goulding v. Davidson,* 26 N.Y. 604; *Rogers v. Stevenson,* 16 Minn. 56; *Wills v. Ross,* 77 Ind. 1.

We are satisfied that the principle referred to applies to the case we are considering, and that the obligation of the defendant, while unenforceable so long as it remained in parol, was a sufficient consid-

> eration for his written promise to pay the same.

Mohr has been consistently followed and approved by this court since that date. See, *Morrison v. Gosnell,* 84 Neb. 275, 121 N.W. 236 (1909); *Pierce v. Domon,* 98 Neb. 120, 152 N.W. 299 (1915); *Ricketts v. Geil,* 137 Neb. 531, 290 N.W. 254 (1940); *Svoboda v. De Wald,* 159 Neb. 594, 68 N.W.2d 178 (1955); *Midcontinent Properties, Inc. v. Pflug,* 197 Neb. 429, 249 N.W.2d 476 (1977).

While it is true that *Mohr* involved the validity of a note taken after a failure to comply with the statute of frauds by having a written contract, we believe the same reasoning applies by analogy to the statutes relating to the necessity of a broker having a license at the time of a sale of real estate. Such contracts, in reality, are not void, but voidable. Both statutes have as their dominant purpose the protection of the public. See, 1973 Floor Debates 1145 (Feb. 27, 1973) (Remarks of Senator Duis). *Svoboda v. De Wald, supra.*

The trial judge reached the same conclusion, with which we agree. In announcing his decision, he stated as follows:

> I think probably the first thing I should say is that the services were performed and the sale made, and the seller in this case received a consideration for the sale. I think this explains the rulings of our Supreme Court under 36-107 when they permit a note to change what would otherwise be a void contract. That is as you recall under 36-107 why it had to be in writing. But in the Moore [Mohr] case and in others quoted the Supreme Court said that the notes took it out of the provisions of the statute. I think the reason for that, or at least one of them, was that basically the court or anybody else likes to see things paid for when they are

— when the work is performed.

. . . .

Well, it's as I say, under the law, as it appears, that's 36-107, which is the written portion because we have cases that say that the making of the notes is then a new matter and it can be collected. But there are no such rulings under 81-885.06 which I think Mr. Blackwell [defendant's attorney] believes to be the principal contention, and I agree with him that it is. Now, the reason that we don't have such good guidelines under 81-885.06 is that there have been no cases cited under the section. And so we have to go with the section itself and what we can derive from other cases, and cases involving other statutes.

Now, what we have under 81-885.06 is a gap in the broker's license for the corporation. And it was during this gap that some of the transactions occurred. This would have been on the Nebraska license, not on the Colorado license, and is the contention that is made by Mr. Blackwell, and it's true that a number of parts of the transaction took place in the State of Nebraska. But I can't help but apply the same principal in the [Mohr] case to 81-885.06. . . .

Therefore, I believe that the principles of the Moore [Mohr] Case also apply to 81-885.06, that is in the execution of the note and the acknowledgment of the debt, that the irregularities in the real estate commission is not all that important. The notes bear interest at 6 percent per annum from due date at 8 percent from maturity until paid. This I think is a valid and enforceable provision in the note. So, we will grant judgment for the plaintiff in this case. . . .

We conclude that Livingston's execution and delivery of the promissory notes in question amounted to an effective renouncement of the benefits of the statutes and that the trial court was correct in finding that the execution and delivery of the notes transformed the agreement to pay a real estate commission from an unenforceable obligation into a collectible debt.

What we have stated above, we believe, disposes of Livingston's second assignment of error to the effect that the trial court erred in finding that there was legal consideration given for the execution for the two promissory notes. As previously stated, an oral agreement to pay a real estate commission is sufficient consideration to support a promissory note. See *Mohr v. Rickgauer, supra,* and other cases supporting that rule, cited above.

Finding no merit to Livingston's assignments of error, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

JOHN ELIKER, APPELLANT, V. EVELYN ELIKER, APPELLEE.
295 N. W. 2d 268

Filed July 22, 1980. Nos. 42932, 43021.

1. **Contempt.** A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings, but strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence.
2. _____. Contempts which are prosecuted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are, ordinarily, termed criminal contempts, while those instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled are, ordinarily, civil contempts.

3. _____. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a mere civil contempt, and the rules applicable to a criminal contempt are not applicable.
4. _____. A proceeding for civil contempt is one instituted to preserve and enforce the rights of a private party to an action and to compel obedience to a judgment or decree intended to benefit such a party litigant.
5. **Contempt: Child Support.** Proceedings brought pursuant to the provisions of Neb. Rev. Stat. §§ 42-358 et seq. (Reissue 1978) are civil in nature and are to be filed and heard in accordance with rules applicable to civil contempt proceedings.
6. **Contempt.** Where an individual is under order of a court to perform a continuing obligation, the fact that a court may, at one point in time, find the individual's failure to perform such act not wilfully contumacious, does not preclude the court from later finding continued disregard of the order as evidence of a subsequent wilful and contumacious act sufficient to constitute contempt of court.
7. **Child Support: Visitation.** The fact that a mother in whose custody a minor child has been placed by the court refuses to permit a father ordered to pay child support, to exercise his rights of visitation does not justify the father's withholding the payment of child support.
8. **Divorce: Modification of Decree: Contempt.** Where a divorced husband neglects to apply for a modification of the divorce decree, in spite of the fact that sufficient grounds exist to warrant modification, the mere existence of such grounds with respect to payments due under the decree is not available as a defense to proceedings for contempt for violating the decree.
9. **Divorce: Child Custody: Child Support.** The disposition of minor children and provisions for their support, in an action where a divorce is granted, is not controllable by agreement of the parties, but by the court on the facts and circumstances as disclosed to it.
10. **Laches: Equity.** The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT and DALE E. FAHRNBRUCH, Judges. Affirmed.

Roger C. Lott, for appellant.

Ron Lahners, Lancaster County Attorney, and Thomas S. Jaudzemis, for appellee.

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

KRIVOSHA, C.J.

The appellant herein, John Eliker, appeals from two separate final orders entered in the same case by the District Court for Lancaster County, Nebraska. Both orders have been consolidated for purposes of appeal. The first order, entered in case No. 42932, resulted from a finding by the District Court that Mr. Eliker had wilfully and contumaciously disregarded a previous judgment of the District Court for Lancaster County, Nebraska, requiring him to make child support payments for his then minor child. As a result of the finding, the trial court ordered Mr. Eliker confined to jail for a period of 90 days, subject, however, to his right to purge himself of such contempt by paying the delinquent child support within 30 days from the date of the order.

In the second case appealed, No. 43021, the trial court ordered and directed Mr. Eliker's employer to withhold and transmit certain earnings of Mr. Eliker to the clerk of the District Court for Lancaster County, Nebraska, to be applied upon payment of the delinquent child support payments. We have reviewed the records in both cases and conclude the orders are, in all respects, correct. The orders in both cases are, therefore, affirmed.

The marriage of Mr. Eliker and his former wife, Evelyn Eliker, was dissolved by decree entered by the District Court for Lancaster County, Nebraska, on March 6, 1969. By the decree, Mrs. Eliker was granted custody of the minor child of the parties and Mr. Eliker was ordered to pay child support in the amount of $50 per month, beginning March 6, 1969. At the time of the entry of the decree, the minor child of the parties was not quite 13 years of age and

obtained her majority on April 20, 1975.

The records in the office of the clerk of the District Court for Lancaster County, Nebraska, disclose that Mr. Eliker made only one of the required child support payments and was, on April 20, 1975, some $3,800 delinquent in child support payments.

On August 1, 1978, the District Court for Lancaster County, Nebraska, pursuant to Neb. Rev. Stat. § 42-358(2) (Reissue 1978), appointed the county attorney of Lancaster County, Nebraska, to commence contempt proceedings against Mr. Eliker for his failure to pay the required child support. On October 25, 1978, a hearing was had before the Honorable Samuel Van Pelt, one of the judges in and for the 3rd judicial district, and on November 16, 1978, Judge Van Pelt entered an order finding that the evidence was not sufficient to establish Mr. Eliker's wilful failure to comply with prior court orders. Accordingly, the contempt proceeding was dismissed.

Thereafter, on March 8, 1979, the Honorable Dale Fahrnbruch, another of the district judges for the 3rd judicial district, acting pursuant to the provisions of § 42-358(2), again entered an order to show cause why Mr. Eliker should not be held in contempt of court for his failure to make child support payments as previously ordered by the court. The record reflects that between the date of November 16, 1978, when the previous contempt proceeding was dismissed, and March 8, 1979, when the subsequent proceeding was filed, Mr. Eliker made no further payments.

In response to the order to show cause entered by Judge Fahrnbruch, Mr. Eliker filed a response. He maintained that Mrs. Eliker should be estopped from enforcing the collection of the delinquent child support payments because of her refusal, during the time that the child was a minor, to permit Mr. Eliker to see the child. Mr. Eliker further maintained that Mrs. Eliker should be denied relief be-

cause of her failure to ever seek collection of the delinquent payments.

Hearing was held on March 26, 1979, before the Honorable Dale Fahrnbruch. Thereafter, the court determined from the evidence that Mr. Eliker had sufficient income to pay the delinquent child support payments and owned a home, free and clear of any liens. Accordingly, the court found that as of March 26, 1979, Mr. Eliker was in contempt of court and thereafter, on July 23, 1979, ordered Mr. Eliker to be confined to jail for a period of 90 days, provided, however, that Mr. Eliker could purge himself of contempt by paying by August 23, 1979, all of the child support payments due.

The second order resulted from an action instituted by the Lancaster County attorney's office pursuant to the provisions of Neb. Rev. Stat. § 42-364.01 (Reissue 1978). Following hearing, the District Court entered an order directing Mr. Eliker's employer to pay into court, out of Mr. Eliker's wages, the sum of $75 each pay period to be applied on the delinquent child support.

We shall first consider the assignments of error raised by Mr. Eliker in case No. 42932. Mr. Eliker maintains that the trial court erred in finding that a contempt proceeding brought pursuant to Neb. Rev. Stat. § 42-358 (Reissue 1978) is civil in nature rather than criminal. Moreover, Mr. Eliker maintains that because the proceeding is a criminal action and not a civil action, it must be prosecuted in the name of the State and is subject to the 3-year statute of limitations provided by Neb. Rev. Stat. § 29-110 (Reissue 1979).

Furthermore, Mr. Eliker maintains that the trial court erred in failing to find that the former hearing, held on October 25, 1978, before Judge Van Pelt, constituted res judicata as to any subsequent proceedings seeking to find Mr. Eliker in contempt of court and, further, as a criminal matter, the present hear-

ing constituted double jeopardy. And, finally, Mr. Eliker maintains that he should not have been held in contempt of court because Mrs. Eliker is precluded from collecting the unpaid child support, under the doctrines of both equitable estoppel and laches.

We turn, then, first to the question of whether a proceeding brought under the provisions of § 42-358 involves a civil contempt proceeding or a criminal contempt proceeding.

To be sure, the question of determining whether or not a contempt action is civil or criminal in nature has caused some difficulty, not only for this court, but for other courts as well. That is due, in part, to the fact that the proceedings are not, in the traditional sense, either criminal or civil. A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings, but strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence. *State, ex rel. Beck v. Lush,* 168 Neb. 367, 95 N.W.2d 695 (1959).

In our earlier decision of *Maryott v. State,* 124 Neb. 274, 246 N.W. 343 (1933), we did, indeed, attempt to clarify the situation. The language of the *Maryott* decision is worthy of repeating in detail here. In *Maryott, supra* at 276-77, 246 N.W. at 344, we said:

> From a careful reading of these and many other cases, involving the question of contempt, it is apparent that much confusion and lack of harmony exist, not only in the decisions of this court, but of other courts. Much of this confusion is due to the failure to observe the distinctions in the several classes of contempt. Generally speaking, contempts are either direct, those committed in the presence of the court while in session,

> or constructive, consisting of those not committed in the presence of the court. Properly speaking, constructive contempts should be divided into two classes — criminal and civil. Those contempts which are prosecuted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are, ordinarily, termed criminal contempts, while those instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled are, ordinarily, civil contempts. . . .
>
> Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a mere civil contempt, and the rules applicable to a criminal contempt are not applicable. Where a civil contempt is charged, it may be by an affidavit by the party to the action who is injuriously affected. Procedure may be in the original action and need not be by information in the name of the state.

Similarly, see, *Bahm v. Raikes,* 200 Neb. 195, 263 N.W.2d 437 (1978); *State, ex rel. Wright, v. Barlow,* 132 Neb. 166, 271 N.W. 282 (1937).

In 17 C.J.S. *Contempt* § 62(6) (1963), the author notes:

> Civil contempt proceedings are generally held to be remedial and civil in their nature; that is, they are proceedings for the enforcement of some duty, and essentially a remedy for coercing a person to do the thing required. As otherwise expressed a proceed-

> ing for civil contempt is one instituted to preserve and enforce the rights of a private party to an action and to compel obedience to a judgment or decree intended to benefit such a party litigant. So a proceeding is one for civil contempt, regardless of its form, if the act charged is wholly the disobedience, by one party to a suit, of a special order made in behalf of the other party, and the disobeyed order may still be obeyed, and the purpose of the punishment is to aid in an enforcement of obedience.

It appears clear beyond question that the purpose of §§ 42-358 et seq. is solely that of coercing payment by a party in a domestic relations matter who has failed to pay previously ordered child support. We, therefore, now hold that proceedings brought pursuant to the provisions of § 42-358 et seq. are civil in nature and are to be filed and heard in accordance with rules applicable to civil contempt proceedings. Accordingly then, having found this proceeding to be civil in nature, Mr. Eliker's arguments concerning the form of the action and the applicability of § 29-110 are easily disposed of. None of the claims have any application in this matter.

Likewise, because the proceedings involved herein are civil in nature and not criminal, the claim concerning double jeopardy has no application. See, *Breed v. Jones* 421 U.S. 519 (1975); Neb. Const. art. I, § 12.

Furthermore, the fact that the trial court earlier found that Mr. Eliker was not wilfully in contempt of court as of a date certain, does not preclude the same trial court from finding Mr. Eliker subsequently in contempt of court. As we noted in the *Maryott* case, one may subsequently become wilfully in contempt of court though previously found not in contempt of court. In *Maryott, supra* at 280, 246 N.W. at 345, we said:

> The judgment of the district court is reversed, and the defendant discharged from the judgment for contempt. However, this is without prejudice to the right to institute other proceedings, or another proceeding for contempt, if the defendant becomes of sufficient ability to pay, and wilfully and contumaciously refuses to comply with the order made with respect to alimony.

The trial court could reasonably have concluded that, by reason of the first hearing, Mr. Eliker's attention was directed to the requirement that he was still obligated to make payment and his failure to do so thereafter did display a wilful and contumacious disregard for the previous order of the court. Where an individual is under order of a court to perform a continuing obligation, the fact that a court may, at one point in time, find the individual's failure to perform such act not wilfully contumacious, does not preclude the court from later finding such continued disregard of the order as evidence of a subsequent wilful and contumacious act sufficient to constitute contempt of court. There is no merit to Mr. Eliker's claim of res judicata.

We turn then to Mr. Eliker's last claim in case No. 42932. Mr. Eliker maintains that Mrs. Eliker should be precluded from seeking to collect unpaid child support, under either the doctrine of equitable estoppel or laches.

Recently, in the case of *Williams v. Williams, ante* p. 630, 294 N.W.2d 357 (1980), we had occasion to examine in detail the doctrine of equitable estoppel and its proper application in a domestic relations matter. We specifically set out in the *Williams* case the basis upon which a court might find the doctrine of equitable estoppel applicable. None of the facts in this case, however, are in any way relevant to that doctrine. This jurisdiction is committed to the view that courts of this state are

without authority to forgive accrued child support and that such payments continue to accrue in accordance with the court's previous order until paid in full or otherwise modified by the court. See, *Smith v. Smith,* 201 Neb. 21, 265 N.W.2d 855 (1978); *Ruehle v. Ruehle,* 169 Neb. 23, 97 N.W.2d 868 (1959). The fact that a mother in whose custody a minor child has been placed by the court refuses to permit a father ordered to pay child support to exercise his rights of visitation does not justify the father's withholding the payment of child support. The father is not without remedy and may make application to the court for further orders requiring the mother to permit the father to exercise his right of visitation. The right of visitation, however, is not a quid pro quo for the payment of child support and the mother's action does not justify the father's failure to pay.

In 17 Am. Jur. 2d *Contempt* § 40 (1964), it is noted:

> Where a divorced husband neglects to apply for a modification of the divorce decree, in spite of the fact that sufficient grounds exist to warrant modification, the mere existence of such grounds with respect to payments due under the decree is not available as a defense to proceedings for contempt for violating the decree.

The fact that Mrs. Eliker may have improperly and without justification prevented Mr. Eliker from exercising visitation rights with his daughter, did not either entitle or justify Mr. Eliker's failing to continue making child support payments as required. Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made. The disposition of minor children and provision for their support, in an action where a divorce is granted, is not controllable by agreement of the parties, but by the court on the facts and circumstances

as disclosed to it. When a court orders the payment of child support, it means to have such order followed. We cannot be more emphatic in that regard. *Jafari v. Jafari,* 204 Neb. 622, 284 N.W.2d 554 (1979); *Koser v. Koser,* 148 Neb. 277, 27 N.W.2d 162 (1947). Mrs. Eliker's refusal to permit Mr. Eliker to visit with his child did not create grounds upon which the doctrine of equitable estoppel could be applied and the trial court was correct in refusing to permit testimony of those facts in connection with an action brought pursuant to the provisions of § 42-358.

Likewise, in the case of *Smith v. Smith, supra,* we specifically found that the defense of laches was not available in such cases, saying:

> "The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action." Finnern v. Bruner, 167 Neb. 281, 92 N. W. 2d 785 (1958).

Id. at 26. Without question, Mr. Eliker caused or contributed to his current problem and had it within his power to avoid the present burden of making a large lump sum payment by either making the payments as ordered or by filing a motion with the trial court seeking release of the order requiring him to make payment of child support.

Likewise, in *Mazanec v. Lincoln Bonding & Ins. Co.,* 169 Neb. 629, 645, 100 N.W.2d 881, 891 (1960), in discussing the concept of laches, we said:

> "The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case." [*Russo v. Williams,*

160 Neb. 564, 582-83, 71 N.W.2d 131, 144 (1955).]

Under all of the circumstances, we do not see how the defense of laches could have any application herein and, again, the trial court did not abuse its discretion in holding the defense inapplicable. The defenses of equitable estoppel and laches being unavailable to Mr. Eliker, testimony concerning those matters, likewise, was inadmissible. Under the general rules of evidence, either civil or criminal, any relevant and material evidence, otherwise competent, is admissible and evidence which is not competent, relevant, and material should be excluded. See 17 C.J.S. *Contempt* § 84(3).

Having thus disposed of all of the assignments of error raised in case No. 42932 and finding the trial court's actions to be without error, we turn to case No. 43021, wherein Mr. Eliker maintains that the trial court erred in failing to compel the county attorney to answer certain requests for admissions served upon the county attorney. The action in case No. 43021 was an action brought pursuant to the provisions of § 42-364.01 to require Mr. Eliker's employer to withhold a certain part of Mr. Eliker's wages and pay it over to the clerk of the District Court. During the proceedings, Mr. Eliker served requests for admissions upon Mrs. Eliker and her attorney, a member of the county attorney's staff. The request for admissions went to the issues of Mrs. Eliker's refusing to permit Mr. Eliker to see the minor child of the parties and the fact that Mrs. Eliker had never previously sought to enforce the delinquent child support payments. The deputy county attorney filed objections to the request for admissions, alleging several grounds, including the fact that the requests were irrelevant to the issue. For reasons which we have already set out, indeed, the requests for admissions were irrelevant, not only to the proceedings under § 42-358, but to the action

brought pursuant to § 42-364.01 as well. Neb. Rev. Stat. § 25-1267.41 (Reissue 1979) specifically permits one upon whom a request for admissions has been served to object to such request for admissions on the grounds that some or all of the requested admissions are irrelevant. The trial court, concluding that the requested admissions were, in fact, irrelevant, was authorized to sustain the objections and relieve Mrs. Eliker's counsel of the requirement of answering the requests for admissions. The trial court was correct in so doing and no error was committed.

Having, therefore, found that there was no error in either case, the judgments of both cases are affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

JOHN ERIC KENTOPP, APPELLEE, V. MARVIN KENTOPP ET AL., APPELLANTS.
IN RE ESTATE OF FRED KENTOPP, DECEASED. ARCHIBALD J. WEAVER, PERSONAL REPRESENTATIVE, APPELLANT, V. JOHN ERIC KENTOPP, APPELLEE.

295 N. W. 2d 275

Filed July 22, 1980. Nos. 42933, 42934.

1. **Decedent's Estates: Jurisdiction of Courts.** Upon the filing of a decedent's estate proceeding, the county court acquires jurisdiction of all matters relating to the decedent's estate, including jurisdiction to partition and sell the decedent's real estate. During the pendency of the decedent's estate proceedings in the county court, and until the estate has been placed in possession of those to whom it devolves or until the jurisdiction of the county court is otherwise terminated, the District Court shall not exercise its original jurisdiction in partition actions as to real estate owned solely by the decedent.
2. **Decedent's Estates.** When an application for the partition of real estate is filed in the county court under the provisions of Neb. Rev.

Stat. § 30-24,109 (Reissue 1979) and the court finds, after notice and hearing, that the property is subject to partition and also finds that the property cannot be partitioned without prejudice to the owners and cannot conveniently be allotted to any one party and should, therefore, be sold, the court shall not appoint a referee but shall direct the personal representative to conduct the proceedings and sell the property and to perform the duties and responsibilities otherwise incumbent upon a referee.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Reversed and remanded with directions.

Weaver, Beekman & Merz, for appellants.

Lantzy & Parsons, for appellee.

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

MCCOWN, J.

These two partition cases, which have been consolidated in this court on appeal, involve the same parties and the same real estate which was owned by a decedent whose estate was in the process of probate in the county court of Richardson County, Nebraska. One of the two cases was filed in the District Court and one was later commenced in the county court. The District Court determined that it had acquired jurisdiction first because the District Court case was filed first and, after trial in the District Court, entered an order of partition and appointed referees, but did not order a sale. The county court meanwhile took the same view and abated the proceeding in the county court until the disposition of the District Court proceeding. The District Court affirmed that action of the county court on appeal. The personal representative of the decedent's estate has appealed in both cases. The appeals here require this court to determine which of the two lower courts had jurisdiction.

On September 25, 1978, Fred Kentopp died testate, a resident of Richardson County, Nebraska. On Oc-

tober 16, 1978, a petition for formal probate of his will was filed in the county court of Richardson County. On November 13, 1978, the will was admitted to formal probate and Archibald J. Weaver, the person designated in the will, was appointed personal representative of the estate.

The will devised certain farmland owned by the decedent to three of his children and five children of a deceased son. That land is the real estate involved in these appeals.

On November 21, 1978, John Eric Kentopp, one of the grandson devisees of the land involved, filed a partition action in the District Court for Richardson County, Nebraska, praying that the real estate be partitioned, or be sold and the proceeds divided between the parties in accordance with their respective interests.

On November 22, 1978, the personal representative filed an application in the county court of Richardson County pursuant to Neb. Rev. Stat. § 30-24,109 (Reissue 1979). The application stated that the land could not be partitioned without prejudice to the owners nor conveniently allotted to one party, and sought an order of the county court directing the personal representative to sell the real estate.

On December 26, 1978, the personal representative filed an answer in the District Court case in which he alleged that the time limit for filing claims in the estate had not yet expired; that federal estate taxes would probably be required to be paid but had not yet been determined or paid; that the time limit had not yet expired for the surviving spouse of the decedent to elect whether to take a testamentary or statutory share; and that the respective shares of the named devisees were, therefore, not known and were unascertainable. The answer alleged that the District Court did not have jurisdiction of the partition action during the pendency of the estate in the county court.

On February 21, 1979, the county court determined that the District Court had jurisdiction to proceed with the partition action and entered an order abating the application for sale of the real estate in the county court pending the disposition of the partition action in the District Court. The personal representative appealed to the District Court and the District Court affirmed the findings and judgment of the county court.

By the time of trial of the partition action in the District Court in the summer of 1979, the evidence showed that all claims against the estate had been barred; that the time for widow's election had expired and no election had been made; and that the federal estate tax return had been prepared and filed. The evidence in substance, established that there was sufficient personal property to pay all debts, claims, taxes, and expenses of administration. On July 9, 1979, the District Court entered its decree finding that it had jurisdiction of the subject matter and of the parties, ordered partition, and appointed referees. The personal representative has appealed in both cases and the cases have been consolidated in this court.

The personal representative contends that under the provisions of the Nebraska Probate Code, and the present constitutional and statutory provisions dealing with the powers and jurisdiction of courts, the county court has exclusive original jurisdiction over all matters relating to settlement of estates of deceased persons, including jurisdiction to partition or sell real estate owned by the decedent during the pendency of the estate proceedings.

The appellee contends that the District Court and the county court have concurrent jurisdiction to partition real property owned by a decedent during the course of administration of the decedent's estate and that the court which first assumes jurisdiction of an application or petition for partition acquires juris-

diction of the partition proceedings.

Some additional background facts are necessary to put the issue in perspective. Prior to 1970, Neb. Const. art. V, § 1, provided, in part: "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law. . . ." Art. V, § 9, provided, in part: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide . . . ." Art. V, § 16, provided, in part: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; appointment of guardians, and settlement of their accounts, and such other jurisdiction as may be given by general law: But they shall not have jurisdiction . . . in civil actions in which title to real estate is sought or drawn into question; nor in actions on mortgages or contracts for the conveyance of real estate . . . ."

Because of the constitutional limitations on the jurisdiction of the county court with respect to real estate and real estate titles, the statutes governing decedents' estates, and the decisions under them, provided that if a partition of real estate was required in an estate proceeding, or if a sale of real estate of a decedent was necessary to pay debts, charges, and costs of administering the estate, the proceedings to partition or sell any real property of the decedent were required to be brought in the District Court. See, Neb. Rev. Stat. 30-1304 to 1307 (Reissue 1964), now repealed; Neb. Rev. Stat. 30-1101, 1102 (Reissue 1964), now repealed. See, also, *Schick v. Whitcomb,* 68 Neb. 784, 94 N.W. 1023 (1903).

Under those previous constitutional and statutory provisions, the District Court had exclusive jurisdic-

tion to order the partition or sale of real estate owned by a decedent whose estate was in the process of administration in the county court, and the county court had no jurisdiction in such matters. Even under those previous constitutional and statutory provisions, however, this court held that an heir or devisee of an estate could not maintain an action for distribution or partition in the District Court until the debts, allowances, and costs of administration in the estate had been paid or provided for unless he gave a bond with approved sureties to pay the same. *Alexander v. Alexander,* 26 Neb. 68, 41 N.W. 1065 (1889).

In 1970, Neb. Const. art. V, § 1, was amended to provide, in relevant part:

> The judicial power of the state shall be vested in a Supreme Court, district courts, county courts, in and for each county, with one or more judges for each county, or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law.

Art. V, § 9 remained unchanged. Art. V, § 16 was repealed in its entirety.

In 1972, Neb. Rev. Stat. § 24-517 (Reissue 1979) was adopted. It now provides in relevant part:

> Each county court shall have the following jurisdiction:
>
> (1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof;
>
> . . . .
>
> (9) All other jurisdiction heretofore provided and not specifically repealed by Laws 1972, Legislative Bill 1032, and such other jurisdiction as hereafter provided by law.

Neb. Rev. Stat. § 30-2211 (Reissue 1979) also deals

with the matter of jurisdiction of the county court over estates and provides:

> (a) To the full extent permitted by the Constitution of Nebraska, the court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (2) protection of minors and incapacitated persons; and (3) trusts.
> (b) The court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

The comment to that section states that it corresponds to § 24-517, and states: "In carrying out this statutory authorization, it is to be remembered that county courts are without equity jurisdiction, but in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction."

Neb. Rev. Stat. § 24-302 (Reissue 1979) deals with the general jurisdiction of the District Courts. It provides: "The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." That language has remained unchanged since 1879.

The Nebraska Probate Code was adopted in 1974 and became operative January 1, 1977. The previous statutory provisions dealing with partition and sale of real estate in a decedent's estate were repealed. Neb. Rev. Stat. § 30-24,109 (Reissue 1979) now provides:

> When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more

> of the heirs or devisees may petition the court, prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

The comment to that section of the probate code states: "Ordinarily heirs or devisees desiring partition of a decedent's property will resolve the issue by agreement without resort to the courts. (See section 30-24,110.) If court determination is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property."

Neb. Rev. Stat. § 30-2476 (Reissue 1979) provides, in relevant part:

> Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 30-24,100, a personal representative, acting reasonably for the benefit of the interested persons, may properly:
>
> . . . .
>
> (6) acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of or abandon an estate asset:
>
> . . . .
>
> (23) sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances, except that unless

> authorized by will, real property may be sold only following a court order with notice given in the manner prescribed by subdivisions (a)(1) and (a)(2) of section 30-2220. . . .

Against the backdrop of those constitutional and statutory provisions, the issue in these cases is which court had jurisdiction to partition and sell the decedent's real estate. The issue is one of first impression in this court since the adoption of the Nebraska Probate Code.

The issue is a narrow one. The appellants concede that the county court has no jurisdiction to partition real estate except as a part of the settlement of decedents' estates, and that any jurisdiction to partition real estate exists only during the pendency of the estate proceedings and until the estate has been placed in possession of those to whom it devolves. The appellee concedes that the county court has such jurisdiction, but contends that the District Court has concurrent jurisdiction, which cannot be limited or taken away and, therefore, contends that whichever court first acquires jurisdiction as to partition retains jurisdiction to the exclusion of the other court.

The appellee relies upon cases holding that the equity jurisdiction of the District Court exists independently of statute and comes from the Constitution and is, therefore, beyond the power of the Legislature to limit or control. See, *Hall v. Hall,* 123 Neb. 280, 242 N.W. 607 (1932); *State, ex rel. Sorenson, v. Farmers State Bank of Polk,* 121 Neb. 532, 237 N.W. 857 (1931).

Essentially, the appellee's position is that if the District Court has previously exercised equity jurisdiction under the provisions of Neb. Const. art. V, § 9, that jurisdiction cannot be limited or taken away by an amendment to some other section of the Constitution nor by any statutes enacted in accordance with such constitutional amendments. The position

of the appellee is that any partition and sale of real estate in a decedent's estate for the purpose of making a division of the proceeds must be treated as an equity case, separate and distinct from matters relating to a decedent's estate or its settlement.

At least since 1879, the county court has had exclusive original jurisdiction in all matters of probate and the settlement of decedents' estates, and the District Court has had exclusive original jurisdiction in equity cases. Because of the prior specific constitutional limits on the power and jurisdiction of the county court to deal with real estate titles and the resulting statutes which mandated that partition and sale of real estate in settlement of a decedent's estate should be in the District Court, the issue of which court would have jurisdiction in the absence of the constitutional restriction was never presented or determined.

If the partition and sale of real estate in a decedent's estate is treated as a "matter relating to a decedent's estate," present constitutional and statutory provisions grant original jurisdiction to the county court. If such a partition and sale is also within the equity jurisdiction of the District Court, then the jurisdiction of the two courts is concurrent, and basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court.

The county court acquires jurisdiction of all matters relating to the administration and settlement of the estate when formal or informal estate proceedings are filed or instituted in the county court. The District Court acquires jurisdiction of the partition action when a petition for partition is filed in the District Court. The appellee's position is that the county court acquires jurisdiction of a decedent's estate at different times for different purposes. The appellee assumes that jurisdiction to partition and sell real estate of a decedent for the purpose of dis-

tributing the proceeds to the devisees is not acquired by the county court at the time the estate proceedings are commenced, but only after an application is filed in the county court requesting that that particular real estate be partitioned and sold. The only support for such a theory rests upon another assumption which is that the partition and sale of real estate in a decedent's estate for the purpose of distributing the proceeds to the devisees is somehow a proceeding separate and distinct from sales of the decedent's real estate for any other purpose, and separate and distinct from all other matters relating to the decedent's estate merely because partition has been traditionally said to be an equity matter. We disagree.

The partition and sale of real estate of a decedent is clearly a matter relating to a decedent's estate and jurisdiction to partition and sell real estate of a decedent is required by the county court at the time jurisdiction is acquired for all other "matters relating to decedents' estates." Under present constitutional and statutory provisions, the county court clearly has exclusive original jurisdiction to authorize the personal representative of a decedent's estate to sell real estate for the purpose of paying debts, claims, and costs of administration. To distinguish the time for attachment of jurisdiction for such a sale from the time of attachment of jurisdiction for a sale of the same property for the purpose of distribution of the proceeds to the devisees merely because the application requests authority to "partition" and sell the real estate is a distinction without a logical difference. Such a distinction exalts form over substance and ancient myth over present reality.

Basic principles of judicial administration require the elimination of unnecessary litigation and the promotion of efficiency and economy in liquidating the estate of a decedent. Current constitutional and

statutory provisions support that result.

We hold that, upon the filing of a decedent's estate proceeding, the county court acquires jurisdiction of all matters relating to the decedent's estate, including jurisdiction to partition and sell the decedent's real estate. During the pendency of the decedent's estate proceedings in the county court, and until the estate has been placed in possession of those to whom it devolves or until the jurisdiction of the county court is otherwise terminated, the District Court shall not exercise its original jurisdiction in partition actions as to real estate owned solely by the decedent.

We also hold that, when an application for the partition of real estate is filed in the county court under the provisions of § 30-24,109 and the court finds, after notice and hearing, that the property is subject to partition and also finds that the property cannot be partitioned without prejudice to the owners and cannot conveniently be allotted to any one party and should, therefore, be sold, the court shall not appoint a referee but shall direct the personal representative to conduct the proceedings and sell the property and to perform the duties and responsibilities otherwise incumbent upon a referee. Such a procedure is consistent with § 30-24,109 and with the rule of construction that the Nebraska Probate Code shall be liberally construed and applied, and is in accord with the underlying purpose of the code to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors. See Neb. Rev. Stat. § 30-2202 (Reissue 1979).

For the reasons stated, the judgment of the District Court in case No. 42933 is reversed and the cause is remanded to the District Court with directions to dismiss.

The judgment of the District Court in case No. 42934 is reversed and the cause is remanded to the District Court with directions to remand the case to

the county court of Richardson County for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., specially concurring.

I agree with the opinion of the majority. However, I wish to state the basis I conceive justifies the holding in this case. It is contained in Neb. Const. art. V, § 1, which specifies that: "[G]eneral administrative authority over all courts in this state shall be vested in the Supreme Court . . . ."

Rules concerning the exercise of concurrent jurisdiction are administrative and there is no prohibition against their announcement in an actual case.

HASTINGS, J., joins in this concurrence.

ALCOHOLIC RESOCIALIZATION CONDITIONING HELP, INC., ET AL., APPELLANTS, V. STATE OF NEBRASKA, CHARLES THONE, GOVERNOR, ET AL., APPELLEES.

295 N. W. 2d 281

Filed July 22, 1980. No. 42947.

1. **Licenses.** A citizen has no vested right in statutory licenses, permits, and privileges.
2. ——. A license to carry on a particular trade may be recalled by legislative action at any time.
3. **Police Power.** No one has a vested right to be protected against consequential injuries arising from a proper exercise of public powers.
4. ——. Any incidental damage resulting from a legislative invocation of its police power does not give rise to a right to enjoin the act or to claim compensation from the public.
5. **Statutes: Bingo.** Neb. Rev. Stat. § 9-146 (Supp. 1979) of the Nebraska Bingo Act, as amended, held constitutional.

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

Charles O. Forrest of Kneifl, Kneifl & Forrest, for appellant Alcoholic Resocialization. Jarve L. Gar-

rett and Mark D. Theisen, for appellant South Omaha Alcoholism Counseling. Paul E. Watts, for appellant Rankin.

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

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

BOSLAUGH, J.

This appeal involves three declaratory judgment actions brought to determine the validity of Neb. Rev. Stat. § 9-146 (Supp. 1979) of the Nebraska Bingo Act. By stipulation, the actions were consolidated in the District Court.

Section 9-146, as originally enacted, provided that not more than 10 bingo occasions per month per license could be held at any one premises. Neb. Rev. Stat. § 9-146 (Cum. Supp. 1978). A bingo occasion is a single gathering or session at which a series of successive bingo games are played. Neb. Rev. Stat. § 9-128 (Cum. Supp. 1978).

The 1979 amendment to § 9-146 added a further restriction. Section 9-146(2) now provides that "not more than two bingo occasions per week" may be held "within a single structure or building," irrespective of the number of licensees authorized to hold bingo occasions on the premises.

Veva Rankin is the lessee of a building at 5636 Ames Avenue in Omaha, Nebraska, which she rents to licensees for the purpose of holding bingo games. The other plaintiffs and intervenors, with the exception of Mary Muff and Nebraskans for Responsible Limited Bingo, are nonprofit organizations licensed to operate bingo games.

The defendants are the State of Nebraska; the Governor; the Attorney General; the County Attorney of Douglas County; the City of Omaha, Nebraska; the Mayor; and the City Prosecutor. The inter-

venors, Mary Muff and Nebraskans for Responsible Limited Bingo, support the position of the defendants.

The trial court sustained general demurrers to the petitions of the plaintiffs and intervenors and dismissed the actions. Veva Rankin, Alcoholic Resocialization Conditioning Help, Inc., Gladiators Athletic Assn. and Gladiators Alumni, Inc., South Omaha Alcoholism Counseling Program, Inc., plaintiffs, and Orvar Odd Lodge No. 24, I. O. V., and Omaha Lodge No. 330, VASA Order of America, intervenors, have appealed.

The appellants contend the 1979 amendment to § 9-146 was unconstitutional because (1) it discriminates against licensees who do not own a building in which bingo occasions may be held; (2) it impairs the obligation of contracts and vested rights; (3) it amended by implication statutory provisions regarding licenses, in violation of Neb. Const. art. III, § 14; and (4) it stifles a legitimate business by creating an arbitrary and unreasonable trade barrier.

It is important at the outset to recognize that the activity which the statute regulates is a form of gambling. Gambling is an activity that, for the most part, is prohibited and, where permitted, may be subjected to strict regulation.

The constitutional provision which authorizes legislation for the licensing and regulation of bingo games permits only nonprofit associations which have been in existence for a period of 5 years immediately preceding the application for a license to obtain licenses. Neb. Const. art. III, § 24. The present Nebraska Bingo Act, §§ 9-124 to 9-176, which was enacted in 1978 and amended in 1979, contains many provisions regulating the conduct of bingo games by licensees under the act.

The 1979 amendment to § 9-146 appears to have been designed to discourage the establishment of "bingo halls" where patrons would be able to attend

a bingo occasion every night of the week. The statutory provision will tend to encourage a wider geographical distribution of locations where bingo games may be held and avoid the concentration of bingo occasions in a relatively few locations.

It may be conceded that, to some extent, the change in the statute will place a hardship on smaller nonprofit organizations, some of which may experience difficulty in finding suitable locations and obtaining the equipment required in order for them to conduct bingo games. We do not believe this circumstance makes the regulation imposed by the 1979 amendment to § 9-146 so unreasonable that it is invalid.

The appellants argue that the amendment to the statute impairs the obligation of contracts, interferes with vested rights, and prevents them from freely contracting in the future. To some extent, this is true of most statutes which are regulatory in nature. The ultimate question is one of reasonableness.

The statute does not interfere with the use of the property leased by Mrs. Rankin except that the number of bingo occasions which may be held in the premises is limited to two per week. The licenses which the other plaintiffs and intervenors hold are not contracts but are subject to whatever reasonable regulation the Legislature may impose from time to time.

Similar contentions were made in *Beisner v. Cochran,* 138 Neb. 445, 293 N.W. 289 (1940). That case involved the repeal of a statute concerning inspection of motor vehicles. The plaintiffs had set up inspection stations in reliance on the act and the repeal of the statute eliminated any demand for their services. In the *Beisner* case, we said:

> [A] citizen has no vested right in statutory licenses, permits and privileges. This being true, a license to carry on a particular trade

> may be recalled by Legislative action at any time. No one has a vested right to be protected against consequential injuries arising from a proper exercise of public powers. That the state under its police power may regulate the use of motor vehicles on the public highways cannot be questioned. Consequently, any incidental damage resulting from a legislative invocation of its police power does not give rise to a right to enjoin the act or to claim compensation from the public. And, likewise, the amendment or repeal of an existing police regulation must necessarily follow the same principle.

Id., at 447-48, 293 N.W. at 291.

The 1979 amendment to § 9-146 did not amend any of the licensing sections of the Nebraska Bingo Act although it did restrict the operations which licensees may conduct in the future. Such regulations as may be imposed after licenses have been issued are not amendments by implication of other sections relating to the issuance of licenses and the conduct of bingo games. We find no merit in the contention of the appellants that the amendment violated Neb. Const. art. III, § 14.

What has been said before disposes of the contention that the amendment created an arbitrary and unreasonable trade barrier to a legitimate business.

The appellant Rankin further contends that the State is estopped to enforce § 9-146, as amended, against her because she entered into the lease of the property in reliance upon the provisions of the statute as they existed prior to the amendment. The difficulty with this contention is that the appellant Rankin had no vested right in the statute and no right to rely on an assumption that no further restrictions or regulations might be imposed upon the operation of bingo games. There is no basis for a claim of estoppel in this situation.

The appellants are not entitled to a declaration that the 1979 amendment to § 9-146 was invalid. The judgment of the District Court is affirmed.

AFFIRMED.

IN RE ESTATE OF LEO G. SAATHOFF, DECEASED. EMMA CLARA SAATHOFF, APPELLANT, V. KENNETH SAATHOFF, APPELLEE.

295 N. W. 2d 290

Filed July 29, 1980. No. 42815.

1. **Undue Influence.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) That there was opportunity to exercise undue influence; (3) That there was a disposition to exercise undue influence for an improper purpose; and (4) That the result was clearly the effect of such undue influence.
2. _____. The undue influence which will void a gift is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.
3. _____. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.
4. **Mental Incompetence: Burden of Proof.** In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing.
5. **Delivery.** Whether or not a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the

particular case. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.

6. _____. Delivery of property to a third person as agent or trustee, for the use of the donee, and not as agent of the donor, under such circumstances as indicate that the donor relinquishes all dominion and control over the property, is a sufficient delivery to complete the gift.

7. **Gifts.** To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, a delivery by the donor, and acceptance by the donee.

8. _____. The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.

9. _____. Where a grantor has conveyed his property as a gift inter vivos, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed.

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

William M. Connolly of Conway and Connolly, for appellant.

Robert E. McKelvie of McKelvie & McNally, and William H. Stowell, for appellee.

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

KRIVOSHA, C. J.

The appellant, Emma Clara Saathoff (Mrs. Saathoff), appeals from an order of the District Court for Webster County, Nebraska, which affirmed an earlier order entered by the county court of Webster County, Nebraska, finding an assignment made by Mrs. Saathoff to her son Kenneth Saathoff (Kenneth), involving property inherited by Mrs. Saathoff from her son Leo Saathoff, was valid and binding. We affirm.

Mrs. Saathoff's son Leo G. Saathoff died intestate on February 4, 1977, leaving his mother, Mrs. Saathoff, as his sole and only heir at law. He also left surviving his brother, Kenneth, and a sister, Dorothy Lutkemeier.

At the time of Leo's death, Mrs. Saathoff, a widow, was 81 years of age. She lived alone in a home owned by her daughter, Dorothy, which was located immediately across the street from where Kenneth lived, and which Mrs. Saathoff rented from Dorothy for $40 per month. Around 6:30 in the evening on Friday, February 4, 1977, Kenneth received a phone call requesting that he come to Leo's farm home because Leo had collapsed. Kenneth and his wife, Maxine, arrived at Leo's farm home between 6:30 and 7 p.m. and found Leo lying on the floor. Leo died soon after they arrived.

Kenneth and his wife, Maxine, returned to Mrs. Saathoff's house in Red Cloud to advise her that Leo had passed away. While there is much conflict in the evidence, there is sufficient evidence from which we can find that, when Kenneth advised Mrs. Saathoff that Leo had died, she threw her hands in the air and said, "I don't want no part of it, I'm getting too old to look after it. You can have it all."

On the following morning, Saturday, February 5, Kenneth and Maxine picked up Mrs. Saathoff and took her to Franklin, Nebraska, to make arrangements for Leo's funeral. After Kenneth and Mrs. Saathoff had finished making the funeral arrangements in Franklin they went back to Red Cloud, where Kenneth and Maxine had lunch at their home while Mrs. Saathoff waited for them. Around 1:30 p.m., Mrs. Saathoff accompanied Kenneth and Maxine to the offices of Jerry McDole (McDole), an attorney in Red Cloud, Nebraska, who had represented Leo during his lifetime. Mrs. Saathoff explained to McDole that she did not wish to inherit the property from Leo's estate, but that she wanted it to go directly

to Kenneth. McDole generally discussed how to accomplish transferring the property from Mrs. Saathoff to Kenneth and said that he would check and see how this could be accomplished, but that it would take an hour or two and she should go home and he would see her later that day, after he had the papers drawn up. McDole testified at trial as to Mrs. Saathoff's condition and demeanor during her office visit and concluded she was competent and acting voluntarily.

Later that afternoon, McDole's secretary, Doris Boller, a niece of Maxine Saathoff, came to Mrs. Saathoff's house with the assignment for Mrs. Saathoff's signature. The two of them sat down at the kitchen table and Ms. Boller read the assignment to Mrs. Saathoff. There is some testimony, though in conflict, that Mrs. Saathoff was of the opinion that if she kept the property from Leo's estate she would lose her social security. There is no evidence, however, to support the claim that Kenneth or McDole ever advised her of that fact or that she made inquiry of either of them about that fact. After she executed the assignment she was heard to say, "It's signed now. Dorothy can't do nothing about it."

The assignment provided that Dorothy was to receive one-third of the livestock owned by Leo, the balance of said livestock and all real estate and personal property owned by Leo at the time of his death to go to Kenneth. Kenneth had helped Leo with the farming over the years for which he had received no compensation.

When Dorothy returned to Red Cloud on Saturday evening, she was advised by Mrs. Saathoff about the assignment. On Monday morning, Dorothy and her husband, Harold Lutkemeier, went to McDole's office and asked for a copy of the assignment. McDole said he could not give them a copy without permission from Mrs. Saathoff and asked to have Mrs. Saathoff authorize him to give Dorothy a copy of the

assignment. Mrs. Saathoff then telephoned McDole and asked him to return the assignment to her. She advised him at that point that the assignment did not reflect her intention and that she had "changed her mind." At no time did she advise McDole that she had been unaware of what she signed or that she had been unduly influenced. She simply indicated that she had changed her mind.

McDole intended to deliver to Dorothy and her husband a copy of the assignment but, through error and oversight, actually delivered to Dorothy the original executed document. Dorothy obtained possession of the document on February 7, 1977, and it remained in her possession until ordered by the county court on November 3, 1977, to be filed with the court. On February 18, 1977, a petition for formal appointment of a special administrator and a petition for formal adjudication of intestacy, determination of heirs, and formal appointment of a personal representative was filed by Mrs. Saathoff. On March 22, 1977, a motion to set aside the petition of Mrs. Saathoff was filed, together with a copy of the assignment and release of interest previously signed by Mrs. Saathoff. The county court of Webster County, Nebraska, then ordered the original of the assignment to be filed with the court and determined, after hearing, that the assignment had been validly executed and delivered and that the property should be distributed as provided for in the assignment. Mrs. Saathoff appealed that order to the District Court for Webster County, Nebraska, which thereafter affirmed the decision of the county court.

Mrs. Saathoff raises several assignments of error which may be generally described as follows: (1) That the assignment was obtained from her by undue influence; (2) That she was incompetent and did not have the capacity to make a gift at the time she executed the assignment; (3) That there was no delivery of the assignment, and therefore, she was

entitled to recall the assignment; and (4) That the trial court erred in not permitting her to testify as to matters subsequent to the execution and delivery of the assignment which were intended to show a contrary intent.

We turn first to the question of whether there was evidence of undue influence.

> The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.

Dunbier v. Rafert, 170 Neb. 570, 103 N.W.2d 814 (1960) (syllabus of the court).

While an examination of the record discloses that Mrs. Saathoff was obviously distressed upon learning of Leo's death, there is no evidence to support the existence of the necessary elements of undue influence. The evidence established that Mrs. Saathoff was a person of strong will, while Kenneth was quite to the contrary. There is no basis to assume that Mrs. Saathoff was subject to undue influence. It may very well be that, if she had been given an opportunity to more carefully reflect on what she was doing, she might have chosen otherwise; there is no evidence, however, that she was subject to undue influence. Likewise, there is no evidence that there was an opportunity for Kenneth to exercise such undue influence. The time Kenneth was alone with Mrs. Saathoff from the time of Leo's death until the execution of the document was relatively short and insufficient to establish any evidence of undue influence on Kenneth's part. The mere fact that Mrs. Saathoff concluded that she did not wish to

acquire the property at her age, but rather wished her children to have it, does not establish undue influence. Nor does the fact that she desired Kenneth, who had helped Leo farm and who had far less than Dorothy, to have more of Leo's property than Dorothy support a claim of undue influence.

> [The] undue influence which will void a . . . (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.

Kolc v. Krystyniak, 196 Neb. 16, 19, 241 N.W.2d 348, 350 (1976). The fact that the division was disproportionate is not sufficient to make the assignment invalid.

> The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.

Rule v. Roth, 199 Neb. 746, 751, 261 N.W.2d 370, 373 (1978). See, also, *Guill v. Wolpert,* 191 Neb. 805, 218 N.W.2d 224 (1974). We simply are unable to find evidence that the execution of the assignment by Mrs. Saathoff was a result of undue influence asserted by Kenneth.

Likewise, with regard to the contention that Mrs. Saathoff was incompetent at the time she made the assignment, we, likewise, are unable to find evidence in the record.

In order to set aside an instrument or in-

> struments . . . for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing.

Dunbier v. Rafert, supra at 589, 103 N.W.2d at 827. Again, the evidence in this case is simply insufficient to prove incompetency on Mrs. Saathoff's part. Not only is it clear that Mrs. Saathoff understood what it was she was doing; she was able to relate it to Dorothy immediately upon Dorothy's arriving in Red Cloud. There is some indication, though the reason is not clear, that Mrs. Saathoff, indeed, changed her mind after Dorothy returned. Changing one's mind after completing a valid gift is not the same as being incompetent when making the gift and does not result in causing the gift to be set aside. While the evidence is clear that Mrs. Saathoff was distressed by reason of her son's death, it is likewise clear that she was not incompetent. She conducted herself in a host of ways and performed numerous acts, including making arrangements for her son's funeral and selecting his casket. Her act in giving the property mostly to her son and only partly to her daughter may have been impetuous; it was not the result of incompetency.

Turning then to the question of the effect of the delivery, we find that when Mrs. Saathoff executed the assignment, she delivered it to McDole's secretary with the intent that it be delivered to Kenneth and with the further intent that she no longer have anything more to do with the assignment.

> Whether or not a deed [or other instrument conveying an interest in property] has been delivered is largely a question of intent

> to be determined by the facts and circumstances of the particular case. [Citations omitted.]
>
> No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.

Milligan v. Milligan, 161 Neb. 499, 503, 74 N.W.2d 74, 77 (1955).

> "Delivery of property to a third person as agent or trustee, for the use of the donee, and not as agent of the donor, under such circumstances as indicate that the donor relinquishes all dominion and control over the property, is a sufficient delivery to complete the gift." 28 C.J. 640.

Kennedy v. Nelson, 125 Neb. 185, 190, 249 N.W. 546, 548 (1933).

> "To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee." [Citation omitted.] . . . "The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. . . ." [Citation omitted.]

Rorabaugh v. Garvis, 198 Neb. 223, 226, 252 N.W.2d 161, 163 (1977).

An examination of the record discloses that Mrs. Saathoff made no reservation and had no hesitation about the execution of the assignment or its delivery

to McDole's secretary. There is simply no dispute that she executed the document intending that it be a valid document and gave it to McDole's secretary for the purpose of doing whatever needed to be done with the document so as to make a valid gift at once. It must be kept in mind that, at that point in time, it had not yet been determined by both Kenneth and Dorothy, or by Mrs. Saathoff, for that matter, who would handle the probate of the estate. Kenneth asked McDole to do so, but neither Dorothy nor Mrs. Saathoff had agreed. The delivery of the document to the court would not be necessary until the estate was filed. Delivering the document to McDole was equivalent to delivering it to the interested parties in that Mrs. Saathoff intended to be free of any further interest in the property. There is no indication or evidence that there was any reservation on Mrs. Saathoff's part, or any intent by her, to reserve any rights in the property at the time that the assignment was delivered to McDole's secretary. We believe that the evidence is sufficient to support a finding that there was an intent to make delivery and, in fact, delivery was made. "Where a grantor has thus conveyed his property, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed." *Milligan v. Milligan, supra* (syllabus of the court).

Mrs. Saathoff maintains that the trial court erred in not permitting testimony of subsequent events and statements by her which were hostile to the intent of making a gift. The trial court's ruling in that regard was correct. We have previously said:

> Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to the deed, are incompetent as against the grantee. But acts and declarations in support thereof are admissible, be-

> cause they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed.

Milligan v. Milligan, supra (syllabus of the court). The most that Mrs. Saathoff could offer by way of testimony was to the effect that she had changed her mind and did not now intend to make the gift which she had previously made. That was not competent or relevant to the issues of whether the execution was as a result of undue influence or incompetency or whether there was, in fact, a delivery.

As we noted at the outset, evidence in this case was, to a large extent, in irreconcilable conflict and, while it is true that, this being an equity matter, we review it de novo, it is likewise true that in an appeal in an equity action, "if there is irreconcilable conflict in a material issue, this court will, in determining the weight of evidence of witnesses who appeared in the trial court to testify, consider the fact that the trial court observed them and their manner of testifying." *Kolc v. Krystyniak, supra* at 20, 241 N.W.2d at 350.

Keeping that rule in mind, our examination of the record convinces us that the appellant did not meet her necessary burden and the trial court was correct in affirming the findings made by the county court who saw and heard the witnesses. We, likewise, find that the execution of the assignment was not the result of undue influence nor was it made at a time when the assignor was incompetent and that there was a complete and absolute delivery. Accordingly, then, the judgment must be affirmed.

AFFIRMED.

M. WILLIAM DUGAN, SR., ALSO KNOWN AS BILL DUGAN, SR., AND MARY E. DUGAN, APPELLANTS, V. VILLAGE OF GREELEY, NEBRASKA, APPELLEE.

295 N. W. 2d 115

Filed July 29, 1980. No. 42821.

1. **Action to Disconnect Land: Municipal Corporations: Appeal and Error.** A decree of the District Court in an action to disconnect land from a city or village is reviewable by the Nebraska Supreme Court and will be tried de novo by this court. Neb. Rev. Stat. §§ 17-414 (Reissue 1977), 25-1925 (Reissue 1979).
2. **Action to Disconnect Land: Municipal Corporations.** To determine whether or not justice and equity require disconnection of land from a city or village, the court may properly consider the benefits received from the city or village, whether the lands are exclusively agricultural, the existence or nonexistence of unity or community of interest with such city or village, and the effect upon the compactness of the city or village of the resulting change of its corporate limits.
3. _____: _____. Disconnection of land from a city or village on the basis of justice and equity requires consideration of all the facts and circumstances tending to show the fairness or unfairness of disconnection as it relates to the particular case.

Appeal from the District Court for Greeley County: JAMES R. KELLY, Judge. Affirmed.

Donald R. Treadway for Brower, Treadway & Bird, P.C., for appellants.

Donald H. Weaver and Harold E. Connors of Harold E. Connors & Charles R. Maser, for appellee.

Heard before BOSLAUGH and MCCOWN, JJ., and COLWELL, KNEIFL, and WHITEHEAD, District Judges.

KNEIFL, District Judge.

Plaintiffs brought this action to have 27.2 acres of their land, located in the Village of Greeley, Greeley County, Nebraska, disconnected therefrom. The trial court denied the prayer of the plaintiffs' petition and plaintiffs appealed. We affirm.

The plaintiffs, M. William Dugan, Sr., also known as Bill Dugan, Sr., and Mary E. Dugan, are the owners of a tract of land located to the south and south-

east of the Village of Greeley, part of which acres is located within the corporate limits of the Village. The property is bound on the north and west by Village streets and to the east by the eastern boundary of the Village. The Village streets on the north and west are blacktop and the county road on the east is gravel. The Village water, sewer, electricity, gas, and fire and police protection are in use or are available to the said property and it is evidenced in the record, although in conflict, that the Village is developing toward the south part of town. Some of the 27.2 acres is platted.

This suit was commenced in accordance with the provisions of Neb. Rev. Stat. § 17-414 (Reissue 1977). It provides the method for disconnecting land from villages. The decree of the District Court is reviewable under the provisions of Neb. Rev. Stat. § 25-1925 (Reissue 1979) and is tried in this court de novo. *Kuebler v. City of Kearney,* 151 Neb. 698, 39 N.W.2d 415 (1949); *Shelton Grain & Supply Co. v. Village of Shelton,* 178 Neb. 695, 134 N.W.2d 815 (1965).

It is the contention of the plaintiffs that the 27.2 acres are exclusively agricultural with no residences on them; that the land is serviced by a pivot irrigation system; that the Village streets do not extend through the land; that the streets near the land in question have no curbs or gutters; that the detachment of the land will not damage the compactness of the Village corporate limits; that the plaintiffs gain no benefits from the Village; and that the land, because of its location in the Village corporate limits, is taxed at a higher rate than other agricultural land in the vicinity.

In *Shelton Grain & Supply Co. v. Village of Shelton, supra,* this court set forth the elements to consider in order to determine whether or not equity and justice required a disconnection of land from a city or village. Those standards are conclusions reached in *Runyan v. Village of Ong,* 154 Neb. 127, 47

N.W.2d 97 (1951); *Davidson v. City of Ravenna,* 153 Neb. 652, 45 N.W.2d 741 (1951); and *Kuebler v. City of Kearney, supra.*

Those elements are stated in *Shelton Grain & Supply Co. v. Village of Shelton*:

> In determining whether or not justice and equity require disconnection of lands from a city or village, the court may properly consider if the lands are exclusively agricultural, the existence or nonexistence of a unity or community of interest with such city or village, the benefits, if any, received from the city or village, and the effect upon the compactness of the city or village by the resulting change of its corporate limits.

(Syllabus of the court.)

The Village contends and the record substantiates that the lands are not exclusively agricultural; that there are grain bins built on the west side of the tract desired disconnected, which are suitable for a commercial operation; that further development is proceeding in that direction; that the land has been in the Village since its incorporation in 1887; that the land is bound on the north and west by blacktop road and on the east by a gravel road; and that residences extend out of the Village limits on the southwest; all of which show that the lands are not used exclusively for agricultural purposes and there is an existence of unity or community of interest between the tract of land and the Village. The tract is provided with electricity from the Village. The tract is also provided police protection and sewer and water are available to the area and provided to adjoining land owned by the plaintiffs. Curb and gutter may be installed on the tract by the formation of districts. A gas pumping station is located on the requested disconnected tract and natural gas is available to the said tract.

The growth of the Village is to the south and to de-

tach the requested tract would have a definite effect on the compactness of the Village. The record shows that it is commonplace for land located within the corporate limits of Villages, while not in immediate use for business or residential property, to be farmed. Such a request as plaintiffs have made would certainly have an economic impact upon the Village.

We are of the opinion, based upon the record, that the land requested disconnected is not exclusively agricultural; that it receives benefits and benefits are available from the Village; that there is a sufficient unity or community of interest between the tract and the Village; and that to detach the said land would have an adverse effect upon the compactness of the Village.

We conclude that the finding of the trial court that justice and equity do not require the disconnection of the 27.2 acres of land from the Village is sustained by the evidence and the reasoning of the following cases supports the conclusions reached: *Shelton Grain & Supply Co. v. Village of Shelton, supra; Runyan v. Village of Ong, supra; Davidson v. City of Ravenna, supra;* and *Kuebler v. City of Kearney, supra.*

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the judgment of the court. On the assumption that we can consider only whether the entire 27.2 acres should be detached, the decision is correct. See *Wagner v. City of Omaha,* 156 Neb. 163, 55 N.W.2d 490 (1952).

HELEN R. CHAMBERLIN, APPELLANT AND CROSS-APPELLEE, v. C. MEADE CHAMBERLIN, APPELLEE AND CROSS-APPELLANT.

295 N. W. 2d 391

Filed July 29, 1980. No. 42834.

1. **Alimony: Divorce.** Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown. Neb. Rev. Stat. § 42-365 (Reissue 1978).
2. **Divorce.** A material change in the condition of the parties since the rendition of the decree of divorce is a prerequisite to a modification of the decree.
3. **Divorce: Alimony.** The provisions of Neb. Rev. Stat. § 42-365 (Cum. Supp. 1972) do not apply to judgments awarding alimony in gross entered prior to July 6, 1972.
4. **Words and Phrases: Good Cause.** The phrase "good cause" depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which decision is committed.
5. **Divorce: Appeal and Error.** In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree.
6. **Judgments.** A judgment by consent constitutes the agreement of the parties and is simply made a matter of record by the court at their request. Although purporting to be, it is not, strictly speaking, the act of a court, but rather the act of the parties to the suit.

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

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

Ray R. Simon of White, Lipp, Simon and Powers, for appellee.

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

BRODKEY, J.

Helen R. Chamberlin (Helen) appeals from an or-

der entered by the District Court for Douglas County, Nebraska, on May 22, 1979, modifying and terminating the provisions for alimony contained in the decree of absolute divorce granted to her in 1967. C. Meade Chamberlin (C. Meade) also cross-appeals from that same order. In the original divorce action, Helen was the petitioner and C. Meade was the respondent. For purposes of clarity, we will in this opinion refer to the parties by their respective names, or will refer to C. Meade, who filed the application to modify the decree in the original divorce proceeding, as "Applicant," or "Cross-Appellant"; and we will refer to Helen herein as "Respondent" or "Appellant." We reverse the order of modification entered by the trial court on May 22, 1979, and reinstate the provisions of the original decree with reference to the payment of alimony.

The divorce decree was entered by the District Court on February 10, 1967. It granted Helen a decree of absolute divorce from C. Meade, awarded her the custody, care, and control of the minor children of the parties, and approved and incorporated into the decree an agreement captioned "Property Settlement, Alimony and Child Support Agreement" which was entered into between the parties.

Paragraph 1 of that agreement provided as follows:

> 1. Defendant [C. Meade] shall pay to plaintiff [Helen] alimony in the amount of Six Hundred Dollars ($600.00) per month, in advance, beginning on the date of entry of decree and on the same date of each month thereafter; said alimony payments shall terminate on the death or remarriage of plaintiff or the death of defendant.

As previously stated, the court found this provision to be fair and reasonable, and incorporated it verbatim into the decree of divorce.

The facts are uncontroverted that C. Meade made

all of the alimony payments required under the above provision of the decree from the date of the entry of the decree on February 10, 1967, until the date of the hearing on his application to modify the alimony provisions of the decree, which he filed on August 4, 1977. In his application, he asked that his obligation for alimony payments as contained in the decree of February 10, 1967, be terminated because of a substantial change in circumstances occurring since the date of the entry of the decree, and alleged such changed circumstances to be that the minor children of the parties had obtained their majority, thereby allowing Helen to engage in employment without adverse effect upon the rearing of said children; that Helen had, in fact, engaged in gainful employment and had exhibited a substantial earning capacity; and that C. Meade had remarried, and that his present wife and two minor children born as the issue of his second marriage were dependent upon him for their support and maintenance.

In her "Responsive Pleading to Respondent's Application to Modify Decree," Helen denied that a significant and substantial change had occurred and that she had substantial earning capacity, and affirmatively alleged that no change in circumstances had occurred to warrant a modification of the decree. In her "Cross-Application," she prayed that the alimony payments be increased to $1,000 per month, but did not specifically allege what change in circumstances she relied on for the requested modification.

C. Meade testified at the hearing on the application to modify that he believed the following circumstances merited modifying the decree: (1) That the two minor children had reached their majority and were employed; (2) That Helen had demonstrated a capability of earning a living; and (3) That he was concerned about being able to send the issue of his second marriage to college. In support of these

claims, evidence was introduced with regard to the financial status of the parties.

C. Meade, who was 59 years of age at the time of the hearing, is a vice president of Mutual of Omaha. He had a monthly gross income of $5,489.90 as determined from the tax return for the tax year preceding the hearing. His monthly living expenses, including deductions from his wages and alimony payments, amounted to $3,927.42. During the period of time from the entry of the decree until the action for modification was instituted, C. Meade's income approximately doubled. Moreover, C. Meade has an amount in excess of $300,000 in a retirement account, managed by his employer. In addition, C. Meade is a retired lieutenant colonel in the National Guard and will be entitled to retirement benefits upon reaching age 60, although the amount of benefits was unknown at the time of the hearing.

Helen was 63 years of age. Since the fall of 1968, she had been employed, initially on a part-time basis, and subsequently on a full-time basis. At the time of the hearing, Helen was employed as an income maintenance technician for Douglas County Social Services. Her gross income per month, from her employment, investments, and alimony was $1,748.35 as determined from the tax returns for the tax year preceding the hearing. Helen's monthly living expenses amounted to $1,119. Because she did not qualify for a retirement plan through her employer, Helen established individual retirement accounts and a deferred compensation plan, under which she had accumulated the sum of $6,882. Helen testified that she desired to retire, and would have an income from social security and investments upon retirement of approximately $416 per month, exclusive of any alimony payments.

In its Order of Modification of Decree of February 10, 1967, entered on May 22, 1979, the trial court found that the provisions of the decree with regard

to alimony were properly subject to modification and determination by the court and that the evidence revealed circumstances representing a substantial change from the conditions existing on the date of the decree, among which were: (1) The attainment of majority by the children of the parties, permitting Respondent to seek and obtain gainful employment; (2) The competency and capability of the Respondent in her employment and her substantial earnings therefrom; (3) The significant accumulated assets of the Respondent and earnings of her investments; and (4) The remarriage of the Applicant and the minor children born the issue of such marriage. The court thereupon ordered and decreed that the Applicant should comply with the payment of alimony as provided in the decree through the monthly installment payment which would fall due on May 10, 1980, following which the Applicant's obligation for monthly alimony payments would cease and terminate.

Helen has appealed to this court from that order. Her principal contention on appeal is that the trial court erred in finding a change in conditions had occurred since the date of the original decree, and that the reasons given by the court for such modification do not constitute "good cause" as that term is used in Neb. Rev. Stat. § 42-365 (Reissue 1978), which section, as far as material herein, provides as follows: "Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown . . . ."

Prior to the adoption by the Legislature of Nebraska's new dissolution of marriage statutes in 1972, commonly referred to as the "No-Fault" act, the rule with regard to the modification of alimony awards in divorce matters because of changed circumstances occurring after the decree was rendered was not stated in terms of "good cause," but, rather,

stated that a material change in the condition of the parties since the rendition of the decree of divorce was a prerequisite to a modification of the decree. See, for example, *Bowman v. Bowman,* 163 Neb. 336, 79 N.W.2d 554 (1956). It is clear that the decree of divorce entered in the instant case was entered prior to the effective date of the new statutes. There is no question, however, that the provisions of the new statutes apply to the modification proceedings in this case. The Legislature specifically provided in the new statutes enacted in 1972 as follows: "This act shall apply to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this act." Neb. Laws 1972, L. B. 820, § 33(3), codified as Neb. Rev. Stat. § 42-379(3) (Reissue 1978). We have, however, recognized an exception to the above rule and have stated that the provisions of Neb. Rev. Stat. § 42-365 (Cum. Supp. 1972) did not apply to judgments awarding *alimony in gross* entered previous to July 6, 1972. *Karrer v. Karrer,* 190 Neb. 610, 211 N.W.2d 116 (1973). It is clear, however, that the alimony award contained in the divorce decree entered in the instant case in 1967 was not an award of alimony in gross, as by the terms of the decree, it was to continue indefinitely, subject to termination only by death or remarriage. See *Ball v. Ball,* 183 Neb. 216, 159 N.W.2d 297 (1968).

While this court has not heretofore specifically defined the term "good cause shown," as used in § 42-365, we note that "good cause" is defined in Black's Law Dictionary 623 (5th ed. 1979) as follows:

> Substantial reason, one that affords a legal excuse. Legally sufficient ground or reason. Phrase "good cause" depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed. Wilson v. Morris, Mo., 369 S.W.2d 402, 407.

> "Good cause" is a relative and highly abstract term, and its meaning must be determined not only by verbal context of statute in which term is employed but also by context of action and procedures involved in type of case presented. Wray v. Folsom, D.C. Ark., 166 F. Supp. 390, 394, 395.

There would seem to be little doubt that, under the above definition, a material change in circumstances since the entry of a divorce decree containing provisions for alimony, would constitute "good cause" for a modification of such original provisions. We emphasize, however, that it is not merely a change in circumstances that warrants such a modification, but only a change of circumstances of a material and substantial nature.

We have held that, in actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree. See, *Howard v. Howard,* 196 Neb. 351, 242 N.W.2d 884 (1976); *Haug v. Haug,* 195 Neb. 377, 238 N.W.2d 455 (1976).

In this case, C. Meade contended, and the lower court found, that the reaching of the age of majority by the minor children was a significant change of circumstances justifying the modification of the alimony award. We are unable to agree that this fact, in and of itself, constituted a change in circumstances significant enough to warrant modification of the alimony award. In addition to the alimony award, a separate award of support was made with which award C. Meade complied. Had this award not been included, it is conceivable that a portion of the alimony award was intended to be used as child support. However, the awards were separate. The attainment of majority age of the minor children is not a factor which, in itself, would require a reduction

of an alimony award to be used by Helen as a means of support for herself alone.

He also contended that his inability to make ends meet was a factor which showed good cause for modifying the alimony award. Were this, in fact, the case, relief sought *may* have been appropriate. However, as was previously stated, the evidence reveals that C. Meade had a monthly income of $5,489.90 and monthly expenses of $3,927.42. We do not believe that C. Meade has shown evidence of his inability to "make ends meet." He had further contended that Helen has shown ability and initiative in her pursuit of employment. It is likewise true that, because of her good stewardship, she has accumulated a considerable amount of assets which will produce income after her impending retirement. However, we do not believe that she should be penalized for using such ability and initiative. The record reveals that, even with such initiative and ability, Helen's monthly income, including alimony payments, was $1,748.35 and her monthly expenses were $1,119. Moreover, it is undisputed that Helen has a frugal and conservative lifestyle, saving whatever and wherever she can. While a change in circumstances has occurred, we do not believe that the change was so substantial as to justify the termination of alimony. On the contrary, Helen contends that the alimony award should be increased due to the effects of high inflation rates on the award and its relative purchasing power, which we will address later. We do not mean to advocate that spouses should not attempt to become self-supporting; in fact, we encourage such practice. We state only that the evidence presented herein does not indicate a substantial change in Helen's ability to support herself financially which would justify modification of the alimony award; Helen should not be penalized because of her efforts to supplement the alimony award.

Finally, C. Meade contends that the obligations of

his remarriage and subsequent offspring create good cause for the modification of the alimony award. Again, we fail to find merit in this claim. The record is clear that his earnings have almost doubled since the entry of the decree of absolute divorce. C. Meade's monthly income is in excess of the expenses he and his current family incur monthly. That his income will undoubtedly continue to increase and that he fully intends to remain employed as long as possible in the future, are undisputed in the record. In light of that evidence, we cannot conclude that his remarriage and obligations thereunder justify modifying the decree.

On balance, we conclude that C. Meade has failed to demonstrate a material and substantial change in circumstances which would justify the modification of the alimony award. We likewise conclude from the evidence as presented and as set forth herein, that Helen has not brought forth sufficient evidence to support a finding that an increase is required in the alimony award. Our review of the evidence de novo convinces us that "good cause" was not shown in the case and the lower court was clearly wrong in modifying the alimony award.

In his cross-appeal, C. Meade also has contended that the lower court committed error in not terminating his liability for the payment of alimony effective upon the date of the order, rather than approximately 1 year subsequent thereto. In view of what we have previously stated, we reject his claim to that effect. He failed to adduce evidence to establish good cause for the modification of the decree and, in fact, we note that a considerable portion of the evidence presented dealt with the reasonableness of the *original* alimony award. While this issue may have been appropriate for our review on direct appeal, we cannot consider it in reviewing an application for the modification of the original decree.

We feel that we should comment on one further

issue. In her brief on appeal, Helen contends that the provisions of the original decree with reference to the payment of alimony were not subject to modification, because they were entered into pursuant to an agreement and stipulation of the parties under Neb. Rev. Stat. § 42-366 (Reissue 1978), which agreement was approved by the court and incorporated in its decree and that the judgment rendered with reference thereto was, in fact, a "consent" judgment. We do not agree. In *McArthur v. Thompson,* 140 Neb. 408, 299 N.W. 519 (1941), we held that a judgment by consent constitutes the agreement of the parties and is simply made a matter of record by the court at their request. Although purporting to be, it is not, strictly speaking, the act of a court, but rather the act of the parties to the suit. In that case, the court also held that when a decree or judgment is made by consent of the parties, the court does not inquire into the merits or equities of the case. The only questions to be determined by it are whether the parties are capable of binding themselves by consent, and whether they have actually done so. These two facts appearing, the court orders the judgment of decree to be entered. In that case, the court also held that a consent judgment is treated as an agreement of the parties and is given greater force than an ordinary judgment and the court is ordinarily without power to open or modify the same over the objection of one of the parties thereto. It is clear that the order for the payment of alimony in this case was not a "consent judgment," notwithstanding the fact that, under the provisions of the applicable statute, cited above, the parties had agreed to the payment of alimony in the amount thereof. It was also required that the court approve the provisions of the agreement, which it did. Moreover, the court is also required to examine into the merits of the matter before it, including the question of whether the marriage was irretrievably broken.

That being so, it cannot be contended that the judgment entered was only an agreement of the parties. The resulting decree was a judgment of the court itself, entered after judicial inquiry into the merits thereof. A judgment entered under such circumstances is clearly not a "consent judgment."

Helen was not awarded attorney's fees by the trial court below and we do not disturb the discretion of the trial court in that regard. However, we believe she is entitled to an award of an attorney's fee in this court and we award her the sum of $750 for that purpose.

We reverse the order of the District Court and remand this matter with directions to reinstate the alimony provisions contained in the decree of divorce entered on February 10, 1967.

REVERSED AND REMANDED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. RODNEY MORGAN, APPELLANT.

295 N. W. 2d 285

Filed July 29, 1980. No. 42974.

Probation and Parole: Constitutional Law: Search and Seizure. A condition contained in a probation order issued by the court to one previously convicted of a drug offense to the effect that the probationer shall submit to a search of his person or property at any time, by any law enforcement officer, with or without probable cause, for controlled substances, which condition is accepted by the probationer, is valid, enforceable, and constitutional, if it is applied in a reasonable manner and contributes to the rehabilitation of the offender.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Donald B. Fiedler, 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.

BRODKEY, J.

The defendant, Rodney A. Morgan, has appealed to this court from a judgment entered by the District Court for Lincoln County, Nebraska, finding him guilty of violating the terms and conditions of a certain order of probation entered on October 27, 1975, in connection with his conviction for the offense of knowingly and intentionally distributing, delivering, or dispensing a controlled substance, to wit, marijuana, to another person. In its judgment entered on July 9, 1979, the trial court ordered that defendant's probation should be extended for an additional period of 90 days; that the search provision contained in paragraph 14 of the Order of Probation should be deleted; that the defendant should pay a fine in the amount of $100; and that he should pay the costs of the action.

In its Order of Probation, entered on October 27, 1975, the trial court sentenced the defendant to probation for a period of 3 years under certain terms and conditions and subject to the further order of the court. In addition to various statutory conditions, including one that the probationer shall refrain from all unlawful conduct, the court included condition 14 reading as follows: "That he shall submit to a search of his person or property at any time by any Law Enforsement [sic] Officer, with or without probable cause, *for controlled substances.*" (Emphasis supplied.) Involved in this appeal is a determination of the validity and constitutionality of condition 14 set out above, and whether such condition is reasonably related to the rehabilitation of the offender.

There is little if any dispute as to the facts involved in this case. The record reveals that on June

21, 1978, an individual taken into custody for questioning in connection with the possession of marijuana, advised the police that he had purchased a controlled substance from a party named "Rod." In an effort to identify the seller of the substance, the suspect was shown a photograph of the defendant Morgan for identification, but the suspect responded that he could not remember for certain, but that the photograph did not resemble the party who had sold the substance to him. Armed with this information and under the authority contained in condition 14 of the probation order, the probation officer and a police officer went to Morgan's residence, which was the home of his mother with whom he was living at the time, and advised Morgan of their identity, the purpose of the visit, and of condition 14 in the probation order. Morgan then responded: "Okay, you can search my room." It is conceded by the State, and was stipulated by counsel for both parties, that at that time the officers did not have sufficient independent information to justify the search on the basis of "probable cause." It is clear that at the time the officers were relying upon the consent of the defendant to search, contained in condition 14 of the probation order, of which condition he (defendant) was aware and consented to at the time he was placed on probation. During the course of the search, a quantity of a substance later determined to be marijuana, was found in Morgan's bedroom and on his person.

Thereafter, on June 22, 1978, the State filed a motion to revoke Morgan's probation, alleging that he had violated condition 1 of his probation order which required him to refrain from all unlawful conduct. Morgan then moved to suppress the evidence seized in the search by the officers on June 21, 1978, alleging that the search was without probable cause, and that condition 14 of the probation order was a violation of his constitutional rights. The District

Court denied defendant's motion to suppress stating:

> The Court finds that since the consent to a search in the Probation Order was limited to a search by a law enforcement officer, but only for controlled substances and there were some grounds to search in the instant case, the search was not illegal, but by prior consent, and the Court finds that the motion to suppress should be overruled. The Court further finds that particularly in cases involving controlled substances prior consent to searches could strongly tend to rehabilitate. The Court further adopts the reasoning of the case of *People vs. Mason* at 488 P. 2d 630.

As previously stated, at a subsequent hearing, the District Court found that Morgan had violated the terms of the conditions of his probation and entered the judgment previously referred to, extending his probation for an additional 90 days, fining him $100 and the costs of the action, and deleting condition 14 of the probation order. In his appeal from that judgment, Morgan contends that the evidence upon which he was convicted was obtained as the result of an unlawful search and seizure and thus was inadmissible.

Since it is conceded by the parties that "no probable cause" existed for the officers' search of his room and person, the search in which the evidence was obtained must be validated, if at all, upon the consent contained in condition 14 of the probation order.

Morgan contends, first and primarily, that the condition of the probation order allowing searches without probable cause is unconstitutional. He asks us to declare such conditions contained in probation orders authorizing warrantless searches to be invalid in this state. Although the validity of such conditions has apparently not heretofore been de-

cided by this court, the subject matter has been a fruitful field for legal analysis and comment, and many articles have been written upon the subject. For example, see, Note, *Fourth Amendment Limitations on Probation and Parole Supervision,* 1976 Duke L. J. 71; Note, *Search and Seizure Rights of Parolees and Probationers in the Ninth Circuit,* 44 Fordham L. Rev. 617 (1975); and Annot., *Validity of Requirement That as Condition of Probation, Defendant Submit to Warrantless Searches,* 79 A.L.R. 3d 1083 (1977).

Respectable and well-reasoned authorities exist on both sides of the question. Numerous jurisdictions, which we believe represent the weight of authority, have examined and passed upon the validity of conditions of probation allowing warrantless searches by law enforcement officers and/or probation officers, and have found them to be valid and not in contravention of the fourth amendment of the United States Constitution, particularly when the condition in question is reasonably related to the crime for which the probationer was convicted. See, for example, *United States v. Gordon,* 540 F.2d 452 (9th Cir. 1976); *People v. Mason,* 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), *cert. denied,* 405 U.S. 1016 (1972); *State v. Montgomery,* 115 Ariz. 583, 566 P.2d 1329 (1977); *State v. Schlosser,* 202 N.W.2d 136 (N.D. 1972); *State v. Mitchell,* 22 N.C. App. 663, 207 S.E.2d 263 (1974); *People v. Santos,* 31 App. Div. 2d 508, 298 N.Y.S.2d 526 (1969), *cert. denied,* 397 U.S. 969 (1970); *State v. Cummings,* 262 N.W.2d 56 (S.D. 1978); *People v. Constancio,* 42 Cal. App. 3d 533, 116 Cal. Rptr. 910 (1974); *Roman v. State,* 570 P.2d 1235 (Alaska 1977); *State v. Bollinger,* 169 N.J. Super. 553, 405 A.2d 432 (1979); *Seim v. State,* 95 Nev. 62, 590 P.2d 1152 (1979).

On the other hand, other jurisdictions, for various reasons, have held such provisions to be invalid, either as violating the fourth amendment of the

United States Constitution, or as being vague and overbroad. See, *United States v. Consuelo-Gonzalez,* 521 F.2d 259 (9th Cir. 1975); *Tamez v. State,* 534 S.W.2d 686 (Tex. Crim. App. 1976); *People v. Peterson,* 62 Mich. App. 258, 233 N.W.2d 250 (1975), *leave to appeal denied* [but see, *People v. Richards,* 76 Mich. App. 695, 256 N.W.2d 793 (1977)]; *Grubbs v. State,* 373 So. 2d 905 (Fla. 1979); *State v. Age,* 38 Or. App. 501, 590 P.2d 759 (1979).

So far as we have been able to ascertain, the Supreme Court of the United States has never passed upon the issue presented.

In an annotation entitled *The Validity of Requirement That, as Condition of Probation, Defendant Submit to Warrantless Searches,* found at 79 A.L.R.3d 1083 et seq., the author of that annotation states at page 1087 the conclusions reached by him after an analysis of the authorities as follows:

> With few exceptions, it has been held that the United States Constitution is not violated by the requirement that a probationer submit to warrantless searches as a condition of probation. It is said that the probationer is free to reject probation if the conditions attached thereto are too onerous, that a warrantless search condition is an extremely valuable aid in rehabilitating the probationer because most crimes involve the possession of incriminating evidence and if a probationer knows he can be searched at any time without warning, he is less likely to engage in such criminal activity, that the purpose of unprovoked searches of the probationer is to determine not only whether he is disobeying the law, but also whether he is obeying the law, and that since a probationer's incarceration is being suspended in an effort to rehabilitate him, the standards for a reasonable search of the probationer are much

less than those of an ordinary citizen.

In deciding this issue, we are particularly persuaded by the language and reasoning of the court in *State v. Montgomery, supra.* In that case, the court held that a condition of probation requiring defendants to submit to search and seizure of person or property at any time by a police officer or probation officer without the benefit of a search warrant was not constitutionally overbroad nor a violation of defendant's fourth amendment rights, stating:

> Probation is a form of punishment, [citation omitted], and the court may require that a defendant comply with numerous conditions of probation when, in the opinion of the court, such conditions aid in the rehabilitation process or prove a reasonable alternative to incarceration as punishment for the crime committed. . . .
>
> Of course, Condition No. 11 [allowing for warrantless searches of probationer by any police officer at any time] is a restriction upon the defendant's privacy, but this does not make the condition unconstitutional. While defendant is on probation his expectations of privacy are less than those of other citizens not so categorized. It is not an unreasonable or an unconstitutional limitation upon his right to be free from unreasonable searches and seizures. . . . "[P]ersons conditionally released to society, such as parolees, may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities 'reasonable' which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands. . . ." [Citation omitted.]

Id. at 584, 566 P.2d at 1330.

While we are of the opinion that such conditions should be sparingly imposed and should be reasonably related to the offense for which the defendant was convicted, nevertheless, under the facts presented in this case, there can be little doubt that the condition was valid, proper, and reasonably enforced.

The record is clear that Morgan had been previously convicted of a drug offense and had been sentenced to probation under certain terms and conditions, including condition 14 involved in this appeal. Condition 14 was fully explained to him and he accepted that condition and consented to it as part of the order of probation. It is true that Morgan argues in his brief on appeal that his consent to such condition was invalid and was a coerced consent because of the fact that he had to accept it to avoid going to prison. We agree with the trial court in its conclusion that his consent was not a coerced consent, but was rather a "choice." Morgan had already been convicted and could have been imprisoned by the court and not placed on probation. Morgan clearly had the choice of submitting to the conditions and remaining out of prison on probation or serving a prison term in the penal complex. If acceptance of this term of probation to avoid going to prison amounts to coercion, the same argument would apply equally to any condition attached to the granting of probation, and the coercion rule would consequently invalidate all conditions of probation. Morgan obviously concluded that it was in his best interests to accept the conditions of probation and avoid imprisonment. His ultimate decision was not based on "coercion," but on a "choice."

In any event, subsequent to Morgan's being placed on probation, his residence was searched by *both* a probation officer and a law enforcement officer under the authority contained in condition 14 and, as a result of such search, additional drugs were found in his possession. This clearly constituted "unlawful

conduct" on his part, in violation of condition 1 of his probation order.

It is clear that the search of Morgan's premises was a "consent" search under the authority contained in condition 14. In *State v. Rathburn,* 195 Neb. 485, 239 N.W.2d 253 (1976), we held that a consent, freely and intelligently given, validates a search even if the suspect was not under arrest or if the officer did not have a search warrant. We also held in that case that the voluntariness of a consent to search is a question of fact to be determined by the totality of the circumstances. We think it is clear that the trial court was correct in finding that the consent to search given by Morgan was freely and voluntarily given and that the evidence obtained through such search was not subject to suppression.

There can be no doubt that criminal activities in the field of drug offenses or on the part of drug offenders are frequently uncovered only through searches of the personal property of the defendant or of the defendant himself. To the extent that the possibility of such searches restrains previously convicted drug offenders from further activity in that field, it clearly aids in the rehabilitation process. Were we to flatly prohibit such searches under provisions similar to those contained in the probation order in this case, we would, we believe, unnecessarily impede and hamper law enforcement authorities, as well as the probation process itself. Reasonable searches are necessary and should be permitted in order to determine whether the probationer is abiding by the conditions of the probation, so that those supervising such persons may determine whether the probationer is making progress in rehabilitation efforts, particularly in drug offenses, or whether the probationer has fallen by the wayside and has resumed his or her incursions into the field of drug addiction, drug abuse, and similar activities.

We therefore hold that conditions in probation or-

ders requiring the probationer to submit to warrantless searches, to the extent that they contribute to the rehabilitation process and are done in a reasonable manner, are valid and constitutional. The facts in the instant case fall within the purview of the rule announced and we conclude that the District Court was correct in holding that the search in this case was valid and that the evidence seized thereby was admissible.

One further matter requires comment. In the order of the District Court denying defendant's motion to suppress evidence seized in the search, the trial judge found, among other things, that "there were some grounds to search in the instant case . . . ." Morgan contends that this finding was erroneous and not supported by the evidence. We agree with this contention; but since, as earlier indicated, we find that the search may be validly upheld under condition 14 of the probation order, it is clear that the finding by the trial judge was, at the most, harmless error.

In the judgment appealed from in this case, the court, in addition to extending the probation for a further period of 90 days, also ordered that condition 14 of the order be deleted. The reason for such deletion does not appear in the record, but the court undoubtedly had good reasons for so doing. In view of our finding that the condition in question is valid and constitutional as applied in this case, there would appear to be no legal necessity for deleting such condition and it is clear it could be reimposed, if necessary, in the future. However, our opinion today does not require the reimposition of such condition and we leave that matter to future necessity and the discretion of the trial court.

We find no merit to Morgan's assignments of error and, therefore, the judgment of the District Court must be affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. The majority has held that a condition contained in a probation order issued by the court to one previously convicted of a drug offense to the effect that the probationer shall submit to a search of his personal property, at any time, by *any* law enforcement officer, *with or without probable cause,* for controlled substances, which condition is accepted by the probationer, is valid, enforceable, and constitutional if it is applied in a reasonable manner and contributes to the rehabilitation of the offender. In my view, the language of the majority opinion is much too broad. It is difficult for me to conceive how a search may be made in a reasonable and constitutional manner if it is also authorized to be made by any law enforcement officer, with or without probable cause. It appears to me that we have simply removed from one on probation all of his fourth amendment rights. While I recognize that one who is placed on probation is not entitled to all of the rights of a free citizen, nevertheless, I am persuaded by those authorities which have held provisions such as the one included in this case to be invalid, either as violating the fourth amendment of the United States Constitution or as being vague and overbroad. See, *United States v. Consuelo-Gonzalez,* 521 F.2d 259 (9th Cir. 1975); *Tamez v. State,* 534 S.W.2d 686 (Tex. Crim. App. 1976); *Grubbs v. State,* 373 So. 2d 905 (Fla. 1979); *State v. Age,* 39 Or. App. 501, 590 P.2d 759 (1979). While it may be true that one convicted has a free choice of either accepting the condition or going to jail, it seems to me that, in such a case, the convicted is given a Hobson's choice. Accordingly, I would have reversed and dismissed.

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

295 N. W. 2d 112

Filed July 29, 1980. No. 43003.

Drunk Driving: Habitual Criminals. In a proceeding pursuant to Neb. Rev. Stat. § 39-669.07 (Reissue 1978) to hear and determine the issue of enhancement of penalty, where proof has been made of defendant's conviction of a prior misdemeanor violation of that statute, the defendant cannot then collaterally attack that prior misdemeanor conviction.

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

Dennis R. Keefe, Public Defender, Rodney J. Rehm, and George D. Green, for appellant.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Defendant, William Voight, was convicted of operating a motor vehicle while under the influence of alcoholic liquor (DWI). He was sentenced as a third offender to a term of 20 months to 3 years imprisonment. He appeals, assigning as error that proof of a prior misdemeanor conviction used to enhance his penalty was constitutionally infirm for failure to show his guilty plea was voluntarily made. We affirm.

Neb. Rev. Stat. § 39-669.07 (Reissue 1978) provided, in part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor . . . . (1) If such conviction is for a first offense, such person shall be guilty of a Class IIIA misdemeanor . . . .

> (2) if such conviction is for a second offense such person shall be guilty of a Class III misdemeanor . . . . and (3) if such conviction is for a third offense, or subsequent offense thereafter, such person shall be guilty of a Class IV felony . . . .

Certified copies of two prior DWI convictions of defendant were received in evidence over defendant's objection, as follows: (a) A misdemeanor conviction of defendant on April 22, 1976, in the municipal court of Lincoln, Lancaster County, Nebraska, on his plea of guilty to DWI, § 39-669.07, and a sentence of $300 fine and 10 days in jail, and (b) A third offense conviction of defendant in the District Court for Lancaster County, Nebraska, on January 10, 1978, upon trial to the court on a charge of DWI, § 39-669.07, and a sentence of 1 year imprisonment. Defendant does not challenge the authenticity of either certified record. Neither of these prior convictions had been set aside by direct appeal or collateral attack. Defendant testified without objection in support of his claim.

This appeal is similar to *State v. Orosco,* 199 Neb. 532, 260 N.W.2d 303 (1977), where the conviction was affirmed based on the proposition that defendant had not met his burden of proof as required in a collateral attack. However, we said, "We assume, for purposes of this opinion, without expressly so deciding, that the defendant would be entitled to collaterally attack the judgment in this fashion. Some courts have held otherwise. See People v. Hendrick, 52 Mich. App. 201, 217 N. W. 2d 112." *Id.* at 542, 260 N.W.2d at 309. That is the issue here, narrowed to enhancement of punishment proceedings under § 39-669.07 and, particularly, to the question of whether or not defendant in such proceedings can collaterally attack his 1976 misdemeanor conviction.

Defendant here follows the procedure in *Orosco* and collaterally attacks the 1976 municipal court

guilty plea conviction for the reasons that it does not show on its face either that the guilty plea was knowingly and intelligently made, or that he was informed of his right to a jury trial and to remain silent, and that he was not informed of his right to confrontation of witnesses, all of which he claims are required by *Boykin v. Alabama,* 395 U.S. 238 (1969); *United States v. Tucker,* 404 U.S. 443 (1972); *State v. Turner,* 186 Neb. 424, 183 N.W.2d 763 (1971); and *State v. Fowler,* 201 Neb. 647, 271 N.W.2d 341 (1978). The State asserts that *Boykin* does not apply to misdemeanors, citing *People v. Tomlinson,* 50 Mich. App. 655, 213 N.W.2d 803 (1973), *leave to appeal denied,* 391 Mich. 824 (1974). The question of minimum standards for guilty pleas in misdemeanor cases has not been settled in this state and, although it is closely related to the issue here, it is not determinative. Also to be considered is the rule that, absent a knowing and intelligent waiver, no person may be imprisoned for any offense unless he was represented by chosen or assigned counsel. *Argersinger v. Hamlin,* 407 U.S. 25 (1972); *Scott v. Illinois,* 440 U.S. 367 (1979).

The certified record of the 1976 conviction includes the complaint, and the trial judge's notes relating to arraignment, defendant's waiver of counsel, followed by an order appointing the public defender, defendant's entering his guilty plea with his counsel present, findings that a factual basis for the guilty plea existed, judgment of conviction, and sentence imposed.

The municipal courts are courts of record, Neb. Rev. Stat. § 26-101 (Reissue 1979), and transcripts of their records, duly certified, are evidence of the facts stated therein, Neb. Rev. Stat. §§ 26-110, 27-902, 27-1005 (Reissue 1979). Such certified records may be used to prove a judgment of conviction. See *State v. Orosco, supra.* Ordinarily, such a certified record imports absolute verity absent proof that the

same is incorrect. See *State v. Morford,* 192 Neb. 412, 222 N.W.2d 117 (1974).

Enhancement of penalty for recidivism has long been a recognized concept of the law of this state. See *Davis v. O'Grady*, 137 Neb. 708, 291 N.W. 82 (1940).

"Authorities differ as to whether the validity of a prior conviction relied on for the enhancement of the punishment for a later offense may be inquired into, and whether the invalidity of such prior conviction prevents its use for such purpose." 24B C.J.S. *Criminal Law* § 1961 (1962). We favor the rule followed in Wisconsin, "[T]he validity of former misdemeanor convictions cannot be collaterally attacked in a proceeding for additional punishment under the repeater statute on a subsequent misdemeanor conviction for the reason that the former convictions are valid until reversed. [Citation omitted.] Such prior misdemeanor convictions may not be subjected to collateral attacks. See *State v. Garcia* (1966), 3 Ariz. App. 194, 412 Pac. 2d 876, 265 Fed. Supp. 951 (involving *felony*)." *State ex rel. Plutshack v. H&SS Department,* 37 Wis. 2d 713, 727, 155 N.W.2d 549, 556 (1968) (emphasis in original).

In a proceeding pursuant to § 39-669.07 to hear and determine the issue of enhancement of penalty, where proof has been made of defendant's conviction of a prior misdemeanor violation of that statute, the defendant cannot then collaterally attack that prior misdemeanor conviction.

In making a record of guilty pleas in these cases, trial courts are urged to show compliance with *Argersinger v. Hamlin, supra.*

From a review of the record, the trial court properly found from all the evidence that defendant's 1979 conviction was his third offense. In addition, defendant could not collaterally attack his 1976 conviction.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

INDEX

Abandonment.

As a general rule, the relinquishment of a child in exchange for an unwarranted payment of consideration to a parent is tantamount to an abandonment of that child. Gray v. Maxwell 385

Abandonment of Contract.

An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with the existence of the contract and are acquiesced in by the other party. James J. Parks Co. v. Lakin ... 184

Abutting Landowner.

In order for a landowner to be considered to have property abutting a vacated street under the provisions of Neb. Rev. Stat. § 15-702.03 (Reissue 1977), some portion of the boundary of the landowner's property previously available for ingress or egress to or from the proposed vacated street must be in common with the property line of that street. City of Lincoln v. Cather & Sons Constr., Inc. 10

Acceleration Clauses.

1. A stipulation in a mortgage, providing that the whole debt secured thereby shall become due and payable upon failure of the mortgagor to pay the interest or any installment of principal upon maturity thereof or to comply with any other condition of the mortgage, is a legal, valid, and enforceable stipulation and is not in the nature of a penalty or forfeiture which a court of equity will refuse to enforce. Occidental Sav. & Loan Assn. v. Venco Partnership 469
2. A "due on sale" clause is a form of acceleration clause and, as such, should be subject to the same rules as other acceleration clauses, including the protection of equitable defenses. Occidental Sav. & Loan Assn. v. Venco Partnership 469

Acceptance of Goods.

An alteration in the condition of the goods may constitute an act inconsistent with seller's ownership, amounting to an acceptance under Nebraska U.C.C. § 2-606(1)(c) (Reissue 1971). Johnson v. Holdrege Coop. Equity

Exchange 568

Acquiescence.

Acquiescence on the part of the owner of the servient tenement which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence. Engel v. Rhen Marshall, Inc. 265

Action to Disconnect Land.

1. A decree of the District Court in an action to disconnect land from a city or village is reviewable by the Nebraska Supreme Court and will be tried de novo by this court. Neb. Rev. Stat. §§ 17-414 (Reissue 1977), 25-1925 (Reissue 1979). Dugan v. Village of Greeley 804
2. To determine whether or not justice and equity require disconnection of land from a city or village, the court may properly consider the benefits received from the city or village, whether the lands are exclusively agricultural, the existence or nonexistence of unity or community of interest with such city or village, and the effect upon the compactness of the city or village of the resulting change of its corporate limits. Dugan v. Village of Greeley 804
3. Disconnection of land from a city or village on the basis of justice and equity requires consideration of all the facts and circumstances tending to show the fairness or unfairness of disconnection as it relates to the particular case. Dugan v. Village of Greeley 804

Actions on Contracts.

As a general rule, a party cannot maintain an action on a contract without prior substantial compliance on his part. If there has been substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. Morris Mills v. Denny Wiekhorst Excavating, Inc. 443

Administrative Hearings.

1. An administrative agency which decides disputes of adjudicative fact is required to act in a judicial manner and orders made in the excess of such judicial function are reviewable by error proceedings. Richardson v. Board of Education 18
2. Even though an agency is performing a legislative function, the Legislature may confer upon it judicial power to determine facts and equities under which

legislation authorizes some changes to be made. Richardson v. Board of Education 18

3. The State Board of Education hearing appeals as provided for in Neb. Rev. Stat. § 79-1103.05(2) (Reissue 1976) acts in a quasi-judicial capacity and, therefore, either party has the right to appeal to the District Court any such order made, either by writ of error or under authority of Neb. Rev. Stat. § 84-917 (Reissue 1976). Richardson v. Board of Education 18

4. The rule against collateral impeachment of judicial decisions applies to the determination of officers and agencies who are called upon to act judicially in matters of administration. Richardson v. Board of Education 18

5. Upon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is required to consider the record made before the director. Hehn v. State 34

6. The review of appeals from orders of the Department of Public Welfare by this court under Neb. Rev. Stat. § 84-917 (6) (Reissue 1976) is governed by the criteria of that statute, as is review by the District Court. The ultimate question is whether or not such orders were in violation of constitutional provisions; whether they were supported by competent, material, and substantial evidence; and whether they were arbitrary or capricious. Gosney v. Department of Public Welfare 137

7. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on the factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Halbert v. Nebraska Liquor Control Commission 687

8. Where the record of the proceedings contains no evidence to justify the order, the action of the Nebraska Liquor Control Commission must be held to be unreasonable and arbitrary. Halbert v. Nebraska Liquor Control Commission 687

9. A procedure which might be suitable for a hearing involving relatively few parties would not be practicable where the parties are numerous and the issues complex. Box Butte County v. State Board of Equalization & Assessment 696

10. The State Tax Commissioner, in holding hearings authorized under Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976), gathers evidence only and does not decide disputes of adjudicative fact, and therefore does

not act in a quasi-judicial capacity. Box Butte County v. State Board of Equalization & Assessment 696

11. The State Tax Commissioner can hold only an administrative hearing, and not a discretionary or a quasi-judicial one, because the power of the State Board of Equalization and Assessment cannot be delegated to the State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment 696

12. The State Tax Commissioner, when authorized by the State Board of Equalization and Assessment to act as a hearing officer under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976), is not acting as a member of the State Board, but is acting in his capacity as State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment 696

13. The burden of proof is on the appellant to establish that the action of the State Board of Equalization and Assessment was erroneous. Box Butte County v. State Board of Equalization & Assessment 696

Administrative Orders.

1. An order of an administrative agency which has become final cannot be relitigated in an action in court to enforce such order. Richardson v. Board of Education 18

2. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order. Hehn v. State 34

3. The director of the Department of Banking and Finance has the discretion to compare two applicants for bank charters and select the one that can best promote the public necessity, convenience, and advantage. Southwestern Bank & Trust Co. v. Dept. of Banking and Finance 599

4. This court, in reviewing the action of the State Board of Equalization and Assessment, will not sit as a super board of equalization and pass upon the merits of the evidence presented to the State Board. Banner County v. State Board of Equalization & Assessment 715

5. Where the record contains some evidence to justify the order of the State Board of Equalization and Assessment, it will not be considered arbitrary and capricious. Banner County v. State Board of Equalization & Assessment 715

Adoption.

1. After a decree of adoption is entered, the usual relation of parent and child and all of the rights, duties, and other legal consequences of the natural relation of parent and child shall thereafter exist between such adoptive child and the person or persons adopting such child and his, her, or their kindred. In re Estate of Luckey. Bailey v. Luckey 53
2. The purpose of Neb. Rev. Stat. § 43-110 (Reissue 1978) is to terminate any relationship which existed between the natural parent and the child and to create a new relationship between the adoptive parent and the child. In re Estate of Luckey. Bailey v. Luckey 53
3. Under the provisions of Neb. Rev. Stat. § 30-2309 (Reissue 1975), a twice-adopted child may not inherit under the laws of intestacy from its first adoptive parent who has thereafter consented to the second adoption and relinquished all rights of a parent as to the child. In re Estate of Luckey. Bailey v. Luckey 53
4. It is not contrary to public policy for persons wishing to adopt a child to make provisions with its mother before birth to pay hospital and medical expenses in connection with the care of the mother and the child. Gray v. Maxwell 385
5. An agreement to pay a mother, in return for the relinquishment of her child, a sum equal to the amount of the hospital and medical expenses which have already been paid by another, constitutes an unwarranted payment of consideration which vitiates the relinquishment. Gray v. Maxwell 385
6. A relinquishment of a child for adoption which is not executed voluntarily may be revoked if such action is taken within a reasonable period of time. Gray v. Maxwell 385
7. As a general rule, the relinquishment of a child in exchange for an unwarranted payment of consideration to a parent is tantamount to an abandonment of that child. Gray v. Maxwell 385

Adverse Possession.

1. The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period. Hutson v. The Rush Creek Land and Livestock Co. 658
2. In order to create title by adverse possession, the possession, in addition to other elements, must be exclu-

sive for the period of limitations. Hutson v. The Rush Creek Land and Livestock Co. 658
3. Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years. Hutson v. The Rush Creek Land and Livestock Co. 658

Alcoholic Liquors.
1. The recommendation of the local governing body to the Nebraska Liquor Control Commission that an application for a liquor license be denied affords a sufficient evidentiary basis for an order of the commission denying the license. Brannen v. Nebraska Liquor Control Commission 662
2. Where the Nebraska Liquor Control Commission intends to rely upon a recommendation of denial by the local governing body to support its refusal to grant a liquor license, the burden is upon the commission to furnish evidence of that action. Brannen v. Nebraska Liquor Control Commission 662
3. Evidence furnished by the Nebraska Liquor control Commission of the action of a local governing body which lacks sufficient clarity to enable one to determine what action the local governing body has taken in regard to a recommendation as to an application for a liquor license, is ineffective to prove a recommendation of denial of the application. Brannen v. Nebraska Liquor Control Commission 662
4. The absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license. Brannen v. Nebraska Liquor Control Commission 662
5. The Nebraska Liquor Control Commission is vested with the discretion of the granting or denial of liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically or capriciously. Halbert v. Nebraska Liquor Control Commission 687
6. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on the factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Halbert v. Nebraska Liquor Control Commission 687
7. Where the record of the proceedings contains no evidence to justify the order, the action of the Nebraska Liquor Control Commission must be held to be unrea-

sonable and arbitrary. Halbert v. Nebraska Liquor Control Commission 687

Alimony.

1. In a proceeding for dissolution of marriage, where the parties by their written agreement and the court by its decree provide that a specific amount of alimony shall be paid for a specified period of time and that the payments are terminable only by the death or remarriage of the recipient, the payment of alimony shall terminate only upon the happening of the event or events set out in the agreement or decree. Benedict v. Benedict 284
2. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Witcig v. Witcig 307
   Van Pelt v. Van Pelt 350
   Kosnopfl v. Kosnopfl 524
   Liss v. Liss 587
3. A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony. Witcig v. Witcig 307
4. Where a judgment for alimony is awarded the court should, if possible, divide the property in such a manner as to provide the means to permit the payment of the alimony judgment. Van Pelt v. Van Pelt 350
5. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment where the decree expressly precludes modification. Van Pelt v. Van Pelt 350
6. In a proceeding for dissolution of marriage, this court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Van Pelt v. Van Pelt 350
7. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Torrey v. Torrey 485
8. In determining whether alimony should be awarded, in what amount, and over what period of time, the ulti-

mate criterion under the statute as well as under the former decisions of this court is one of reasonableness. The relevant considerations will vary from case to case. Kosnopfl v. Kosnopfl 524

9. The earning capacity of the husband is an element to be considered in the allowance of alimony. Kosnopfl v. Kosnopfl 524

10. Orders for the payment of alimony may, in some instances, be modified for good cause shown. Anderson v. Anderson 655

11. In order to warrant the modification of a decree of dissolution providing for the payment of alimony, there must be evidence of changed circumstances supporting such action. Anderson v. Anderson 655

12. Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown. Neb. Rev. Stat. § 42-365 (Reissue 1978). Chamberlin v. Chamberlin 808

13. The provisions of Neb. Rev. Stat. § 42-365 (Cum. Supp. 1972) do not apply to judgments awarding alimony in gross entered prior to July 6, 1972. Chamberlin v. Chamberlin 808

Amended Pleadings.

Amendments may be allowed, in the exercise of proper discretion by the court, even after the evidence is closed. Engel v. Rhen Marshall, Inc. 265

Appeal and Error.

1. An administrative agency which decides disputes of adjudicative fact is required to act in a judicial manner and orders made in the exercise of such judicial function are reviewable by error proceedings. Richardson v. Board of Education 18

2. One cannot be denied his right of review in appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for. Richard v. Board of Education 18

3. The State Board of Education hearing appeals as provided for in Neb. Rev. Stat. § 79-1103.05 (2) (Reissue 1976) acts in a quasi-judicial capacity and, therefore, either party has the right to appeal to the District Court any such order made, either by writ of error or under authority of Neb. Rev. Stat. § 84-917 (Reissue 1976). Richardson v. Board of Education 18

4. An order of an administrative agency which has become final cannot be relitigated in an action in court

to enforce such order. Richardson v. Board of Education 18
5. The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. Troy & Stalder Co. v. Continental Casualty Co. 28
6. Upon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is required to consider the record made before the director. Hehn v. State 34
7. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order. Hehn v. State 34
8. 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. Marts v. Marts 38
Elsasser v. Elsasser 128
Murdoch v. Murdoch 327
9. Determination of the feasibility of a recreational facility is a legislative function and is not within the scope of judicial review. Winter v. Lower Elkhorn Nat. Resources Dist. 70
10. This court will not interfere on appeal with a conviction based upon evidence unless the evidence is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. French 92
11. This court will not overturn a sentence of the trial court which does not grant probation unless there has been an abuse of discretion. State v. French 92
12. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. State v. French 92
State v. Weik 217
13. Equity cases are heard de novo by the court. However, in determining the weight to be given to the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Chalen v. Cialino 106
14. 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. Schaneman v. Schaneman 113

15. Even when the case is triable de novo, the superior position of the original trier of facts is to be respected and accorded great weight. Schaneman v. Schaneman 113

16. The review of appeals from orders of the Department of Public Welfare by this court under Neb. Rev. Stat. § 84-917 (6) (Reissue 1976) is governed by the criteria of that statute, as is review by the District Court. The ultimate question is whether or not such orders were in violation of constitutional provisions; whether they were supported by competent, material, and substantial evidence; and whether they were arbitrary or capricious. Gosney v. Department of Public Welfare . 137

17. It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case. Engel v. Rhen Marshall, Inc. 265

18. In an action in equity, it is the duty of this court to try the issues of fact de novo on the record and reach an independent conclusion thereon without reference to the findings of the District Court. Jackman v. Daiss, Inc. 295

19. The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion. Hanson v. Rockwell 299

20. 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 the facts rather than the opposite. Witcig v. Witcig 307
Torrey v. Torrey 485

21. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Witcig v. Witcig 307
Van Pelt v. Van Pelt 350
Kosnopfl v. Kosnopfl 524

22. A decree fixing custody of minor children will not be

modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Murdoch v. Murdoch 327
23. A trial judge's overruling of a motion for change of judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. Murdoch v. Murdoch.. 327
24. When a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Sortino v. Paynter 348
Shreves v. D. R. Anderson Constructors, Inc. 433
25. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Sortino v. Paynter 348
26. In a proceeding for dissolution of marriage, this court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Van Pelt v. Van Pelt 350
Torrey v. Torrey 485
27. In an appeal to the Supreme Court of an action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 2416 and 2418 to 2420 (Reissue 1977) and 2417 (Cum. Supp. 1978), the finding of the trial court will not be disturbed unless it is clearly wrong. Lindgren v. City of Gering 360
28. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in that party's favor and that party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Lindgren v. City of Gering 360
Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc. 651
29. A party may not properly assign as error on appeal the admission of evidence if no objection or motion to strike was made at trial. Lindgren v. City of Gering 360
30. The standards to be followed by trial judges before accepting a guilty plea are not per se rules, with which the failure to technically comply will mandate an automatic reversal. State v. Rouse 371
31. 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 review of issues already litigated.

State v. Rouse 371
32. By failing to challenge the indeterminateness of a sentence directly in an appeal, a defendant has waived the right to contest it in a post conviction review. State v. Rouse 371
33. In reviewing a decision in a habeas corpus case involving the custody of a child, it is necessary that this court try the case de novo on the record, giving great weight, however, to the findings of the trial court where the evidence is in irreconcilable conflict. Gray v. Maxwell 385
34. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be drawn from the evidence presented. Woodsmall v. Marijo, Inc. 405
35. The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. By its terms, this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, each of which, in itself, might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in the case. Shreves v. D. R. Anderson Constructors, Inc. 433
36. This court will not ordinarily disturb a trial court's order granting a new trial, and will not disturb it at all unless it clearly appears that no tenable grounds existed therefor. Shreves v. D. R. Anderson Constructors, Inc. 433
37. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Torrey v. Torrey 485
38. The trial court is not bound in all cases to set aside to one party that property which was inherited or gifted to that party and divide only the remaining property between the parties. Torrey v. Torrey 485
39. The source of property is only one of the factors to consider in the division of property. Torrey v. Torrey 485
40. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at the decision considered only such evidence as was competent and relevant; and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Torrey v. Torrey . 485
41. If the evidence in the District Court on appeal from an order of the civil service commission is sufficient to

show that the order of the commission suspending or discharging an employee was made in good faith for cause, the order of the commission must be affirmed. Adkins & Webster v. North Platte Civil Service Comm. 500

42. The imposition of a sentence in a criminal proceeding is essential to create a final judgment from which an appeal may be taken. In re Interest of Wolkow 512

43. A finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed. In re Interest of Wolkow 512

44. A decision in a criminal case is final for appellate purposes only when the litigation between the parties is terminated and nothing remains but enforcement by execution of what has been determined. To create finality in a criminal case, it is necessary that there be a judgment of conviction followed by a sentence. In re Interest of Wolkow 512

45. In the absence of a sentence on a criminal contempt finding, the decision lacks the finality which would allow this court to review it. In re Interest of Wolkow 512

46. It is fundamental that there can be no appeal to this court until there has been a judgment or final order in the court from which the appeal is taken. In re Interest of Wolkow 512

47. The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. Whitlatch v. Whitlatch 527

48. In evaluating the general concept of the best interests and welfare of the children, great weight will be given to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial. Whitlatch v. Whitlatch 527

49. In a prosecution for a crime, the only errors which require reversal of a cause are those prejudicial to the rights of the accused, or which constitute the denial of a substantial legal right. State v. Packett 548

50. An appeal from a county board of equalization is heard as in equity and is tried de novo in this court. Otradovsky v. Board of Equalization 559

51. In an appeal from a county board of equalization on the ground that the property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property. Otradovsky v. Board of Equalization 559

52. As a discretionary matter, the determination of whether a default judgment should be set aside will, on appeal,

be presumed to have been made in proper exercise of that discretion where the contrary does not appear from the record. Diplomat Inn, Inc. v. Weindorf 565

53. It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of a district court have been wisely exercised. Diplomat Inn, Inc. v. Weindorf 565

54. The burden of showing an abuse of discretion by a trial court rests on the appellant. Such an abuse cannot be presumed, but must be made to appear by the evidence before its existence can be found by an appellate court. Diplomat Inn, Inc. v. Weindorf 565

55. 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. Meyer v. First United Methodist Church ... 607

56. A motion for new trial filed in a criminal case after the trial court has announced its decision but before judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates. State v. Kolar 619

57. This court may, at its option, note a plain error not assigned. State v. Kolar 619

58. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc. 651

59. A trial court has a wide range of discretion in determining whether or not the witness' qualification to state his opinion has been established. That decision will not be disturbed on appeal absent an abuse of that discretion. Danielsen v. Richards Mfg. Co., Inc. 676

60. The order of the State Board of Equalization and Assessment ordinarily will not be reversed unless it utterly failed to follow a reasonable course of action. Box Butte County v. State Board of Equalization & Assessment 696

61. This court, in reviewing the action of the State Board of Equalization and Assessment, will not sit as a super

board of equalization and pass upon the merits of the evidence presented to the State Board. Banner County v. State Board of Equalization & Assessment 715

62. Where the record contains some evidence to justify the order of the State Board of Equalization and Assessment, it will not be considered arbitrary and capricious. Banner County v. State Board of Equalization & Assessment 715

63. An individual taxpayer may have standing to appeal from a final order of the State Board of Equalization and Assessment if such taxpayer has made a showing before that board requiring some affirmative action by it. Great Western v. State Board of Equalization & Assessment 721

64. It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals and a taxpayer who requests such action of the board has not made a showing requiring affirmative action by the board so as to have standing to appeal to this court. Great Western v. State Board of Equalization & Assessment 721

65. A decree of the District Court in an action to disconnect land from a city or village is reviewable by the Nebraska Supreme Court and will be tried de novo by this court. Neb. Rev. Stat. §§ 17-414 (Reissue 1977), 25-1925 (Reissue 1979). Dugan v. Village of Greeley ... 804

66. In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree. Chamberlin v. Chamberlin 808

Arrests.

1. The offering of a preliminary test of the breath under Neb. Rev. Stat. § 39-669.08(3) (Reissue 1978) is not a condition precedent to an arrest for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor. State v. Gerber 75

2. Absent exigent circumstances, the police cannot make a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. State v. Schlothauer 670

3. An officer may arrest a suspect in a public place without a warrant when it appears that a felony has been committed and there are reasonable grounds to believe

that the person arrested is guilty of the offense. State v. Tipton 731

4. The test of probable cause for a warrantless arrest is whether, at the moment, the facts and circumstances within the knowledge of the officers and of which they had reasonably trustworthy information where sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Tipton 731

Assault.

To constitute the offense of assault with intent to do great bodily harm, there must be an unlawful assault coupled with a present ability and intent to injure, but no actual battery need occur. State v. Packett 548

Assignments.

An assignee acquires only the rights of the assignor. State Securities Co. v. Daringer 427

Assistance of Counsel.

The decision to object or not to object is part of trial strategy and, accordingly, we grant due deference to the discretion of defense counsel to formulate trial tactics. Effectiveness of counsel is not to be judged by hindsight. State v. Auger 666

Attorney Misconduct.

It is generally improper for counsel, during the pendency of a proceeding, to communicate ex parte with the judge as to the merits of the case. State v. Packett ... 548

Attorneys.

1. A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitutes grounds for suspension or disbarment. State ex rel. Nebraska State Bar Association v. Walsh 737
2. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspen-

sion or disbarment. State ex rel. Nebraska State Bar Association v. Walsh 737
3. An attorney may be subject to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, if such conduct might have been found to be illegal. State ex rel. Nebraska State Bar Association v. Walsh 737
4. Cumulative acts of misconduct are more cause for concern than an isolated instance of negligence or misconduct, and justify more severe sanctions. State ex rel. Nebraska State Bar Association v. Walsh 737

Attorney's Fees.
1. Legal services furnished to a minor charged with a crime may be necessaries. County of York v. Johnson 200
2. In the determination of a reasonable attorney's fee, the court should consider the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties. Prucka v. Papio Nat. Resources Dist..... 234
3. The court, in awarding a reasonable attorney's fee, may consider the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such a contract is customary in the locality. While the actual agreement is neither the sole factor nor a factor to be given any greater weight than any of the other factors, it may, nevertheless, be considered. Prucka v. Papio Nat. Resources Dist. 234
4. Any work done in connection with a condemnation proceeding which is relevant and material and properly introduced in evidence on appeal in the District Court, whenever prepared, may be considered by the District Court in awarding a reasonable attorney's fee. Prucka v. Papio Nat. Resources Dist. 234
5. The allowance of a reasonable attorney's fee for necessary services performed by an attorney in perfecting an appeal to the District Court will not be reversed on appeal to this court in the absence of abuse of discretion. Prucka v. Papio Nat. Resources Dist. 234
6. The allowance of attorney's fees and costs is discretionary with the trial court and depends upon a con-

sideration of all the facts and circumstances presented. Witcig v. Witcig 307
7. The award of attorney's fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Kosnopfl v. Kosnopfl 524

Bank Charters.
The director of the Department of Banking and Finance has the discretion to compare two applicants for bank charters and select the one that can best promote the public necessity, convenience, and advantage. Southwestern Bank & Trust Co. v. Dept. of Banking and Finance 599

Bankruptcy.
1. Congress did not give bankruptcy courts exclusive jurisdiction over all controversies which in some way affect the debtor's estate. Morford v. City of Omaha 271
2. Suits for injunctive relief seeking to restrain a governmental unit from enforcing police or regulatory powers are not automatically stayed upon the filing of a bankruptcy petition. Morford v. City of Omaha 271
3. It is within the sound discretion of the trial court to determine whether or not a stay of proceedings should be granted upon the filing of a petition in bankruptcy in matters involving the enforcement of police or regulatory powers. Morford v. City of Omaha 271

Bingo.
Neb. Rev. Stat. § 9-146 (Supp. 1979) of the Nebraska Bingo Act, as amended, held constitutional. Alcoholic Resocialization Conditioning Help, Inc. v. State 788

Blood, Breath, and Urine Tests.
1. Before the results of a preliminary breath test may be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the preliminary test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possesses a valid permit issued by the Nebraska Department of Health for that purpose. State v. Gerber 75
2. Before the results of a Breathalyzer test may be received in evidence, it must be shown that the require-

ments of Neb. Rev. Stat. § 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the Breathalyzer test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possessed a valid permit issued by the Nebraska Department of Health for that purpose. State v. Gerber 75

3. Before the results of a Breathalyzer test for blood alcohol are admissible into evidence, a proper foundation must be laid for the admission of such evidence. State v. Gerber 75

4. Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. State v. Gerber 75
State v. Scott 451

5. Before the results of a Breathalyzer test may be offered in evidence for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. State v. Kolar 619

Board of Adjustment.

Neb. Rev. Stat. § 19-911 (Cum. Supp. 1978) was amended by L.B. 410, 1975 Neb. Laws, to restrict the application of the term "legislative body" to villages. Staley v. City of Blair 292

Breach of Contract.

1. Nebraska U.C.C. § 2-607(3) (Reissue 1971), which provides that a buyer of "goods" must, within a reasonable time after he discovers or should have discovered a breach, notify the seller of the breach or be barred of remedy, does not apply to sales of real estate. Fink v. Denbeck 462
2. The general rule is that a demand for performance of a contract is not necessary previous to bringing suit for breach unless required by the terms of the contract or its peculiar nature. Fink v. Denbeck 462
3. The general measure of damages for breach of contract is the amount which will compensate the party for the loss which the breach entailed. Fink v. Denbeck .. 462
4. In the case of a breach of warranty of the condition of real property sold, whether the measure is the cost of repair or the difference in value with and without the defect depends upon the facts. If the defect may be remedied, the ordinary measure is the cost of remedying the defect, not to exceed the value of the property. Fink v. Denbeck 462
5. Whether the theory of recovery in an action on contract is breach of warranty as to the condition of improvements on real estate or misrepresentation as to their condition, the measure of damages is the cost of remedying the defect if that will fully compensate for the loss suffered. Fink v. Denbeck 462

Breach of Warranty.

1. In the case of a breach of warranty of the condition of real property sold, whether the measure is the cost of repair or the difference in value with and without the defect depends upon the facts. If the defect may be remedied, the ordinary measure is the cost of remedying the defect, not to exceed the value of the property. Fink v. Denbeck 462
2. Whether the theory of recovery in an action on contract is breach of warranty as to the condition of improvements on real estate or misrepresentation as to their condition, the measure of damages is the cost of remedying the defect if that will fully compensate for the loss suffered. Fink v. Denbeck 462
3. Where a purchaser receives what he purchased, and bases his right to rescind upon a false representation of its quality or condition, or another matter affecting its value, he must show that the representation was material and that he was misled thereby to his damage. Fricke v. Hart 590

Brokers.

1. A seller of real estate is under no obligation to sell his property to a purchaser procured by a broker. The broker's obligation is merely to provide a purchaser and he has no authority, unless otherwise specifically agreed, to enter into a binding contract of sale on behalf of the seller. Carroll v. Action Enterprises, Inc. 204
2. A real estate broker or agent of a seller who receives a purchase offer from a prospective purchaser for submission to the seller has a duty to the prospective purchaser to timely and truthfully submit or communicate such offer to the seller. Carroll v. Action Enterprises, Inc. 204

Broker's Licenses.

A promissory note given by a vendor of real estate to a corporate real estate broker in Nebraska and accepted by the broker in payment for brokerage services previously rendered in the sale of certain real estate located in Colorado, which the vendor subsequently acknowledged, reaffirmed, and promised to pay for such services, is supported by a valid and lawful consideration and action may be brought upon said note and recovery had thereon, notwithstanding the fact that, at the time of the transaction in question, said corporate broker did not hold a valid and current Nebraska real estate broker's license as required at that time by Neb. Rev. Stat. §§ 81-885.06 and 885.16 (Reissue 1976), but all of the officers and salesmen of said corporation involved in the transaction held current Nebraska and Colorado broker's licenses, and the corporation also held a current Colorado corporate broker's license. Peterson & Vogt v. Livingston 753

Burden of Proof.

1. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order. Hehn v. State 34
2. In an action based on undue influence when a confidential relationship exists between the parties and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant. Schaneman v. Schaneman 113
3. The burden of proof is on the party who asserts that

a change of domicile has taken place. Gosney v. Department of Public Welfare 137
4. The burden of proof is upon the claimant seeking compensation for services rendered during the life of the deceased person to prove an agreement, express or implied, to pay for the services. In re Estate of Bouma. Nehls v. Giles 209
5. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. Dawson v. Papio Nat. Resources Dist. 225
6. A party will not be permitted to plead one cause of action and, upon trial, rely upon proof establishing another. In order that a recovery may be had in an action, the pleadings and the proof must agree. Shreves v. D. R. Anderson Constructors, Inc. 433
7. If permitting the lender to exercise the "due on sale" clause in a particular case would be inequitable, a court of equity is not helpless to fashion appropriate relief. However, the burden to plead and prove the facts in that regard should be upon the mortgagor and not upon the mortgagee. Occidental Sav. & Loan Assn. v. Venco Partnership 469
8. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Sellens v. Allen Products Co., Inc. 506
9. The burden of proof remains upon the party contesting the valuation to establish that the valuation was incorrect. Otradovsky v. Board of Equalization 559
Box Butte County v. State Board of Equalization & Assessment 696
10. It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of a district court have been wisely exercised. Diplomat Inn, Inc. v. Weindorf 565
11. The burden of showing an abuse of discretion by a trial court rests on the appellant. Such abuse cannot be presumed, but must be made to appear by the evidence before its existence can be found by an appellate court. Diplomat Inn, Inc. v. Weindorf 565
12. The burden is upon the party moving for a summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Johnson v. Holdrege Coop. Equity Exchange 568
Fricke v. Hart 590
13. In a workmen's compensation case, the claimant must establish that the injury for which compensa-

tion is sought arose out of and in the course of employment. Meyer v. First United Methodist Church ... 607

14. The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period. Hutson v. The Rush Creek Land and Livestock Co. 658

15. Where the Nebraska Liquor Control Commission intends to rely upon a recommendation of denial by the local governing body to support its refusal to grant a liquor license, the burden is upon the commission to furnish evidence of that action. Brannen v. Nebraska Liquor Control Commission 662

16. Evidence furnished by the Nebraska Liquor Control Commission of the action of a local governing body which lacks sufficient clarity to enable one to determine what action the local governing body has taken in regard to a recommendation as to an application for a liquor license, is ineffective to prove a recommendation of denial of the application. Brannen v. Nebraska Liquor Control Commission 662

17. The presumption is that the State Board of Equalization and Assessment performed its duties and the burden is upon the party objecting to such action to prove that it was erroneous, capricious, and contrary to law. Box Butte County v. State Board of Equalization & Assessment 696

18. In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing. In re Estate of Saathoff. Saathoff v. Saathoff 793

Cancellation of Insurance.

Where an insurer has information that there are multiple owners of an insured motor vehicle, though only one may be shown as the named insured, the company may not cancel the policy either at the request of the named insured or at the company's initiative, until notice is given to all persons known to have an ownership interest in the motor vehicle, at their last known address, affording such owners a reasonable opportunity to obtain other insurance. Hansen v. U.S.A.A.

Casualty Ins. Co. 147

Causes of Action.

A petition in an action against the parents of a minor for reimbursement for necessaries furnished to the minor at his request which does not allege that the parents refused to provide the necessaries for the minor does not state a cause of action. County of York v. Johnson 200

Change Orders.

1. Where the parties ignore a provision in the contract that requires change orders to be in writing, it will not furnish a defense to a claim for compensation for the additional work performed. D. K. Meyer Corp. v. Bevco, Inc. 318
   Shreves v. D. R. Anderson Constructors, Inc. 433
2. The parties to a construction contract which requires written change orders may avoid such provisions where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provisions, or the party claiming the benefit of the provisions is estopped to rely upon them. Shreves v. D. R. Anderson Constructors, Inc. 433

Child Custody.

1. The best interests of the minor children is the paramount consideration in determining custodial issues.
   Marts v. Marts 38
   Elsasser v. Elsasser 128
   Murdoch v. Murdoch 327
   Whitlatch v. Whitlatch 527
2. Where a decree has been entered following trial on the merits which awards custody of minor children, it is ordinarily not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree. Marts v. Marts 38
3. The discretion of the trial court on the granting or changing of custody of minor children is subject to review. However, the determinaton 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. Marts v. Marts 38
   Elsasser v. Elsasser 128
   Murdoch v. Murdock 327
4. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is un-

fit for that purpose or that the best interests of the children require such action. Murdoch v. Murdoch ... 327
5. In reviewing a decision in a habeas corpus case involving the custody of a child, it is necessary that this court try the case de novo on the record, giving great weight, however, to the findings of the trial court where the evidence is in irreconcilable conflict. Gray v. Maxwell ... 385
6. Proceedings in habeas corpus to obtain custody of a child are governed by consideration of expediency and equity, and should not be bound by technical rules. Gray v. Maxwell ... 385
7. When a controversy arises as to the custody of a minor between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent. Whitlatch v. Whitlatch ... 527
8. The welfare of a child of tender years is paramount to the wishes of the parent where the child has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Whitlatch v. Whitlatch ... 527
9. The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. Whitlatch v. Whitlatch 527
10. In evaluating the general concept of the best interests and welfare of the children, great weight will be given to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial. Whitlatch v. Whitlatch ... 527
11. The disposition of minor children and provisions for their support, in an action where a divorce is granted, is not controllable by agreement of the parties, but by the court on the facts and circumstances as disclosed to it. Eliker v. Eliker ... 764

Child Support.
1. While the cost of caring for a child is an important consideration in determining child support, the father's ability to make the payments is equally important. Hanson v. Rockwell ... 299
2. The decision of the trial court in awarding child support will not be disturbed on appeal unless there appears a clear basis, in the record, for finding that the trial court abused its discretion. Hanson v. Rockwell ... 299
3. Alimony, support, and property settlement issues must

be considered together to determine whether the trial court abused its discretion. Torrey v. Torrey 485

4. While equitable estoppel may be applicable in delinquent child support cases, the mere execution of a document consenting to the adoption of a child, standing alone, is insufficient to justify imposing the doctrine of equitable estoppel to deny to a parent with custody of a minor child the benefits of a previously entered order of the court, regarding the payment of child support. Williams v. Williams 630
5. Proceedings brought pursuant to the provisions of Neb. Rev. Stat. §§ 42-358 et seq. (Reissue 1978) are civil in nature and are to be filed and heard in accordance with rules applicable to civil contempt proceedings. Eliker v. Eliker 764
6. The fact that a mother in whose custody a minor child has been placed by the court refuses to permit a father ordered to pay child support, to exercise his rights of visitation does not justify the father's withholding the payment of child support. Eliker v. Eliker 764
7. The disposition of minor children and provisions for their support, in an action where a divorce is granted, is not controllable by agreement of the parties, but by the court on the facts and circumstances as disclosed to it. Eliker v. Eliker 764

Circumstantial Evidence.

1. Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Danielsen v. Richards Mfg. Co., Inc. 676
2. Conjecture, speculation, or choice of possibilities is not proof. However, where there is evidence which will lead a reasoning mind to one conclusion rather than another, the evidence will be held to support the verdict. The circumstantial evidence must be such as to make plaintiff's contention as to the fact reasonably probable, not merely possible. Danielsen v. Richards Mfg. Co., Inc. 676

Civil Service Act.

1. The civil service act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be

suspended or discharged for cause for any of the reasons listed in Neb. Rev. Stat. § 19-1807 (Reissue 1977). Adkins & Webster v. North Platte Civil Service Comm. 500
2. The final determination of discharge of an employee under the civil service act rests in the civil service commission. Adkins & Webster v. North Platte Civil Service Comm. 500
3. If the evidence in the District Court on appeal from an order of the civil service commission is sufficient to show that the order of the commission suspending or discharging an employee was made in good faith for cause, the order of the commission must be affirmed. Adkins & Webster v. North Platte Civil Service Comm. 500

Collateral Attack.
1. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Richardson v. Board of Education 18
2. Where the court or quasi-judicial agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack if the judgment is only voidable and not void. Richardson v. Board of Education 18
3. The rule against collateral impeachment of judicial decisions applies to the determination of officers and agencies who are called upon to act judicially in matters of administration. Richardson v. Board of Education 18
4. In an action on a foreign judgment, rendered in proceedings in which there was no service of process on the defendant and no waiver of such service, the defendant may show as a complete defense that the attorney who entered an appearance for him had no authority to do so. Olson v. England 256

Collateral Estoppel.
Collateral estoppel may be applied if the idential issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. Borland v. Gillespie 191

Conditional Promises.
1. It is well established that the parol evidence rule does not prevent a party from using contemporaneous or prior negotiations or expressions to show that the writ-

ing was never intended to be operative or that it was intended to be effective only upon the happening of a condition precedent, provided that the condition sought to be proved is not inconsistent with a specific term in the writing. Cosgrove v. Mademoiselle Fashions ... 275

2. When parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of the agreement; but this does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend. Even though parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of a written instrument, if the condition precedent is inconsistent with, or contradictory to, the written instrument, parol evidence thereof is not admissible. Cosgrove v. Mademoiselle Fashions 275

Conspiracy.

1. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. Dixon v. Reconciliation, Inc. 45
2. An action of conspiracy sounds essentially in tort. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter, persons cannot conspire. Dixon v. Reconciliation, Inc. 45
3. To state a cause of action for conspiracy, it is necessary for the pleader to allege not only the conspiracy and the doing of the wrongful acts, but also facts showing that damage resulted therefrom. Dixon v. Reconciliation, Inc. 45
4. To set forth a claim of conspiracy between a corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties. Dixon v. Reconciliation, Inc. .. 45

Constitutional Law.

1. In order to question the constitutionality of a statute,

Rule 18 of the Revised Rules of the Supreme Court (1977) requires the appealing party to serve a copy of its brief on the Attorney General. Richardson v. Board of Education 18

2. The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. Aschenbrenner v. Nebraska P. P. Dist. 157
3. If an act is complete and independent in itself, it may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the provisions of Neb. Const. art. III, § 14, relating to amendments. Aschenbrenner v. Nebraska P. P. Dist. 157
4. This court will not strike down an act of the Legislature under the provision of the Neb. Const. art. III, § 14, if it can be said that the title calls attention to the subject matter of the bill. Aschenbrenner v. Nebraska P.P. Dist. 157
5. In examining the validity of a legislative act, all reasonable doubts must be resolved in favor of its constitutionality. Aschenbrenner v. Nebraska P.P. Dist. 157
6. The mere fact that an act of the Legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if, in other respects, it is a complete act in itself. Aschenbrenner v. Nebraska P. P. Dist. 157
7. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. Aschenbrenner v. Nebraska P.P. Dist. 157
8. For the nexus test to apply, thus making a compulsory dedication a constitutionally valid exercise of the police power, the nexus must be rational. This means it must be substantial, demonstrably clear, and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements, not for the purpose of "banking" the land for use in a projected but unscheduled possible future use. Simpson v. City of North Platte 240
9. Equal protection is the guarantee that similar people

will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same. Grosvenor v. Grosvenor 395
10. No state shall deny to any person within its jurisdiction the equal protection of the laws. Grosvenor v. Grosvenor 395
11. The lien of a judgment is statutory and not a fundamental or basic right. Legislation affecting judgment liens is, on its face, economic and social welfare legislation. The standard by which a court reviews a classification established by such legislation is whether it has a rational basis and is at least arguably related to a legitimate function of government not prohibited by the Constitution. Grosvenor v. Grosvenor 395
12. There are sufficient differences between judgment liens in marriage dissolution cases and other types of judgments to support the legislative determination that such liens are entitled to a treatment different from judgments generally. Grosvenor v. Grosvenor 395
13. Once Miranda warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. In re Interest of Durand. State v. Durand 415
14. The Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. In re Interest of Durand. State v. Durand 415
15. The general rule applicable to custodial interrogations by the police is that if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. In re Interest of Durand. State v. Durand 415
16. To establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination. State v. Long 446
17. There must be more than a showing that a law or ordinance has not been enforced against others or that it is sought to be enforced against the person claiming discrimination. A finding of unlawful selective enforcement must be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. Long 446
18. Provisions that are so vague, general, and indefinite as to be incapable of practical application are arbitrary

and unreasonable and therefore unconstitutional. State ex rel. Douglas v. Herrington 516

19. Absent exigent circumstances, the police cannot make a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. State v. Schlothauer 670

20. The consistent use of reasonably current reappraisals, done under uniform conditions and regulations approved by the State Tax Commissioner, meets the constitutional test of uniformity. Box Butte County v. State Board of Equalization & Assessment 696

21. A condition contained in a probation order issued by the court to one previously convicted of a drug offense to the effect that the probationer shall submit to a search of his person or property at any time, by any law enforcement officer, with or without probable cause, for controlled substances, which condition is accepted by the probationer, is valid, enforceable, and constitutional, if it is applied in a reasonable manner and contributes to the rehabilitation of the offender. State v. Morgan 818

Construction Contracts.

A provision in a construction subcontract permitting the contractor to withhold payments to his subcontractor until payment is received from the owner should not be construed in such a manner as to deny money rightfully due the subcontractor which was withheld as a result of a dispute between the contractor and the owner not directly involving the subcontractor. D. K. Meyer Corp. v. Bevco, Inc. 318

Consumer Protection.

An installment loan made by a licensee under the installment loan act, Neb. Rev. Stat. §§ 45-114 to 158 (Reissue 1978), and pursuant to the terms of that act, is an action or transaction otherwise permitted, prohibited, or regulated by a regulatory body acting under the statutory authority of this state and is, therefore, exempt from the provisions of the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 1623 (Reissue 1978). Kuntzelman v. Avco Financial Services of Nebraska, Inc. 130

Contempt.

1. A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings, but strictly speak-

ing, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence. Eliker v. Eliker 764

2. Contempts which are prosecuted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are, ordinarily, termed criminal contempts, while those instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled are, ordinarily, civil contempts. Eliker v. Eliker 764
3. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a mere civil contempt, and the rules applicable to a criminal contempt are not applicable. Eliker v. Eliker 764
4. A proceeding for civil contempt is one instituted to preserve and enforce the rights of a private party to an action and to compel obedience to a judgment or decree intended to benefit such a party litigant. Eliker v. Eliker 764
5. Proceedings brought pursuant to the provisions of Neb. Rev. Stat. §§ 42-358 et seq. (Reissue 1978) are civil in nature and are to be filed and heard in accordance with rules applicable to civil contempt proceedings. Eliker v. Eliker 764
6. Where an individual is under order of a court to perform a continuing obligation, the fact that a court may, at one point in time, find the individual's failure to perform such act not wilfully contumacious, does not preclude the court from later finding continued disregard of the order as evidence of a subsequent wilful and contumacious act sufficient to constitute contempt of court. Eliker v. Eliker 764
7. Where a divorced husband neglects to apply for a modification of the divorce decree, in spite of the fact that sufficient grounds exist to warrant modification, the mere existence of such grounds with respect to payments due under the decree is not available as a defense to proceedings for contempt for violating the decree. Eliker v. Eliker 764

Contractors and Subcontractors.

A provision in a construction subcontract permitting the contractor to withhold payments to his subcontractor until payment is received from the owner should not be construed in such a manner as to deny money right-

fully due the subcontractor which was withheld as a result of a dispute between the contractor and the owner not directly involving the subcontractor. D. K. Meyer Corp. v. Bevco, Inc. 318

Contracts.

1. A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties must be determined from its contents. Clemens Mobile Homes, Inc. v. Anderson ... 58
Rullman v. LaFrance, Walker, Jackley & Saville 180
2. Where the contract is unambiguous, it is not subject to interpretation or construction. Clemens Mobile Homes, Inc. v. Anderson 58
3. Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. Rullman v. LaFrance, Walker, Jackley & Saville 180
4. An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with the existence of the contract and are acquiesced in by the other party. James J. Parks Co. v. Lakin 184
5. A seller of real estate is under no obligation to sell his property to a purchaser procured by a broker. The broker's obligation is merely to provide a purchaser and he has no authority, unless otherwise specifically agreed, to enter into a binding contract of sale on behalf of the seller. Carroll v. Action Enterprises, Inc. 204
6. A real estate broker or agent of a seller who receives a purchase offer from a prospective purchaser for submission to the seller has a duty to the prospective purchaser to timely and truthfully submit or communicate such offer to the seller. Carroll v. Action Enterprises, Inc. 204
7. When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. Cosgrove v. Mademoiselle Fashions 275
8. It is well established that the parol evidence rule does not prevent a party from using contemporaneous or prior negotiations or expressions to show that the writing was never intended to be operative or that it was intended to be effective only upon the happening of a condition precedent, provided that the condition sought to be proved is not inconsistent with a specific term in the writing. Cosgrove v. Mademoiselle

Fashions 275

9. When parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of the agreement; but this does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend. Even though parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of a written instrument, if the condition precedent is inconsistent with, or contradictory to, the written instrument, parol evidence thereof is not admissible. Cosgrove v. Mademoiselle Fashions 275

10. Where the parties ignore a provision in the contract that requires change orders to be in writing, it will not furnish a defense to a claim for compensation for the additional work performed. D. K. Meyer Corp. v. Bevco, Inc. 318

Shreves v. D. R. Anderson Constructors, Inc. 433

11. The interpretation given a contract by the parties themselves while engaged in the performance of the contract, is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced. D. K. Meyer Corp. v. Bevco, Inc. 318

12. A provision in a construction subcontract permitting the contractor to withhold payments to his subcontractor until payment is received from the owner should not be construed in such a manner as to deny money rightfully due the subcontractor which was withheld as a result of a dispute between the contractor and the owner not directly involving the subcontractor. D. K. Meyer Corp. v. Bevco, Inc. 318

13. One tenant-in-common cannot ordinarily bind his cotenants by a contract with a third party unless he is duly authorized or unless his act is thereafter ratified. Ahrens v. Dye 423

14. Ratification is the acceptance by remaining cotenants of benefits or rents under a lease executed by one cotenant. Ahrens v. Dye 423

15. The parties to a construction contract which requires written change orders may avoid such provisions where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of

the provisions, or the party claiming the benefit of the provisions is estopped to rely upon them. Shreves v. D. R. Anderson Constructors, Inc. 433

16. As a general rule, a party cannot maintain an action on a contract without prior substantial compliance on his part. If there has been substantial performance, an action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. Morris Mills v. Denny Wiekhorst Excavating, Inc. 443

17. Where there has been part performance and the adverse party appropriated and retained the work performed, the value of the labor or property received and accepted, less the damages for the failure to fully perform, may be recovered. Morris Mills v. Denny Wiekhorst Excavating, Inc. 443

18. The proper construction of a written contract is generally a question of law to be determined by the courts. Dockendorf v. Orner 456

19. In construing a written instrument, the court must look to the agreement in its entirety. Dockendorf v. Orner 456

20. The rules which hold a contract void as against public policy should not be unduly extended. Persons should not be unnecessarily restricted in their freedom to make their own contracts; and, therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy. Occidental Sav. & Loan Assn. v. Venco Partnership 469

21. It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands. Occidental Sav. & Loan Assn. v. Venco Partnership 469

22. When the partners are disclosed and known to a party contracting and the contract is signed by only one partner who contracts on his own behalf, the other partners are not bound thereby. Waite v. Salestrom 578

23. 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 the plain, ordinary, and popular sense. Farm Bureau Ins. Co. of Nebraska v. Wozny 639

24. When the parties to a dispute have defined by contract the nature and extent of a particular duty, what constitutes an unreasonable or negligent performance of that duty cannot be ascertained without reference to the contractual definition. Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc. 651
25. A contract complete in itself will be conclusively presumed to supersede and discharge another made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. The Nebraskans, Inc. v. Homan 749

Contracts for Services.
1. The burden of proof is upon the claimant seeking compensation for services rendered during the life of the deceased person to prove an agreement, express or implied, to pay for the services. In re Estate of Bouma. Nehls v. Giles 209
2. Personal services rendered by a child to a parent are presumed, in the absence of special circumstances, to have been rendered gratuitously. This presumption may be overcome by sufficient evidence tending to establish a contract for remuneration. In re Estate of Bouma. Nehls v. Giles 209

Convictions.
1. This court will not interfere on appeal with a conviction based upon evidence unless the evidence is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. French 92
2. A finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed. In re Interest of Wolkow . 512
3. A decision in a criminal case is final for appellate purposes only when the litigation between the parties is terminated and nothing remains but enforcement by execution of what has been determined. To create finality in a criminal case, it is necessary that there be a judgment of conviction followed by a sentence. In re Interest of Wolkow 512
4. In the absence of a sentence on a criminal contempt finding, the decision lacks the finality which would allow this court to review it. In re Interest of Wolkow ... 512

Corporations.
To set forth a claim of conspiracy between a corporation

and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties. Dixon v. Reconciliations, Inc. 45

Course of Employment.

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. Meyer v. First United Methodist Church 607

Courts.

1. One cannot be denied his right of review in the appellate courts, and proceedings in error are always resorted to where no other method is pointed out or provided for. Richardson v. Board of Education 18
2. Congress did not give bankruptcy courts exclusive jurisdiction over all controversies which in some way affect the debtor's estate. Morford v. City of Omaha .. 271
3. It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands. Occidental Sav. & Loan Assn. v. Venco Partnership 469

Criminal Appeals.

1. The standards to be followed by trial judges before accepting a guilty plea are not per se rules, with which the failure to technically comply will mandate an automatic reversal. State v. Rouse 371
2. 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 review of issues already litigated. State v. Rouse 371
3. By failing to challenge the indeterminateness of a sentence directly in an appeal, a defendant has waived the right to contest it in a post conviction review. State v. Rouse 371
4. In a prosecution for a crime, the only errors which require reversal of a cause are those prejudicial to the rights of the accused, or which constitute the denial of a substantial legal right. State v. Packett 548
5. The decision to object or not to object is part of trial strategy and, accordingly, we grant due deference to

the discretion of defense counsel to formulate trial tactics. Effectiveness of counsel is not to be judged by hindsight. State v. Auger 666

Criminal Complaints and Informations.

1. The mere allegation of intent to commit one of the crimes enumerated in Neb. Rev. Stat. § 28-533 (Reissue 1975), unaccompanied by any allegations of overt acts toward its accomplishment, is defective. In re Interest of Durand. State v. Durand 415
2. Defects or omissions in indictments or informations which are of such a fundamental character as to make the indictment wholly invalid are generally not subject to waiver by the accused. In re Interest of Durand. State v. Durand 415
3. An information or complaint must inform the accused with reasonable certainty of the charge against him so that he may prepare his defense and be enabled to plead the judgment as a bar to a later prosecution for the same offense. State v. Scott 451

Criminal Intent.

The mere allegation of intent to commit one of the crimes enumerated in Neb. Rev. Stat. § 28-533 (Reissue 1975), unaccompanied by any allegations of overt acts toward its accomplishment, is defective. In re Interest of Durand. State v. Durand 415

Criminal Law.

In a criminal case, 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. Tatum 625

Damages.

1. Where there is competent evidence of future pain and suffering that is reasonably certain to continue into the future, the amount of damages is for the jury. Bassinger v. Agnew 1
2. The evidence of damages is required to be direct and certain. Proof that damage might or could have been caused by the accident is not sufficient to sustain a verdict for a claimant. Borland v. Gillespie 191
3. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. Dawson v. Papio Nat. Resources Dist. 225
4. The general measure of damages for breach of con-

tract is the amount which will compensate the party for the loss which the breach entailed. Fink v. Denbeck 462

5. In the case of a breach of warranty of the condition of real property sold, whether the measure is the cost of repair or the difference in value with and without the defect depends upon the facts. If the defect may be remedied, the ordinary measure is the cost of remedying the defect, not to exceed the value of the property. Fink v. Denbeck 462

6. Whether the theory of recovery in an action on contract is breach of warranty as to the condition of improvements on real estate or misrepresentation as to their condition, the measure of damages is the cost of remedying the defect if that will fully compensate for the loss suffered. Fink v. Denbeck 462

7. To recover compensation under the Workmen's Compensation Act, the claimant must show that an unexpected or unforeseen injury was caused by the employment. Sellens v. Allen Products Co., Inc. 506

8. An injury, disability, or death that is the result of a natural progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable. Sellens v. Allen Products Co., Inc. 506

9. If it is claimed that an injury was the result of exertion in the employment, the evidence must show that the employment contributed in some material and substantial degree to cause the injury. Sellens v. Allen Products Co., Inc. 506

10. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Sellens v. Allen Products Co., Inc. 506

11. If there is a personal causal contribution in the form of a previously weakened or diseased heart, a heart attack is compensable only if the employment exertion is greater than that of nonemployment life. The comparison is with the exertion present in the normal nonemployment life of the workman or any other person. Sellens v. Allen Products Co., Inc. 506

12. The false representations must have been the proximate cause of the damage before a party may recover. Luscher v. Empkey 572

Decedent's Estates.

1. Upon the filing of a decedent's estate proceeding, the county court acquires jurisdiction of all matters

relating to the decedent's estate, including jurisdiction to partition and sell the decedent's real estate. During the pendency of the decedent's estate proceedings in the county court, and until the estate has been placed in possession of those to whom it devolves or until the jurisdiction of the county court is otherwise terminated, the District Court shall not exercise its original jurisdiction in partition actions as to real estate owned solely by the decedent. In re Estate of Kentopp. Kentopp v. Kentopp 776

2. When an application for the partition of real estate is filed in the county court under the provisions of Neb. Rev. Stat. § 30-24,109 (Reissue 1979) and the court finds, after notice and hearing, that the property is subject to partition and also finds that the property cannot be partitioned without prejudice to the owners and cannot conveniently be allotted to any one party and should, therefore, be sold, the court shall not appoint a referee but shall direct the personal representative to conduct the proceedings and sell the property and to perform the duties and responsibilities otherwise incumbent upon a referee. In re Estate of Kentopp. Kentopp v. Kentopp 776

Decrees.

1. Where a decree has been entered following trial on the merits which awards custody of minor children, it is ordinarily not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree. Marts v. Marts 38
2. In a proceeding for dissolution of marriage, where the parties by their written agreement and the court by its decree provide that a specific amount of alimony shall be paid for a specified period of time and that the payments are terminable only by the death or remarriage of the recipient, the payment of alimony shall terminate only upon the happening of the event or events set out in the agreement or decree. Benedict v. Benedict 284

Deeds.

1. A restrictive covenant requiring approval of an owner's use of property is unenforceable if it fails to provide a clear standard by which such approval will be judged and when such approval will be required. Ross v. Newman 42
2. Restrictions on the erection or use of buildings will be construed, if possible, so as to effectuate the intention

of the parties. Ross v. Newman 42
3. Covenants restricting the use of property are not favored in the law and, if ambiguous, will be construed in a manner permitting the maximum unrestricted use of the property. Ross v. Newman 42

Default Judgments.
1. The matter of setting aside a default judgment is, to a large extent, within the discretion of the trial court. Diplomat Inn, Inc. v. Weindorf 565
2. As a discretionary matter, the determination of whether a default judgment should be set aside will, on appeal, be presumed to have been made in proper exercise of that discretion where the contrary does not appear from the record. Diplomat Inn, Inc. v. Weindorf 565

Delegation of Authority.
1. The authority authorized to be granted to the State Tax Commissioner by the State Board of Equalization and Assessment under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976) to hold hearings to enable him to advise and assist the board and to expedite the equalization hearings, may be delegated to the deputy state tax commissioner during the absence or disability of the State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment 696
2. The State Tax Commissioner can hold only an administrative hearing, and not a discretionary or a quasi-judicial one, because the power of the State Board of Equalization and Assessment cannot be delegated to the State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment 696
3. The State Tax Commissioner, when authorized by the State Board of Equalization and Assessment to act as a hearing officer under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976), is not acting as a member of the State Board, but is acting in his capacity as State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment 696

Delivery.
1. Whether or not a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended,

either by words or acts, or both combined, is sufficient. In re Estate of Saathoff. Saathoff v. Saathoff 793
2. Delivery of property to a third person as agent or trustee, for the use of the donee, and not as agent of the donor, under such circumstances as indicate that the donor relinquishes all dominion and control over the property, is a sufficient delivery to complete the gift. In re Estate of Saathoff. Saathoff v. Saathoff ... 793

Delivery of Goods.
If there has been an actual delivery and the price is capable of being made definite, delivery of goods may be sufficient to constitute a sale. Johnson v. Holdrege Coop. Equity Exchange 568

Demurrer.
1. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. A petition is sufficient if, from the statement of facts set forth therein, the law entitles the plaintiff to recover. Dixon v. Reconciliation, Inc. 45
2. Pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled. Dixon v. Reconciliation, Inc. 45

Directed Verdict.
1. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence favorable to the party against whom the motion is made and who is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom.
Bassinger v. Agnew 1
Novotny v. McClintick 99
Borland v. Gillespie 191
Woodsmall v. Marijo, Inc. 405
2. At the conclusion of either party's case, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find on a particular issue in favor of the party upon whom the burden of proof on that issue is imposed. Bassinger v. Agnew 1
Novotny v. McClintick 99
Borland v. Gillespie 191

3. A trial court has the duty not to submit to the jury issues which are not sustained by the evidence. Schanaman v. Ramirez 212
4. Questions of negligence, contributory negligence, and assumption of the risk are for the trier of facts, but where reasonable minds can draw but one conclusion from the facts adduced with regard to those issues, a directed verdict is proper. Woodsmall v. Marijo, Inc. 405
5. The trial court should only decide a question as a matter of law, and not submit the issue to the jury, when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. Woodsmall v. Marijo, Inc. 405

Disabled Persons.
1. Persons under legal disability generally are incapable of losing or gaining a residence or domicile by acts controlled by others. Gosney v. Department of Public Welfare 137
2. A mentally ill or deficient minor, who is incapable of acquiring a domicile of choice and who continues to live with his parents upon attaining the age of majority, retains the domicile of such parents. Gosney v. Department of Public Welfare 137
3. A court having jurisdiction over an incompetent, and particularly a court which has appointed a guardian for him, may, whenever it appears to be in the incompetent's best interest, direct or authorize the guardian or those having control of the incompetent's person to change the incompetent's domicile for him. Gosney v. Department of Public Welfare 137

Disciplinary Proceedings.
1. A license to practice law in this jurisdiction is granted on the implied understanding that the party receiving it shall at all times demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitutes grounds for suspension or disbarment. State ex rel. Nebraska State Bar Association v. Walsh 737
2. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension

or disbarment. State ex rel. Nebraska State Bar Association v. Walsh 737
3. An attorney may be subject to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, if such conduct might have been found to be illegal. State ex rel. Nebraska State Bar Association v. Walsh 737
4. Cumulative acts of misconduct are more cause for concern than an isolated instance of negligence or misconduct, and justify more severe sanctions. State ex rel. Nebraska State Bar Association v. Walsh 737

Discrimination.
1. To establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination. State v. Long 446
2. There must be more than a showing that a law or ordinance has not been enforced against others or that it is sought to be enforced against the person claiming discrimination. A finding of unlawful selective enforcement must be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. Long 446

Divorce.
1. Where a decree has been entered following trial on the merits which awards custody of minor children, it is ordinarily not subject to modification in the absence of a material change of circumstances occurring subsequent to the entry of the decree. Marts v. Marts 38
2. In a proceeding for dissolution of marriage, where the parties by their written agreement and the court by its decree provide that a specific amount of alimony shall be paid for a specified period of time and that the payments are terminable only by the death or remarriage of the recipient, the payment of alimony shall terminate only upon the happening of the event or events set out in the agreement or decree. Benedict v. Benedict 284
3. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken. Witcig v. Witcig 307
4. 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 the facts rather than the opposite. Witcig v. Witcig 307
Torrey v. Torrey 485
5. Where the parties to an action for dissolution of marriage are unable to agree upon a division of property, the trial court shall make such division as it deems conscionable and fair under all the facts and circumstances, taking into account the equities of the situation, irrespective of how legal title is held. Witcig v. Witcig 307
Torrey v. Torrey 485
6. A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony. Witcig v. Witcig 307
7. Where a judgment for alimony is awarded the court should, if possible, divide the property in such a manner as to provide the means to permit the payment of the alimony judgment. Van Pelt v. Van Pelt 350
8. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance of support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment where the decree expressly precludes modification. Van Pelt v. Van Pelt 350
9. In a proceeding for dissolution of marriage, the fixing of alimony or distribution of property rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Van Pelt v. Van Pelt 350
Liss v. Liss 587
Kosnopfl v. Kosnopfl 524
10. In a proceeding for dissolution of marriage, this court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Van Pelt v. Van Pelt 350
Torrey v. Torrey 485
11. Neb. Rev. Stat. § 42-371(4) (Reissue 1978) gives to a court which has entered a judgment for property division payable in installments, authority to release or subordinate the judgment under the conditions prescribed by the statute. Grosvenor v. Grosvenor 395

12. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Torrey v. Torrey 485
13. 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. Torrey v. Torrey 485
14. The trial court is not bound in all cases to set aside to one party that property which was inherited or gifted to that party and divide only the remaining property between the parties. Torrey v. Torrey 485
15. The source of property is only one of the factors to consider in the division of property. Torrey v. Torrey 485
16. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under the statute as well as under the former decisions of this court is one of reasonableness. The relevant considerations will vary from case to case. Kosnopfl v. Kosnopfl 524
17. The earning capacity of the husband is an element to be considered in the allowance of alimony. Kosnopfl v. Kosnopfl 524
18. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Kosnopfl v. Kosnopfl 524
19. Orders for the payment of alimony may, in some instances, be modified for good cause shown. Anderson v. Anderson 655
20. In order to warrant the modification of a decree of dissolution providing for the payment of alimony, there must be evidence of changed circumstances supporting such action. Anderson v. Anderson 655
Chamberlin v. Chamberlin 808
21. Where a divorced husband neglects to apply for a modification of the divorce decree, in spite of the fact that sufficient grounds exist to warrant modification, the mere existence of such grounds with respect to payments due under the decree is not available as a defense to proceedings for contempt for violating the decree. Eliker v. Eliker 764
22. The disposition of minor children and provisions for their support, in an action where a divorce is granted, is not controllable by agreement of the parties, but by the court on the facts and circumstances as disclosed to it. Eliker v. Eliker 764

23. Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown. Neb. Rev. Stat. § 42-365 (Reissue 1978). Chamberlin v. Chamberlin 808
24. A material change in the condition of the parties since the rendition of the decree of divorce is a prerequisite to a modification of the decree. Chamberlin Chamberlin 808
25. The provisions of Neb. Rev. Stat. § 42-365 (Cum. Supp. 1972) do not apply to judgments awarding alimony in gross entered prior to July 6, 1972. Chamberlin v. Chamberlin 808

Domicile.

1. The terms "residence" and "domicile," as used in statutes, are generally convertible terms. Gosney v. Department of Public Welfare 137
2. Domicile is that place where a person has his true, fixed, and permanent home. Gosney v. Department of Public Welfare 137
3. In order to effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of a change, is, however long continued, per se insufficient. Gosney v. Department of Public Welfare 137
4. In order to acquire a domicile by choice there must be a concurrence of: (1) Residence (bodily presence) in the new locality, and (2) An intention there to remain. Act and intent must, therefore, concur, and the absence of either of these thwarts the change. Gosney v. Department of Public Welfare 137
5. The residence of a minor is, by operation of law, determined and fixed by that of the parent legally entitled to custody and control. Gosney v. Department of Public Welfare 137
6. The burden of proof is on the party who asserts that a change of domicile has taken place. Gosney v. Department of Public Welfare 137
7. The mere transfer of a person to an institution for treatment of mental illness or deficiency does not, in and of itself, alter the legal domicile. Gosney v. Department of Public Welfare 137
8. Persons under legal disability generally are incapable of losing or gaining a residence or domicile by acts controlled by others. Gosney v. Department of Public Welfare 137

9. A mentally ill or deficient minor, who is incapable of acquiring a domicile of choice and who continues to live with his parents upon attaining the age of majority, retains the domicile of such parents. Gosney v. Department of Public Welfare 137
10. A court having jurisdiction over an incompetent, and particularly a court which has appointed a guardian for him, may, whenever it appears to be in the incompetent's best interest, direct or authorize the guardian or those having control of the incompetent's person to change the incompetent's domicile for him. Gosney v. Department of Public Welfare 137

Double Jeopardy.
Where it has been determined in a previous prosecution that an essential element of a crime did not exist, any subsequent prosecution for a different offense involving the same element is barred. State v. Long 446

Drunk Driving.
1. The offering of a preliminary test of the breath under Neb. Rev. Stat. § 39-669.08(3) (Reissue 1978) is not a condition precedent to an arrest for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor. State v. Gerber 75
2. Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. State v. Gerber 75
State v. Scott 451
State v. Kolar 619
3. In a proceeding pursuant to Neb. Rev. Stat. § 39-669.07 (Reissue 1978) to hear and determine the issue of enhancement of penalty, where proof has been made of defendant's conviction of a prior misdemeanor violation

of that statute, the defendant cannot then collaterally attack that prior misdemeanor conviction. State v. Voight 829

Due on Sale Clauses.

1. "Due on sale" clauses are not direct restraints on alienation within the meaning of the law. Occidental Sav. & Loan Assn. v. Venco Partnership 469
2. Generally, "due on sale" clauses are neither direct nor indirect restraints on alienation as a matter of law and, therefore, are not void as such. Occidental Sav. & Loan Assn. v. Venco Partnership 469
3. A "due on sale" clause contained in a mortgage contract is not contrary to the public policy of this jurisdiction and is, therefore, valid and enforceable. Occidental Sav. & Loan Assn. v. Venco Partnership 469
4. A "due on sale" clause is a form of acceleration clause and, as such, should be subject to the same rules as other acceleration clauses, including the protection of equitable defenses. Occidental Sav. & Loan Assn. v. Venco Partnership 469
5. If permitting the lender to exercise the "due on sale" clause in a particular case would be inequitable, a court of equity is not helpless to fashion appropriate relief. However, the burden to plead and prove the facts in that regard should be upon the mortgagor and not upon the mortgagee. Occidental Sav. & Loan Assn. v. Venco Partnership 469

Easements.

As a general rule, there is no implied reservation of an easement when one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. Chalen v. Cialino 106

Eminent Domain.

1. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed and an assessment beyond the benefits so conferred is a taking of property for public use without compensation and, therefore, illegal. Briar West, Inc. v. City of Lincoln 172
2. Generally, in an eminent domain proceeding, evidence about the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of

the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting market conditions. Dawson v. Papio Nat. Resources Dist. 225

3. A city may not, under the guise of the police power, take private property for public use without just compensation. Simpson v. City of North Platte 240
4. For the nexus test to apply, thus making a compulsory dedication a constitutionally valid exercise of the police power, the nexus must be rational. This means it must be substantial, demonstrably clear, and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements, not for the purpose of "banking" the land for use in a projected but unscheduled possible future use. Simpson v. City of North Platte 240
5. A city may not, under the guise of the police power, require a property owner to dedicate private property for some future public purpose as a condition of obtaining a building permit without paying the property owner just compensation, when the requested dedicated property is to be placed in a land bank for future use by the city and such future use is not directly occasioned by the construction sought to be permitted. Simpson v. City of North Platte 240

Equal Protection.

1. Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same. Grosvenor v. Grosvenor 395
2. No state shall deny to any person within its jurisdiction the equal protection of the laws. Grosvenor v. Grosvenor 395
3. The lien of a judgment is statutory and not a fundamental or basic right. Legislation affecting judgment liens is, on its face, economic and social welfare legislation. The standard by which a court reviews a classification established by such legislation is whether it has a rational basis and is at least arguably related to a legitimate function of government not prohibited by the Constitution. Grosvenor v. Grosvenor 395
4. There are sufficient differences between judgment liens in marriage dissolution cases and other types of

judgments to support the legislative determination that such liens are entitled to a treatment different from judgments generally. Grosvenor v. Grosvenor 395

5. To establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination. State v. Long 446

6. There must be more than a showing that a law or ordinance has not been enforced against others or that it is sought to be enforced against the person claiming discrimination. A finding of unlawful selective enforcement must be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. Long 446

Equitable Estoppel.

1. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to that party's injury, detriment, or prejudice. Williams v. Williams ... 630

2. The gist of equitable estoppel is that a party who has, by his statements or conduct, asserted a claim based on the assumption of the truth of certain facts whereby he has obtained a benefit from another party cannot later assert that those facts are not true if, by reason of that assertion, the other party will be prejudiced. Equitable estoppel is, to that extent, like fraud and cannot be confined within any strict definition. Williams v. Williams 630

3. The essential elements of equitable estoppel are, as to a party estopped: (1) Conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) The intention or, at least, the exception that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) Knowledge, actual or constructive, of the real facts; and, as to the other party, (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Good faith reliance upon the conduct or statements of the party to be estopped; and (3) Action or inaction based thereon of such a character as to change the

position or status of that party to his injury, detriment, or prejudice. Williams v. Williams 630
4. The essential element of equitable estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice. Williams v. Williams 630
5. An essential element of equitable estoppel is the entire good faith and innocence of the party imposed on. Estoppel cannot be claimed by one acting on a representation, if he knows or should know of its falsity. Where one with a convenient opportunity to ascertain the real facts by the exercise of reasonable diligence neglects to do so after having been put upon inquiry, he will not be permitted to defeat another's just rights by urging an equitable estoppel based on his having acted to his disadvantage in relying upon that other's innocently mistaken representation regarding those facts, where such representation was not made for the purpose of inducing him so to act. Williams v. Williams 630
6. While equitable estoppel may be applicable in delinquent child support cases, the mere execution of a document consenting to the adoption of a child, standing alone, is insufficient to justify imposing the doctrine of equitable estoppel to deny to a parent with custody of a minor child the benefits of a previously entered order of the court regarding the payment of child support. Williams v. Williams 630

Equity.

1. Equity cases are heard de novo by the court. However, in determining the weight to be given to the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Chalen v. Cialino 106
2. In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred. Schaneman v. Schaneman 113
3. An equitable right may not be properly asserted in an action unless all of the necessary parties have been made parties to the action. James J. Parks Co. v. Lakin 184
4. It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the

findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case. Engel v. Rhen Marshall, Inc. 265
Jackman v. Daiss, Inc. 295

5. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required, and thus avoid unnecessary litigation. Kuhlman v. Cargile 302
6. If permitting the lender to exercise the "due on sale" clause in a particular case would be inequitable, a court of equity is not helpless to fashion appropriate relief. However, the burden to plead and prove the facts in that regard should be upon the mortgagor and not upon the mortgagee. Occidental Sav. & Loan Assn. v. Venco Partnership 469
7. The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action. Eliker v. Eliker 764

Escape.

Legal custody is an essential element of the crime of escape from legal custody of a law enforcement officer. State v. Schlothauer 670

Evidence.

1. Evidence that a letter was properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails. Troy & Stalder Co. v. Continental Casualty Co. 28
2. 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. Troy & Stalder Co. v. Continental Casualty Co. 28
3. The presumption of receipt of mail by the addressee may be rebutted by any relevant evidence. Positive testimony that a letter was not received simply raises a question of fact to be decided by the trier of fact. Troy & Stalder Co. v. Continental Casualty Co. 28
4. Before the results of a preliminary breath test may be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978)

have been met, including evidence that the method of performing the preliminary test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possesses a valid permit issued by the Nebraska Department of Health for that purpose. State v. Gerber 75

5. Before the results of a Breathalyzer test may be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the Breathalyzer test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possessed a valid permit issued by the Nebraska Department of Health for that purpose. State v. Gerber 75

6. Before the results of a Breathalyzer test for blood alcohol are admissible into evidence, a proper foundation must be laid for the admission of such evidence. State v. Gerber 75

7. Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. State v. Gerber 75
State v. Scott 451
State v. Kolar 619

8. Evidence of other similar acts may be admissible to show the absence of mistake or accident. State v. French 92

9. The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings and, unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. Ocander v. B-K Corporation 287

10. The reception of evidence collateral to the main issue is within the sound legal discretion of the trial court. Ocander v. B-K Corporation 287

11. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ocander v. B-K Corporation 287
12. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Ocander v. B-K Corporation 287
13. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in that party's favor and that party is entitled to the benefit of every inference that can reasonably be deducted from the evidence. Lindgren v. City of Gering 360
14. A party may not properly assign as error on appeal the admission of evidence if no objection or motion to strike was made at trial. Lindgren v. City of Gering .. 360
15. An extra-judicial statement not offered to prove the truth of the matter asserted is not hearsay. Gray v. Maxwell 385
16. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at the decision considered only such evidence as was competent and relevant; and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Torrey v. Torrey 485
17. If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment. State v. Packett 548
18. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. State v. Packett 548
19. Prior consistent statements of a witness are not admissible as corroborative evidence except to rebut an express or implied charge against him of recent fabrication or improper influence or motive. State v. Packett 548
20. The slightest penetration is sufficient, if established be-

yond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for first degree sexual assault, and such element may be proved by either direct or circumstantial evidence. State v. Tatum 625

21. It is not essential that the victim be corroborated by other witnesses as to the particular act or acts which constitute the offense of sexual assault. It is sufficient if the victim is corroborated as to material facts and circumstances which tend to support the victim's testimony as to the principal fact in issue. State v. Tatum 625

22. In a prosecution for sexual assault, after the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged outrage, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made. State v. Tatum 625

Expert Witnesses.

1. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. Dawson v. Papio Nat. Resources Dist. 225
   Danielsen v. Richards Mfg. Co., Inc. 676
2. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken. Dawson v. Papio Nat. Resources Dist. 225
3. A specialist from one medical community is competent to testify as an expert witness in a medical negligence case as to the standard of care or skill required in another community, if the witness has knowledge or familiarity with the practice and standard in similar communities. Wentling v. Jenny 335
4. There is no exact standard for fixing the qualifications of an expert or skilled witness. Such a witness will be deemed qualified if and only if he possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value. Danielsen v. Richards Mfg. Co., Inc. 676
5. A trial court has a wide range of discretion in determining whether or not the witness' qualification to state his opinion has been established. That decision will not

be disturbed on appeal absent an abuse of that discretion. Danielsen v. Richards Mfg. Co., Inc. 676

6. If an expert witness is permitted to render an opinion without prior disclosure of the underlying facts or data upon which his opinion is based, then the expert must establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render an opinion; and likewise that experts within the specific field would rely upon the data or information relied upon by the testifying expert in rendering the opinion. Danielsen v. Richards Mfg. Co., Inc. 676

7. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken. However, where the expert testified concerning the information that was the basis of his opinion, and was subject to cross-examination on that matter, the trial court does not ordinarily abuse its discretion in allowing the opinion testimony. Danielsen v. Richards Mfg. Co., Inc. 676

Express Warranty.

A positive statement by a seller of the condition of personal property made during the negotiations for its sale which indicates an intention to be bound by the truth thereof and which was so understood and relied upon by the other party, is an express warranty. Fricke v. Hart 590

False Pretenses.

1. The essential elements of the crime of obtaining goods by false pretenses are: (1) There must be a false pretense or, in other words, a false representation of a claimed fact; (2) The false pretense must be made with the intent to cheat and defraud the victim; (3) Property of the victim must be obtained because of the false pretense; (4) There must be reliance by the victim upon the false pretense; and (5) The false pretense must be an effective cause in inducing the owner to part with his property. State v. French 92

2. Whether there is an intent on the part of one person to cheat or defraud another usually must be inferred from the nature of the acts themselves and the circumstances surrounding them. State v. French 92

Fiduciary Relationship.

1. A confidential relation exists between two persons if one has gained the confidence of the other and pur-

ports to act or advise with the interest of the other in mind. Schaneman v. Schaneman 113
2. In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred. Schaneman v. Schaneman 113
3. In an action based on undue influence when a confidential relationship exists between the parties and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant. Schaneman v. Schaneman 113

Findings of Fact.

Under the provisions of Neb. Rev. Stat. § 25-1127 (Reissue 1975), the court is not obligated to answer specific interrogatories propounded to the court by a litigant, but is merely required, when requested, to make such specific findings of fact as the trial court concludes are appropriate and necessary to resolve the action. Lindgren v. City of Gering 360

Foreclosure.

1. A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered and such procedure would not offend against justice and equity. State Securities Co. v. Daringer 427
2. A plea for strict foreclosure is addressed to the sound legal discretion of the court and will be granted only where it would be inequitable and unjust to refuse it. State Securities Co. v. Daringer 427

Foreign Judgments.

In an action on a foreign judgment, rendered in proceedings in which there was no service of process on the defendant and no waiver of such service, the defendant may show as a complete defense that the attorney who entered an appearance for him had no authority to do so. Olson v. England 256

Foundation.

1. Before the results of a preliminary breath test may

be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the preliminary test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possesses a valid permit issued by the Nebraska Department of Health for that purpose. State v. Gerber 75

2. Before the results of a Breathalyzer test may be received in evidence, it must be shown that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978) have been met, including evidence that the method of performing the Breathalyzer test has been approved by the Nebraska Department of Health and that the person administering and interpreting the test possessed a valid permit issued by the Nebraska Department of Health for that purpose. State v. Gerber 75

3. Before the results of a Breathalyzer test for blood alcohol are admissible into evidence, a proper foundation must be laid for the admission of such evidence. State v. Gerber 75

4. Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. State v. Gerber 75

State v. Scott 451

State v. Kolar 619

5. Generally, in an eminent domain proceeding, evidence about the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting market conditions. Dawson v. Papio Nat. Resources Dist. 225

6. If an expert witness is permitted to render an opinion

without prior disclosure of the underlying facts or data upon which his opinion is based, then the expert must establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render an opinion; and likewise that experts within the specific field would rely upon the data or information relied upon by the testifying expert in rendering the opinion. Danielsen v. Richards Mfg. Co., Inc. 676

7. Expert testimony should not be received, or if received should be stricken, if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Danielsen v. Richards Mfg. Co., Inc. 676

8. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken. However, where the expert testified concerning the information that was the basis of his opinion, and was subject to cross-examination on that matter, the trial court does not ordinarily abuse its discretion in allowing the opinion testimony. Danielsen v. Richards Mfg. Co., Inc. 676

Fraud.

1. The essential elements of the crime of obtaining goods by false pretenses are: (1) There must be a false pretense or, in other words, a false representation of a claimed fact; (2) The false pretense must be made with the intent to cheat and defraud the victim; (3) Property of the victim must be obtained because of the false pretense; (4) There must be reliance by the victim upon the false pretense; and (5) The false pretense must be an effective cause in inducing the owner to part with his property. State v. French 92

2. Whether there is an intent on the part of one person to cheat or defraud another usually must be inferred from the nature of the acts themselves and the circumstances surrounding them. State v. French 92

3. The elements which must be alleged and proved to sustain an action for fraudulent misrepresentation are: (1) That a factual representation was made which was known to be untrue by the party making it or which was recklessly made; (2) That the representation was made with the intent to deceive and to induce action on the part of the other party; and (3) That the other party did, in fact, rely on the representation and acted thereon, thereby sustaining injury. Novotny v.

McClintick 99
Luscher v. Empkey 572
4. The test of whether a party relied upon the other party's representations is generally whether he would have acted in the absence of the representations. Luscher v. Empkey 572
5. The false representations must have been the proximate cause of the damage before a party may recover. Luscher v. Empkey 572
6. Where a purchaser receives what he purchased, and bases his right to rescind upon a false representation of its quality or condition, or another matter affecting its value, he must show that the representation was material and that he was misled thereby to his damage. Fricke v. Hart 590
7. If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if it is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of a showing to the contrary, that the transaction was induced by the misrepresentation. Fricke v. Hart 590
8. A person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. Fricke v. Hart 590

Gifts.

1. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, a delivery by the donor, and acceptance by the donee. In re Estate of Saathoff. Saathoff v. Saathoff 793
2. The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. In re Estate of Saathoff. Saathoff v. Saathoff 793
3. Where a grantor has conveyed his property as a gift inter vivos, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed. In re Estate of Saathoff. Saathoff v. Saathoff 793

Good Cause.

The phrase "good cause" depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which decision is committed. Chamberlin v. Chamberlin 808

Gross Negligence.

1. An oral warning and disregard of the warning when sufficient time exists to avoid the danger constitutes sufficient evidence to submit the issue of gross negligence to the jury. Kreifels v. Wurtele 491
2. The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. Kreifels v. Wurtele 491

Growing Crops.

A tenant who plants crops knowing the terms of the lease will expire before they can be harvested loses all his interest in the crop upon termination of the lease. Ahrens v. Dye 423

Guest Statute.

The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. Kreifels v. Wurtele 491

Guilty Pleas.

1. A defendant should not be permitted to withdraw a plea of guilty or nolo contendere absent proof that such withdrawal is necessary to correct a manifest injustice. State v. Rouse 371
2. The standards to be followed by trial judges before accepting a guilty plea are not per se rules, with which the failure to technically comply will mandate an automatic reversal. State v. Rouse 371

Habeas Corpus.

1. In reviewing a decision in a habeas corpus case involving the custody of a child, it is necessary that this court try the case de novo on the record, giving great weight, however, to the findings of the trial court where the evidence is in irreconcilable conflict. Gray v. Maxwell .. 385
2. Proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity, and should not be bound by technical rules.

Gray v. Maxwell 385

Habitual Criminals.

In a proceeding pursuant to Neb. Rev. Stat. § 39-669.07 (Reissue 1978) to hear and determine the issue of enhancement of penalty, where proof has been made of defendant's conviction of a prior misdemeanor violation of that statute, the defendant cannot then collaterally attack that prior misdemeanor conviction. State v. Voight 829

Hearsay.

1. Where the declarant is unavailable as a witness, a hearsay statement not specifically covered by any statutory exception to the hearsay rule, but having equivalent circumstantial guarantees of trustworthiness, may be admissible under the provisions of Neb. Rev. Stat. § 27-804(2)(3) (Reissue 1975). State v. Beam 248
2. An extra-judicial statement not offered to prove the truth of the matter asserted is not hearsay. Gray v. Maxwell 385

Identification Procedures.

Any suggestiveness of a photographic identification procedure must be considered harmless error where no evidence or showing is made that the in-court identification was dependent on the photographic lineup. State v. Van Egmond 356

Impeachment.

1. If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment. State v. Packett 548
2. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. State v. Packett 548

Implied Consent.

The inference of implied approval of use of a family vehicle arises necessarily when prior use of the vehicle is established and when there is no proof or inference of express disapproval. Kreifels v. Wurtele ... 491

Indeterminate Sentences.

1. An indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous, but not void. State v. Rouse 371
2. An indeterminate sentence not authorized under the circumstances may still be a valid sentence for the maximum term included therein. State v. Rouse 371

Indispensable Parties.

1. An indispensable party is one who not only has an interest in the subject matter of the controversy, but has an interest of such a nature that a final determination cannot be made without affecting his rights, or leaving the controversy in such condition that the final determination may be wholly inconsistent with equity and good conscience. James J. Parks Co. v. Lakin 184
2. The absence of indispensable parties cannot be waived by the parties to the litigation. James J. Parks Co. v. Lakin 184

Inferences.

The inference of implied approval of use of a family vehicle arises necessarily when prior use of the vehicle is established and when there is no proof or inference of express disapproval. Kreifels v. Wurtele 491

Injunction.

1. Before one may be granted injunctive relief, one must plead and prove that, unless the injunction is granted, the moving party will suffer irreparable harm and damage and has no other adequate remedy at law. City of Lincoln v. Cather & Sons Constr., Inc. 10
2. Injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury. The right must be clear and the damage, irreparable. City of Lincoln v. Cather & Sons Constr., Inc. 10
3. Generally, injunction is not a proper action to prevent a landowner from seeking damages to property through inverse condemnation by reason of earlier governmental action. City of Lincoln v. Cather & Sons Constr., Inc. 10
4. Suits for injunctive relief seeking to restrain a governmental unit from enforcing police or regulatory powers are not automatically stayed upon the filing of a bankruptcy petition. Morford v. City of Omaha 271
5. It is within the sound discretion of the trial court to determine whether or not a stay of proceedings should

be granted upon the filing of a petition in bankruptcy in matters involving the enforcement of police or regulatory powers. Morford v. City of Omaha 271

Installment Loans.

An installment loan made by a licensee under the installment loan act, Neb. Rev. Stat. §§ 45-114 to 158 (Reissue 1978), and pursuant to the terms of that act, is an action or transaction otherwise permitted, prohibited, or regulated by a regulatory body acting under the statutory authority of this state and is, therefore, exempt from the provisions of the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 1623 (Reissue 1978). Kuntzelman v. Avco Financial Services of Nebraska, Inc. 130

Insurance Contracts.

1. Any contract of insurance which is contrary to any settled rule of public policy is invalid and unenforceable. Hansen v. U.S.A.A. Casualty Ins. Co. 147
2. Where an insurer has information that there are multiple owners of an insured motor vehicle, though only one may be shown as the named insured, the company may not cancel the policy either at the request of the named insured or at the company's initiative, until notice is given to all persons known to have an ownership interest in the motor vehicle, at their last known address, affording such owners a reasonable opportunity to obtain other insurance. Hansen v. U.S.A.A. Casualty Ins. Co. 147
3. 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 the plain, ordinary, and popular sense. Farm Bureau Ins. Co. of Nebraska v. Wozny ... 639
4. The acceptance in the past by an insurer of overdue premiums from an insured will not constitute a course of dealing upon which the insured may rely in failing to pay a premium when due, unless the previous acceptance of overdue premiums had become a custom, a habit, or a practice. Farm Bureau Ins. Co. of Nebraska v. Wozny 639

Insurance Premiums.

The acceptance in the past by an insurer of overdue premiums from an insured will not constitute a course of dealing upon which the insured may rely in failing to

pay a premium when due, unless the previous acceptance of overdue premiums had become a custom, a habit, or a practice. Farm Bureau Ins. Co. of Nebraska v. Wozny 639

Intent.

Whether there is an intent on the part of one person to cheat or defraud another usually must be inferred from the nature of the acts themselves and the circumstances surrounding them. State v. French 92

Intention of the Parties.

1. A written contract expressed in unambiguous language is not subject to interpretation or construction but the intention of the parties must be determined from its contents. Rullman v. LaFrance, Walker, Jackley & Saville 180
2. The interpretation given a contract by the parties themselves, while engaged in the performance of the contract, is one of the best indications of the true intent of the parties and, ordinarily, that construction of the contract should be enforced. D. K. Meyer Corp. v. Bevco, Inc. 318

Intestate Succession.

1. The right of inheritance is purely a creature of statute and must be determined not as a matter of sentiment but as a matter of law. In re Estate of Luckey. Bailey v. Luckey 53
2. Under the provisions of Neb. Rev. Stat. § 30-2309 (Reissue 1975), a twice-adopted child may not inherit under the laws of intestacy from its first adoptive parent who has thereafter consented to the second adoption and relinquished all rights of a parent as to the child. In re Estate of Luckey. Bailey v. Luckey 53

Inverse Condemnation.

1 Generally, injunction is not a proper action to prevent a landowner from seeking damages to property through inverse condemnation by reason of earlier governmental action. City of Lincoln v. Cather & Sons Constr., Inc. 10
2. In order for a landowner to be considered to have property abutting a vacated street under the provisions of Neb. Rev. Stat. § 15-702.03 (Reissue 1977), some portion of the boundary of the landowner's property previously available for ingress or egress to or from the proposed vacated street must be in common with the property

line of that street. City of Lincoln v. Cather & Sons Constr., Inc. 10

Irretrievable Breakdown.

When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken. Witcig v. Witcig 307

Irrigation.

The unappropriated waters of every natural stream within the State of Nebraska may be diverted from one basin to another, except when such diversion is contrary to the public interest, in which case it shall be denied. Little Blue N.R.D. v. Lower Platte North N.R.D. 535

Irrigation Districts.

An irrigation district is liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence. Lindgren v. City of Gering 360

Irrigation Systems.

The owner of an irrigation ditch or canal is required to exercise ordinary care in the construction, maintenance, and operation thereof. Otherwise stated, the measure of care which an owner is bound to use is that which ordinarily prudent people exercise under like circumstances when the risk is their own, or such as a prudent person, with due regard for the rights of others, and the risk of the undertaking, would exercise in conveying through an artificial channel a substance, such as water, that possesses detrimental and destructive, as well as beneficial and productive qualities, unless properly restrained. If the requisite degree of care is not exercised, the proprietor may be held liable for all damage proximately resulting from the wrongful act or omission. Lindgren v. City of Gering 360

Joint Tortfeasors.

1. Where the negligence of two or more persons concurs producing a single indivisible injury, such persons are jointly and severally liable although there was no common duty, common design, or concerted action. Lindgren v. City of Gering 360
2. If the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if an injury is caused by the subsequent inde-

pendent act of a third person made possible by such condition, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. Lindgren v. City of Gering 360

Judgments.

1. A collateral attack upon a judgment will not lie unless the judgment is absolutely void. Richardson v. Board of Education 18
2. Where the court or quasi-judicial agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack if the judgment is only voidable and not void. Richardson v. Board of Education 18
3. The rule against collateral impeachment of judicial decisions applies to the determination of officers and agencies who are called upon to act judicially in matters of administration. Richardson v. Board of Education 18
4. The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. Troy & Stalder Co. v. Continental Casualty Co. 28
   Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc. 651
5. The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded. Kuhlman v. Cargile 302
6. Where a judgment on the merits is rendered in favor of the defendant in an action to enforce one or two or more alternative remedies, the plaintiff cannot thereafter maintain an action to enforce another of the remedies. Kuhlman v. Cargile 302
7. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. Kuhlman v. Cargile 302
8. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most

favorable to the successful party. Every controverted fact must be resolved in that party's favor and that party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Lindgren v. City of Gering 360
Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc. 651

9. Under the provisions of Neb. Rev. Stat. § 25-1127 (Reissue 1975), the court is not obligated to answer specific interrogatories propounded to the court by a litigant, but is merely required, when requested, to make such specific findings of fact as the trial court concludes are appropriate and necessary to resolve the action. Lindgren v. City of Gering 360
10. Neb. Rev. Stat. § 42-371(4) (Reissue 1978) gives to a court, which has entered a judgment for property division payable in installments, authority to release or subordinate the judgment under the conditions prescribed by the statute. Grosvenor v. Grosvenor 395
11. In the absence of statutory authority, a court ordinarily has no power to correct, amend, open, or vacate a valid judgment after the expiration of the term. Grosvenor v. Grosvenor 395
12. Statutes providing for the modification of vested judgments apply only to judgments rendered after the statute takes effect. Grosvenor v. Grosvenor 395
13. The imposition of a sentence in a criminal proceeding is essential to create a final judgment from which an appeal may be taken. In re Interest of Wolkow 512
14. It is fundamental that there can be no appeal to this court until there has been a judgment or final order in the court from which the appeal is taken. In re Interest of Wolkow 512
15. A judgment by consent constitutes the agreement of the parties and is simply made a matter of record by the court at their request. Although purporting to be, it is not, strictly speaking, the act of a court, but rather the act of the parties to the suit. Chamberlin v. Chamberlin 808

Judicial Notice.

This court will not take judicial notice of a municipal ordinance which does not appear in the record. State v. Long 446

Juries.

1. At the conclusion of either party's case, there is a preliminary question for the court to decide, when prop-

erly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find on a particular issue in favor of the party upon whom the burden of proof on that issue is imposed. Bassinger v. Agnew 1
Borland v. Gillespie 191
2. Where there is competent evidence of future pain and suffering that is reasonably certain to continue into the future, the amount of damages is for the jury. Bassinger v. Agnew 1
3. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. Ybarra v. Wassenmiller 164
4. A trial court has the duty not to submit to the jury issues which are not sustained by the evidence. Schanaman v. Ramirez 212

Jurisdiction.
1. Where the court or quasi-judicial agency has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack if the judgment is only voidable and not void. Richardson v. Board of Education 18
2. The failure of a putative father to support his alleged child is only an ancillary issue in a paternity case and is not an act "causing tortious injury" within the meaning of the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64
3. An act of sexual intercourse between consenting adults does not constitute an act "causing tortious injury" in this state for purposes of the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64
4. In a paternity action, Nebraska courts do not acquire personal jurisdiction over a nonresident putative father by virtue of personal service in the state of his residence under the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64
5. If a judgment appears on its face to have been entered

by a court of general jurisdiction, such jurisdiction over the subject matter and the parties will be presumed, unless disproved by extrinsic evidence or the record itself. Olson v. England 256

6. Congress did not give bankruptcy courts exclusive jurisdiction over all controversies which in some way affect the debtor's estate. Morford v. City of Omaha .. 271

7. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required, and thus avoid unnecessary litigation. Kuhlman v. Cargile 302

Jurisdiction of Courts.

Upon the filing of a decedent's estate proceeding, the county court acquires jurisdiction of all matters relating to the decedent's estate, including jurisdiction to partition and sell the decedent's real estate. During the pendency of the decedent's estate proceedings in the county court, and until the estate has been placed in possession of those to whom it devolves or until the jurisdiction of the county court is otherwise terminated, the District Court shall not exercise its original jurisdiction in partition actions as to real estate owned solely by the decedent. In re Estate of Kentopp. Kentopp v. Kentopp 776

Jury Instruction.

The jury must be instructed upon the rights and liabilities of the parties under the theory of concurrent negligence if the evidence warrants, even though the issue is not pleaded and no instruction is requested. Weiseth v. Karlen 724

Jury Trial.

One charged with a criminal violation in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, may make an oral request for a jury trial at the time of arraignment or may make a written request prior to trial in accordance with rules established by the particular county or municipal court. State v. Gerber 75

Jury Verdicts.

1. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has the right to keep the

benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured. Shreves v. D. R. Anderson Constructors, Inc. 433

2. A jury's understanding of the instructions of the court is a matter that inheres in the verdict and cannot be classified as extraneous, prejudicial information improperly brought to the jury's attention. Lambertus v. Buckley 440

3. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict. Lambertus v. Buckley 440

Laches.

The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action. Eliker v. Eliker 764

Landlords and Tenants.

A tenant who plants crops knowing the terms of the lease will expire before they can be harvested loses all his interest in the crop upon termination of the lease. Ahrens v. Dye 423

Larceny.

1. Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the crime charged. State v. Weik 217

2. The value of the property at the time and place of the taking is a fact question for the decision of the jury from the evidence adduced. State v. Weik 217

3. Rules for establishing value in civil cases are ordinarily applicable in distinguishing between grand and petit larceny. State v. Weik 217

Legal Residence.

1. A requirement of a state statute that an applicant for medical assistance must be a bona fide resident of that state to receive such assistance and a finding that one is not a bona fide resident, but has come into the state for the sole purpose of receiving such benefits, does not create any irrebuttable presumption or permanent classification that would prevent appropriate proof of

legitimate residency. Gosney v. Department of Public Welfare 137
2. The terms "residence" and "domicile," as used in statutes, are generally convertible terms. Gosney v. Department of Public Welfare 137
3. The residence of a minor is, by operation of law, determined and fixed by that of the parent legally entitled to custody and control. Gosney v. Department of Public Welfare 137
4. The burden of proof is on the party who asserts that a change of domicile has taken place. Gosney v. Department of Public Welfare 137
5. The mere transfer of a person to an institution for treatment of mental illness or deficiency does not, in and of itself, alter the legal domicile. Gosney v. Department of Public Welfare 137
6. Persons under legal disability generally are incapable of losing or gaining a residence or domicile by acts controlled by others. Gosney v. Department of Public Welfare 137
7. A mentally ill or deficient minor, who is incapable of acquiring a domicile of choice and who continues to live with his parents upon attaining the age of majority, retains the domicile of such parents. Gosney v. Department of Public Welfare 137
8. A court having jurisdiction over an incompetent, and particularly a court which has appointed a guardian for him, may, whenever it appears to be in the incompetent's best interest, direct or authorize the guardian or those having control of the incompetent's person to change the incompetent's domicile for him. Gosney v. Department of Public Welfare 137

Legal Title.

Where the parties to an action for dissolution of marriage are unable to agree upon a division of property, the trial court shall make such division as it deems conscionable and fair under all the facts and circumstances, taking into account the equities of the situation, irrespective of how legal title is held. Witcig v. Witcig 307

Legislative Delegation.

Even though an agency is performing a legislative function, the Legislature may confer upon it judicial power to determine facts and equities under which legislation authorizes some changes to be made. Richardson v. Board of Education 18

Legislative Intent.

1. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. Grosvenor v. Grosvenor 395
2. The purpose of all rules or maxims for the construction or interpretation of statutes is to discover the true intention of the law, and the rules or canons of construction are merely aids for ascertaining legislative intent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent. Grosvenor v. Grosvenor 395
3. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. Grosvenor v. Grosvenor 395

Lesser-Included Offense.

The test which must 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. Weik 217

Liability.

Where the giving of a notice of loss within the prescribed time is made a condition precedent to liability, failure to comply with such provision prevents recovery. Dockendorf v. Orner 456

Licenses.

1. A citizen has no vested right in statutory licenses, permits, and privileges. Alcoholic Resocialization Conditioning Help, Inc. v. State 788
2. A license to carry on a particular trade may be recalled by legislative action at any time. Alcoholic Resocialization Conditioning Help, Inc. v. State 788

Licenses and Permits.

1. The recommendation of the local governing body to the Nebraska Liquor Control Commission that an application for a liquor license be denied affords a sufficient evidentiary basis for an order of the commission denying the license. Brannen v. Nebraska Liquor Control Commission 662
2. Where the Nebraska Liquor Control Commission intends

to rely upon a recommendation of denial by the local governing body to support its refusal to grant a liquor license, the burden is upon the commission to furnish evidence of that action. Brannen v. Nebraska Liquor Control Commission 662

3. Evidence furnished by the Nebraska Liquor Control Commission of the action of a local governing body which lacks sufficient clarity to enable one to determine what action the local governing body has taken in regard to a recommendation as to an application for a liquor license, is ineffective to prove a recommendation of denial of the application. Brannen v. Nebraska Liquor Control Commission 662

4. The absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license. Brannen v. Nebraska Liquor Control Commission 662

5. The Nebraska Liquor Control Commission is vested with the discretion of the granting or denial of liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically or capriciously. Halbert v. Nebraska Liquor Control Commission 687

Liens.

1. Generally, title to land is not unmarketable because of an outstanding lien if the lien may be discharged with the purchase money at the time fixed for performance. James J. Parks Co. v. Lakin 184

2. If the encumbrance may not be discharged out of the purchase money, specific performance is not an appropriate remedy. James J. Parks Co. v. Lakin 184

3. The lien of a judgment is statutory and not a fundamental or basic right. Legislation affecting judgment liens is, on its face, economic and social welfare legislation. The standard by which a court reviews a classification established by such legislation is whether it has a rational basis and is at least arguably related to a legitimate function of government not prohibited by the Constitution. Grosvenor v. Grosvenor 395

4. There are sufficient differences between judgment liens in marriage dissolution cases and other types of judgments to support the legislative determination that such liens are entitled to a treatment different from judgments generally. Grosvenor v. Grosvenor 395

Limited Partnerships.

A general partner of a limited partnership has, with certain exceptions, all the rights and powers and is subject to all the restrictions of a partnership without limited partners. Waite v. Salestrom 578

Market Value.

Generally, in an eminent domain proceeding, evidence about the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting market conditions. Dawson v. Papio Nat. Resources Dist. 225

Marketable Title.

Generally, title to land is not unmarketable because of an outstanding lien if the lien may be discharged with the purchase money at the time fixed for performance. James J. Parks Co. v. Lakin 184

Medical Assistance.

1. In order to qualify for medical assistance under Neb. Rev. Stat. § 68-1020 (Reissue 1976), a person must be a bona fide resident of the State of Nebraska. Gosney v. Department of Public Welfare 137
2. A requirement of a state statute that an applicant for medical assistance must be a bona fide resident of that state to receive such assistance and a finding that one is not a bona fide resident, but has come into the state for the sole purpose of receiving such benefits, does not create any irrebuttable presumption or permanent classification that would prevent appropriate proof of legitimate residency. Gosney v. Department of Public Welfare 137

Medical Expenses.

It is not contrary to public policy for persons wishing to adopt a child to make provision with its mother before birth to pay hospital and medical expenses in connection with the care of the mother and the child. Gray v. Maxwell 385

Medical Malpractice.

1. A specialist from one medical community is competent to testify as an expert witness in a medical negligence

case as to the standard of care or skill required in another community, if the witness has knowledge or familiarity with the practice and standard in similar communities. Wentling v. Jenny 335

2. In the treatment and diagnosis of certain common prevailing diseases, the medical standards of care and skill are national, rather than local or regional. Wentling v. Jenny 335

Mental Incompetence.

In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing. In re Estate of Saathoff. Saathoff v. Saathoff 793

Merger.

A contract complete in itself will be conclusively presumed to supersede and discharge another made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. The Nebraskans, Inc. v. Homan 749

Minors.

The residence of a minor is, by operation of law, determined and fixed by that of the parent legally entitled to custody and control. Gosney v. Department of Public Welfare 137

Minors' Contracts.

Legal services furnished to a minor charged with a crime may be necessaries. County of York v. Johnson 200

Miranda Rights.

1. Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. In re Interest of Durand. State v. Durand 415
2. The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. In re Interest of Durand. State v. Durand 415

3. The general rule applicable to custodial interrogations by the police is that if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. In re Interest of Durand. State v. Durand 415

Modification of Decree.

Where a divorced husband neglects to apply for a modification of the divorce decree, in spite of the fact that sufficient grounds exist to warrant modification, the mere existence of such grounds with respect to payments due under the decree is not available as a defense to proceedings for contempt for violating the decree. Eliker v. Eliker 764

Mortgages.

1. A stipulation in a mortgage, providing that the whole debt secured thereby shall become due and payable upon failure of the mortgagor to pay the interest or any installment of principal upon maturity thereof or to comply with any other condition of the mortgage, is a legal, valid, and enforceable stipulation and is not in the nature of a penalty or forfeiture which a court of equity will refuse to enforce. Occidental Sav. & Loan Assn. v. Venco Partnership 469
2. A "due on sale" clause contained in a mortgage contract is not contrary to the public policy of this jurisdiction and is, therefore, valid and enforceable. Occidental Sav. & Loan Assn. v. Venco Partnership 469

Motions for New Trial.

1. The standard of judicial review of a trial court's order granting a new trial is whether or not the trial court abused its discretion. By its terms, this discretion is necessarily broader than a narrowly isolated and rigid examination of the merits of each alleged error in the record. A combination of errors, each of which, in itself, might not be grounds for granting a new trial, may result in a finding by the trial judge that justice will be served by retrying the issues in the case. Shreves v. D. R. Anderson Constructors, Inc. ... 433
2. This court will not ordinarily disturb a trial court's order granting a new trial, and will not disturb it at all unless it clearly appears that no tenable grounds existed therefor. Shreves v. D. R. Anderson Constructors, Inc. 433
3. A motion for new trial filed in a criminal case after the trial court has announced its decision, but before

judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates. State v. Kolar 619

Motor Vehicles.

1. A pedestrian has equal rights with the operator of a vehicle in the use of a private way used by members of the public and each must use reasonable care for his own safety and the safety of others. Bassinger v. Agnew 1
   Ybarra v. Wassenmiller 164
2. The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. Ybarra v. Wassenmiller 164
3. In backing a vehicle, the operator's duty to sound a horn is not an absolute one, but depends upon the circumstances at the time. Ybarra v. Wassenmiller 164
4. One who is in a place of safety and is aware of a moving vehicle in close proximity to him, and who moves from such place of safety into the path of the vehicle and is struck, is, by his own conduct, guilty of negligence more than slight sufficient to defeat his recovery. Ybarra v. Wassenmiller 164
5. Conditions affecting the visibility of a motorist impose upon a driver the duty to exercise a degree of care commensurate with the existing circumstances. Central Constr. Co. v. Republican City School Dist. No. 1 615
6. A turn across a highway between intersections is a particularly dangerous maneuver. Central Constr. Co. v. Republican City School Dist. No. 1 615
7. The operator of a dirt scraper upon a highway which is under construction but not closed to traffic, who turns to the left without giving a turn signal and at a time when his vision is so obscured by dust that he cannot see whether other traffic is approaching, is guilty of negligence more than slight as a matter of law. Central Constr. Co. v. Republican City School Dist. No. 1 615

Municipal Corporations.

1. A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality. Briar West, Inc. v. City of Lincoln 172
2. Statutes granting powers to municipalities are to be strictly construed and where doubt exists, such doubt must be resolved against the grant. Briar West, Inc. v. City of Lincoln 172
3. Municipalities have no power to impose conditions on subdivisions which are not within the purview of their delegated authority or enabling legislation. Briar West, Inc. v. City of Lincoln 172
4. A city may not, under the guise of the police power, take private property for public use without just compensation. Simpson v. City of North Platte 240
5. A city may not, under the guise of the police power, require a property owner to dedicate private property for some future public purpose as a condition of obtaining a building permit without paying the property owner just compensation, when the requested dedicated property is to be placed in a land bank for future use by the city and such future use is not directly occasioned by the construction sought to be permitted. Simpson v. City of North Platte 240
6. A decree of the District Court in an action to disconnect land from a city or village is reviewable by the Nebraska Supreme Court and will be tried de novo by this court. Neb. Rev. Stat. §§ 17-414 (Reissue 1977), 25-1925 (Reissue 1979). Dugan v. Village of Greeley ... 804
7. To determine whether or not justice and equity require disconnection of land from a city or village, the court may properly consider the benefits received from the city or village, whether the lands are exclusively agricultural, the existence or nonexistence of unity or community of interest with such city or village, and the effect upon the compactness of the city or village of the resulting change of its corporate limits. Dugan v. Village of Greeley 804
8. Disconnection of land from a city or village on the basis of justice and equity requires consideration of all the facts and circumstances tending to show the fairness or unfairness of disconnection as it relates to the particular case. Dugan v. Village of Greeley 804

Municipal Ordinances.

1. This court will not take judicial notice of a municipal ordinance which does not appear in the record. State v. Long 446
2. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Long .. 446

Municipal Powers.

1. A municipal corporation may exercise only such powers as are expressly granted, those essential to the declared objects and purposes of a municipality. Briar West, Inc. v. City of Lincoln 172
2. Statutes granting powers to municipalities are to be strictly construed and where doubt exists, such doubt must be resolved against the grant. Briar West, Inc. v. City of Lincoln 172
3. Municipalities have no power to impose conditions on subdivisions which are not within the purview of their delegated authority or enabling legislation. Briar West, Inc. v. City of Lincoln 172

Necessaries.

1. Legal services furnished to a minor charged with a crime may be necessaries. County of York v. Johnson 200
2. A petition in an action against the parents of a minor for reimbursement for necessaries furnished to the minor at his request which does not allege that the parents refused to provide the necessaries for the minor does not state a cause of action. County of York v. Johnson 200

Necessary Parties.

An equitable right may not be properly asserted in an action unless all of the necessary parties have been made parties to the action. James J. Parks Co. v. Lakin 184

Negligence.

1. A pedestrian has a legal right to walk longitudinally along a highway or driveway, but in doing so is required to use reasonable care for his own safety. Bassinger v. Agnew 1
   Ybarra v. Wassenmiller 164
2. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to

have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence. If reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. Ybarra v. Wassenmiller 164

3. The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. Ybarra v. Wassenmiller 164

4. In backing a vehicle, the operator's duty to sound a horn is not an absolute one, but depends upon the circumstances at the time. Ybarra v. Wassenmiller 164

5. One who is capable of understanding and discretion, and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent or contributorily negligent. Ybarra v. Wassenmiller 164
Woodsmall v. Marijo, Inc. 405

6. One who is in a place of safety and is aware of a moving vehicle in close proximity to him, and who moves from such place of safety into the path of the vehicle and is struck, is, by his own conduct, guilty of negligence more than slight sufficient to defeat his recovery. Ybarra v. Wassenmiller 164

7. In an action based upon negligence, the plaintiff, in order to recover, must establish not only the negligence of the defendant, but also that such negligence was the "proximate cause" of the occurrence, accident, or harm; and also the proximate cause of the resulting damages. Borland v. Gillespie 191

8. "Proximate cause," as used in the law of negligence, is that cause which in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury, and without which the injury would not have occurred. Borland v. Gillespie 191

9. A tort-feasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person. Borland v. Gillespie 191

10. The evidence of damages is required to be direct and certain. Proof that damage might or could have been caused by the accident is not sufficient to sustain a verdict for a claimant. Borland v. Gillespie 191
11. A driver who fails to see another who is favored over him is guilty of negligence as a matter of law. Schanaman v. Ramirez 212
12. Negligence is not presumed and the mere happening of an accident does not prove negligence. Schanaman v. Ramirez 212
13. It is essential to the defense of contributory negligence that the negligence of the plaintiff be the proximate cause or a proximately contributing cause. Schanaman v. Ramirez 212
14. The owner of an irrigation ditch or canal is required to exercise ordinary care in the construction, maintenance, and operation thereof. Otherwise stated, the measure of care which an owner is bound to use is that which ordinarily prudent people exercise under like circumstances when the risk is their own, or such as a prudent person, with due regard for the rights of others, and the risk of the undertaking, would exercise in conveying through an artificial channel a substance, such as water, that possesses detrimental and destructive, as well as beneficial and productive qualities, unless properly restrained. If the requisite degree of care is not exercised, the proprietor may be held liable for all damages proximately resulting from the wrongful act or omission. Lindgren v. City of Gering 360
15. Where the negligence of two or more persons concurs producing a single indivisible injury, such persons are jointly and severally liable although there was no common duty, common design, or concerted action. Lindgren v. City of Gering 360
16. If the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if an injury is caused by the subsequent independent act of a third person made possible by such condition, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. Lindgren v. City of Gering 360
17. Questions of negligence, contributory negligence, and assumption of the risk are for the trier of facts, but where reasonable minds can draw but one conclusion from the facts adduced with regard to those issues, a directed verdict is proper. Woodsmall v. Marijo, Inc. 405
18. To constitute want of due care, it is not required that a

person should have anticipated the precise risk which occurred; it is sufficient that he has placed himself in a position of known danger where there was no need for him to be, or that he knew or should have known that substantial injury was likely to result from his act. Woodsmall v. Marijo, Inc. 405

19. When a collision occurs where the driver of a motor vehicle turning left across a highway between intersections fails to look to the rear for approaching traffic at a time and place when so looking would be effective, and where such driver fails to signal his intention to make such a left turn, such a driver is guilty of negligence as a matter of law. Mazankowski v. Harders 583

20. Conditions affecting the visibility of a motorist impose upon a driver the duty to exercise a degree of care commensurate with the existing circumstances. Central Constr. Co. v. Republican City School Dist. No. 1 615

21. A turn across a highway between intersections is a particularly dangerous maneuver. Central Constr. Co. v. Republican City School Dist. No. 1 615

22. The operator of a dirt scraper upon a highway which is under construction but not closed to traffic, who turns to the left without giving a turn signal and at a time when his vision is so obscured by dust that he cannot see whether other traffic is approaching, is guilty of negligence more than slight as a matter of law. Central Constr. Co. v. Republican City School Dist. No. 1 615

23. When the parties to a dispute have defined by contract the nature and extent of a particular duty, what constitutes an unreasonable or negligent performance of that duty cannot be ascertained without reference to the contractual definition. Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc. 651

24. The jury must be instructed upon the rights and liabilities of the parties under the theory of concurrent negligence if the evidence warrants, even though the issue is not pleaded and no instruction is requested. Weiseth v. Karlen 724

Notice.

1. Evidence that a letter was properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails. Troy & Stalder Co. v. Continental Casualty Co. 28

2. 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. Troy & Stalder Co. v. Continental Casualty Co. 28

3. The presumption of receipt of mail by the addressee may be rebutted by any relevant evidence. Positive testimony that a letter was not received simply raises a question of fact to be decided by the trier of fact. Troy & Stalder Co. v. Continental Casualty Co. 28
4. Where an insurer has information that there are multiple owners of an insured motor vehicle, though only one may be shown as the named insured, the company may not cancel the policy either at the request of the named insured or at the company's initiative, until notice is given to all persons known to have an ownership interest in the motor vehicle, at their last known address, affording such owners a reasonable opportunity to obtain other insurance. Hansen v. U.S.A.A. Casualty Ins. Co. 147
5. Where the giving of a notice of loss within the prescribed time is made a condition precedent to liability, failure to comply with such provision prevents recovery. Dockendorf v. Orner 456
6. The purpose of the notice, provided for in Neb. Rev. Stat. § 77-508 (Reissue 1976), is to give the affected counties an opportunity to appear and meet the challenge to their property valuations for tax purposes. Box Butte County v. State Board of Equalization & Assessment 696

Options to Buy or Sell.

1. Options to buy or sell real estate should be strictly construed and not extended beyond the express provisions thereof. State Securities Co. v. Daringer 427
2. The exercise of an option to buy or sell real estate must be absolute, unambiguous, without condition or reservation, and in accordance with the offer made. State Securities Co. v. Daringer 427

Parent and Child.

1. A petition in an action against the parents of a minor for reimbursement for necessaries furnished to the minor at his request which does not allege that the parents refused to provide the necessaries for the minor does not state a cause of action. County of York v. Johnson 200
2. Personal services rendered by a child to a parent are presumed, in the absence of special circumstances, to have been rendered gratuitously. This presumption may be overcome by sufficient evidence tending to establish a contract for remuneration. In re Estate of Bouma. Nehls v. Giles 209

Parental Rights.

1. After a decree of adoption is entered, the usual relation of parent and child and all of the rights, duties, and other legal consequences of the natural relation of parent and child shall thereafter exist between such adoptive child and the person or persons adopting such child and his, her, or their kindred. In re Estate of Luckey. Bailey v. Luckey 53
2. The purpose of Neb. Rev. Stat. § 43-110 (Reissue 1978) is to terminate any relationship which existed between the natural parent and the child and to create a new relationship between the adoptive parent and the child. In re Estate of Luckey. Bailey v. Luckey 53
3. Under the provisions of Neb. Rev. Stat. § 30-2309 (Reissue 1975), a twice-adopted child may not inherit under the laws of intestacy from its first adoptive parent who has thereafter consented to the second adoption and relinquished all rights of a parent as to the child. In re Estate of Luckey. Bailey v. Luckey 53
4. Generally speaking, it is in the best interests of a minor child that it should be in the care of the natural parent, assuming that such parent has not been shown to be unfit to perform parental duties or that such parent has not forfeited such parental rights by abandonment or otherwise. Gray v. Maxwell 385
5. As a general rule, the relinquishment of a child in exchange for an unwarranted payment of consideration to a parent is tantamount to an abandonment of that child. Gray v. Maxwell 385

Parol Evidence.

1. Parol evidence is not admissible to add to, contradict, or vary the terms of a written contract. Rullman v. LaFrance, Walker, Jackley & Saville 180
2. When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. Cosgrove v. Mademoiselle Fashions 275
3. It is well established that the parol evidence rule does not prevent a party from using contemporaneous or prior negotiations or expressions to show that the writing was never intended to be operative or that it was intended to be effective only upon the happening of a condition precedent, provided that the condition sought to be proved is not inconsistent with a specific term in

the writing. Cosgrove v. Mademoiselle Fashions 275
4. When parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of the agreement; but this does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend. Even though parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of a written instrument, if the condition precedent is inconsistent with, or contradictory to, the written instrument, parol evidence thereof is not admissible. Cosgrove v. Mademoiselle Fashions 275

Partial Performance.

Where there has been part performance and the adverse party appropriated and retained the work performed, the value of the labor or property received and accepted, less the damages for the failure to fully perform, may be recovered. Morris Mills v. Denny Wiekhorst Excavating, Inc. 443

Partnership Agreements.

A partner is an agent of the partnership for the purpose of carrying out its business in the usual way. He has, however, no authority to unilaterally modify the agreement by which the partnership was created. A partnership agreement may be modified only by the unanimous consent, express or implied, of all the partners. Waite v. Salestrom 578

Partnerships.

1. A general partner of a limited partnership has, with certain exceptions, all the rights and powers and is subject to all the restrictions of a partnership without limited partners. Waite v. Salestrom 578
2. A partner is an agent of the partnership for the purpose of carrying out its business in the usual way. He has, however, no authority to unilaterally modify the agreement by which the partnership was created. A partnership agreement may be modified only by the unanimous consent, express or implied, of all the partners. Waite v. Salestrom 578
3. When the parties are disclosed and known to a party

contracting and the contract is signed by only one partner who contracts on his own behalf, the other partners are not bound thereby. Waite v. Salestrom 578

Paternity.

1. The failure of a putative father to support his alleged child is only an ancillary issue in a paternity case and is not an act "causing tortious injury" within the meaning of the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64
2. An act of sexual intercourse between consenting adults does not constitute an act "causing tortious injury" in this state for purposes of the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64
3. In a paternity action, Nebraska courts do not acquire personal jurisdiction over a nonresident putative father by virtue of personal service in the state of his residence under the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64

Pedestrians.

1. A pedestrian has equal rights with the operator of a vehicle in the use of a private way used by members of the public and each must use reasonable care for his own safety and the safety of others. Bassinger v. Agnew 1
   Ybarra v. Wassenmiller 164
2. A pedestrian has a legal right to walk longitudinally along a highway or driveway, but in doing so is required to use reasonable care for his own safety. Bassinger v. Agnew 1
   Ybarra v. Wassenmiller 164
3. One who is in a place of safety and is aware of a moving vehicle in close proximity to him, and who moves from such place of safety into the path of the vehicle and is struck, is, by his own conduct, guilty of negligence more than slight sufficient to defeat his recovery. Ybarra v. Wassenmiller 164

Penalties.

Clarity should be particularly demanded of a statute which would impose very substantial penalties on counties violating it. State ex rel. Douglas v. Herrington .. 516

Penalties and Forfeitures.

A stipulation in a mortgage, providing that the whole debt secured thereby shall become due and payable upon failure of the mortgagor to pay the interest or any installment of principal upon maturity thereof or to comply with any other condition of the mortgage, is a legal, valid, and enforceable stipulation and is not in the nature of a penalty or forfeiture which a court of equity will refuse to enforce. Occidental Sav. & Loan Assn. v. Venco Partnership 469

Pensions.

A pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony. Witcig v. Witcig 307

Permits.

An application for a water permit under Neb. Rev. Stat. § 46-233 (Reissue 1978) is not required until actual construction work at the site is commenced. Winter v. Lower Elkhorn Nat. Resources Dist. 70

Petitions.

1. The petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Dixon v. Reconciliation, Inc. 45
2. A petition in an action against the parents of a minor for reimbursement for necessaries furnished to the minor at his request which does not allege that the parents refused to provide the necessaries for the minor does not state a cause of action. County of York v. Johnson 200
3. Amendments may be allowed, in the exercise of proper discretion by the court, even after the evidence is closed. Engel v. Rhen Marshall, Inc. 265

Photographs.

Any suggestiveness of a photographic identification procedure must be considered harmless error where no evidence or showing is made that the in-court identification was dependent on the photographic lineup. State v. Van Egmond 356

Pleadings.

1. The petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Dixon v. Reconciliation, Inc. 45
2. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. A petition is sufficient if, from the statement of facts set forth therein, the law entitles the plaintiff to recover. Dixon v. Reconciliation, Inc. 45
3. Pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled. Dixon v. Reconciliation, Inc. 45
4. The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings and, unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. Ocander v. B-K Corporation 287
5. A party will not be permitted to plead one cause of action and, upon trial, rely upon proof establishing another. In order that a recovery may be had in an action, the pleadings and the proof must agree. Shreves v. D. R. Anderson Constructors, Inc. 433

Police Power.

1. A city may not, under the guise of the police power, take private property for public use without just compensation. Simpson v. City of North Platte 240
2. For the nexus test to apply, thus making a compulsory dedication a constitutionally valid exercise of the police power, the nexus must be rational. This means it must be substantial, demonstrably clear, and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements, not for the purpose of "banking" the land for use in a projected but unscheduled possible future use. Simpson v. City of North Platte 240
3. A city may not, under the guise of the police power, require a property owner to dedicate private property

for some future public purpose as a condition of obtaining a building permit without paying the property owner just compensation, when the requested dedicated property is to be placed in a land bank for future use by the city and such future use is not directly occasioned by the construction sought to be permitted. Simpson v. City of North Platte 240

4. Suits for injunctive relief seeking to restrain a governmental unit from enforcing police or regulatory powers are not automatically stayed upon the filing of a bankruptcy petition. Morford v. City of Omaha 271
5. It is within the sound discretion of the trial court to determine whether or not a stay of proceedings should be granted upon the filing of a petition in bankruptcy in matters involving the enforcement of police or regulatory powers. Morford v. City of Omaha 271
6. The lien of a judgment is statutory and not a fundamental or basic right. Legislation affecting judgment liens is, on its face, economic and social welfare legislation. The standard by which a court reviews a classification established by such legislation is whether it has a rational basis and is at least arguably related to a legitimate function of government not prohibited by the Constitution. Grosvenor v. Grosvenor 395
7. There are sufficient differences between judgment liens in marriage dissolution cases and other types of judgments to support the legislative determination that such liens are entitled to a treatment different from judgments generally. Grosvenor v. Grosvenor .. 395
8. No one has a vested right to be protected against consequential injuries arising from a proper exercise of public powers. Alcoholic Resocialization Conditioning Help, Inc. v. State 788
9. Any incidental damage resulting from a legislative invocation of its police power does not give rise to a right to enjoin the act or to claim compensation from the public. Alcoholic Resocialization Conditioning Help, Inc. v. State 788

Political Subdivisions Tort Claims Act.

In an appeal to the Supreme Court of an action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to 2416 and 2418 to 2420 (Reissue 1977) and 2417 (Cum. Supp. 1978), the finding of the trial court will not be disturbed unless it is clearly wrong. Lindgren v. City of Gering 360

Post Conviction Act.

1. 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. Rouse 371
   State v. Auger 666
2. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of a prisoner's rights such as to render the judgment void or voidable under the Constitution of Nebraska or of the United States. State v. Rouse 371
3. By failing to challenge the indeterminateness of a sentence directly in an appeal, a defendant has waived his right to contest it in a post conviction review. State v. Rouse 371

Prejudgment Interest.

Prejudgment interest should be awarded in an action for a liquidated sum which represents a balance owing on a contract and which action is decided in the claimant's favor. D. K. Meyer Corp. v. Bevco, Inc. 318

Prejudicial Error.

In a prosecution for a crime, the only errors which require reversal of a cause are those prejudicial to the rights of the accused, or which constitute the denial of a substantial legal right. State v. Packett 548

Prescriptive Easements.

1. The use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. Chalen v. Cialino 106
2. The use and enjoyment which will create an easement by prescription must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, and it must continue for the full prescriptive period. Chalen v. Cialino 106
   Engel v. Rhen Marshall, Inc. 265
3. A permissive use of the land of another, that is, a use or license exercised in subordination to the other's claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued. Chalen v. Cialino 106
4. To establish a prescriptive right to an easement, use

and enjoyment must have been exercised under a claim of right. A use by express or implied permission or license cannot ripen into an easement by prescription. Chalen v. Cialino 106

5. Acquiescence on the part of the owner of the servient tenement which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence. Engel v. Rhen Marshall, Inc. 265

6. A prescriptive right is not looked on with favor by the law and it is essential that all of the elements of use and enjoyment necessary to give title to real estate concur in order to create an easement by prescription. Engel v. Rhen Marshall, Inc. 265

Presumptions.

1. Evidence that a letter was properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails. Troy & Stalder Co. v. Continental Casualty Co. 28

2. 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. Troy & Stalder Co. v. Continental Casualty Co. 28

3. The presumption of receipt of mail by the addressee may be rebutted by any relevant evidence. Positive testimony that a letter was not received simply raises a question of fact to be decided by the trier of fact. Troy & Stalder Co. v. Continental Casualty Co. 28

4. In determining whether a presumption of undue influence has been rebutted, the court may consider whether the grantor has received independent advice. Schaneman v. Schaneman 113

5. The existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. State v. Long 446

6. There is a presumption that the valuation made by the board of equalization is correct. However, this presumption disappears when competent evidence to the contrary is introduced. The reasonableness of the valuation then becomes a question of fact to be determined from the evidence. Otradovsky v. Board of Equalization 559

7. As a discretionary matter, the determination of whether a default judgment should be set aside will, on appeal, be presumed to have been made in proper exercise of that discretion where the contrary does not appear from the record. Diplomat Inn, Inc. v. Weindorf 565

8. It will be presumed, in the absence of a showing to the contrary, that the discretionary powers of a district court have been wisely exercised. Diplomat Inn, Inc. v. Weindorf 565
9. The burden of showing an abuse of discretion by a trial court rests on the appellant. Such abuse cannot be presumed, but must be made to appear by the evidence before its existence can be found by an appellate court. Diplomat Inn, Inc. v. Weindorf 565
10. If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if it is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of a showing to the contrary, that the transaction was induced by the misrepresentation. Fricke v. Hart 590
11. The presumption is that the State Board of Equalization and Assessment performed its duties and the burden is upon the party objecting to such action to prove that it was erroneous, capricious, and contrary to law. Box Butte County v. State Board of Equalization & Assessment 696

Pretrial Conference.
1. Issues stipulated to at a pretrial conference constitute the issues upon which the case is to be tried. Olson v. England 256
2. The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified. Olson v. England 256

Pretrial Motions.
The time from filing to final disposition of pretrial motions is excluded in computing the time for trial. State v. Long 446

Prior Consistent Statements.
Prior consistent statements of a witness are not admissible as corroborative evidence except to rebut an express or implied charge against him of recent fabrication or improper influence or motive. State v. Packett 548

Prior Inconsistent Statements.
1. If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for pur-

pose of impeachment. State v. Packett 548
2. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. State v. Packett 548

Probable Cause.
The test of probable cause for a warrantless arrest is whether, at the moment, the facts and circumstances within the knowledge of the officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. State v. Tipton 731

Probation and Parole.
1. This court will not overturn a sentence of the trial court which does not grant probation unless there has been an abuse of discretion. State v. French 92
2. A condition contained in a probation order issued by the court to one previously convicted of a drug offense to the effect that the probationer shall submit to a search of his person or property at any time, by any law enforcement officer, with or without probable cause, for controlled substances, which condition is accepted by the probationer, is valid, enforceable, and constitutional, if it is applied in a reasonable manner and contributes to the rehabilitation of the offender. State v. Morgan 818

Promissory Notes.
1. While an oral promise to pay a commission to a broker for the sale of real estate is unenforceable because of the statute of frauds so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission. Peterson & Vogt v. Livingston 753
2. A promissory note given by a vendor of real estate to a corporate real estate broker in Nebraska and accepted by the broker in payment for brokerage services previously rendered in the sale of certain real estate located in Colorado, which the vendor subsequently acknowledged, reaffirmed, and promised to pay for such services, is supported by a valid and lawful consideration and action may be brought upon said note and recovery had thereon, notwithstanding the fact that, at

the time of the transaction in question, said corporate broker did not hold a valid and current Nebraska real estate broker's license as required at that time by Neb. Rev. Stat. §§ 81-885.06 and 885.16 (Reissue 1976), but all of the officers and salesmen of said corporation involved in the transaction held current Nebraska and Colorado broker's licenses, and the corporation also held a current Colorado corporate broker's license. Peterson & Vogt v. Livingston 753

Proper Lookout.

1. A motorist must see what is in plain sight. Schanaman v. Ramirez 212
2. A driver who fails to see another who is favored over him is guilty of negligence as a matter of law. Schanaman v. Ramirez 212
3. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. Schanaman v. Ramirez 212
4. When a collision occurs where the driver of a motor vehicle turning left across a highway between intersections fails to look to the rear for approaching traffic at a time and place when so looking would be effective, and where such driver fails to signal his intention to make such a left turn, such a driver is guilty of negligence as a matter of law. Mazankowski v. Harders ... 583
5. The operation of a dirt scraper upon a highway which is under construction but not closed to traffic, who turns to the left without giving a turn signal and at a time when his vision is so obscured by dust that he cannot see whether other traffic is approaching, is guilty of negligence more than slight as a matter of law. Central Constr. Co. v. Republican City School Dist. No. 1 615

Property Division.

1. The fixing of alimony or distribution of property rests in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Witcig v. Witcig 307
   Van Pelt v. Van Pelt 350
   Kosnopfl v. Kosnopfl 524
   Liss v. Liss 587
2. Where the parties to an action for dissolution of marriage are unable to agree upon a division of property, the trial court shall make such division as it deems conscionable and fair under all the facts and circum-

stances, taking into account the equities of the situation, irrespective of how legal title is held. Witcig v. Witcig 307
Torrey v. Torrey 485
3. Where a judgment for alimony is awarded the court should, if possible, divide the property in such a manner as to provide the means to permit the payment of the alimony judgment. Van Pelt v. Van Pelt 350
4. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment where the decree expressly precludes modification. Van Pelt v. Van Pelt 350
5. In a proceeding for dissolution of marriage, this court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Van Pelt v. Van Pelt 350
Torrey v. Torrey 485
6. Neb. Rev. Stat. § 42-371(4) (Reissue 1978) gives to a court which has entered a judgment for property division payable in installments, authority to release or subordinate the judgment under the conditions prescribed by the statute. Grosvenor v. Grosvenor 395
7. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Torrey v. Torrey 485
8. 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. Torrey v. Torrey 485
9. The trial court is not bound in all cases to set aside to one party that property which was inherited or gifted to that party and divide only the remaining property between the parties. Torrey v. Torrey 485
10. The source of property is only one of the factors to consider in the division of property. Torrey v. Torrey 485

Proximate Cause.
1. In an action based upon negligence, the plaintiff, in order to recover, must establish not only the negligence of the defendant, but also that such negligence was the "proximate cause" of the occurrence, accident, or harm; and also the proximate cause of the resulting damages. Borland v. Gillespie 191

2. "Proximate cause," as used in the law of negligence, is that cause which in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury, and without which the injury would not have occurred. Borland v. Gillespie 191
3. A tort-feasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person. Borland v. Gillespie 191
4. It is essential to the defense of contributory negligence that the negligence of the plaintiff be the proximate cause or a proximately contributing cause. Schanaman v. Ramirez 212
5. If the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if an injury is caused by the subsequent independent act of a third person made possible by such condition, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. Lindgren v. City of Gering 360

Public Employees.

1. The civil service act, where applicable, prohibits the suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in Neb. Rev. Stat. § 19-1807 (Reissue 1977). Adkins & Webster v. North Platte Civil Service Comm. 500
2. The final determination of discharge of an employee under the civil service act rests in the civil service commission. Adkins & Webster v. North Platte Civil Service Comm. 500
3. If the evidence in the District Court on appeal from an order of the civil service commission is sufficient to show that the order of the commission suspending or discharging an employee was made in good faith for cause, the order of the commission must be affirmed. Adkins & Webster v. North Platte Civil Service Comm. 500

Public Policy.

1. Any contract of insurance which is contrary to any settled rule of public policy is invalid and unenforceable. Hansen v. U.S.A.A. Casualty Ins. Co. 147
2. It is not contrary to public policy for persons wishing

to adopt a child to make provision with its mother before birth to pay hospital and medical expenses in connection with the care of the mother and the child. Gray v. Maxwell 385

3. The rules which hold a contract void as against public policy should not be unduly extended. Persons should not be unnecessarily restricted in their freedom to make their own contracts; and, therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy. Occidental Sav. & Loan Assn. v. Venco Partnership 469

4. It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands. Occidental Sav. & Loan Assn. v. Venco Partnership 469

5. A "due on sale" clause contained in a mortgage contract is not contrary to the public policy of this jurisdiction and is, therefore, valid and enforceable. Occidental Sav. & Loan Assn. v. Venco Partnership 469

Public Welfare.

1. In order to qualify for medical assistance under Neb. Rev. Stat. § 68-1020 (Reissue 1976), a person must be a bona fide resident of the State of Nebraska. Gosney v. Department of Public Welfare 137

2. A requirement of a state statute that an applicant for medical assistance must be a bona fide resident of that state to receive such assistance and a finding that one is not a bona fide resident, but has come into the state for the sole purpose of receiving such benefits, does not create any irrebuttable presumption or permanent classification that would prevent appropriate proof of legitimate residency. Gosney v. Department of Public Welfare 137

Quantum Meruit.

Where there has been part performance and the adverse party appropriated and retained the work performed, the value of the labor or property received and accepted, less the damages for the failure to fully perform, may be recovered. Morris Mills v. Denny Wiekhorst Excavating, Inc. 443

Ratification.

Ratification is the acceptance by remaining cotenants of benefits or rents under a lease executed by one cotenant. Ahrens v. Dye 423

Real Estate.

1. A seller of real estate is under no obligation to sell his property to a purchaser procured by a broker. The broker's obligation is merely to provide a purchaser and he has no authority, unless otherwise specifically agreed, to enter into a binding contract of sale on behalf of the seller. Carroll v. Action Enterprises, Inc. .. 204
2. A real estate broker or agent of a seller who receives a purchase offer from a prospective purchaser for submission to the seller has a duty to the prospective purchaser to timely and truthfully submit or communicate such offer to the seller. Carroll v. Action Enterprises, Inc. 204
3. Nebraska U.C.C. § 2-607(3) (Reissue 1971), which provides that a buyer of "goods" must, within a reasonable time after he discovers or should have discovered a breach, notify the seller of the breach or be barred of remedy, does not apply to sales of real estate. Fink v. Denbeck 462
4. In the case of a breach of warranty of the condition of real property sold, whether the measure is the cost of repair or the difference in value with and without the defect depends upon the facts. If the defect may be remedied, the ordinary measure is the cost of remedying the defect, not to exceed the value of the property. Fink v. Denbeck 462
5. Whether the theory of recovery in an action on contract is breach of warranty as to the condition of improvements on real estate or misrepresentation as to their condition, the measure of damages is the cost of remedying the defect if that will fully compensate for the loss suffered. Fink v. Denbeck 462

Real Estate Brokers.

1. While an oral promise to pay a commission to a broker for the sale of real estate is unenforceable because of the statute of frauds so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission. Peterson & Vogt v. Livingston 753
2. Delivery of a promissory note to pay a commission for the sale of real estate amounts to an effective renouncement of the benefit of the protection afforded by

the statute of frauds, and delivery of the note transforms the agreement to pay a real estate commission from an unenforceable obligation into a collectible debt. Peterson & Vogt v. Livingston 753

3. A promissory note given by a vendor of real estate to a corporate real estate broker in Nebraska and accepted by the broker in payment for brokerage services previously rendered in the sale of certain real estate located in Colorado, which the vendor subsequently acknowledged, reaffirmed, and promised to pay for such services, is supported by a valid and lawful consideration and action may be brought upon said note and recovery had thereon, notwithstanding the fact that, at the time of the transaction in question, said corporate broker did not hold a valid and current Nebraska real estate broker's license as required at that time by Neb. Rev. Stat. §§ 81-885.06 and 885.16 (Reissue 1976), but all of the officers and salesmen of said corporation involved in the transaction held current Nebraska and Colorado broker's licenses, and the corporation also held a current Colorado corporate broker's license. Peterson & Vogt v. Livingston 753

Real Estate Sales Contracts.

1. A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered and such procedure would not offend against justice and equity. State Securities Co. v. Daringer 427
2. A plea for strict foreclosure is addressed to the sound legal discretion of the court and will be granted only where it would be inequitable and unjust to refuse it. State Securities Co. v. Daringer 427

Record.

Upon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is required to consider the record made before the director. Hehn v. State 34

Recusal.

A trial judge's overruling of a motion for change of judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. Murdoch v. Murdoch ... 327

Relevance.

1. The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings and, unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. Ocander v. B-K Corporation 287
2. The reception of evidence collateral to the main issue is within the sound legal discretion of the trial court. Ocander v. B-K Corporation 287
3. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ocander v. B-K Corporation 287
4. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Ocander v. B-K Corporation 287
5. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at the decision considered only such evidence as was competent and relevant; and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Torrey v. Torrey 485

Reliance.

1. The test of whether a party relied upon the other party's representations is generally whether he would have acted in the absence of the representations. Luscher v. Empkey 572
2. If a misrepresentation is likely to affect the conduct of a reasonable person with reference to a transaction with another person, it is generally material to the contract, and if it is material to the transaction entered into by a person deceived thereby, it is assumed, in the absence of a showing to the contrary, that the transaction was induced by the misrepresentation. Fricke v. Hart 590
3. A person is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. Fricke v. Hart 590

Relinquishment.

1. An agreement to pay a mother, in return for the relinquishment of her child, a sum equal to the amount of the hospital and medical expenses which have already been paid by another, constitutes an unwarranted payment of consideration which vitiates the relinquishment. Gray v. Maxwell 385
2. A relinquishment of a child for adoption which is not executed voluntarily may be revoked if such action is taken within a reasonable period of time. Gray v. Maxwell 385
3. As a general rule, the relinquishment of a child in exchange for an unwarranted payment of consideration to a parent is tantamount to an abandonment of that child. Gray v. Maxwell 385

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. Packett 548

Repeal of Statutes.

Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. Little Blue N.R.D. v. Lower Platte North N.R.D. 535

Rescission.

Where a purchaser receives what he purchased, and bases his right to rescind upon a false representation of its quality or condition, or another matter affecting its value, he must show that the representation was material and that he was misled thereby to his damage. Fricke v. Hart 590

Reservations.

1. As a general rule, there is no implied reservation of an easement when one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. Chalen v. Cialino 106
2. A grantor cannot derogate from his own grant and, as a general rule, he can only retain a right over a portion of his land conveyed absolutely if there is an express reservation. Chalen v. Cialino 106

Res Judicata.

1. The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded. Kuhlman v. Cargile 302
2. Where a judgment on the merits is rendered in favor of the defendant in an action to enforce one of two or more alternative remedies, the plaintiff cannot thereafter maintain an action to enforce another of the remedies. Kuhlman v. Cargile 302
3. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. Kuhlman v. Cargile 302

Restraints on Alienation.

1. "Due on sale" clauses are not direct restraints on alienation within the meaning of the law. Occidental Sav. & Loan Assn. v. Venco Partnership 469
2. Generally, "due on sale" clauses are neither direct nor indirect restraints on alienation as a matter of law and, therefore, are not void as such. Occidental Sav. & Loan Assn. v. Venco Partnership 469

Restrictive Covenants.

1. A restrictive covenant requiring approval of an owner's use of property is unenforceable if it fails to provide a clear standard by which such approval will be judged and when such approval will be required. Ross v. Newman 42
2. Restrictions on the erection or use of buildings will be construed, if possible, so as to effectuate the intention of the parties. Ross v. Newman 42
3. Covenants restricting the use of property are not favored in the law and, if ambiguous, will be construed in a manner permitting the maximum unrestricted use of the property. Ross v. Newman 42

Revocation.

1. Upon a petition for review of an order of suspension of an operator's license by the director of the De-

partment of Motor Vehicles, the District Court is required to consider the record made before the director. Hehn v. State 34
2. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order. Hehn v. State 34

Right-of-Way.
1. A pedestrian has equal rights with the operator of a vehicle in the use of a private way used by members of the public and each must use reasonable care for his own safety and the safety of others. Bassinger v. Agnew 1
Ybarra v. Wassenmiller 164
2. A pedestrian has a legal right to walk longitudinally along a highway or driveway, but in doing so is required to use reasonable care for his own safety. Bassinger v. Agnew 1
Ybarra v. Wassenmiller 164
3. The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Schanaman v. Ramirez 212
4. By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Schanaman v. Ramirez 212
5. A driver who fails to see another who is favored over him is guilty of negligence as a matter of law. Schanaman v. Ramirez 212
6. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nonetheless keep a proper lookout and watch where he is driving. Schanaman v. Ramirez 212
7. One does not forfeit his right-of-way by driving at an unlawful speed. Schanaman v. Ramirez 212

Right to Counsel.
1. Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation

must cease. In re Interest of Durand. State v. Durand 415
2. The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. In re Interest of Durand. State v. Durand 415
3. The general rule applicable to custodial interrogations by the police is that if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. In re Interest of Durand. State v. Durand 415

Rules of Courts.

One charged with a criminal violation in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, may make an oral request for a jury trial at the time of arraignment or may make a written request prior to trial in accordance with rules established by the particular county or municipal court. State v. Gerber 75

Rules of Supreme Court.

In order to question the constitutionality of a statute, Rule 18 of the Revised Rules of the Supreme Court (1977) requires the appealing party to serve a copy of its brief on the Attorney General. Richardson v. Board of Education 18

Rules of the Road.

1. It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety. Schanaman v. Ramirez 212
2. The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Schanaman v. Ramirez 212
3. A motorist must see what is in plain sight. Schanaman v. Ramirez 212

Sales.

1. If there has been an actual delivery and the price is capable of being made definite, delivery of goods may be sufficient to constitute a sale. Johnson v. Holdrege Coop. Equity Exchange 568
2. An alteration in the condition of the goods may constitute an act inconsistent with seller's ownership, amounting to an acceptance under Nebraska U.C.C. §

2-606(1)(c) (Reissue 1971). Johnson v. Holdrege Coop. Equity Exchange 568

3. A positive statement by a seller of the condition of personal property made during the negotiations for its sale which indicates an intention to be bound by the truth thereof, and which was so understood and relied upon by the other party, is an express warranty. Fricke v. Hart 590

Schools and School Districts.

The State Board of Education hearing appeals as provided for in Neb. Rev. Stat. § 79-1103.05(2) (Reissue 1976) acts in a quasi-judicial capacity and, therefore, either party has the right to appeal to the District Court any such order made, either by writ of error or under authority of Neb. Rev. Stat. § 84-917 (Reissue 1976). Richardson v. Board of Education 18

Search and Seizure.

A condition contained in a probation order issued by the court to one previously convicted of a drug offense to the effect that the probationer shall submit to a search of his person or property at any time, by any law enforcement officer, with or without probable cause, for controlled substances, which condition is accepted by the probationer, is valid, enforceable, and constitutional, if it is applied in a reasonable manner and contributes to the rehabilitation of the offender. State v. Morgan . 818

Sentences.

1. This court will not overturn a sentence of the trial court which does not grant probation unless there has been an abuse of discretion. State v. French 92
2. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
   State v. French 92
   State v Weik 217
   State v. Packett 548
   State v. Tipton 731
3. An indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous but not void. State v. Rouse 371
4. An indeterminate sentence not authorized under the circumstances may still be a valid sentence for the maximum term included therein. State v. Rouse 371
5. The imposition of a sentence in a criminal proceeding is essential to create a final judgment from which an appeal may be taken. In re Interest of Wolkow 512

6. A decision in a criminal case is final for appellate purposes only when the litigation between the parties is terminated and nothing remains but enforcement by execution of what has been determined. To create finality in a criminal case, it is necessary that there be a judgment of conviction followed by a sentence. In re Interest of Wolkow 512
7. In the absence of a sentence on a criminal contempt finding, the decision lacks the finality which would allow this court to review it. In re Interest of Wolkow ... 512

Service of Process.

In an action on a foreign judgment, rendered in proceedings in which there was no service of process on the defendant and no waiver of such service, the defendant may show as a complete defense that the attorney who entered an appearance for him had no authority to do so. Olson v. England 256

Sexual Assault.

1. The slightest penetration is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for first degree sexual assault, and such element may be proved by either direct or circumstantial evidence. State v. Tatum 625
2. It is not essential that the victim be corroborated by other witnesses as to the particular act or acts which constitute the offense of sexual assault. It is sufficient if the victim is corroborated as to material facts and circumstances which tend to support the victim's testimony as to the principal fact in issue. State v. Tatum 625
3. In a prosecution for sexual assault, after the victim has testified to the commission of the offense, it is competent to prove in corroboration of that testimony as to the main fact that, within a reasonable time after the alleged outrage, the victim made complaint to a person to whom a statement of such an occurrence would naturally be made. State v. Tatum 625

Specific Performance.

1. Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the sound legal discretion of the court. It will not be granted where enforcement of the contract would be unjust. James J. Parks Co. v. Lakin 184
2. A party seeking specific performance must show his right to the relief sought, including proof that he is

ready, able, and willing to perform his obligations under the contract. James J. Parks Co. v. Lakin 184
3. The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right of relief. James J. Parks Co. v. Lakin .. 184
4. If the encumbrance may not be discharged out of the purchase money, specific performance is not an appropriate remedy. James J. Parks Co. v. Lakin 184

Speeding.
One does not forfeit his right-of-way by driving at an unlawful speed. Schanaman v. Ramirez 212

Speedy Trials.
The time from filing to final disposition of pretrial motions is excluded in computing the time for trial. State v. Long 446

Standard of Care.
1. A specialist from one medical community is competent to testify as an expert witness in a medical negligence case as to the standard of care or skill required in another community, if the witness has knowledge or familiarity with the practice and standard in similar communities. Wentling v. Jenny 335
2. In the treatment and diagnosis of certain common prevailing diseases, the medical standards of care and skill are national, rather than local or regional. Wentling v. Jenny 335

Standing.
1. An individual taxpayer may have standing to appeal from a final order of the State Board of Equalization and Assessment if such taxpayer has made a showing before that board requiring some affirmative action by it. Great Western v. State Board of Equalization & Assessment 721
2. It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals and a taxpayer who requests such action of the board has not made a showing requiring affirmative action by the board so as to have standing to appeal to this court. Great Western v. State Board of Equalization & Assessment 721

State Equalization Board.
1. The State Board of Equalization and Assessment, in performing its equalization functions, acts in a quasi-

judicial capacity. Box Butte County v. State Board of Equalization & Assessment 696
2. The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing assessment of property. Box Butte County v. State Board of Equalization & Assessment 696
Banner County v. State Board of Equalization & Assessment 715
3. The presumption is that the State Board of Equalization and Assessment performed its duties and the burden is upon the party objecting to such action to prove that it was erroneous, capricious, and contrary to law. Box Butte County v. State Board of Equalization & Assessment 696
4. The order of the State Board of Equalization and Assessment ordinarily will not be reversed unless it utterly failed to follow a reasonable course of action. Box Butte County v. State Board of Equalization & Assessment 696
5. Where different methods or factors are used to equalize various kinds of property, the record of the State Board of Equalization and Assessment hearings must demonstrate some reasonable degree of correlation between and among the various methods and factors. Box Butte County v. State Board of Equalization & Assessment 696
6. This court, in reviewing the action of the State Board of Equalization and Assessment, will not sit as a super board of equalization and pass upon the merits of the evidence presented to the State Board. Banner County v. State Board of Equalization & Assessment 715
7. Where the record contains some evidence to justify the order of the State Board of Equalization and Assessment, it will not be considered arbitrary and capricious. Banner County v. State Board of Equalization & Assessment 715
8. An individual taxpayer may have standing to appeal from a final order of the State Board of Equalization and Assessment if such taxpayer has made a showing before that board requiring some affirmative action by it. Great Western v. State Board of Equalization & Assessment 721
9. It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals and a taxpayer who requests such action of the board has not made a showing requiring affirmative action by the board so as to have standing to appeal to this court. Great Western v. State Board of

Equalization & Assessment 721

Statute of Frauds.

1. While an oral promise to pay a commission to a broker for the sale of real estate is unenforceable because of the statute of frauds so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission. Peterson & Vogt v. Livingston 753
2. Delivery of a promissory note to pay a commission for the sale of real estate amounts to an effective renouncement of the benefit of the protection afforded by the statute of frauds, and delivery of the note transforms the agreement to pay a real estate commission from an unenforceable obligation into a collectible debt. Peterson & Vogt v. Livingston 753

Statutes.

1. In order for a landowner to be considered to have property abutting a vacated street under the provisions of Neb. Rev. Stat. § 15-702.03 (Reissue 1977), some portion of the boundary of the landowner's property previously available for ingress or egress to or from the proposed vacated street must be in common with the property line of that street. City of Lincoln v. Cather & Sons Constr., Inc. 10
2. In order to question the constitutionality of a statute, Rule 18 of the Revised Rules of the Supreme Court (1977) requires the appealing party to serve a copy of its brief on the Attorney General. Richardson v. Board of Education 18
3. The failure of a putative father to support his alleged child is only an ancillary issue in a paternity case and is not an act "causing tortious injury" within the meaning of the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64
4. An act of sexual intercourse between consenting adults does not constitute an act "causing tortious injury" in this state for purposes of the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64
5. In a paternity action, Nebraska courts do not acquire personal jurisdiction over a nonresident putative father by virtue of personal service in the state of his residence under the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536(1)(c) (Reissue 1975). State ex rel. Larimore v. Snyder 64

6. An application for a water permit under Neb. Rev. Stat. § 46-233 (Reissue 1978) is not required until actual construction work at the site is commenced. Winter v. Lower Elkhorn Nat. Resources Dist. 70
7. An installment loan made by a licensee under the installment loan act, Neb. Rev. Stat. §§ 45-114 to 158 (Reissue 1978), and pursuant to the terms of that act, is an action or transaction otherwise permitted, prohibited, or regulated by a regulatory body acting under the statutory authority of this state and is, therefore, exempt from the provisions of the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 1623 (Reissue 1978). Kuntzelman v. Avco Financial Services of Nebraska, Inc. 130
8. The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. Aschenbrenner v. Nebraska P. P. Dist. 157
9. If an act is complete and independent in itself, it may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the provisions of Neb. Const. art. III, § 14, relating to amendments. Aschenbrenner v. Nebraska P. P. Dist. 157
10. This court will not strike down an act of the Legislature under the provision of the Neb. Const. art. III, § 14, if it can be said that the title calls attention to the subject matter of the bill. Aschenbrenner v. Nebraska P. P. Dist. 157
11. In examining the validity of a legislative act, all reasonable doubts must be resolved in favor of its constitutionality. Aschenbrenner v. Nebraska P. P. Dist. ... 157
12. The mere fact that an act of the Legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if, in other respects, it is a complete act in itself. Aschenbrenner v. Nebraska P. P. Dist. 157
13. The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. Aschenbrenner v. Nebraska P. P. Dist. 157
14. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. Grosvenor v. Grosvenor 395
15. The purpose of all rules or maxims for the con-

struction or interpretation of statutes is to discover the true intention of the law, and the rules or cannons of construction are merely aids for ascertaining legislative intent. The rules of construction are neither ironclad nor inflexible, and must yield to manifestations of a contrary intent. Grosvenor v. Grosvenor 395

16. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. Grosvenor v. Grosvenor 395

17. Statutes providing for the modification of vested judgments apply only to judgments rendered after the statute takes effect. Grosvenor v. Grosvenor 395

18. Clarity should be particularly demanded of a statute which would impose very substantial penalties on counties violating it. State ex rel. Douglas v. Herrington .. 516

19. The established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. State ex rel. Douglas v. Herrington 516

20. Provisions that are so vague, general, and indefinite as to be incapable of practical application are arbitrary and unreasonable and therefore unconstitutional. State ex rel. Douglas v. Herrington 516

21. In construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will. State ex rel. Douglas v. Herrington 516
Little Blue N.R.D. v. Lower Platte North N.R.D. 535

22. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. State ex rel. Douglas v. Herrington ... 516

23. When invalid portions are so interwoven with the rest of the act that the act may not be operative with the void portions eliminated, the whole act fails. State ex rel. Douglas v. Herrington 516

24. Where the language of a statute is plain and unam-

biguous, no interpretation is needed and the court is without authority to change the language. Little Blue N.R.D. v. Lower Platte North N.R.D. 535
25. In interpreting the meaning of a statutory provision the whole provision should be read in order to arrive at a conclusion as to its proper meaning. Little Blue N.R.D. v. Lower Platte North N.R.D. 535
26. Courts should give statutory language its plain and ordinary meaning. Little Blue N.R.D. v. Lower Platte North N.R.D. 535
27. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. Little Blue N.R.D. v. Lower Platte North N.R.D. 535
28. Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. Little Blue N.R.D. v. Lower Platte North N.R.D. 535
29. It is only when the appraisal made by the Tax Commissioner under proper statutory provisions fails to reflect current values to use in an assessment/sales ratio that Neb. Rev. Stat. § 77-508.01 (Reissue 1976) requires that the necessary "appraisals" be "conducted by qualified appraisers." Banner County v. State Board of Equalization & Assessment 715
30. Neb. Rev. Stat. § 9-146 (Supp. 1979) of the Nebraska Bingo Act, as amended, held constitutional. Alcoholic Resocialization Conditioning Help, Inc. v. State 788

Stipulations.
1. Issues stipulated to at a pretrial conference constitute the issues upon which the case is to be tried. Olson v. England 256
2. The general rule is that parties have no right to stipulate as to matters of law and such a stipulation, if made, will be disregarded. Staley v. City of Blair 292

Strict Liability.
An irrigation district is liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence. Lindgren v. City of Gering 360

Substantial Performance.
As a general rule, a party cannot maintain an action on a contract without prior substantial compliance on his part. If there has been substantial performance, an

action may be maintained without prejudice to any showing of damages by the other party for less than full and complete performance. Morris Mills v. Denny Wiekhorst Excavating, Inc. 443

Subdivisions.

Municipalities have no power to impose conditions on subdivisions which are not within the purview of their delegated authority or enabling legislation. Briar West, Inc. v. City of Lincoln 172

Summary Judgment.

1. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense. Dockendorf v. Orner 456
2. Summary judgment is an appropriate remedy when only a question of law is presented and there is no genuine issue of material fact. Johnson v. Holdrege Coop. Equity Exchange 568
   Williams v. Williams 630
   The Nebraskans, Inc. v. Homan 749
3. The burden is upon the party moving for a summary judgment to show that no issue of facts exists, and unless he can conclusively do so, the motion must be overruled. Johnson v. Holdrege Coop. Equity Exchange 568
   Fricke v. Hart 590
4. The moving party is not entitled to summary judgment except where there exists no genuine issues as to any material fact in the case and where, under the facts, he is entitled to a judgment as a matter of law. Fricke v. Hart 590
5. 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. Fricke v. Hart 590
6. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom; if when so viewed, reasonable men might draw different conclusions, the motion should be denied and the case tried on its merits. Fricke v. Hart 590
7. A motion for a summary judgment is not a substitute for a demurrer on a motion for a directed verdict.

Fricke v. Hart 590
8. The purpose of a motion for summary judgment is to pierce the allegations of a pleading and to show conclusively that the controlling facts are otherwise than as alleged. Fricke v. Hart 590
9. The question presented on a motion for summary judgment is not whether the evidence is sufficient to support a finding by a factfinder in favor of the moving party, but rather whether there exists no genuine issue as to any material fact so that, under those facts, the moving party is entitled to a judgment as a matter of law. Williams v. Williams 630
10. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. Williams v. Williams 630

Tax Assessments.
1. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed and an assessment beyond the benefits so conferred is a taking of property for public use without compensation and, therefore, illegal. Briar West, Inc. v. City of Lincoln 172
2. An appeal from a county board of equalization is heard as in equity and is tried de novo in this court. Otradovsky v. Board of Equalization 559
3. In an appeal from a county board of equalization on the ground that the property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property. Otradovsky v. Board of Equalization 559
4. There is a presumption that the valuation made by the board of equalization is correct. However, this presumption disappears when competent evidence to the contrary is introduced. The reasonableness of the valuation then becomes a question of fact to be determined from the evidence. Otradovsky v. Board of Equalization 559
5. The burden of proof remains upon the party contesting the valuation to establish that the valuation was incorrect. Otradovsky v. Board of Equalization 559
Box Butte County v. State Board of Equalization & Assessment 696
6. The classification of the land as irrigated or dryland does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value. Otradov-

sky v. Board of Equalization 559
7. The authority authorized to be granted to the State Tax Commissioner by the State Board of Equalization and Assessment under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976) to hold hearings to enable him to advise and assist the board and to expedite the equalization hearings, may be delegated to the deputy state tax commissioner during the absence or disability of the State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment 696
8. The purpose of the notice provided for in Neb. Rev. Stat. § 77-508 (Reissue 1976) is to give the affected counties an opportunity to appear and meet the challenge to their property valuations for tax purposes. Box Butte County v. State Board of Equalization & Assessment .. 696
9. Where different methods or factors are used to equalize various kinds of property, the record of the State Board of Equalization and Assessment hearings must demonstrate some reasonable degree of correlation between and among the various methods and factors. Box Butte County v. State Board of Equalization & Assessment 696
Banner County v. State Board of Equalization & Asment 715
10. The consistent use of reasonable current reappraisals, done under uniform conditions and regulations approved by the State Tax Commissioner, meets the constitutional test of uniformity. Box Butte County v. State Board of Equalization & Assessment 696
11. When it is shown that different methods of appraisal applied to different classes of property result in a determination of fair market value for each class of property, reasonable correlation has been demonstrated between the several methods of appraisal. Box Butte County v. State Board of Equalization & Assessment 696
12. The State Board of Equalization and Assessment is a factfinding body vested with a wide latitude of judgment and discretion in arriving at equalization of values. Banner County v. State Board of Equalization & Assessment 715
13. It is only when the appraisal made by the Tax Commissioner under proper statutory provisions fails to reflect current values to use in an assessment/sales ratio that Neb. Rev. Stat. § 77-508.01 (Reissue 1976) requires that the necessary "appraisals" be "conducted by qualified appraisers." Banner County v. State

Board of Equalization & Assessment 715

Tax Commissioner.

1. The authority authorized to be granted to the State Tax Commissioner by the State Board of Equalization and Assessment under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976) to hold hearings to enable him to advise and assist the board and to expedite the equalization hearings, may be delegated to the deputy state tax commissioner during the absence or disability of the State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment .. 696
2. The State Tax Commissioner, in holding hearings authorized under Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976), gathers evidence only and does not decide disputes of adjudicative fact, and therefore does not act in a quasi-judicial capacity. Box Butte County v. State Board of Equalization & Assessment 696
3. The State Tax Commissioner can hold only an administrative hearing, and not a discretionary or a quasi-judicial one, because the power of the State Board of Equalization and Assessment cannot be delegated to the State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment .. 696
4. The State Tax Commissioner, when authorized by the State Board of Equalization and Assessment to act as a hearing officer under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976), is not acting as a member of the State Board, but is acting in his capacity as State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment 696

Tenants in Common.

1. Tenants in common can deal with third parties just as fully as owners of property held individually. Ahrens v. Dye 423
2. One tenant in common cannot ordinarily bind his cotenants by a contract with a third party unless he is duly authorized or unless his act is thereafter ratified. Ahrens v. Dye 423
3. If a tenant in common does nothing to mislead a third person, or the conduct of the tenant is not such as to warrant a third person's reliance, the tenant is not estopped to assert that he is not bound by unauthorized acts of his cotenants. Ahrens v. Dye 423

Termination of Employment.

1. The civil service act, where applicable, prohibits the

suspension or discharge of employees for political or religious reasons but provides that employees may be suspended or discharged for cause for any of the reasons listed in Neb. Rev. Stat. § 19-1807 (Reissue 1977). Adkins & Webster v. North Platte Civil Service Comm. 500

2. The final determination of discharge of an employee under the civil service act rests in the civil service commission. Adkins & Webster v. North Platte Civil Service Comm. 500

3. If the evidence in the District Court on appeal from an order of the civil service commission is sufficient to show that the order of the commission suspending or discharging an employee was made in good faith for cause, the order of the commission must be affirmed. Adkins & Webster v. North Platte Civil Service Comm. 500

Transbasin Diversion.

The unappropriated waters of every natural stream within the State of Nebraska may be diverted from one basin to another, except when such diversion is contrary to the public interest, in which case it shall be denied. Little Blue N.R.D. v. Lower Platte North N.R.D. 535

Trial.

1. The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. Troy & Stalder Co. v. Continental Casualty Co. 28

2. Evidence of other similar acts may be admissible to show the absence of mistake or accident. State v. French 92

Turning Vehicles.

1. It is unlawful for the driver of a vehicle to turn left unless and until such movement can be made with reasonable safety. Schanaman v. Ramirez 212

2. The driver of a vehicle who intends to turn left at an intersection is to yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or approaching so close as to constitute an immediate hazard. Schanaman v. Ramirez 212

3. When a collision occurs where the driver of a motor vehicle turning left across a highway between intersections fails to look to the rear for approaching traffic at a time and place when so looking would be effec-

tive, and where such driver fails to signal his intention to make such a left turn, such a driver is guilty of negligence as a matter of law. Mazankowski v. Harders 583

4. A turn across a highway between intersections is a particularly dangerous maneuver. Central Constr. Co. v. Republican City School Dist. No. 1 615

5. The operator of a dirt scraper upon a highway which is under construction but not closed to traffic, who turns to the left without giving a turn signal and at a time when his vision is so obscured by dust that he cannot see whether other traffic is approaching, is guilty of negligence more than slight as a matter of law. Central Constr. Co. v. Republican City School Dist. No. 1 615

Undue Influence.

1. A prima facie case of undue influence is made out in the case of a deed where it is shown by clear and satisfactory evidence (1) That the grantor was subject to such influence; (2) That the opportunity to exercise it existed; (3) That there was a disposition to exercise it; and (4) That the result appears to be the effect of such influence. Schaneman v. Schaneman 113

2. In an action based on undue influence when a confidential relationship exists between the parties and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant. Schaneman v. Schaneman 113

3. In determining whether a presumption of undue influence has been rebutted, the court may consider whether the grantor has received independent advice. Schaneman v. Schaneman 113

4. The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) That there was opportunity to exercise undue influence; (3) That there was a disposition to exercise undue influence for an improper purpose; and (4) That the result was clearly the effect of such undue influence. In re Estate of Saathoff. Saathoff v. Saathoff 793

5. The undue influence which will void a gift is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor. In re Es-

state of Saathoff. Saathoff v. Saathoff 793
6. The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. In re Estate of Saathoff. Saathoff v. Saathoff 793

Uniform Commercial Code.
Nebraska U.C.C. § 2-607(3) (Reissue 1971), which provides that a buyer of "goods" must, within a reasonable time after he discovers or should have discovered a breach, notify the seller of the breach or be barred of remedy, does not apply to sales of real estate. Fink v. Denbeck 462

Unilateral Contracts.
1. The burden of proof is upon the claimant seeking compensation for services rendered during the life of the deceased person to prove an agreement, express or implied, to pay for the services. In re Estate of Bouma. Nehls v. Giles 209
2. Personal services rendered by a child to a parent are presumed, in the absence of special circumstances, to have been rendered gratuitously. This presumption may be overcome by sufficient evidence tending to establish a contract for remuneration. In re Estate of Bouma. Nehls v. Giles 209

Vagueness.
1. Clarity should be particularly demanded of a statute which would impose very substantial penalties on counties violating it. State ex rel. Douglas v. Herrington .. 516
2. The established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. State ex rel. Douglas v. Herrington ... 516
3. Provisions that are so vague, general, and indefinite as to be incapable of practical application are arbitrary and unreasonable and therefore unconstitutional. State ex rel. Douglas v. Herrington 516

Valuation.
1. In an appeal from a county board of equalization on the

ground that the property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property. Otradovsky v. Board of Equalization 559
2. The burden of proof remains upon the party contesting the valuation to establish that the valuation was incorrect. Otradovsky v. Board of Equalization 559
Box Butte County v. State Board of Equalization & Assessment 696
3. The classification of the land as irrigated or dryland does not alone establish the actual value of the land. The classification is only one of many factors to be considered in determining the actual value. Otradovsky v. Board of Equalization 559
4. The authority authorized to be granted to the State Tax Commissioner by the State Board of Equalization and Assessment under the provisions of Neb. Rev. Stat. §§ 77-507 and 508 (Reissue 1976) to hold hearings to enable him to advise and assist the board and to expedite the equalization hearings, may be delegated to the deputy state tax commissioner during the absence or disability of the State Tax Commissioner. Box Butte County v. State Board of Equalization & Assessment .. 696
5. The purpose of the notice provided for in Neb. Rev. Stat. § 77-508 (Reissue 1976) is to give the affected counties an opportunity to appear and meet the challenge to their property valuations for tax purposes. Box Butte County v. State Board of Equalization & Assessment 696
6. Where different methods or factors are used to equalize various kinds of property, the record of the State Board of Equalization and Assessment hearings must demonstrate some reasonable degree of correlation between and among the various methods and factors. Box Butte County v. State Board of Equalization & Assessment 696
Banner County v. State Board of Equalization & Assessment 715
7. The consistent use of reasonably current reappraisals, done under uniform conditions and regulations approved by the State Tax Commissioner, meets the constitutional test of uniformity. Box Butte County v. State Board of Equalization & Assessment 696
8. When it is shown that different methods of appraisal applied to different classes of property result in a determination of fair market value for each class of property, reasonable correlation has been demonstrated between the several methods of appraisal.

Box Butte County v. State Board of Equalization & Assessment 696

9. It is only when the appraisal made by the Tax Commissioner under proper statutory provisions fails to reflect current values to use in an assessment/sales ratio that Neb. Rev. Stat. § 77-508.01 (Reissue 1976) requires that the necessary "appraisals" be "conducted by qualified appraisers." Banner County v. State Board of Equalization & Assessment 715

Value of Goods.

1. Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the crime charged. State v. Weik 217
2. The value of the property at the time and place of the taking is a fact question for the decision of the jury from the evidence adduced. State v. Weik 217

Verdicts.

In a criminal case, 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. Tatum 625

Vicarious Liability.

The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. Kreifels v. Wurtele 491

Visitation.

The fact that a mother in whose custody a minor child has been placed by the court refuses to permit a father, ordered to pay child support, to exercise his rights of visitation does not justify the father's withholding the payment of child support. Eliker v. Eliker 764

Void Contracts.

The rules which hold a contract void as against public policy should not be unduly extended. Persons should not be unnecessarily restricted in their freedom to make their own contracts; and, therefore, the court should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so. The usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy. Occidental Sav.

& Loan Assn. v. Venco Partnership 469

Voluntariness.

A relinquishment of a child for adoption which is not executed voluntarily may be revoked if such action is taken within a reasonable period of time. Gray v. Maxwell 385

Waiver.

1. Where the parties ignore a provision in the contract that requires change orders to be in writing, it will not furnish a defense to a claim for compensation for the additional work performed. D. K. Meyer Corp. v. Bevco, Inc. 318
   Shreves v. D. R. Anderson Constructors, Inc. 433
2. The parties to a construction contract which requires written change orders may avoid such provisions where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provisions, or the party claiming the benefit of the provisions is estopped to rely upon them. Shreves v. D. R. Anderson Constructors, Inc. 433

Waters-Beneficial Use.

1. Determination of the feasibility of a recreational facility is a legislative function and is not within the scope of judicial review. Winter v. Lower Elkhorn Nat. Resources Dist. 70
2. An application for a water permit under Neb. Rev. Stat. § 46-233 (Reissue 1978) is not required until actual construction work at the site is commenced. Winter v. Lower Elkhorn Nat. Resources Dist. 70

Words and Phrases.

1. The terms "residence" and "domicile," as used in statutes, are generally convertible terms. Gosney v. Department of Public Welfare 137
2. "Proximate cause," as used in the law of negligence, is that cause which, in a natural and continuous sequence unbroken by an efficient intervening cause, produced the injury, and without which the injury would not have occurred. Borland v. Gillespie 191
3. By "right-of-way" is meant the right of one vehicle to proceed in a lawful manner in preference to another approaching under such circumstances of direction, speed, and proximity as to give rise to danger of a collision unless one grants precedence to the other. Schanaman v. Ramirez 212

4. Acquiescence on the part of the owner of the servient tenement which is necessary to acquisition of a prescriptive easement means passive assent or submission, quiescence, consent by silence. Engel v. Rhen Marshall, Inc. 265
5. Neb. Rev. Stat. § 19-911 (Cum. Supp. 1978) was amended by 1975 Neb. Laws, L.B. 410, to restrict the application of the term "legislative body" to villages. Staley v. City of Blair 292
6. A "due on sale" clause is a form of acceleration clause and, as such, should be subject to the same rules as other acceleration clauses, including the protection of equitable defenses. Occidental Sav. & Loan Assn. v. Venco Partnership 469
7. The phrase "good cause" depends upon the circumstances of the individual case, and a finding of its existence lies largely in the discretion of the officer or court to which decision is committed. Chamberlin v. Chamberlin 808

Workmen's Compensation.

1. To recover compensation under the Workmen's Compensation Act, the claimant must show that an unexpected or unforeseen injury was caused by the employment. Sellens v. Allen Products Co., Inc. 506
Meyer v. First United Methodist Church 607
2. An injury, disability, or death that is the result of a natural progression of any preexisting condition or that is due to natural causes, although occurring while the employee is at work, is not compensable. Sellens v. Allen Products Co., Inc. 506
3. If it is claimed that an injury was the result of exertion in the employment, the evidence must show that the employment contributed in some material and substantial degree to cause the injury. Sellens v. Allen Products Co., Inc. 506
4. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Sellens v. Allen Products Co., Inc. 506
5. If there is a personal causal contribution in the form of a previously weakened or diseased heart, a heart attack is compensable only if the employment exertion is greater than that of nonemployment life. The comparison is with the exertion present in the normal nonemployment life of the workman or any other person. Sellens v. Allen Products Co., Inc. 506
6. The course of employment requirement tests work-con-

nection 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. Meyer v. First United Methodist Church 607

7. 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. Meyer v. First United Methodist Church ... 607